English High Court Rules on Art. 4 Rome II Regulation

The English High Court has recently rendered an insightful and thought provoking decision on the application of Art. 4 II and III of the Rome II Regulation (Winrow v. Hemphill, [2014] EWHC 3164). The case revolved around a road traffic accident that had taken place in Germany in late 2009. The (first) defendant, a UK national, had driven the car, while the claimant, likewise a UK national, had been sitting in the rear. As a result of the accident, caused by the (first) defendant's negligence, the claimant suffered injury and initiated proceedings for damages in England.

The court had to determine the applicable law in accordance with Art. 4 of the Rome II Regulation. What made the choice of law analysis complicated were the following – undisputed – facts (quote from the judgment):

- At the time of the accident, 16 November 2009, the Claimant was living in Germany, having moved there in January 2001 with her husband who was a member of HM Armed Services. Germany was not the preferred posting of the Claimant's husband. It was his second choice. He had four separate three year postings in Germany.
- Since the Claimant's husband was due to leave the army in February 2014 after twenty-two years' service he would have returned to England one and a half to two years before that date to undertake re-settlement training. It was always their intention to return to live in England.
- Whilst in Germany, the Claimant and her family lived on a British Army base where schools provided an English education. The Claimant's eldest son remained in England at boarding school when the Claimant's husband was posted to Germany. Their three other children were at school in Germany.
- The Claimant was employed while in Germany on a full-time basis as an Early Years Practitioner by Service Children's Education. This is a UK Government Agency.
- The Claimant and her husband returned to live in England in June 2011, earlier than planned. Her husband left the Army in August 2013.
- The First Defendant is a UK national. She was also an army wife. Her

husband served with the Army in Germany. She had been in Germany for between eighteen months and two years before the accident. She returned to England soon afterwards.

Against this backdrop, the court had to decide whether to apply German law as law of the place of the tort (Art. 4 I Rome II) or English law as law of the common habitual residence of the parties (Art. 4 II Rome II) or as law of the manifestly more closer connection (Art. 4 III Rome II). After a detailed discussion of the matter Justice Slade DBE held that that German law applied because England was not the common habitual residence of the parties at the time of the accident. Nor was the case manifestly more closely connected with England than with Germany:

"41. The Claimant had been living and working in Germany for eight and a half years by the time of the accident. She was living there with her husband. Three of their children were at school in Germany. The family remained living in Germany for a further eighteen months after the accident. There was no evidence that during this time the family had a house in England. The residence of the Claimant in Germany was established for a considerable period of time. The fact that the Claimant and her family were living in Germany because the Army had posted her husband there and that it was not his first choice does not render her presence there involuntary. He and his family were living in Germany because of his job. The situation of the Claimant in Germany was similar to that of the spouses of other workers posted abroad. This is not an unusual situation. Having regard to the length of stay in the country, its purpose and the establishing of a life there – three children were in an army run school in Germany and the Claimant worked at an army base school – in my judgment the habitual residence of the Claimant at the time of her accident was Germany. When the Claimant came to live in England in 2011 her status changed and she became habitually resident here. However, the family's intention to return to live in England after the Claimant's husband's posting in Germany came to an end did not affect her status in November 2009. The Claimant has not established that the law of the tort indicated by Article 4(1), German law, has been displaced by Article 4(2).

42. The burden is on the Claimant to establish that the effect of Article 4(1) is displaced by Article 4(3). The standard required to satisfy Article 4(3) is high. The party seeking to disapply Article 4(1) or 4(2) has to show that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1) or 4(2).

43. The circumstances to be taken into account are not specified in Article 4(3). As does Miss Kinsler, I respectfully take issue with the exclusion by Mr Dickinson from the circumstances to be taken into account under Article 4(3) of the country in which the accident and damage occurred or the common habitual residence at the time of the accident of the Claimant and the person claimed to be liable. That these are determinative factors for the purposes of Articles 4(1) and 4(2) does not exclude them from consideration under 4(3). All the circumstances of the case are to be taken into account under Article 4(3). If the only relevant circumstance were the country where the damage occurred or the common habitual residence of the Claimant and the tortfeasor the issue of the proper law of the tort would be determined by Article 4(1) or 4(2). However, these factors are not excluded as being amongst others to be considered under Article 4(3). Further, under Article 4(2), habitual residence is to be considered at the time when the damage occurs. Preamble (17) to Rome II makes clear that the country in which damage occurs, which is the subject of Article 4(1), is the country where the injury was sustained. However, under Article 4(3), the habitual residence of the Claimant at the time when consequential loss is suffered may also be relevant.

44. Mr Chapman rightly acknowledged that one system of law governs the entire tortious claim. Different systems do not govern liability and quantum. In Harding v Wealands [2005] 1 WLR 1539, the issue was whether damages for personal injury caused by negligent driving in New South Wales Australia should be calculated according to the law applicable in accordance with the Private International Law (Miscellaneous Provisions) Act 1995 ('the 1995 Act') or whether it is a question of procedure which fell to be determined in accordance with the *lex fori*, English law. Considering factors which connect the tort with respective countries, in section 12(1)(b) of the 1995 Act, a provision similar to Article 4(3), Waller LJ in observed at paragraph 12:

"…the identification is of factors that connect the *tort* with the respective countries, not the *issue or issues* with the respective countries."

The majority judgment of the Court of Appeal, Waller LJ dissenting, was overruled in the House of Lords. The *obiter* observations of Waller LJ on the factors which connect the *tort* rather than separate *issues* with a particular country were undisturbed on appeal.

45. I do not accept the contention by Mr Chapman that the circumstances to be

taken into account in considering Article 4(3) will vary depending upon the issues to be determined and, as I understood his argument, the stage reached in the proceedings. Nor do I accept the submission that "the centre of gravity" of the tort when liability was conceded and only damages were to be considered depended upon circumstances relevant to or more weighted towards that issue. As was held by Owen J at paragraph 46 of Jacobs:

"…the question under Art 4(3) is not whether the right to compensation is manifestly more connected to England and Wales, but whether the tort/delict has such a connection."

The "centre of gravity" referred to in the Commission Proposal for Rome II and by Flaux J in Fortress Value in considering Article 4(3) is the centre of gravity of the *tort* not of the *damage and consequential loss*caused by the tort.

46. Whilst I do not accept the argument advanced by Mr Chapman that different weight is to be attributed to relevant factors depending on the stage reached in the litigation, since there is no temporal limitation on these factors, a court will make an assessment on the relevant facts as they stand at the date of their decision. The balance of factors pointing to country A rather than country B may change depending upon the time but not the stage in the proceedings at which the court makes its assessment. At the time of the accident both the claimant and the defendants may be habitually resident in country A and by the time of the court's decision, in country B. At the time of the accident it may have been anticipated that all loss would be suffered in country A but by the date of the assessment it is known that current and future loss will be suffered in country B.

47. There is some difference of opinion as to whether the circumstances to be taken into account in considering Article 4(3) are limited to those connected with the tort and do not include those connected with the consequences of the tort. It may also be said that the tort and the consequences of the tort are treated as distinct in Article 4. Article 4(1) refers separately to the tort, to damage and to the indirect consequences of the "event". Article 4(2) refers to "damage". Accordingly it could be said that the reference in Article 4(3) to *tort* but not also to *damage* or *indirect consequences* indicates that it is only factors showing a manifestly closer connection of the tort, but not the damage direct or indirect, caused by or consequential on it, which are relevant.

48. Section 12 of the 1995 Act considered in Harding, whilst differing from Article 4(3) by including reference to the law applicable to *issues* in the case was otherwise to similar effect in material respects to Article 4(3). Section 12(2) provides:

> *"The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question, or to any of the circumstances or consequences of those events."*

Applying section 12, Elias J, as he then was, in deciding whether the law of the place of the motor vehicle accident should be displaced, took into account "the fact that the consequences of the accident will be felt in England" [34]. This approach was not doubted on appeal CA [17]. In Stylianou, Sir Robert Nelson adopted a similar approach when considering Article 4(3) which does not expressly include the consequences of the tortious events as a relevant factor in determining whether the general rules as to the applicable law of the tort are displaced. The Judge observed that there are powerful reasons for saying that the Claimant's condition in England is a strong connecting factor with this country. [83].

49. Including the consequences of a tort as a factor to be taken into account in considering Article 4(3) has received endorsement from writers on the subject. Mr Dickinson writes in *The Rome II Regulation* at paragraph 4.86:

"The reference in Article 4(3) to 'the tort/delict' (in the French text, '*fait dommageable*') should be taken to refer in combination to the event giving rise to the damage and all of the consequences of that event, including indirect consequences."

Further the authors of *Dicey* write at paragraph 35-032:

> *"Thus it would seem that the event or events which give rise to damage, whether direct or indirect, could be circumstances relevantly considered under Art 4(3), as could factors relating to the parties, and possibly also factors relating to the consequences of the event or events."*

50. Whilst the answer to the question is by no means clear, I will adopt the

approach suggested as possible in Dicey, as correct by Mr Dickinson and adopted by Sir Robert Nelson. Accordingly the link of the consequences of the tort to a particular country will be considered as a relevant factor for the purposes of Article 4(3).

51. Unlike Articles 4(1) and 4(2), Article 4(3) contains no temporal limitation on the factors to be taken into account. If, as in this case, the claimant and the defendant were habitually resident in country A at the time of the accident but in country B at the time the issue of whether the exception provided by Article 4(3) applied, in my judgment both circumstances may be taken into account. Similarly, if at the time of the accident it was anticipated that the Claimant would remain in country A and all her consequential loss would be incurred there, but by the time the issue of whether the exception provided by Article 4(3) applied, she had moved to country B and was incurring loss there, in my judgment both circumstances may be taken into account in deciding whether in all the circumstances the tort is manifestly more closely connected with country B than with country A.

52. The European Commission recognised in their proposal for Rome II that the "escape clause" now in Article 4(3) would generate a degree of unforeseeability as to the applicable law. In my judgment that unforeseeability includes not only the factors taken into account but also that the nature and importance of those factors may depend upon the time at which a court makes an assessment under Article 4(3) in deciding whether there is a "manifestly closer connection" of the tort with country B rather than country A. The court making a decision under Article 4(3) undertakes a balancing exercise, weighing factors to determine whether there is a manifestly closer connection between the tort and country B rather than country A whose law would otherwise apply by reason of Article 4(1) or 4(2).

53. Whilst Mr Chapman relied principally on the country where consequential loss is being suffered and the current habitual residence of the Claimant and the First Defendant, I also consider other factors raised by counsel in determining whether, in all the circumstances of the case, the tort is manifestly more closely connected with England than with Germany.

54. In my judgment the common United Kingdom nationality of the Claimant and the First Defendant is a relevant consideration. Waller LJ at paragraph 18

of Harding considered the nationality of the Defendant to a road traffic accident claim to be relevant to determining the applicable law of the tort under the similar provisions of section 12 of the 1995 Act.

55. Although there is no United Kingdom law or English nationality in my judgment that does not, as was contended by Miss Kinsler, prevent the United Kingdom nationality of those involved in the tort being relevant to whether English law applies. For example the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 implementing Directive 2000/26/EC of 16 May 2000, the Fourth Motor Insurance Directive, referred in Regulation 13(1)(i) to the United Kingdom as "an EEA state". Regulation 12(4) specified the law applicable to loss and damage as that "under the law applying in that part of the United Kingdom in which the injured party resided at the date of the accident". Article 25 of Rome II provides that:

> *"Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation."*

I take into account the United Kingdom nationality of the Claimant and the First Defendant at the time of the accident and now, when the issue is being determined, as a factor indicating a connection of the tort with English law.

56. That the Claimant and the First Defendant are now habitually resident in England is, in my judgment in the circumstances of this case, relevant to determining the system of law to which the tort has a greater connection. However, I view the weight to be given to this factor in the light of the Claimant's habitual residence in Germany for about eight and a half years by the time of the accident. The Claimant was not a short-term visitor to Germany. She had established a life there with her husband for the time being.

57. I take account of the fact that the Claimant remained in Germany for a further eighteen months after the accident during which time she received a significant amount of medical treatment for her injuries including, in June 2010, an operation to remove a prolapsed disc. The Claimant states that between 15 and 25 March 2011 she spent just under two weeks in a German hospital for pain management.

In April and May 2011 she had further treatment in Germany for the pain. Some of the injuries she suffered after the accident, neck and shoulder pains and pain in her stomach, resolved whilst she was in Germany.

58. Article 15 of Rome II makes it clear that the applicable law determined by its provisions applies not only to liability but also to:

> *"15(c) the existence, the nature and the assessment of damage or the remedy claimed."*

Whilst recital (33) states that when quantifying damages for personal injury in road traffic accident cases all the relevant actual circumstances of the Claimant including actual losses and costs of after-care should be taken into account by the court determining the claim of a person who suffered the accident in a State other than that where they were habitually resident, as Sir Robert Nelson observed at paragraph 78 of **Stylianou**, the recital cannot override the terms of Article 4.

59. In my judgment "all the circumstances" of the case relevant to determining whether a tort is manifestly more closely connected with country B than country A can include where the greater part of loss and damage is suffered. Where, as in this case, causation and quantum of loss are in issue, at this stage the location of the preponderance of loss may be difficult to ascertain. However, weight is to be given to the assertion by the Claimant that she continued to suffer pain after she and her husband returned to England in June 2011. She attended a pain clinic in Oxford and received treatment. She states that as a result of her pain and the effects of the accident she had become depressed. The continuing pain and suffering and medical treatment is a factor connecting the tort with England. So is the contention that loss of earnings has been and will be suffered in England.

60. The vehicle driven by the First Defendant was insured and registered in England. Whilst a factor to be taken into account, as was observed in Harding at paragraph 18, where the motor vehicle involved in the accident was insured is not a strong connecting factor. Nor is where the vehicle was registered.

61. In Stylianou, Sir Robert Nelson considered that the continued and active pursuit of proceedings in Western Australia was an important factor to take into consideration under Article 4(3). The pursuit of proceedings by the Claimant in the English courts is taken into account in this case, however it is not a strong

connecting factor. The choice of forum does not determine the law of the tort.

62. Factors weighing against displacement of German law as the applicable law of the tort by reason of Article 4(1) are that the road traffic accident caused by the negligence of the First Defendant took place in Germany. The Claimant sustained her injury in Germany. At the time of the accident both the Claimant and the First Defendant were habitually resident there. The Claimant had lived in Germany for about eight and a half years and remained living there for eighteen months after the accident.

63. Under Article 4(3) the court must be satisfied that the tort is manifestly more closely connected with English law than German law. Article 4(3) places a high hurdle in the path of a party seeking to displace the law indicated by Article 4(1) or 4(2). Taking into account all the circumstances, the relevant factors do not indicate a manifestly closer connection of the tort with England than with Germany. The law indicated by Article 4(1) is not displaced by Article 4(3). The law applicable to the claim in tort is therefore German law."

A discussion of the case can be found here.

French Supreme Court Rules on Scope of Rome II Regulation

The French supreme court for private and criminal matters (*Cour de cassation*) ruled on the respective scopes of the 1971 Hague Convention on the law applicable to traffic accidents and the Rome II Regulation in a judgment of 30 April 2014.

In 2010, a traffic accident occurred in Spain involving two cars. The first was registered in France, the second in Spain. The passenger of the French car initiated proceedings in France against the driver of the same car.

The lower courts found that both parties had their habitual residence in France

and that French law thus governed as a consequence of Article 4(2) of the Rome II Regulation. In order to avoid applying the 1971 Hague Convention, to which France is a party, the court of appeal ruled that both France and Spain were members of the EU, and that the Rome II Regulation thus prevailed over conventions entered into by the Member States (article 28(2)).

The French Supreme court sets aside the judgment on the ground that Article 28 of the Rome II Regulation expressly provides that international conventions prevail over the Rome II Regulation when they were also ratified by third states. As it is the case for the 1971 Hague Convention, the latter should have been applied.

Under Articles 3 and 4 of the 1971 Hague Convention, when the traffic accident involves cars registered in different states, the law of the place of accident, here Spain, applies.

Greek Commentary on the Rome II Regulation

The first Greek Commentary on the Rome II Regulation edited by Prof. Dr. Angelos Bolos (Panteion University) and Dr. Dimitrios-Panagiotis Tzakas was just published.

This collective work undertakes an in-depth analysis on the specific provisions of Regulation No 864/2007 (Rome II) and scrutinizes its doctrinal implications with regard to the existing CJEU case law, especially on the Brussels I Regulation. Furthermore, attention is paid to the impact of the Rome II Regulation on sectors characterized by specificities which are not addressed by specific choice-of-law rules (i.e. traffic accidents, capital markets law etc.).

The contributors (V. Athanassopoulou, A. Emilianides, Th. Katsas, V. Koumpli, E.

Liaskos, A. Metallinos, A. Bolos, K. Noussia, A. Papadelli, E. Spinellis, T.-E. Synodinou, D.P. Tzakas) give particular consideration to the ongoing Europeanization in the fields of the Private International Law and highlight its implications for the jurisprudence of the Hellenic courts after the enactment of a new set of choice-of-law rules.

Tick Tock: CJEU rules on temporal application of the Rome II Regulation

On 17 November 2011, the Court of Justice of the European Union delivered its ruling in Case C-412/10, *Homawoo v GMF Assurances* on the temporal effect of the Rome II Regulation (Regulation (EC) No 864/2007) . In line with the earlier opinion (if not all of the reasoning) of Advocate General Mengozzi, the Court rules that the date of application of the Rome II Regulation is fixed by Art. 32 of the Regulation at 11 January 2009, with the consequence that the Regulation will apply only to events giving rise to damage occurring from that date (Art. 31).

The terms of the Court's ruling are as follows:

> *Articles 31 and 32 of 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'), read in conjunction with Article 297 TFEU, must be interpreted as requiring a national court to apply the Regulation only to events giving rise to damage occurring after 11 January 2009 and that the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope ratione temporis of the Regulation.*

Although differing from my own view, influenced by the legislative history of Arts 31 and 32, the Court's reasoning is quite convincing. The swift and decisive

settlement of this point of controversy, just over a year after the reference, is to be welcomed.

European Parliament's Working Document on the Amendment of the Rome II Regulation

On May 25, 2011, the Committee of Legal Affairs (Rapporteur: Diane Wallis) of the European Parliament has issued a Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). The Working Paper discusses the desirability to fill the gap in the Regulation on the applicable law to non-contractual obligations arising out of violations of privacy and rights relating to personality.

Readers will recall that *Conflictoflaws.Net* had organized an online symposium on this topic last summer. We are delighted that the Rapporteur found the contributions "thoughtful and thought-provoking", although the range of views expressed had made her task no easier. The Rapporteur made particular mention of the proposal of Professor Jan von Hein, indicating that she found his approach "balanced and reasonable".

Tick, Tock: Temporal Application of the Rome II Regulation

Referred to the CJEU

Two recent decisions of the English High Court consider the temporal effect of the Rome II Regulation, with the first of these making a reference to the CJEU as to the combined effect of Articles 31-32 of the Regulation (to my knowledge, the first reference with respect to this Regulation).

Each of the cases (Homawoo v GMF Assurance SA [2010] EWHC 1941 (QB) and Bacon v Nacional Suiza [2010] EWHC 1941 (QB)) concerned proceedings with respect to injuries suffered by the claimant in a road traffic accident occurring (a) in a Member State (France in Homawoo and Spain in Bacon) and (b) in 2007 (but in each case after 20 August, the first critical date in terms of defining the temporal effect of the Regulation). In each case, proceedings were issued in England before 9 January 2009 (the second critical date). In Bacon, the sole defendant was the insurer of the only car involved in the accident (Mr Bacon was a pedestrian). In Homawoo, although the driver and owner of the car causing injury were also joined, proceedings were only pursued against the insurer. Liability was disputed (successfully) in Bacon, but accepted in Homawoo.

The question for decision by each of Sharp J (Homawoo) and Tomlinson J (Bacon) was whether the Rome II Regulation applied, with the result that damages would fall to be assessed by reference to the law applicable under the Regulation (French or Spanish law) and not the law of the forum (cf. Harding v Wealands [2007] 1 AC 1, under the pre-existing English rules of applicable law).

Under Article 31 of the Rome II Regulation, the Regulation "shall apply to events giving rise to damage which occur after its entry into force". Under Article 32, the Regulation (with the sole exception of Article 29) "shall apply from 11 January 2009". This combination clearly suggests, as both judges accepted, a distinction between the date of entry into force of the Regulation and its date of application, with only the latter being specifically designated in Article 32 (9 January 2009). If that view, supported by records of the discussions in the Council's Rome II working group, is accepted as representing the legislative intention of the EU, it would seem to follow that the date of entry into force must be fixed at 20 August 2007 in accordance with Article 254 of the EC Treaty (now TFEU, Article 297). Nevertheless, an important conundrum remains to be resolved, in that the precise meaning of the words "shall apply" in Articles 31 and 32 must be

explained: What is it to which the Regulation's rules of applicable law "shall apply"?

Needless to say, given the unsatisfactory drafting, commentators differ in their approaches (for my own, see Dickinson, The Rome II Regulation (2008), paras 3.315-3.321), as did the two judges in these cases.

In Homawoo, Sharp J (at [43]-[49]) was unhappy with interpretations of Article 32 as referring to the date of commencement of legal proceeedings or the date of determination of those proceedings. She suggested (at [50]) that a reading of Articles 31 and 32 as inter-linking and complete in themselves so that the Regulation would apply only to events giving rise to damage after 11 January 2009 "would give legal certainty", but accepted that the "clear language of Article 31" made it impossible to reach this conclusion, at least without a preliminary reference to the CJEU. Accordingly (at [51]) she posed the following questions:

> *If the meaning and effect of Article 31 is that Rome II is to apply to events giving rise to damage which occur after the 'entry into force' of the Regulation on 20th August 2007, what is the meaning and effect of 'shall apply from 11th January 2009' in Article 32? Is it 'apply to proceedings commenced' or 'apply to determination by a court' after that date? What is the meaning and effect of Article 31? Should it be interpreted so that the Regulation shall apply to events giving rise to damage which occur on or after 11th January 2009?*

In Bacon, it was not necessary for Tomlinson finally to decide the temporal application point or to consider whether to make a reference, as he had held the claimant on the facts solely responsible for the accident and exhonerated the defendant under Spanish law, which it was agreed applied to the question of liability in any event. Nevertheless, having heard arguments similar to those advanced before Sharp J, he concluded (at [61]) that the Regulation applied to the determination as from 11 January 2009 of the law applicable to a non-contractual obligation arising out of an event giving rise to damage on or after 20 August 2007.

Although Sharp J (at [46]) had observed that parties who are considering the possibility of settlement will wish to understand what law applies to the calculation of damages and they (like judges) need to know whether Rome II applies, Tomlinson J took the view (I would submit, correctly) that the Regulation

is directed at the Member States and their courts (see [61]). This is not to deny that the Regulation's provisions are not relevant in calculating the parameters of settlement, but merely to accept that the parameters of settlement must themselves be calculated by reference to a hypothetical future determination by a court or tribunal having jurisdiction over the matter. Settlement discussions, as other commercial negotiations, are conducted by reference to the putatively applicable law, and in cross-border transactions it must be accepted that the rights and obligations of the parties may fall to be determined at different times and by different courts or tribunals according to different legal rules.

On the view taken by Tomlinson J (according with the wording and legislative history of Articles 31-32) the likely date of any future judicial determination was a factor which those negotiating settlements in the EU before 11 January 2009 would need to take into account, alongside such other factors as the identity and geographical location (within or outside a Member State) of the court(s) or tribunal(s) before which the matter could be brought if their negotiations were not to bear fruit. That is not illogical or unjust (see Tomlinson J, at [38]). Nor does it involve giving retroactive effect to the Regulation's provisions, which were published in the Official Journal on 31 July 2007. Nor, at the point of determination, does it result in any uncertainty as to the source of the rules of applicable law that the court must apply. Further, as Tomlinson J pointed out (at [65]), the opportunity for taking any tactical advantage of the separation of entry into force and application of the Regulation ended (if this interpretation is accepted) on 11 January 2009, following which any determination by a Member State court of the law applicable to a non-contractual obligation must carried out in accordance with the Regulation's rules. From that date, the Regulation (at least according to its major objective) promotes a different kind of certainty (decisional harmony), in ensuring that Member State courts apply the same law in the determination of non-contractual obligations, even if the event giving rise to damage occurred between 20 August 2007 and 11 January 2009. The harmonisation of approach in this area across the Member States is, of course, the primary objective of the Rome II Regulation (see Recitals (6) and (15)) and this interpretation appears, therefore, teleologically superior, even if it leads to a short term problem (now expired) in terms of the foreseeability of court decisions (see Recital (16)).

In any event, it may be questioned whether the form of "legal certainty" craved by

Sharp J and other proponents of this solution is of any significant or lasting value. The very fact of a reference to the CJEU on this point (and the contrary view of Tomlinson J and many others) will leave those engaging in settlement discussions with respect to events occurring between 20 August 2007 and 11 January 2009 in doubt as to the source of the rules for determining the law applicable to the parties' non-contractual obligations for years to come. By the time that we have a firm answer, the large majority of cases (particularly those involving traffic accidents) will likely have settled notwithstanding that doubt (unpredictability of outcome may even be seen as a driver of settlement). If the CJEU follows the view of Tomlinson J, as I would submit that it should, all those whose claims remain (and those whose claims remain undiscovered) will know where they stand, even if the events on which the claim is based occurred in the interregnum. As decisional harmony will (or ought to) have been improved, even in the latter class of cases, so too the incentive for one party to upset settlement discussions by rushing off to bring proceedings in a Member State court that it considers will apply a favourable law will (or ought to) have been diminished. We will all, according to the tin, be better off.

It is suggested that, what as first sight may appear an awkward or "arbitrary" (Tomlinson J, at [38]) combination of provisions in Articles 31 and 32, is in fact a combination of puritanism and pragmatism. The authors of the Regulation, in their unremitting quest to harmonise the rules of European private international law, were anxious that their new creation should be vivified at the earliest opportunity. That, however posed a problem in that the objectives of the Regulation might be put at risk if the creature's handlers (Member State judges) were not trained as to how to use it, with the result that a period of education was built in. The modified prospective effect of the Regulation can be seen, therefore, as an attempt to resolve the conflict between the ideals of a single area of justice and the reality of twenty six different ones.

The significance of questions of temporal effect will, of course, fade over time as claims are resolved and new ones arise. In a few years, we may all be better off and wonder what the excitement was about, although Mr Homawoo, Mr Bacon and others in their position may question exactly what they have found themselves in the middle of.

Dickinson on The Rome II Regulation: Supplement Now Available

Andrew Dickinson's monograph on **The Rome II Regulation – The Law Applicable to Non-Contractual Obligations** was published in December 2008, and subsequent contributions from courts and academics have been seen throughout 2009 and 2010. To ensure that his work stays up-to-date and comprehensive, Dickinson has published an **Updating Supplement** to accompany the monograph. From the OUP website:

- This supplement updates The Rome II Regulation: The Law Applicable to Non-Contractual Obligations, which is the leading practitioner work which focuses on the Rome II regulation
- This supplement incorporates all major substantive developments since publication of the Main Work in December 2008 including the implementation of the Regulation in the UK, recent ECJ cases concerning other EC private international law instruments and new decisions of the English courts concerning the pre-Regulation rules of applicable law

Written by an experienced practitioner, who had substantial involvement in the consultation process leading to the regulation, offering valuable insight into the background and working of the regulation

This updating supplement brings the Main Work The Rome II Regulation up to date and incorporates substantive developments since publication of the book in December 2008. In particular it draws attention to legislation implementing the Regulation in the United Kingdom, to recent ECJ cases concerning other EC private international law instruments, to new decisions of the English courts concerning the pre-Regulation rules of applicable law, and to recent books and journal articles providing further colour to the picture surrounding the Regulation since its adoption in January 2009. It is an essential purchase for all

who already own the Main Work, and maintains its currency.

You can buy the main work together with the commentary for £200, or just the supplement for £45.

Bertoli: Party Autonomy and the Rome II Regulation

Paolo Bertoli (University of Insubria) has published two interesting articles (in English) on the role of party autonomy in the Rome II regulation. Here are the references:

Choice of Law by the Parties in the Rome II Regulation, in Rivista di diritto internazionale, 2009, pp. 697-716.

Party Autonomy and Choice-Of-Law Methods in the "Rome II" Regulation on the Law Applicable to Non-Contractual Obligations, in Il Diritto dell'Unione europea, 2009, pp. 229-264.

An abstract has been kindly provided by the author:

The articles discuss, also in comparison with American private international law theories and methods, the innovative provisions relating to party autonomy set forth in the EC "Rome II" regulation on the law applicable to non-contractual obligations, the choice-of-law methods that such provisions follow, and their role and significance in the framework of the European "federalized" private international law system. In particular, the articles demonstrate that a distinction can, and should, be made between cases in which party autonomy operates in the context, and demonstrates the existence in Rome II, of: (i) a traditional (or, in American terminology, "jurisdiction-selecting") choice-of-law method, (ii) a "content-oriented" choice-of-law method, and (iii) a European lex fori approach.

With reference to the development of EC private international law, see also the author's thorough analysis of the role of the European Court of Justice, in his volume "Corte di giustizia, integrazione comunitaria e diritto internazionale privato e processuale" (Giuffrè, 2005) and "The Court of Justice, European Integration and Private International Law" (in *Yearbook of Private International law*, vol. VIII-2006, pp. 375-412: the article can be browsed through the Libreka! website).

Dickinson: Rome II Regulation Monograph Supplement, and our New Consultant Editor

Scholarly writings on the new Rome II Regulation have continued to pour in from all Member States, and the ECJ's recent case law on other civil justice instruments (particularly the Brussels I Regulation) has also addressed issues of relevance to Rome II. For the time being, national courts have had little opportunity to consider the Rome II Regulation, but that will no doubt soon change. Andrew Dickinson's monograph – The Rome II Regulation – The Law Applicable to Non-Contractual Obligations – was published on 18th December 2008, and will undoubtedly be a source of valuable guidance for practitioners and academics for some time to come. To ensure that it remains up to date, however, Andrew Dickinson has committed to publishing supplements to the work. The first supplement, which runs to some 54 pages, is available on the companion website to the book and can be downloaded from **here (PDF)**. I would urge all those interested in Rome II to take advantage of it.

It will, following from the above, come as no surprise that I am delighted to announce that Andrew will be joining the Conflict of Laws .net team as a Consultant Editor, posting primarily on developments in European civil and commercial matters. A short biography appears below, and I am sure everyone who uses this site will be pleased that he will be contributing to the website on a

regular basis.

Biography

Andrew Dickinson is a solicitor advocate (qualified 1997; higher rights 2002), consultant to Clifford Chance LLP and visiting fellow at the British Institute of International and Comparative Law.

Andrew is a member of the North Committee (the Ministry of Justice's advisory committee on private international law) and of the editorial board of the Journal of Private International Law. He has recently joined the editorial team of Dicey, Morris and Collins on the Conflict of Laws.

Andrew's main area of legal practice and research interest is private international law, but his practice also covers civil litigation, commercial and banking law and public international law. He is the author of The Rome II Regulation: The Law Applicable to Non-Contractual Obligations (OUP, 2008) (romeii.eu), co-author of State Immunity: Selected Materials and Commentary (OUP, 2004) and an editor of the International Commercial Litigation Handbook (LexisNexis, 2006). His published papers include "European Private International Law: Embracing New Horizons or Mourning the Past? " (2005) 1 J Priv Int L 197 and "Third Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?" (2007) 3 J Priv Int L 53.

Rome II Regulation Applicable in EU

Starting from today, 11 January 2009, Regulation no. 864/2007 on the law applicable to non-contractual obligations (Rome II) is applicable in the Member States (see its Art. 32), excepting Denmark.

In the comments to one of our previous posts, some **debate was raised as to the proper construction of Art. 31 ("Application in time") of the Regulation**,

according to which the new regime applies to "events giving rise to damage which occur after its entry into force". A very large majority of scholars (almost all the published articles) takes the view that, for the purposes of Art. 31, the date of entry into force coincides with the date of application of the Regulation, so that it would be applicable to events giving rise to damage occurring on or after 11 January 2009.

Other elements, taken from the legislative process (see the comments to the abovementioned post), would suggest the opposite view that, following the ordinary rules set by Art. 254(1) of the EC Treaty, the Regulation entered into force on 20 August 2007, thus applying to events occurred on or after this previous date. The latter interpretation is shared by the SCADplus (summary of EU legislation) webpage on Rome II, which holds no official value, and is referred to by Prof. *Hartley* in his article on the Rome II Reg. ("Choice of Law for Non-Contractual Liability: Selected Problems Under the Rome II Regulation", in ICLQ (2008), p. 899 ff., at footnote 2 on p. 899, quoting Prof. *Morse* in *Dicey and Morris*).

Two others points are worth mentioning, as regards the final provisions of Rome II:

1. according to Art. 29(2), the Commission is expected to publish in the OJ the **list of existing 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" (mainly, the 1971 Hague Convention on Traffic Accidents and the 1973 Hague Convention on Products Liability): the deadline for Member States to notify of such conventions was set to 11 July 2008. To my knowledge, the list has not yet been published;

2. according to the review clause in Art. 30(2), not later than 31 December 2008 **the Commission** was expected **to present 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 to Directive 95/46/EC […]". Neither this study has been released, as yet, as far as I know.

Readers are encouraged to report on first cases of application of the new

Regulation before national courts.