UK Regulations Implementing Rome II Regulation Adopted

As pointed out by Andrew Dickinson on the BIICL-PRIVATEINTLAW list (the mailing list promoted by the British Institute of International and Comparative Law, devoted to conflict matters), on 18 November 2008 were laid before the UK Parliament the Regulations implementing the EC Rome II Regulation in England, Wales and Northern Ireland (the Scottish Parliament is expected to legislate separately for Scotland).

The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (S.I., 2008, No. 2986), dated 12 November 2008, were made by the Secretary of State, as designated by the European Communities (Designation) (No.2) Order 2008 no. 1792 to exercise the powers conferred by section 2(2) of the European Communities Act 1972 (c. 68) in relation to private international law (readers who are unfamiliar – as I am – with the implementation of EC Law in the UK by means of statutory instruments may find useful this Wikipedia page and the Explanatory Memorandum to the European Community (Designation) (No. 2) Order 2008).

Here's an excerpt of the Explanatory Note to the implementing Regulations; most notably, **the application of the conflict rules provided by the EC instrument is extended to intra-UK conflicts**:

> *The purpose of these regulations is two-fold. The first is to modify the relevant current inconsistent national law in England and Wales and Northern Ireland. Regulations 2 and 3 restrict the application of the general statutory choice of law rules in this area. These are contained in Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Regulation 4 restricts the application of certain provisions in the Foreign Limitation Periods Act 1984 and regulation 5 restricts the application of analogous provisions in the Foreign Limitation Periods (Northern Ireland) Order 1985.*
>
> *The second purpose involves extending the application of the Regulation to certain cases that would otherwise not be regulated by it. These are cases where in principle the choice of applicable law is confined to the law of one of*

> *the United Kingdom's three jurisdictions, that is England and Wales, Scotland and Northern Ireland, and to the law of Gibraltar. These cases therefore lack the international dimension which is otherwise characteristic of cases falling under the Regulation. Under Article 25(2) of the Regulation Member States are not obliged to apply the Regulation to such cases. To maximise consistency between the rules that apply to determine the law applicable to non-contractual obligations, regulation 6 of these regulations extends, in relation to England and Wales and Northern Ireland, the scope of the Regulation to conflicts solely between the laws of England and Wales, Scotland, Northern Ireland and Gibraltar.*

The Regulations, subject in the Parliament to the negative resolution procedure, will enter into force on 11 January 2009 (the same date as the Rome II Reg.: see its Art. 32, and the comments to our previous post here). The text is available on the Office of Public Sector Information (OPSI) website.

Trinity College Dublin to Host Conference on Rome II Regulation

On June 21, 2008, Trinity College Dublin is hosting a conference on the Rome II regulation on the law applicable to non-contractual obligations. Full details are available here.

The conference will examine the regulation and its implications for the practice of tort law. TCD has put together a team of speakers that includes leading experts from across Europe and North America.

Paper topics include "Rome II: A True Piece of Community Law", "Has the Forum Lost its Grip?", "The Significance of Close Connection" and "The Application of Multiple Laws under Rome II".

German Article on Rome II Regulation

Thomas Thiede and *Markus Kellner* (both Vienna) have written an article on **Forum Shopping between Rome II and the Hague Convention on the Law applicable to Traffic Accidents** in the legal journal Versicherungsrecht (VersR 2007, 1624 et seq.): *"'Forum shopping' zwischen dem Haager Übereinkommen über das auf Verkehrsunfälle anzuwendende Recht und der Rom-II-Verordnung".*

The authors argue that Article 28 (1) Rome II, which provides as a general rule that the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties and which lay down conflict-of-law rules relating to non-contractual obligations, leads to the precedence of the Hague Convention on the law applicable to traffic accidents since the exception clause of Article 28 (2) Rome II is – due to the fact that also Non-Member States are parties to the Hague Convention – not applicable.

It is submitted that the subsidiarity of the Rome II Regulation on the one side and the fact that the Hague Convention has not been ratified by some Member States on the other side entails the possibility of forum shopping. Thus, the authors argue, it would have been preferable to give priority to the Rome II Regulation over all Hague Conventions in order to ascertain – at least for intra-EU cases – the applicability of only one law.

Rome II Regulation Adopted

After the adoption by the Council in the session of 28 June, **the joint text of the Rome II Regulation has been approved on 10 July 2007 by the plenary session of the European Parliament**, in a vote by a show of hands on the

legislative resolution attached to the Report prepared by Diana Wallis (the debate held in the EP's session is available here: it is worth mentioning that the Rapporteur and other MEPs consider the text agreed upon in the conciliation stage as "an initial roadmap", stressing the importance of the review clause and of the studies that shall be submitted by the Commission on the matters that were set aside in the conciliation stage).

The Rome II Regulation, after the signing of the Presidents of the Council and of the Parliament, will be soon published in the Official Journal.

It will enter into force on the twentieth day following its publication in the O.J., and will apply, to events giving rise to damage occurred after its entry into force (Art. 31), from 18 months after the date of its adoption (Art. 32).

Seminar: Substance and Procedure in the Law Applicable to Torts – Harding v Wealands & the Rome II Regulation

Substance and Procedure in the Law Applicable to Torts – *Harding v Wealands* and the Rome II Regulation

Seminar at the British Institute of International & Comparative Law

Tuesday 21 November 2006 17:00 to 19:00
Location: Charles Clore House, 17 Russell Square, London WC1B 5JP

Participants:

- Chair: Mr Justice Lawrence Collins
- Dr Janeen Carruthers, University of Glasgow
- Charles Dougherty (2 Temple Gardens)

- George Panagopoulos (Richards Butler)

This seminar is part of the British Institute's seminar series on private international law which will run throughout the Autumn of 2006 and well into 2007 entitled Private International Law in the UK: Current Topics and Changing Landscapes, sponsored by Herbert Smith.

For more information, see the BIICL website.

Those who attended the launch seminar on 24th October may be interested to know that a transcript is now available on the BIICL website (Institute members only.)

German Article on Rome II Regulation

Dr. Michael Sonnentag (*Freiburg*) has published an article in the German legal journal "Zeitschrift für vergleichende Rechtswissenschaft" on the Europeanisation of the non-contractual law of obligations ("Zur Europäisierung des Internationalen außervertraglichen Schuldrechts durch die geplante Rom II – Verordnung", Vol. 105 No.3 (2006), p. 256).

In his article *Sonnentag* attends to the background of the existing proposals, the legal basis, the scope of application of a future Rome II Regulation, its individual conflict of law rules and general questions such as public policy.

German Federal Supreme Court refers questions to the CJEU relating to the concept of “habitual residence” under Art. 8 (a), (b) of the Rome III Regulation

In its decision of 20 December 2023 (Case No. XII ZB 117/23), the German Federal Supreme Court has referred three questions to the CJEU relating to the interpretation of Art. 8 (a), (b) of the Rome III Regulation. The following is a convenience translation of the German press release:

Facts of the Case:

The spouses, German nationals, married in 1989. Initially, they lived together in Berlin since 2006. In June 2017 , the couple deregistered their domicile from the German population register (*Melderegister*) and moved to Stockholm, where the husband was employed at the German embassy. They nonetheless maintained their rented apartment in Berlin so that they could return as soon as the husband’s posting in Sweden was completed. However, when in September 2019 the husband was once again transferred to the embassy in Russia, the parties changed their place of residence from Stockholm straight to Moscow, where the couple lived in a flat on the embassy compound. Both spouses hold diplomatic passports.

In January 2020, the wife travelled to Berlin to undergo medical surgery, but subsequently returned in February. According to the husband, the couple informed their two (adult) children in March 2021 that they had decided to file for divorce. The ensuing separation at the end of May 2021 resulted in the wife returning to the flat in Berlin and the husband continuing to live in the flat on the Moscow embassy premises.

Procedural History:

In July 2021, the husband filed an application for divorce with the German local court (*Amtsgericht Kreuzberg*), which the wife at the time successfully contested on the grounds that the year of separation (*Trennungsjahr*) mandatory under German law had not yet passed, as the separation had taken place in May 2021 at the earliest.

Following the husband's appeal, the Berlin regional court (*Kammergericht*) nethertheless divorced the marriage in accordance with Russian substantive law. In its reasoning, the court stated that (in the absence of a choice of law according to Art. 5) the applicable law was governed by Art. 8 (b) of the Rome III Regulation, because it could be assumed that the last common habitual residence in Moscow did not end until the wife's depature to Germany in May 2021, i.e. less than one year beforce the court was first seised as required under Art. 8 lit. b) of the Rome III Regulation.

Subsequently, the wife lodged an appeal on points of law to the Federal Supreme Court (*Bundesgerichtshof*) seeking a divorce under German substantive law.

Questions:

The German Federal Supreme Court has referred to the CJEU the following three questions: According to which criteria is the habitual residence of the spouses to be determined within the meaning of Art. 8 lit. a) and lit. b) Rome III Regulation, in particular:

1. Does the posting as diplomat affect the assumption of habitual residence in the receiving State or does it even preclude such an assumption?

2. Is it necessary that the physical presence of the spouses in a State must have been of a certain duration before habitual residence can be assumed to be established?

3. Does the establishment of habitual residence require a certain degree of social and family integration in the state concerned?

Implications

In the ideal case, the expected decision of the ECJ will provide for legal certainty for families and people employed in the diplomatic service and similar professions. In addition, the decision could also, more generally, bring about

further insights into the concept of habitual residence in EU secondary law and thus also be of interest with regard to the related European Matrimonial Property Regulation/European Registered Partnership Regulation, Brussels IIter Regulation and possibly also the European Succession Regulation.

The Press Release (available in German only) for the decision can be found here.

German Federal Court of Justice rules on what constitutes a genuine international element within the meaning of Art. 3(3) of the Rome I-Regulation (BGH, judgment of 29 November 2023, No. VIII ZR 7/23)

by Patrick Ostendorf (HTW Berlin)

The principle of party autonomy gives the parties to a contract the opportunity to determine the applicable substantive (contract) law themselves by means of a choice-of-law clause – and thus to avoid (simple) mandatory rules that would otherwise bite. According to EU Private International law, however, the choice of the applicable contract law requires a genuine international element: in purely domestic situations, i.e. where *"all other elements relevant to the situation at the time of the choice"* are located in a single country, all the mandatory rules of this country remain applicable even if the parties have chosen a foreign law (Art. 3 (3) Rome I Regulation).

In the absence (for the time being) of relevant case law from the European Court of Justice, the precise requirements of this threshold are not yet settled. However, in a recent judgment, the German Federal Court of Justice (Bundesgerichtshof) has – seemingly for the first time – considered the requirements for a sufficient international element in this respect.

The decision concerned a lease agreement for an apartment in Berlin which was rented out by the embassy of a foreign state (the embassy acting on behalf of the foreign ministry of that state, which was the owner of the apartment). The lease contained a choice-of-law clause in favor of the law of that state and was drafted in the language of that state.

As the lease was entered into for a fixed term, the landlord informed the tenant shortly before the expiry of the lease that it would not be renewed and asked them to vacate the premises accordingly. The tenant in turn invoked section 575(1) of the German Civil Code (Bürgerliches Gesetzbuch – BGB), according to which a fixed-term lease agreement is deemed to have been concluded for an indefinite period of time if the landlord has failed to inform the tenant in writing of the reasons for the fixed term at the time the lease was concluded.

The Bundesgerichtshof concludes that these facts constitute a purely domestic situation within the meaning of Art. 3 (3) of the Rome I Regulation; therefore section 575 BGB (a mandatory provision of the German Civil Code) applies notwithstanding the governing law clause in the contract providing otherwise. Accordingly, the request by the claimant to grant eviction has to be rejected.

As a starting point for its analysis, the Court emphasised that the genuine international element required for a choice of law must be of some significance and weight for the specific transaction in question (based on the principles of the applicable conflict-of-laws rules, in particular the connections with a foreign state referred to in Art. 4 Rome I Regulation), whereas subjective references to a foreign law based solely on the agreement of the parties will generally not suffice.

Even the fact that a foreign state was a party to the lease agreement does not, in the view of the Court, change this, since the embassy, acting both as the agent of the foreign state and as the institution responsible for the further implementation of the lease agreement, constitutes a branch within the meaning of Art. 19(2) of the Rome I Regulation ("*If the contract is concluded in the course of the business*

of a branch, agency or other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or establishment is situated shall be treated as the place of habitual residence"). It follows that not only the tenant's but also the landlord's habitual residence is deemed to be in Germany. Finally, according to the Court, the fact that the apartment in question was primarily used for the accommodation of embassy staff (although not in the present case), that the contract was concluded in a foreign language and that the tenant was (also) a foreign national is not sufficient to establish a genuine international element as well.

Although the decision of the Bundesgerichtshof is undoubtedly well reasoned, it reaches the opposite conclusion to recent English case law: in particular, the English Court of Appeal has (even before Brexit) taken the contrary view that the use of a foreign contractual language or a standard form contract tailored to international transactions would even on a standalone basis be sufficient to constitute a relevant international element – and accordingly allow the parties to escape the restrictions stipulated by Art. 3(3) Rome I Regulation (Dexia Crediop SpA v Comune di Prato [2017] EWCA Civ 428, discussed here).

Further guidance from the European Court of Justice on the interpretation of Art. 3(3) Rome I Regulation would therefore be desirable.

The "Event Giving Rise to the Damage" under Art. 7 Rome II Regulation in CO2 Reduction Claims – A break through an empty Shell?

Written by Madeleine Petersen Weiner/Marc-Philippe Weller

In this article, we critically assess the question of where to locate the "event giving rise to the damage" under Art. 7 Rome II in CO_2 reduction claims. This controversial – but often overlooked – question has recently been given new grounds for discussion in the much discussed "*Milieudefensie et al. v. Shell*" case before the Dutch district court in The Hague. In this judgment, the court had to determine the law applicable to an NGO's climate reduction claim against *Royal Dutch Shell*. The court ruled that Dutch law was applicable as the law of the place where the damage occurred under Art. 4 (1) Rome II and the law of the event giving rise to the damage under Art. 7 Rome II as the place where the business decision was made, *i.e.*, at the Dutch headquarters. Since according to the district court both options – the place of the event where the damage occurred and the event giving rise to the damage – pointed to Dutch law, this question was ultimately not decisive.

However, we argue that it is worth taking a closer look at the question of where to locate the event giving rise to the damage for two reasons: First, in doing so, the court has departed from the practice of interpreting the event giving rise to the damage under Art. 7 Rome II in jurisprudence and scholarship to date. Second, we propose another approach that we deem to be more appropriate regarding the general principles of proximity and legal certainty in choice of law.

1. *Shell* – the judgment that set the ball rolling (again)

The Dutch environmental NGO *Milieudefensie* and others, which had standing under Dutch law before national courts for the protection of environmental damage claims, made a claim against the *Shell* group's parent company based in the Netherlands with the aim of obliging *Shell* to reduce its CO_2 emissions. According to the plaintiffs, *Shell's* CO_2 emissions constituted an unlawful act. The Dutch district court agreed with this line of reasoning, assuming tortious responsibility of *Shell* for having breached its duty of care. The court construed the duty of care as an overall assessment of *Shell's*obligations by, among other things, international standards like the UN Guiding Principles of Human Rights Responsibilities of Businesses, the right to respect for the private and family life under Art. 8 ECHR of the residents of the Wadden region, *Shell's* control over the group's CO_2 emissions, and the state's and society's climate responsibility etc. This led the district court to ruling in favor of the plaintiffs and ordering *Shell* to reduce its greenhouse gas emissions by 45% compared to 2019.

In terms of the applicable law, the court ruled that Dutch law was applicable to the claim. The court based its choice of law analysis on Art. 7 Rome II as the relevant provision. Under Art. 7 Rome II, the plaintiff can choose to apply the law of the event giving rise to the damage rather than the law of the place where the damage occurred as per the general rule in Art. 4 (1) Rome II. The court started its analysis by stating that "climate change, whether dangerous or otherwise, due to CO_2 emissions constitutes environmental damage in the sense of Article 7 Rome II", thus accepting without further contemplation the substantive scope of application of Art. 7 Rome II.

The court went on to find that the adoption of the business policy, as asserted by the plaintiffs, was in fact "an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region". The court thereby declined *Shell's* argument that *Milieudefensie's* choice pointed to the law of the place where the actual CO_2 emissions occurred, which would lead to a myriad of legal systems due to the many different locations of emitting plants operated by *Shell*.

2. The enigma that is "the event giving rise to the damage" to date

This line of reasoning marks a shift in the way "the event giving rise to the damage" in the sense of Art. 7 Rome II has been interpreted thus far. To date, there have been four main approaches: A broad approach, a narrower one, one that locates the event giving rise to the damage at the focal point of several places, and one that allows the plaintiff to choose between several laws of events which gave rise to the damage.

(1.) The Dutch district court's location of the event giving rise to the damage fits into the broad approach. Under this broad approach, the place where the business decision is made to adopt a policy can qualify as a relevant event giving rise to the damage. As a result, this place will usually be that of the effective headquarters of the group. On the one hand, this may lead to a high standard of environmental protection as prescribed by recital 25 of the Rome II Regulation, as was the case before the Dutch district court, which applied the general tort clause Art. 6:162 BW. On the other hand, this may go against the practice of identifying a *physical* action which *directly* leads to the damage in question, rather than a purely internal process, such as the adoption of a business policy.

(2.) Pursuant to a narrower approach, the place where the direct cause of the violation of the legal interest was set shall be the event giving rise to the damage. In the case of CO_2 reduction claims, like *Milieudefensie et al. v. Shell*, that place would be located (only) at the location of the emitting plants. This approach – while dogmatically stringent – may make it harder to determine responsibility in climate actions as it cannot necessarily be determined which plant led to the environmental damage, but rather the emission as a whole results in air pollution.

(3.) Therefore, some scholars are in favor of a focal point approach, according to which the event giving rise to the damage would be located at the place which led to the damage in the most predominant way by choosing one focal point out of several events that may have given rise to the damage. This approach is in line with the prevailing opinion regarding jurisdiction in international environmental damage claims under Art. 7 Nr. 2 Brussels I-*bis* Regulation. In practice, however, it may sometimes prove difficult to identify one focal point out of several locations of emitting plants.

(4.) Lastly, one could permit the victim to choose between the laws of several places where the events giving rise to the damage took place. However, if the victim were given the option of choosing a law, for example, of a place that was only loosely connected to the emissions and resulting damages, Art. 7 Rome II may lead to significantly less predictability.

3. Four-step-test: A possible way forward?

Bearing in mind these legal considerations, we propose the following interpretation of the event giving rise to the damage under Art. 7 Rome II:

First, as a starting point, the laws of the emitting plants which *directly* lead to the damage should be considered. However, in order to adequately mirror the legal and the factual situations, the laws of the emitting plants should only be given effect insofar as they are responsible for the total damage.

If there are several emitting plants, some of which are more responsible for greenhouse gas emissions than others, these laws should only be invoked under Art. 7 Rome II for the *portion of their responsibility regarding the entire claim*. This leads to a *mosaic approach* as adopted by the CJEU in terms of jurisdiction for claims of personality rights. This would give an exact picture of contributions

to the environmental damage in question and would be reflected in the applicable law.

Second, in order not to give effect to a myriad of legal systems, this mosaic approach should be slightly moderated in the sense that courts are given the opportunity to make estimations of proportions of liability in order not to impose rigid calculation methods. For example, if a company operates emitting plants all over the world, the court should be able to roughly define the proportions of each plant's contribution, so as to prevent potentially a hundred legal systems from coming into play to account for a percentile of the total emissions.

Third, as a fall-back mechanism, should the court not be able to accurately determine each plant's own percentage of responsibility for the total climate output, the court should identify the central place of action in terms of the company's environmental tort responsibility. This will usually be at the location of the emitting plant which emits the most CO_2 for the longest period of time, and which has the most direct impact on the environmental damage resulting from climate change as proclaimed in the statement of claim.

Fourth, only as a *last resort*, should it not be possible to calculate the contributions to the pollution of each emitting plant, and to identify one central place of action out of several emitting plants, the event giving rise to the damage under Art. 7 Rome II should be located at the place where the *business decisions* are taken.

This proposal is discussed in further detail in the upcoming Volume 24 of the Yearbook of Private International Law.

Human rights in global supply chains: Do we need to amend the

Rome II-Regulation?

Written by Giesela Rühl, Humboldt-University of Berlin

The protection of human rights in global supply chains has been high on the agenda of national legislatures for a number of years. Most recently, also the European Union has joined the bandwagon. After Commissioner for Justice Didier Reynders announced plans to prepare a European human rights to due diligence instrument in April 2020, the JURI Committee of the European Parliament has now published a Draft Report on corporate due diligence and corporate accountability. The Report contains a motion for a European Parliament Resolution and a Proposal for a Directive which will, if adopted, require European companies – and companies operating in Europe – to undertake broad mandatory human rights due diligence along the entire supply chain. Violations will result, among others, in a right of victims to claim damages.

The proposed Directive is remarkable because it amounts to the first attempt of the European legislature to establish cross-sectoral mandatory human rights due diligence obligations coupled with a mandatory civil liability regime. However, from a private international law perspective the Draft Report attracts attention because it also contains proposals to change the Brussels Ia Regulation and the Rome II Regulation. In this post I will briefly discuss – and criticize – the proposed changes to the Rome II Regulation. For a discussion of the changes to the Brussels Ia Regulation I refer to *Geert Van Calster's* thoughts on GAVC.

Victims' unilateral right to choose the applicable law

The proposed change to the Rome II Regulation envisions the introduction of a new Article 6a entitled "Business-related human rights claims". Clearly modelled on Article 7 Rome II Regulation relating to environmental damage the proposal allows victims of human rights violations to choose the applicable law. However, unlike Article 7 Rome II Regulation, which limits the choice to the law of the place of injury and the law of the place of action, the proposed Article 6a allows victims of human rights violations to choose between potentially four different laws, namely

1) the law of the country in which the damage occurred, i.e. the law of the place of injury,

2) the law of the country in which the event giving rise to damage occurred, i.e. the law of the place of action,

3) the law of the country in which the parent company has its domicile or, where the parent company does not have a domicile in a Member State,

4) the law of the country where the parent company operates.

The rationale behind the proposed Article 6a Rome II Regulation is clear: The JURI Committee tries to make sure that the substantive provisions of the proposed Directive will actually apply – and not fall prey to Article 4(1) Rome II Regulation which, in typical supply chain cases, leads to application of the law of the host state in the Global South and, hence, non-EU law. By allowing victims to choose the applicable law, notably the law of the (European) parent company, the JURI Committee takes up recommendations that have been made in the literature over the past years.

However, a right to choose the applicable law *ex post* – while certainly good for victims – is conceptually ill-conceived because it results in legal uncertainty for all companies that try to find out *ex ante* what their obligations are. Provisions like the proposed Article 6a Rome II Regulation, therefore, fundamentally impair the deterrence function of tort law and increase compliance costs for companies because they have to adjust their behaviour to four – potentially – different laws to avoid liability. It is for this reason that choice of law rules that allow one party to unilaterally choose the applicable law *ex post* have largely (even though not completely) fallen out of favour.

Alternative roads to European law

The proposed Article 6a Rome II Regulation, however, does not only fail to convince conceptually. It also fails to convince as regards to the purpose that it seeks to achieve. In fact, there are much better ways to ensure that European standards apply in supply chain cases. The most obvious way is to simply adopt the envisioned European instrument in the form of a Regulation. Its provisions would then have to be applied as international uniform law by all Member State courts – irrespective of the provisions of the Rome II Regulation. However, even if

the European legislature prefers to adopt a European instrument in the form of a Directive – for political or competence reasons –, no change of the Rome II Regulation is necessary to ensure that it is applied throughout Europe. In fact, its provisions can simply be classified as overriding mandatory provisions in the meaning of Article 16 Rome II Regulation. The national provisions implementing the Directive will then apply irrespective of the otherwise applicable law.

In the light of the above, application of European human rights due diligence standards can be ensured without amending the Rome II Regulation. It is, therefore, recommended that the JURI Committee rethinks – and then abandons – the proposed Article 6a Rome II Regulation.

Note: This post is also available via the blog of the European Association of Private International Law.