European Commission Rome II Study

The British Institute of International and Comparative Law (BIICL) (in consortium with Civic Consulting) has been selected by the European Commission to conduct a study supporting the preparation of a report on the application of the Rome II Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (JUST/2019/JCOO/FW/CIVI/0167).

The study assesses the 10-year application of the Rome II Regulation in the Member States and will support the Commission in the future review of the Regulation. It analyses all areas covered and looks into specific, cutting-edge questions, such as cross-border corporate violations of businesses against human rights and the potential impact of the development of artificial intelligence.

To gather views of practitioners and academics from all Member States, BIICL conducts a survey which is available here: https://www.surveymonkey.com/r/JLWQ8XQ

Please contribute your experience to the study, if you have a particular expertise in the Rome II Regulation, or in one of the above-mentioned areas – namely cross-border torts related to artificial intelligence, corporate abuses against human rights, or defamation.
BIICL invites interested colleagues from all Member States to participate in the survey, but seeks in particular more contributions from: Bulgaria, Croatia, Cyprus, Finland, Luxembourg, Romania and Slovenia.

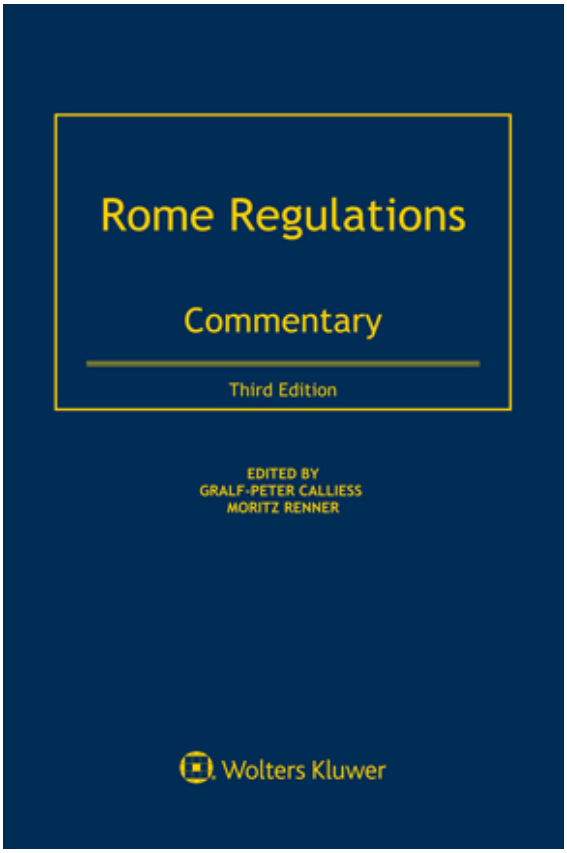
Deadline: December 31st, 2020

More information about the Study is available on BIICL's website (https://www.biicl.org/projects/com-study-on-the-rome-ii-regulation).

Out now: Guinchard (ed.), Rome I and Rome II in Practice

This book is devoted to the applicable law to contractual and non-contractual obligations in the European Union as applied before the Courts. It should be a valuable resource for practitioners, the judiciary, and academics who are interested in understanding how EU law is applied on national level. The Rome I and II Regulations are meant to provide for uniform conflict-of-laws rules. In theory, all national courts of EU Member States (excluding Denmark) apply the same rules determining the applicable law. *Rome I and Rome II in Practice* examines whether the theory has been put into practice and assesses the difficulties that may have arisen in the interpretation and application of these Regulations. The book contains a general report by the editor and a number of national reports.

Out now: Calliess/Renner (eds.), Rome Regulations, Commentary, Third Edition 2020



This book is an article-by-article 'German-style' commentary on the Rome I, II and III Regulations on European Union (EU) conflict of laws. It describes and systematically explains black letter law as applied by the Court of Justice of the EU (CJEU) and the Member State courts.

Out now: Rome I and Rome II in Practice

Rome I and Rome II in Practice, a volume edited by Emmanuel Guinchard focusing on the application of the theoretically uniform rules of Rome I and Rome II by the national courts of the Member States, has recently been published by Intersentia. A true treasure trove for scholars of comparative private international law, the book features national reports from 20 Member States and the UK drafted by specialist authors as well as a review of the case law of the CJEU and extensive conclusions by the editor. Each national report contains both general

remarks on the jurisprudence of the national courts as well as a structured review of the application of the two Regulations to a wide range of specific questions.

Several of the national reports have been provided by current or former editors of this blog, including Apostolos Anthimos (Greece), Matthias Weller (Austria & Germany), and Pietro Franzina (Italy).

Further information and the table of contents can be found here.

Opinion of AG Saugmandsgaard Øe on characterisation of an action relating to abuse of dominant position brought between parties to a contract. Articles 7(1) and (2) of the Brussels I bis Regulation in the case C-59/19, Wikingerhof

An action brought between parties to a contract in a scenario where the consent to at least some of the contractual terms was allegedly expressed by the plaintiff only on account of the dominant position of the defendant is to be considered as falling within the concept of 'matters relating to contract' [Article 7(1) of the Brussels I bis Regulation] or within the concept of 'matters relating to delict or quasi-delict' [Article 7(2) of the Regulation]?

In his Opinion delivered last Thursday, 10 September 2020, Advocate General Saugmandsgaard Øe addresses that question for the purposes of the reference for

a preliminary ruling in the case C-59/19, Wikingerhof.

Legal and factual context

A company established under German law and operating a hotel in this Member State, Wikingerhof GmbH & Co KG, signs a contract with Booking.com BV, a company which its registered office in the Netherlands that operates a hotel reservation platform. On the basis of the contract, the hotel is to be listed on that platform. The general terms and conditions that are supposed to apply to the contract contain a clause according to which the place of jurisdiction for all disputes arising from that contract, with the exception of payment and invoice disputes, is Amsterdam.

Wikingerhof brings and action for cessation against Booking.com before German courts and argues that it expressed its consent to at least to some of the contractual terms only on account of the dominant position of the defendant. The plaintiff views some of the practices of the defendant in connection with hotel reservation intermediation as an infringement of competition law. It seeks an order restraining the defendant from carrying on with these practices.

The defendant objects, inter alia, to the jurisdiction of the courts seised in the matter. The first instance court agrees and rules the action inadmissible. It considers that the parties have concluded an agreement conferring jurisdiction and as a consequence the action should have been brought before the courts in Amsterdam.

The second instance court dealing with an appeal brought by the plaintiff also views the action as inadmissible, yet on the different grounds.

It considers that the German courts do not have jurisdiction under Articles 7(1) and (2) of the Brussels I bis Regulation. For the second instance court, the action seeks to change the content of the contract and to alter the defendant’s practices. The action in question should therefore receive a contractual qualification, yet ‘the place of performance’ within the meaning of Article 7(1) of the Regulation is not situated in Germany. For that court, the question of whether an effective agreement conferring jurisdiction was entered into is therefore irrelevant. It

seems that this court considers that under no circumstances the German courts hold jurisdiction over the action brought by the plaintiff.

Ultimately, the case comes before the Federal Court of Justice (Bundesgerichtshof). The latter considers that the parties have not entered into an effective agreement conferring jurisdiction. The requirements relating to the form of such agreement, set in Article 25(1)(a) and (2) of the Brussels I bis Regulation have not been met. However, the Federal Court of Justice refers a preliminary question relating to the characterization of the action brought by the plaintiff:

'Is Article 7(2) of [the Brussels I bis Regulation] to be interpreted as meaning that jurisdiction for matters relating to tort or delict exists in respect of an action seeking an injunction against specific practices if it is possible that the conduct complained of is covered by contractual provisions, but the applicant asserts that those provisions are based on an abuse of a dominant position on the part of the defendant?'

Opinion of Advocate General

According to the Opinion of AG Saugmandsgaard Øe, a civil liability action based on a breach of competition law falls within the scope of 'matters relating to delict or quasi-delict' within the meaning of Article 7(2) of the Brussels I bis Regulation, also when the plaintiff and the defendant are parties to a contract and the alleged anticompetitive conduct materializes itself in their contractual relationship.

The analysis that precedes this conclusion begins with an observation that the action brought by the plaintiff in the main proceedings is 'based' on the violation of the rules of German law prohibiting, like Article 102 TFEU, abuse of dominant position (point 19).

Next, the Opinion acknowledges that while it results from the case-law that the actions on anticompetitive conducts – including those constituting an infringement under Article 102 TFEU – fall within the scope of Article 7(2) of the Regulation, the particularity of the proceedings at hand stem from the fact that the alleged anticompetitive conduct occurred within the context of a contractual relationship (point 26).

After that, a reminder of case-law on Article 7(1) and (2) of the Regulation leads the AG to the judgments in Kalfelis and Brogsitter. Concerning the latter, he considers that two interpretations of the judgment are a priori possible (point 68). First, which the AG describes as 'maximalist', would imply that an action based on delict falls under the concept of 'matter relating to contract' within the meaning of Article 7(1) if the action concerns a harmful event that could (also) constitute a breach of a contractual obligation. In other terms, a national court would have to verify whether an action could also have been brought on the basis of breach of a contractual obligation. For the AG, that interpretation would imply that the contractual characterisation of a claim prevails over its characterisation as a matter relating to delict (point 69).

The AG rejects such 'maximalist' interpretation. First, an analysis allowing to establish a potential breach of a contractual obligation would be too burdensome at the stage where the jurisdiction is determined and could require consideration of the substance of the case (point 76). Next, under the Regulation, no hierarchy exists between the rules on jurisdiction provided for in Articles 7(1) and (2) (point 79). In this context, the AG resorts to an argument based on the idea that the solution adopted in relation to the rules on jurisdiction would have to be followed in relation to the conflict-of-laws rules of the Rome I and Rome II Regulations: the contractual characterisation would have to prevail also under these Regulations (points 81 and 82).

As a consequence, **the AG pronounces himself in favour of a second interpretation of the judgment in Brogsitter that he describes as a 'minimalist' one**. Here, an action would fall within the scope of Article 7(1) of the Regulation where 'the interpretation of the contract […] is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the [defendant] by the [plaintiff]' (point 70).

At points 90 et seq., the AG describes the method of characterisation that results from his 'minimalist' interpretation of the judgment in Brogsitter. He discusses the cases where a plaintiff invokes rules of substantive law in his submission of action and where he or she does not – according to the AG, in the latter scenario, his method does not change fundamentally. He argues that on the basis of other elements of the submission of action, a judge has to identify the 'obligation' relied on by the plaintiff (point 96).

At points 100 and 101, the AG furtherly explains and recaps the method: where the plaintiff invokes, in his submission of an action, rules of substantive law imposing a duty on everyone and it does not appear 'indispensable' to establish the content of a contract in order to assess the lawful or unlawful nature of the conduct alleged against the defendant, the action is based on a non-contractual obligation (the Opinion uses the term 'obligation délictuelle') and therefore falls within the scope of 'matters relating to delict or quasi-delict' within the meaning of Article 7(2) of the Brussels I bis Regulation. However, where, irrespective of the rules of law relied on, a judge can assess the legality of the conduct only by reference to a contract, the action is essentially based on a 'contractual obligation' and therefore falls within the scope of 'matters relating to a contract' within the meaning of Article 7(1) of the Regulation.

It is yet to be seen to what extent the importance of the rules of substantive law invoked by a plaintiff will play a role in the future judgment of the Court. In any case, on the basis of these findings, the AG concludes that the contractual characterisation of the action brought by the plaintiff before the German courts should be rejected.

The Opinion can be found here (no English version yet).

On a side note…

The lecture of the Opinion presented above raises a point that could on its own inspire an interesting discussion. It seems that, for the AG, what is true under the Brussels regime, should also stand as true under the Rome I and II Regulation. In fact, an argument relating to the consistency between the solutions adopted with regards to the Brussels I bis and Rome I/II Regulations is invoked in the Opinion in order to reject the interpretation which, for the AG, would imply the priority of contractual characterisation over non-contractual characterisation (see points 81 and 82).

Against this background, in his Opinion in Bosworth and Hurley (points 91 to 103), AG Saugmandsgaard Øe seemed to consider that the contractual characterisation of an action should be favoured over the non-contractual characterisation where an individual contract of employment is at stake. That consideration was made in relation to the rules of jurisdiction and more precisely

– to Article 18 of Lugano II Convention. As it was not necessary to answer the preliminary question that inspired the aforementioned considerations of the AG, the Court did not have an opportunity to clarify in its Judgment whether such preference of contractual characterisation does indeed occur.

Yet, if that is the case and the argument on the consistency of solutions adopted under the Regulations is valid, should the Rome I and II Regulations be read as implying a priority (or even exclusivity) of a contractual characterisation also for the conflict-of-laws purposes in a situation where a harmful conduct concerns employee – employer scenario?

A Textbook Example of Art 17 Rome II: Higher Regional Court of Cologne, 27 March 2020

Art. 17 of the Rome II Regulation, which transposes an element of US conflicts theory (the concept of local data) into a European choice-of-law instrument, is certainly one of the more controversial provisions of the Regulation. It stipulates that

> *[i]n assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.*

In a highly illustrative decision of 27 March 2020 (1 U 95/19), the Higher Regional Court of Cologne (upholding a decision from the Regional Court of Bonn) has provided a textbook example of its application in practice.

The case involved two German citizens who had collided while paragliding/hang

gliding in Italy. While one had remained unharmed, the other one had sustained several injuries and, upon returning home, decided to sue for damages.

As both parties were habitually resident in the same Member State – in fact, they lived less than 50 km away from each other, in Cologne and Bonn, respectively – the Court naturally applied German law pursuant to Art. 4(2) Rome II. Under the applicable tort statute, the fact that both parties had engaged in aerial activities meant that the degree to which the defendant would be liable depended on the respective dangerousness of each party's activity as well as on whether or not one party had behaved negligently.

While the first factor already put the claimant on the back foot with the Court deeming his hang glider significantly more dangerous than the defendant's paraglider, the Court went on to apply two Italian presidential decrees as well as the general regulations approved by the Italian Civil Aviation Authority (*Ente Nazionale per l'Aviazione Civile, ENAC*) on the basis of Art. 17 Rome II in order to establish that the claimant had negligently violated the applicable aviation rules. Accordingly, his claim failed in its entirety.

Out now: 3rd edition of Hüßtege/Mansel (eds), NomosKommentar on the Rome Regulations and related

instruments

Adding to the list of recent German publications on Private International Law, the 3rd edition of Volume VI of the German *NomosKommentar BGB* has just been published.

The book edited by Heinz-Peter Mansel (University of Cologne) and Rainer Hüßtege (Higher Regional Court of Munich) offers detailed commentary on the Rome I, II, and III Regulations, the Succession Regulation (650/2012), the two new Regulations on matrimonial property regimes and property consequences of registered partnerships (2016/1103 and 2016/1104), and on the 2007 Hague Maintenance Obligations Protocol. The authors include both academics and practitioners, with the book seeking to not only make a contribution to legal scholarship but to also provide guidance for legal practitioners working on cross-border cases.

Third-party effects of assignments: BIICL event on 3 July 2018

The British Institute of International and Comparative Law is organising an event to be held on 3 July on the recent developments pertaining to third-party effects of assignment.

Time: 16:30 – 19.00 (Registration open from 16:00)

Venue: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

The panel of distinguished speakers will discuss the recent proposal for an EU Regulation on the law applicable to third-party effects of assignment. The Rome I Regulation regulates contractual aspects of assignment but for a prolonged period of time the third-party aspects of assignment were surrounded by haze. Third-party effects of assignment are notoriously important in certain industries,

such as securitisation and factors. Speakers involved in the preparatory work leading up to the proposal reflect on the operation of the proposal in practice. Further details can be found here.

Cross-Border Business Crisis: a Conference in Rome

On 3-4 November 2017 the LUISS «Guido Carli» University School of Law, with the support of the International Law Association (Italian Branch) and the auspices of the International Insolvency Institute, will host in Rome a conference on «Cross-Border Business Crisis: International and European Horizons».

Three bilingual (English/Italian) sessions are scheduled: I) International and European Policies on Business Crisis (Chairperson: Luciano Panzani); II) Regulation 2015/848 within the European System of Private International Law (Chairperson: Stefania Bariatti); III) Cross-Border Insolvency and Italian Legal Order: Old and New Challenges (Chairperson: Sergio M. Carbone).

Speakers include academics and practitioners (Massimo V. Benedettelli, Giorgio Corno, Domenico Damascelli, Luigi Fumagalli, Anna Gardella, Lucio Ghia, Francisco J. Garcimartín Alférez, Antonio Leandro, Maria Chiara Malaguti, Fabrizio Marongiu Buonaiuti, Alberto Mazzoni, Paul Omar, Antonio Tullio, Robert van Galen, Francesca Villata, Ivo-Meinert Willrodt).

Most of them are members of the ILA-Italy Study Group on «Cross-Border Insolvency and National Legal Orders» and will discuss the findings of their research during the conference.

Program and details on registration are available here

Litigación Internacional en la Unión Europea II – Calvo/Carrascosa/Caamiña

Litigación international en la Unión Europea II- Ley aplicable a los contratos internacionales. Comentario al reglamento Roma I (International litigation in the European Union II. The law applicable to international contracts. Commentary to the Rome I Regulation) represents the second issue of a collection of treatises on European private international law.

The first part discusses the role and impact of the New Lex Mercatoria in international trade, with a comprehensive study of the Rome I Regulation on the law applicable to contractual obligations.

In the second part an analysis of more than one hundred international trade contracts is undertaken, with special attention to the structure of each contract and the applicable law. International sale of goods, countertrade, donations, international loan, agency contracts, factoring, confirming, crowdfunding, consulting, due diligence, leasing, supply, construction, deposit, management, outsourcing, catering, cash-pooling, engineering, guarantee contracts, timesharing, fiduciary contracts, franchising, distribution contracts, bank contracts, stock contracts, company contracts, joint venture and many others contracts are examined from a private international law perspective. The book also incorporates specific chapters on international consumer contracts and international labor contracts. Besides, special attention is paid to international insurance contracts.

The third part of the book addresses the international contracts drafting techniques with a focus on clauses which are usually included therein.

Several annexes with the best case-law in the field of international contracts and the most commonly used clauses complement the book.

Publishers: Thomson Reuters Aranzadi, 2017, 897 pages.