

## EDITORIAL COMMENTS

### Sometimes it takes thirty years and even more ...

In the European Community, legislative projects often take time – some even take the time span of a whole generation, some thirty years, and even more ... Take the *Societas Europaea*: the Commission started with its work way back in 1965, but it was not until 8 October 2004 that an SE company could be set up under Regulation No. 2157/2001.

#### *Historical background*

A comparable story could be told with regard to Regulation No. 864/2007 on the law applicable to non-contractual obligations (the “Rome II” Regulation) of 11 July 2007<sup>1</sup> which will enter into force on 11 January 2009. Work began this time in 1967 with the aim to draft a convention on conflict-of-law rules applicable to contractual and non-contractual obligations.<sup>2</sup> Such a convention was seen as a necessary complement to the Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 27 September 1968. Given the purpose of the Brussels Convention to enhance the certainty and foreseeability as to which civil courts have jurisdiction to hear disputes with a cross-border connection and to promote the mutual recognition of judgments and their enforcement (the “free movement of judgments”), the idea behind the harmonization of the conflict-of-law rules is a simple one: disputes before civil courts of the Member States should be adjudicated according to one and the same applicable substantive law, irrespective of the *forum*, thereby preventing any form of *forum shopping*, and enhancing the mutual trust on which (at least to some extent) the principle of mutual recognition of judgments is based.

1. Regulation (EC) No. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J. 2007, L 199/40.

2. For a historical account see e.g. Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”), COM(2003)427 final, pp. 2–4; for more details, see Giuliano and Lagarde, Report on the Convention on the law applicable to contractual obligations, O.J. 1980, C 282/1, at pp. 4–8.

The working group of experts which had been set up in 1967 by the Commission presented a first preliminary draft convention in 1972.<sup>3</sup> After the accession of the UK, Ireland and Denmark, work seemed to slow down, and in 1978 it was decided to split up the project and give priority to work on the chapter concerning contractual obligations. These negotiations succeeded, and in June 1980 the Convention on the law applicable to contractual obligations ("Rome Convention")<sup>4</sup> was opened for signature. It finally entered into force in 1991, and for some time now work has been in progress to transform this Convention into a regulation ("Rome I").<sup>5</sup>

After having fallen into total oblivion for more than fifteen years, the project of a convention on conflict-of-law rules relating to non-contractual obligations was reanimated by the Council Resolution of 14 October 1996,<sup>6</sup> which was supposed to launch a discussion on the necessity of such a convention. In view of the Amsterdam Treaty, creating the Area of Freedom, Security and Justice with the respective competences for the Community to take measures, the Council adopted an Action Plan at the end of 1998, in which, among many other proposals, a "legal instrument on the law applicable to non-contractual obligations (Rome II)" was called for. The Commission never published an official green paper on the project,<sup>7</sup> and has rightly been criticized for this omission.<sup>8</sup> Instead, it launched consultations on a preliminary draft proposal it had prepared by 2002,<sup>9</sup> and finally published a proposal in 2003.<sup>10</sup> The proposal was transmitted to the European Parliament and Council, the

3. See Lando, von Hoffmann and Siehr (Eds.), *European Private International Law of Obligations* (Tübingen, 1975); Lipstein (Ed.), *Harmonization of Private International Law of the EEC* (London, 1975).

4. O.J. 1980, L 266/1.

5. EC Commission, Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, COM(2002)654 final; EC Commission, Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005)650 final. See "Editorial comments: On the way to a Rome I Regulation", 43 CML Rev. (2006), 913–922.

6. O.J. 1996, C 319/1.

7. There was an unofficial version which, for whatever reasons, has never been published as an official green paper; see von Hein, "Die Kodifikation des europäischen Internationalen Deliktsrechts", 102 *Zeitschrift für vergleichende Rechtswissenschaft* (2003), 528–562, at 533.

8. E.g. Dickinson, "Cross-Border Torts in EC Courts – A Response to the Proposed 'Rome II' Regulation", (2002) EBLR, 369–375, at 370.

9. The draft proposal is reproduced e.g. in: Hamburg Group for Private International Law, "Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations", 67 *RabelsZ* (2003), 1–56. The draft is, to some extent, based on a proposal presented by the "Groupe européen de droit international privé" (GEDIP), published in 7 *Eur.Rev.Priv.L.* (1999), 46–58.

10. COM(2003)427 final.

European Parliament adopting no less than 54 amendments at first reading in plenary session. After intensive discussion also in the media and after the publication of an amended proposal in 2006,<sup>11</sup> the Regulation was finally adopted and published in July 2007.

### *Scope of the Regulation*

The Regulation introduces (except for Denmark, cf. Art. 1(4)<sup>12</sup>) common conflict-of-law rules for non-contractual obligations in civil and commercial matters. Some matters are excluded from the scope of the Regulation, e.g. obligations arising out of family relationships and relationships with comparable effect, matrimonial property regimes, negotiable instruments, the law of companies (in a broad sense), relations between persons connected with a trust, nuclear damage, and liability of a State for acts in the exercise of State authority (*acta iure imperii*). Whereas these limitations of the scope of the Regulation seem to make sense on an *ad hoc* basis, there is one further exception that may come as a surprise: the Regulation does not cover violations of privacy and rights relating to personality, including defamation (Art. 1(1)(g)). It is obvious that tort claims in this field belong to the very subject matter which the Regulation is meant to cover;<sup>13</sup> however, in the course of legislation it seems to have proved impossible to bridge the differing conceptions related to appropriate conflict-of-law rules – a result which reflects varying and obviously deep-rooted attitudes and conceptions on how to solve the conflict between an adequate protection of the personality on the one hand and freedom of press on the other.

The Regulation covers non-contractual obligations, embracing all claims and legal consequences that may arise out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo* (Art. 2(1)). The conflicts rules are attributed universal application – that is to say, the provisions apply irrespective of whether the substantive law to be applied is the law of a Member State or the law of a third country (Art. 3). The approach taken by the Regulation in formulating the relevant conflict-of-law rules is based on a number of (conflicting) policies: the rules should achieve a reasonable degree of legal

11. Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (“Rome II”), COM(2006)83 final.

12. Since Denmark chose to opt out of further EC legislation in the Area of Freedom, Security and Justice; a separate convention will be needed to associate Denmark with these rules.

13. Art. 6 of the proposal of 2003, *supra* note 2, contained a conflicts rule, dealing with violations of privacy and rights relating to personality; for a critical analysis see Wagner, “Article 6 of the Commission Proposal: Violation of Privacy: Defamation by Mass Media”, 13 Eur. Rev. Priv. Law (2005), 21–37.

certainty, they should strike an adequate balance between the interests of the person against whom the claim is made and the person who has sustained damage, they should correspond to the policies followed in the relevant field of substantive law, and they should be receptive to the demands of justice in the individual case. The connecting factors used by the conflict-of-law rules of the Regulation are deemed to be the most appropriate to achieve these objectives.<sup>14</sup>

### *The conflict-of-law rules*

For various reasons, freedom of choice of the law applicable by the parties (*party autonomy*) cannot play the same fundamental role in the field of non-contractual obligations as it does with regard to contractual relations in Article 3 of the Rome Convention. Nevertheless, the Regulation provides for considerable leeway for the choice of law by the parties concerned; under Article 14(1), they may enter into an agreement on the applicable law *after* the event giving rise to the claim occurred (a solution found in the law of various Member States). In addition – and that seems to be quite a step forward – party autonomy is granted without such a restriction where all parties pursue commercial activities, provided that the agreement is “freely negotiated”. In the end (ignoring the restrictions set out in Art. 14(2) and (3) and the exceptions for intellectual property rights, unfair competition and acts restricting free competition<sup>15</sup>), party autonomy has thereby become the *primary* conflicts rule for non-contractual claims in the commercial sector. No doubt, legal certainty for the parties is the winner.

Insofar as parties cannot agree, or have not agreed, on a law applicable to non-contractual obligations, the Regulation offers four sets of rules for claims arising out of tort/delict, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* respectively. All four sets of rules provide for a more or less “hard and fast” conflicts rule that is supplemented by more specific conflicts rules for certain claims or specific situations, and by an open-ended (“escape”) clause referring to the law of a country to which the case is manifestly most closely related. These supplementing rules may either replace the general conflicts rule (as in the torts chapter) or be applicable only if the general rule turns out not to be applicable (e.g. with regard to *culpa in contrahendo*). Taking this approach, the Regulation strives for a compromise between the exigencies of legal certainty on the one hand and the insight that

14. Recital 14 of the Preamble.

15. Art. 6(4); Art. 8(3).

broad and simple conflict-of-law rules that do not reflect the different law-fact patterns in the real world will not work in the long run.

The approach taken by the Regulation may be illustrated by the provisions concerning torts/delicts. Article 4(1) sets forth a broad (in its scope) general rule providing for the application of the law of the country in which the direct damage occurred (the law of the country where the harmful event occurred is relevant only insofar as its rules of safety and conduct, e.g. traffic rules, must be taken into account; Art. 17). The idea behind this general conflicts rule is that applying the law of the country where the direct damage occurred responds to the victim's legitimate expectations as far as compensation and adequate insurance is concerned, without neglecting the legitimate expectations of the person against whom the claim is made. However, if both parties – the person claimed to be liable and the person sustaining the damage – have their habitual residence in the same country, the law of this country shall apply (Art. 4(2)): the general rule becomes replaced by a more specific conflict-of-law rule that seems to correspond to the parties' interests in a better fashion than the general rule. The Regulation thereby sets out a rule that was developed by the New York Court of Appeals, way back in the 1950s, in *Babcock v. Jackson* – sparking off the “conflicts revolution” in the United States. Article 4(3) adds an “escape clause”, empowering the judge to apply the law of another country if “it is clear from all circumstances of the case” that the tort/delict is “manifestly more closely connected” with this other country. This escape clause is meant to serve the notion of flexibility (at the cost of legal certainty and foreseeability) as a necessary complement to the rather inflexible rules set forth in Article 4(1) and (2). Hopefully, the escape clause will not be used by the courts of the Member States as a cover-up tool to reach the same results that were previously reached by their traditional conflicts rules.

The three basic rules set forth for tort/delict obligations in Article 4 are supplemented and replaced by special rules for *specific* tort/delict claims relating to product liability, environmental damage, the infringement of intellectual property rights (including related and industrial property rights), and industrial action (Arts. 5, 7–9): partly, the general rule of Article 4(1) (law of the country where the direct damage is sustained) is just rephrased in more specific terms, partly other solutions are preferred.

#### *Claims based on unfair competition and antitrust offences*

Article 6, dealing with claims based on unfair competition and on antitrust offences, seems to be of special interest. The rules contained in Article 4(1)–(3) are applicable to acts of unfair competition which affect exclusively the interests of a specific competitor (Art. 6(2) e.g. blackmailing), whereas

for other acts of unfair competition, the law of the country shall be applied where the competitive relations or the collective interests of consumers are, or are likely to be, affected (Art. 6(1)). Both rules sound familiar to Dutch or German students of private international law. It is to be noted that with regard to multistate acts of unfair competition, the law of all the countries concerned will be applicable (in the same way as under Art. 4(1) when the direct damage occurs in several countries<sup>16</sup>). Moreover, as the connecting factor in Article 6(1) of the “Rome II” Regulation is obviously based on some sort of “effects principle”, the question arises as to how the relationship of Article 6(1) to the so-called State-of-origin principle set out in Article 3(1) and (2) of the so-called E-Commerce Directive 2000/31/EC<sup>17</sup> should be conceived. Despite the clear wording of Article 1(4) of Directive 2000/31/EC that it does not establish additional rules on private international law, the implications of Article 3(1) and (2) of this Directive have stirred up an intensive discussion in academic quarters on the issue whether e.g. with regard to acts of unfair competition the national rules of conflicts law or only the application of substantive law are affected. In recital 35 of the Preamble of the “Rome II” Regulation it is stated that “(t)he application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC ...”. The “Rome II” Regulation thereby seems to follow the conception that the State-of-origin principle of the E-Commerce Directive does not touch on the rules of private international law, including the rules set forth by the Regulation, but rather imposes a restrictive effect on the application of the substantive law designated by the relevant conflicts rules.

The Regulation offers a surprise as far as antitrust torts are concerned. Article 6(3)(a) calls for the application of the law of the country “where the market is, or is likely to be, affected.” Conflicts rules based on this version of the “effect-on-the-market principle” are widespread in the sphere of economic law, but (except for Swiss law) generally formulated in a *unilateral* manner, leading only to the application of the law of the *forum*. In contrast, Article 6(3)(a) contains a *multilateral* conflicts rule leading to the application of the antitrust law of other countries than the *forum*. This rule may be regarded as more or less self-evident as far as an infringement of Community competition law is concerned. However, with regard to the application of the competition law of other Member States and of third countries, Article 6(3)(a) seems to break new ground. Up till now, civil courts, for varying rea-

16. See Explanatory Memorandum, *supra* note 2, p. 11.

17. O.J. 2000, L 178/1.

sons, have been very reluctant (to say the least) to apply the antitrust law of a foreign country. In academic quarters there has been a lively discussion on this issue for more than half a decade. So it comes as a surprise that Article 6(3)(a) seems to give an answer to this discussion, embracing tort claims based e.g. on an infringement of U.S. antitrust law.<sup>18</sup>

*Some final observations ...*

Besides these conflicts rules the “Rome II” Regulation contains provisions that any student of private international law would expect in such a regulation – provisions on classification (what legal issues are covered?), on *renvoi*, overriding mandatory provisions of the *forum*, the *ordre public*, and such like. This is not the appropriate place to deal with them. Nor is this the right place to enter into a discussion of whether the conflicts rules as described above are in the end convincing. It is perhaps enough to say that the “Rome II” Regulation follows to a large extent solutions that have been developed in some of the Member States, and that the final version of the Regulation has taken into account the public and academic criticism that was levelled at the draft proposal of 2003.

Taken together with the proposed “Rome I” Regulation, “Rome II” will replace an essential part of national conflicts law by Community law. Erasmus students will (hopefully) be taught the same principles of the conflicts law of obligations whether they study at Sevilla or Helsinki (with the notable exception of Copenhagen ...).

Though “Rome II” only deals with conflicts law, there may be some indirect implications for the substantive law of obligations as well. Take the conflicts rule in Article 12 dealing with *culpa in contrahendo*, a private law institution concerning pre-contractual obligations that is not known in the private law of all Member States. Judges applying Article 12 in the future will have to reflect on the difference between tort/delict claims on the one hand and obligations that arise from *culpa in contrahendo* on the other – and they will have to do it with regard to the private law of the *forum* as well, even if

18. It is interesting to note that recital 23 of the Preamble defines (“[f]or the purposes of this Regulation”) the concept of restriction of competition (as referred to in Art. 6(3)) as infringements of Art. 81 or Art. 82 EC (or of the law of a Member State) with an impact on competition within a Member State or within the internal market. This statement could be interpreted as restricting the scope of Art. 6(3) to claims based on the competition law of the Community or a Member State. However, the *language* of Art. 6(3)(a) is crystal clear: the provision refers to the law of the *country* (and not the *Member State*, as in Art. 6(3)(b) where the market is affected, and therefore to the markets of third countries as well. Viewed in this light, recital 23 of the Preamble is just meant to restate the effects principle on which the application of Community competition law (and perhaps the law of the Member States) is built.



it does not differentiate between obligations on this basis. In the long run we may expect repercussions on the growing convergence of the national private law systems.

The conflicts law of non-contractual obligations plays an important role in the everyday business of the courts at least in some Member States (think of tourism and traffic accidents). Even a superficial reading of the “Rome II” Regulation reveals that behind nearly any paragraph and even any sentence lurk more than one legal issue that will have to be resolved by the Court of Justice. “Rome II” will (taken together with “Rome I”) increase the workload of the Court, and it will confront the Court, at least to some extent, with some very “technical” issues with nevertheless broad implications. This should again stimulate reflections on Court reform.

*... and what about competence?*

Finally, one further question still has to be posed: is the Community competent at all to enact the “Rome II Regulation”? The Regulation is based on Articles 61 (c) and 67 EC “in particular”. Article 65 EC is not mentioned in the first part of the Preamble, giving the legal basis,<sup>19</sup> but it is referred to in Article 61(c) EC. Article 65 EC seems to be the decisive basis of competence, and in that regard a number of questions arise (which can only be indicated, but not be answered here).

Article 65 EC presupposes that “(m)asures in the field of judicial cooperation in civil matters having cross-border implications” may only be taken “insofar as necessary for the proper functioning of the internal market”. The wording resembles the text of Article 95(1) EC (“... establishment and functioning of the internal market”). If the case law of the Court of Justice (*Tobacco I*<sup>20</sup>) is to be transferred and applied to “Rome II”, one would have to ask whether the diversity of national conflict-of-law rules amounts to a barrier to interstate trade or leads to an appreciable distortion of competition.<sup>21</sup> The Commission has argued that the Community has “the power to put flesh on the bones” of Article 65 EC and “the discretion to determine whether a measure is necessary for the proper functioning of the internal market”.<sup>22</sup> It is submitted that this position does not wholly reflect the approach taken by

19. Recital 2 of the preamble refers to Art. 65(b) EC.

20. Case C-376/98, *Germany v. European Parliament and Council*, [2000] ECR I-8419; see “Editorial comments, Taking (the limits of) competences seriously”, 37 CML Rev. (2000), 1301–1305.

21. In the Explanatory Memorandum (*supra* note 2), the Commission deals with the issue, however not very convincingly; see pp. 6–7.

22. Explanatory Memorandum, *supra* note 2, p. 6.



the Court of Justice in its *Tobacco I* judgment. The decisive question will be whether (and to what extent) there is a difference between the “functioning” (in Art. 95(1) EC) and the “proper functioning” of the internal market (in Art. 65 EC), the latter reaching further than the former. Probably one could make a good case for the latter proposition.<sup>23</sup>

A different issue is posed by the wording of Article 65(b) EC which – in contrast to Article 65(a) and (c) EC – (only) allows for measures “promoting the compatibility” of the rules applicable in the Member States concerning the conflicts of laws and of jurisdiction. Does the notion of “promotion of compatibility” really encompass the competence to *replace* national conflicts rules by Community rules?<sup>24</sup>

A final question that may be asked concerns the competence of the Community to enact conflict rules with universal application (Art. 3 of the “Rome II” Regulation), that is to say: rules that designate not only the applicable law of a Member State but also the law of a third country. Are such rules necessary for the “proper functioning” of the internal market? The Commission, in its Explanatory Memorandum to the proposal of 2003, argues that the concern for certainty in the law, the avoidance of complexity (by a potential doubling of the sources of conflicts rules), and the Union’s commitment in favour of transparent legislation are related to the “proper functioning”, and therefore justify the enactment of “Rome II”.<sup>25</sup> In its *Owusu* judgment the Court has (for good reasons) accepted a Community competence, related to the proper functioning of the internal market, to enact rules of jurisdiction with regard to third country settings.<sup>26</sup> It is suggested that the problems and policies involved in jurisdiction and conflicts rules are not necessarily identical; so *Owusu* is not the end of the story. The issue, at the latest, will be presented to the Court when it comes to damage claims based on the antitrust law of third countries (Art. 6(3)(a)). We will have to wait and see.

23. E.g. Rossi in Callies and Ruffert (Eds.), *EUV/EGV*, 3rd ed. (Munich, 2007), Article 65 EGV No. 8, with reference to the German equivalent of “proper” (“reibungslos”). In Case C-281/02, *Owusu*, [2005] ECR I-1383, para 33, the Court has accepted that uniform rules on jurisdiction contribute to the proper functioning of the internal market.

24. For a negative answer see Remien, “European private international law, the European Community and its emerging area of freedom, security and justice”, 38 CML Rev. 38 (2001), 53–86, at 75; Rossi in Callies and Ruffert, previous footnote, Art. 65 EGV No. 16; contra: Basedow, “The Communitarization of the conflict of laws under the Treaty of Amsterdam”, 37 CML Rev. (2000) 687–708, at 702. The same problem of competence arises, of course, also with regard to the jurisdiction rules contained in Regulation No. 44/2001, O.J. 2001, L 12/1. The Court did not deal with this issue in *Owusu*, *supra* note 23, paras. 25–26, 29, 34, nor in Opinion 1/03, *Lugano Convention*, [2006] ECR I-1145, para 134.

25. Explanatory Memorandum, *supra* note 2, p. 10.

26. *Owusu*, *supra* note 23, para 34.