

Procedure file

Basic information	
COD - Ordinary legislative procedure (ex-codecision procedure) Regulation	2003/0168(COD) Procedure completed
Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II	
See also 2009/2170(INL)	
Subject 7.40.02 Judicial cooperation in civil and commercial matters	

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	CODE EP Delegation to Conciliation Committee		29/01/2007
		ALDE WALLIS Diana	
	Former committee responsible		
	JURI Legal Affairs		14/09/2004
		ALDE WALLIS Diana	
	JURI Legal Affairs		14/09/2004
		ALDE WALLIS Diana	
	JURI Legal Affairs and Internal Market		07/10/2003
		ELDR WALLIS Diana	
Former committee for opinion			
LIBE Citizens' Freedoms and Rights, Justice and Home Affairs			
LIBE Civil Liberties, Justice and Home Affairs		21/02/2005	
	PPE-DE KUDRYCKA Barbara		
Council of the European Union	Council configuration	Meeting	Date
	Environment	2812	28/06/2007
	Justice and Home Affairs (JHA)	2807	12/06/2007
	Justice and Home Affairs (JHA)	2794	19/04/2007
	Competitiveness (Internal Market, Industry, Research and Space)	2751	25/09/2006
	Justice and Home Affairs (JHA)	2732	01/06/2006
	Justice and Home Affairs (JHA)	2725	27/04/2006
European Commission	Commission DG	Commissioner	
	Justice and Consumers	FRATTINI Franco	

Key events			
21/07/2003	Legislative proposal published	COM(2003)0427	Summary
04/09/2003	Committee referral announced in Parliament, 1st reading		

16/09/2004	Committee referral announced in Parliament, 1st reading		
21/06/2005	Vote in committee, 1st reading		
27/06/2005	Committee report tabled for plenary, 1st reading	A6-0211/2005	
05/07/2005	Debate in Parliament		
06/07/2005	Decision by Parliament, 1st reading	T6-0284/2005	Summary
20/02/2006	Modified legislative proposal published	COM(2006)0083	Summary
24/09/2006	Council position published	09751/7/2006	Summary
28/09/2006	Committee referral announced in Parliament, 2nd reading		
20/12/2006	Vote in committee, 2nd reading		Summary
22/12/2006	Committee recommendation tabled for plenary, 2nd reading	A6-0481/2006	
18/01/2007	Debate in Parliament		
18/01/2007	Decision by Parliament, 2nd reading	T6-0006/2007	Summary
19/04/2007	Parliament's amendments rejected by Council		Summary
15/05/2007	Formal meeting of Conciliation Committee		
21/06/2007	Joint text approved by Conciliation Committee co-chairs	03619/2007	
25/06/2007	Final decision by Conciliation Committee		
28/06/2007	Report tabled for plenary, 3rd reading	A6-0257/2007	
28/06/2007	Decision by Council, 3rd reading		
28/06/2007	Decision by Council, 3rd reading		
09/07/2007	Debate in Parliament		
10/07/2007	Results of vote in Parliament		
10/07/2007	Decision by Parliament, 3rd reading	T6-0317/2007	Summary
11/07/2007	Final act signed		
11/07/2007	End of procedure in Parliament		
31/07/2007	Final act published in Official Journal		

Technical information

Procedure reference	2003/0168(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Regulation
	See also 2009/2170(INL)

Legal basis	EC Treaty (after Amsterdam) EC 061
Stage reached in procedure	Procedure completed
Committee dossier	CODE/6/45335

Documentation gateway

Legislative proposal		COM(2003)0427	22/07/2003	EC	Summary
Economic and Social Committee: opinion, report		CES0841/2004 OJ C 241 28.09.2004, p. 0001-0007	02/06/2004	ESC	
Committee draft report		PE349.977	29/03/2005	EP	
Committee opinion	LIBE	PE357.649	17/05/2005	EP	
Committee report tabled for plenary, 1st reading/single reading		A6-0211/2005	27/06/2005	EP	
Text adopted by Parliament, 1st reading/single reading		T6-0284/2005 OJ C 157 06.07.2006, p. 0098-0370 E	06/07/2005	EP	Summary
Modified legislative proposal		COM(2006)0083	21/02/2006	EC	Summary
Council statement on its position		12219/2006	14/09/2006	CSL	
Council position		09751/7/2006 OJ C 289 28.11.2006, p. 0068-0083 E	25/09/2006	CSL	Summary
Commission communication on Council's position		COM(2006)0566	27/09/2006	EC	Summary
Committee draft report		PE378.852	08/11/2006	EP	
Committee recommendation tabled for plenary, 2nd reading		A6-0481/2006	22/12/2006	EP	
Text adopted by Parliament, 2nd reading		T6-0006/2007	18/01/2007	EP	Summary
Commission opinion on Parliament's position at 2nd reading		COM(2007)0126	14/03/2007	EC	Summary
Joint text approved by Conciliation Committee co-chairs		03619/2007	22/06/2007	CSL/EP	
Report tabled for plenary by Parliament delegation to Conciliation Committee, 3rd reading		A6-0257/2007	28/06/2007	EP	
Text adopted by Parliament, 3rd reading		T6-0317/2007	10/07/2007	EP	Summary
Draft final act		03619/2007/LEX	11/07/2007	CSL	

Additional information

National parliaments	IPEX
European Commission	EUR-Lex

Final act

[Regulation 2007/864](#)
[OJ L 199 31.07.2007, p. 0040](#) Summary

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

PURPOSE : to present a proposal for a Regulation aimed at harmonising the rules on the law applicable to non-contractual obligations ("Rome II"). **CONTENT** : the purpose of this proposal for a Regulation is to standardise the Member States' rules of conflict of laws regarding non-contractual obligations and thus extended the harmonisation of private international law in relation to civil and commercial obligations which is already well advanced in the Community with the "Brussels I" Regulation and the Rome Convention of 1980. This measure is being taken as part of ongoing efforts by the EU to create a genuine European area of freedom and justice. The goal is to ensure that courts in all the Member States apply the same law to cross-border disputes involving non-contractual obligations, thereby facilitating mutual recognition of court rulings in the European Union. The rules proposed by the Commission strike a reasonable balance between the interests of the parties involved in a cross-border dispute. They also aim at applying a law that reflects the centre of gravity of the situation. There is a substantial difference in scope between the Brussels and Rome conventions. The former covers both contractual and non-contractual obligations whereas the latter covers only contractual obligations the proposed Regulation, commonly known as the "Rome II", will be the natural extension of the unification of the rules of private international law relating to contractual and non-contractual obligations in civil or commercial matters in the Community. The initiative focuses on the question of civil liability for damage caused to others, particularly in case of accidents such as traffic accidents or accidents caused by a defective product, or in case of invasion of privacy. With increased trade and movement within the Union, this kind of litigation will become more widespread. Member States do not at present have common rules for deciding which law should apply in cases concerning non-contractual obligations, so each court applies its own national rules. Consequently, the outcome of cases can vary widely from one Member State to another, prompting plaintiffs to bring their actions before the courts which will apply the most favourable legislation ("forum shopping"). The conflict of laws' rules proposed by the Commission strike a reasonable balance between the interests of the person claimed to be liable and the person sustaining the damage. Since the basic rule leads, in general, to the application of the law of the place where the damage is sustained, the proposal reflects the legitimate expectations of the victim, who - in particular in the case of an accident - never intended to enter into relation with the author of the damage. The proposed regulation also contains specific rules for particular matters in which the basic rule does not allow for striking such a balance. The solutions proposed by the Commission, which reflect the recent developments of the rules on conflict of laws' in the Member States, also lead to the application of a law that corresponds to the centre of gravity of the situation. They will also serve to strengthen legal certainty: many Member States have not codified their private international law rules, and as a result solutions emerge from the decisions of the courts which are generally not well known by the public. Thus the present proposal contributes to better transparency and foreseeability of how these types of disputes are resolved. International jurisdiction and the recognition and enforcement of judgements in another Member State is already dealt with in Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, which applies to both contractual and non-contractual obligations. As regards applicable law, the rules on contracts were harmonised by the Rome Convention of 1980 on the law applicable to contractual obligations. This initiative will complete the harmonisation at Community level of the rules of private international law on civil and commercial obligations. This proposal was the subject of a large-scale public debate based on a written consultation on a preliminary draft proposal for a Regulation in 2002 and a public hearing in Brussels in January 2003. The final Commission proposal takes due account of the numerous comments made.?

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

The European Parliament adopted a resolution drafted by Diana WALLIS (UK, ALDE,) and made some amendments to the Commission's proposal. The principal amendments are as follows:

- The parties may agree, by an agreement entered into after their dispute arose or, where there is a pre-existing arms-length commercial relationship between traders of equal bargaining power, by an agreement freely negotiated before the dispute arose, to submit non-contractual obligations to the law of their choice.
- In the absence of such an agreement and unless otherwise provided for in the Regulation, the law applicable to a non-contractual obligation arising out of a tort or a delict will be the law of the country in which the damage occurs or is likely to occur.
- Notwithstanding the general rule on freedom to choose the applicable law and by way of exception, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. Parliament sets out the factors that may be taken into account as manifestly connecting a non-contractual obligation with another country. They include protection of legitimate expectations;
- The choice of law made by the parties will not deprive an employee who is a party to a contract of employment of the protection that would be afforded to him by the mandatory rules under certain conditions;
- For violation of privacy and defamation cases, the country in which the most significant element or elements of the damage occur or are likely to occur should be deemed to be the country to which the publication or broadcasting service is principally directed, or if this is not apparent, the country in which editorial control is exercised, and that country's law should be applicable. The country to which a publication or broadcast is directed should be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. Similar considerations should apply in respect of publication via the Internet or other electronic networks. The Commission had proposed a different formula, under which the law of the country where the damage occurs would apply unless this breaches the fundamental principles of freedom of expression and information.
- Special rules are laid down for liability arising out of unjust enrichment or agency without authority.
- Parliament clarified that the Regulation does not apply to non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships as having comparable effects to marriage.
- Parliament deleted specific choice-of-law rules for environmental offences, product liability and unfair competition, opting instead for a

general rule that the law applicable shall be the law of the country in which the damage occurs.

- On road traffic accidents, for the purposes of determining the type of claim for damages and calculating the quantum of the claim, the court must apply the rules of the individual victim's place of habitual residence unless it would be inequitable to the victim to do so. With regard to liability, the applicable law will be the law of the place where the accident occurred.
- The law applicable to a non-contractual obligation arising out of industrial action will be the law of the country in which the action is to be taken or has been taken.
- The court seized will establish the content of the foreign law of its own motion. To this end, the parties' collaboration may be required. If it is impossible to establish the content of the foreign law and the parties agree, the law of the court seized shall be applied. However, the rules of the Regulation do not apply to evidence and procedure.
- The Commission must report on certain specified matters within three years of the date of adoption of the Regulation.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

The Commission accepts 16 amendments presented by Parliament since they make improvements relating either to the clarity of the instrument or to questions of detail, or add material that will be potentially useful in implementing the initial proposal.

The amendments accepted by the Commission in substance and subject to redrafting aim to:

- make reference to the Rome I Regulation. But until the Regulation has been adopted, it would be preferable to refer to the future Community instrument that will replace the Rome Convention of 1980;
- bring non-contractual obligations based on strict liability and the capacity to incur liability in tort/delict within the scope of the Regulation. While the Commission can accept this analysis, it prefers to combine all the points concerning the scope of the Regulation in a single recital ? recital 5 ? without repeating all the questions already covered expressly by Article 12 (scope of the applicable law);
- specify that unjust enrichment and administration of others' affairs without a mandate are to be considered as breaches of non-contractual obligations for the purposes of the Regulation. The Commission agrees with this. But to avoid making the text more cumbersome, it prefers to combine all the points concerning the scope of the Regulation in a single recital. Above all the Commission feels it is preferable to restate that there should be an autonomous and coherent interpretation of the legal concepts used in the Brussels I and Rome II instruments and the Rome Convention of 1980 ? or the Community instrument that will replace it ? by the Court of Justice rather than a long but inevitably incomplete list of details. This amendment also aims to exclude the liability of public administrations in respect of acts or omissions occurring in the performance of their duties from the scope of the Regulation. The Commission accepts the amendment as regards the substance but prefers the forms of words commonly used in international conventions.
- exclude non-contractual obligations governed by specific provisions of company law or specific provisions applicable to other bodies corporate such as associations. The Commission accepts this amendment as regards the substance but proposes drafting it in simpler terms;
- exclude non-contractual obligations arising from a trust. The Commission accepts the principle of the amendment but prefers to adopt the wording of the Hague Convention of 1 July 1985;
- exclude liability for acts of public authority, including liability of publicly appointed office-holders;
- allow certain parties who are already in a contractual relationship to choose the law applicable to their non-contractual obligation before the loss or damage is sustained. The Commission can accept the principle of an ex ante choice and agrees that the choice should be subject to strict conditions, in particular to protect the weaker party. But the conditions for the choice should be expressed in clear and simple terms. If the legal terms are not precise enough, parties might feel they were being given an incentive to litigate, which would make the procedure more cumbersome in terms of duration and cost and thus run counter to the objective pursued by the Regulation. The wording proposed by the Commission would both protect consumers and employees from ill-thought-out choices and exclude the possibility of such choices being imposed in standard contracts;
- the Commission can accept the principle of the amendments which would change the structure and title of the sections to make a clearer distinction between the general rule and special rules for certain categories of liability. To reflect proceedings in the Council and the differences between the Member States' legal systems, the Commission proposal makes an additional distinction between the special rules applicable to certain categories of liability and the specific rules governing unjust enrichment and administration of others' affairs;
- replace the single rule of Article 9 of the initial Commission proposal, applicable to all quasi-contracts, by two specific rules, one applying to unjust enrichment and the other to administration of others' affairs. The Commission can accept this additional distinction. In its amended proposal, however, it wishes to reflect certain technical improvements in the text emerging from Council proceedings;
- seek to clarify the rule on direct actions against the insurer of the person liable without modifying it as to the substance. The Commission can accept the principle of redrafting the rule to make it easier to understand. But it prefers the form of words that emerged from the Council, which pursues the same objective;
- seek to clarify the place where a natural person working from home has his habitual residence. The Commission can accept the principle of this clarification, but it prefers a form of words that is closer to what emerged from the Council, whereby the court would prefer the actual place where an occupation is exercised rather than an official address which might turn out to be purely fictitious.

As regards the amendments accepted by the Commission in part, these refer to the following:

- adapting recital 7 of the initial proposal to the changes made by an amendment relating to the general rule in Article 3;
- the rules of safety and conduct in the country where the loss or damage is sustained serves two purposes: first, to add the words ?in so far as is appropriate? so as to emphasise even further that the application of these rules is in the discretion of the court, and second, to exclude this possibility in matters of defamation and unfair competition. The Commission can accept the proposed clarification for the first sentence of

the recital. But Parliament's report offers no justification for excluding the rule in matters of defamation and unfair competition. The Commission accordingly sees no reason for depriving the perpetrators of these two categories of liability of the protection which this rule gives them;

- the amendment relating to the general rule in Article 3 of the initial Commission proposal can be accepted as regards the drafting improvements to paragraph 1, which confirms the rule proposed by the Commission. On the other hand, the Commission cannot accept the changes to paragraphs 2 and 3. Paragraph 2 brings in a specific rule concerning traffic accidents which would subject to two different laws the non-contractual obligation and the amount of damages. The Commission appreciates Parliament's efforts to find a fair solution for so many people who are the victims of traffic accidents but this solution, which would diverge sharply from the law in force in the Member States, cannot be adopted without prior in-depth analysis. It is accordingly proposed that the question be considered in detail in the report on the application of the Regulation. As regards paragraph 3, the amendment would substantially alter the spirit of the instrument. While it is specified that the exception clause available to the court really would be applied 'by way of exception', the current wording runs the risk of sending a message that is contrary to the foreseeability objective pursued by the Regulation. The mere fact that the paragraph lists no less than 5 factors that can be taken into consideration to justify activating the exception clause means that the parties and the courts will routinely check the justification for the solution that the general rule would have generated even where it is at first sight satisfactory. The Commission therefore cannot accept this part of the amendment and maintains its initial approach, which the Council also appears to have endorsed. But the Commission does acknowledge the significance of some of the factors listed in paragraph 3, in particular as regards the parties' shared habitual residence, a pre-existing de facto or de jure relationship or the legitimate expectations of the parties. As the first two of these are already mentioned expressly in paragraphs 2 and 3 of the initial proposal, Article 5(3) of the amended proposal now contains an express reference to the legitimate expectations of the parties;

- the mechanism for the public policy (ordre public) exception, first inserts a new paragraph 1a) to spell out the concept of public policy of the forum by listing reference instruments. Even though the public policy of the Member States will inevitably contain common elements, there are variations from one to another. Consequently the Commission cannot accept such a list. The proposed new paragraph 1b) addresses the issue of damages in amounts regarded as excessive, such as certain types of exemplary or punitive damages, already covered by a specific rule in Article 24 of the initial Commission proposal. Subject to drafting changes to make clear that punitive damages are not ipso facto excessive, the Commission can accept this rule being incorporated in the Article concerning the public policy of the forum. Under the proposed new paragraph 1c), only the parties would be able to rely on the exception clause. But it is for the court to ensure compliance with the fundamental values of the forum, and that task cannot be delegated to the parties, especially as they are not always legally represented. The Brussels I Regulation provides for the possibility for the court to withhold the exequatur from a judgment given in another Member State if it would be contrary to the public policy of the forum. The Commission accordingly cannot accept the proposed paragraph 1c);

- the provision of an obligation for the Commission to report on the application of the Regulation after it is in force. While the Commission acknowledges the value of such a report, it cannot accept all the conditions provided for by the amendment. For one thing, the period of 3 years after adoption of the Regulation would not allow an adequate number of judgments to be given as the basis for an effective evaluation. As in the Brussels I Regulation, the Commission proposes a period of 5 years after the Regulation enters into force. As for the content of the report, the question of the amount of damages awarded by the courts and the elaboration of a code of ethics for the European media are way out of place in a conflict-of-laws regulation. The Commission accordingly cannot accept that these questions should be dealt with in a report on the application of this Regulation. On the other hand the Commission agrees with Parliament on the need to consider how to achieve a more uniform approach to applying foreign law in the courts of the Member States. It does not believe that the time is ripe for a legislative initiative in this respect, but it can accept the idea of looking into the question in depth in the application report.

The Commission has rejected the amendments aiming to:

- adapt the recitals to reflect the removal of several special rules for specific forms of liability;
- abolish the special rule for product liability;
- abolish the special rule for anti-competitive practices;
- change the substance of the rule applicable to violations of privacy, particularly by the press;
- bring in a new special rule concerning damage arising from the exercise of the right to strike by employed people;
- restate that, until such time as the Community adopts detailed legislation on the law applicable to traffic accidents, Member States will either apply the 1971 Hague Convention or the general rules of the Rome II Convention;
- delete the special rule for damage to the environment. The Commission cannot accept this amendment as the proposed rule reflects the 'polluter pays' principle promoted by the Community and already applied in several Member States. The Greens, incidentally, abstained from voting on this amendment in plenary;
- raise the question of the evaluation of the damages, which would generally (except as regards traffic accidents) be governed by the lex fori;
- address the question of the application of foreign law by the court.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

The Council took its decision by qualified majority. The delegations of Estonia and Latvia voted against due to their reservations on Article 9 on industrial action and its implications for the freedom to provide services.

The Council's common position retains the essence of the Commission's initial proposal as modified by the amended proposal which reflected a number of amendments adopted by the European Parliament in its first reading.

The substantive differences in the common position in comparison with the amended proposal of the Commission and the Parliament's amendment are summarised as follows:

As regards the substantive departures from the Commission's amended proposal:

Scope: Article 1(2)(g) reflects the Commission's amended proposal (Article 1(2)(h)) where the Commission suggested the exclusion from scope of violations of privacy and of rights relating to personality when perpetrated by the media. The common position goes, however, further. It does not limit this exclusion only to non-contractual obligations entered into by the media, but extends it to all and any such non-contractual obligation. The main reason for this approach was the ultimate inability to agree on the scope (definition) of media in this context. This exclusion is mitigated by the wording of the review clause (Article 30) which focuses the attention to this specific area of non-contractual obligation as a specific subject of the report on the application of the future Regulation.

Product liability: Article 5 on product liability departs in its drafting approach considerably from the Commission's proposal (Article 6 of the amended proposal), albeit not in its intention. The common position reflects the need for a specific rule on products liability which strikes an appropriate balance between the interests of the victim and the person liable. The Commission continues to regret the approach in the common position which provides for a rather complex system of cascade application of connecting factors. It remains persuaded that its original solution offered an equally balanced solution for the interests at stake, while expressed in much simpler drafting.

Unfair competition: Article 6 extends the application of the rule on unfair competition also to acts restricting free competition, while Article 7 of the Commission's amended proposal applies only to unfair commercial practices.

Industrial action: Article 9 introduces a specific rule on the law applicable to non-contractual obligations arising out of industrial action. The provision on these lines was part of the Parliament's amendments which the Commission did not accept and consequently was not included in its amended proposal.

The text of the provision in the common position is a redraft which attempts to give effect to the main objections of the Commission during the discussions in the Council. Its scope is now defined more precisely and is, in particular, limited to the issue of liability of employers, workers and/or trade unions in the context of an industrial action.

Overriding mandatory provisions: the articles on mandatory provisions have been simplified.

Public policy on the forum: the application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.

Article 27 departs from Article 23 in the Commission's initial proposal (Article 3 of the amended proposal) which contained a much more detailed rule explaining the relationship between the different sources of Community law (in particular as regards the relationship with specific instruments promoting the proper functioning of the internal market). In view of the recent developments in the European Parliament and the Council in the context of negotiations of other proposals such specifically tailored provision in this instrument seems no longer necessary.

Relationship with other international conventions (Article 28) : the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.

New provisions introduced by the Council

Article 2 is a provision of a technical nature which intends to provide definition of certain concepts used throughout the Regulation with the intention to simplify the drafting of its individual provisions.

At the JHA Council meeting in Luxembourg (27 and 28 April 2006) the Commission made this declaration: "The Commission is prepared, in appropriate cases, to examine the possibility of making proposal to the Council authorising Member States to conclude international agreements concerning specific sectoral matters which contain provisions on the law applicable to non-contractual obligations. This remains without prejudice to the possibility of the Community to negotiate and conclude such international agreements in accordance with the provisions of Article 300 EC."

Article 12 introduces a specific proposal for non-contractual obligations preceding the conclusion of a contract. Such specific provision was not included in the Commission's proposal, even though the intention was always to cover this type of obligations by this instrument. This reflected the line taken in the case law of the European Court of Justice in the context of the 1968 Brussels Convention (replaced by Regulation 44/2001), whereby this type of obligations is to be considered non-contractual. The Commission has originally opted for a more flexible solution in the Article 5(3) of its amended proposal, whereas the Council seems to prefer a more detailed provision on the issue. The content of the proposed provision leads, in principle, to the same result as envisaged by the Commission, i.e. to the application of the law of the country which is most closely connected with the non-contractual obligation.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

The Commission accepts the common position in the light of the fact that it includes the key elements included in its initial proposal and Parliament's amendments as incorporated into its amended proposal.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

The committee adopted the report by Diana WALLIS (ALDE, UK) amending the Council's common position under the 2nd reading of the codecision procedure. The amendments focused on a number of issues concerning which Parliament's 1st reading position had not been reflected in the Council's text:

- the committee again insisted that the special provisions on unfair competition and environmental damage should be deleted from the text, on the grounds that the general rule can cater perfectly well for such cases;
- the rapporteur expressed disappointment that the Commission had decided to withdraw from its proposal the provisions on privacy and rights

of personality, which were specifically excluded from the scope of the Council's common position (although they were mentioned in the review clause). The committee wanted these matters to be governed by the final regulation and reinstated the amendment on this subject adopted by Parliament at 1st reading. Under these provisions, as regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur should be applicable. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be "the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised", and that country's law should be applicable. The factors used to determine that country would include the language of the publication or broadcast or sales or audience size in the country as a proportion of total sales or audience size, or a combination of those factors. Similar considerations should apply in respect of publication via the Internet or other electronic networks;

- with regard to road traffic accidents, the committee again sought to have the victims' national law applied for the purposes of calculating the quantum of the claim. However, this time it extended the provisions to cover personal injury cases in general. The amendment provided that that, in quantifying damages in personal injury cases, "the court seised should apply the principle of *restitutio in integrum* having regard to the victim's actual circumstances in his country of habitual residence". This would include the actual cost of after-care and medical attention;

- MEPs in the committee reinstated the EP's 1st reading amendment designed to ensure that the 'Rome II' regulation can co-exist with internal market legislation and promote, rather than hamper, the proper functioning of the internal market;

- lastly, the committee amended the review clause in order to ensure a more focused approach in future to finding solutions to those issues to which Parliament attached particular importance, such as road traffic accidents, violations of privacy and rights relating to the personality.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

The European Parliament adopted a resolution drafted by Diana Wallis (ALDE, UK) and approved a number of amendments that reintroduce the provisions related to violations of privacy, previously deleted in the Council's common position. The key amendments were as follows:

- a new recital states that the conflict-of-laws rules set out in the Regulation also cover obligations based on strict liability and the harmonised rules on connecting factors also apply to the question of the capacity to incur liability in tort/delict;

- nevertheless, the need to avoid distortions of competition and the requirement of legal certainty must be tempered by the need to do justice in individual cases, and consequently the courts must have a margin of discretion;

- as in the Rome Convention, the principle of "*iura novit curia*" applies. The court itself should of its own motion establish the foreign law. For the purposes of establishing the foreign law the parties should be permitted to assist the court and the court should also be able to ask the parties to provide assistance;

- Article 6 on unfair competition and acts restricting free competition was deleted from the text. It was considered that the general rule could cater perfectly well for cases involving unfair competition. Article 6(3) should cover, *inter alia*, distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, within the meaning of Articles 81 and 82 of the Treaty;

"Environmental damage" should cover damage to protected species and natural habitats, water damage and land damage as defined in Article 2 of Directive 2004/35/EC;

- Parliament inserted a new article on violations of privacy and rights relating to the personality. (Please see the preceding summary on this point.) As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur will be applicable. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur will be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed must be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. This provision will apply *mutatis mutandis* to publications via the Internet and other electronic networks;

- with regard to road traffic accidents, Parliament again sought to have the victims' national law applied for the purposes of calculating the quantum of the claim. The amendment states that, in quantifying damages in personal injury cases, the court seised shall apply the principle of *restitutio in integrum*, having regard to the victim's actual circumstances in his country of habitual residence. This would include the actual cost of after-care and medical attention;

- the Commission's report must pay particular attention to the effects of the way in which foreign law is treated in the different jurisdictions and the question of damages, including the possibility of awarding exemplary or punitive damages in certain jurisdictions. The report shall also include an analytical study of the extent to which courts in the Member States apply foreign law in practice, including recommendations as to the desirability of a common approach to the application of foreign law. The Commission, after extensive consultation with the interested parties, including the Hague Conference on Private International Law, must submit a report on the situation with regard to the law applicable to road traffic accidents. The report must be accompanied by an extensive study of the scale of the phenomenon, the problems and an extended impact assessment. If appropriate, the report will propose amendments to the Regulation and/or the adoption of specific legislation.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

The Commission accepted 6 amendments made by Parliament either in their entirety, or subject to rewording or in part only. These include the following:

- a technical drafting change to reflect that the fact that the Rome Convention of 1980 on the law applicable to contractual obligations will be replaced by the future "Rome I" Regulation, currently being negotiated in the Council and Parliament;
- Parliament's amendment stating that the application of a provision of the law designated by the Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded may be regarded as being contrary to the public policy of the forum. In its original proposal the Commission preferred a form of words that made it clearer that non-compensatory damages are not per se contrary to public policy if the amount is reasonable. But, since the rule proposed by Parliament leaves the courts with considerable room for discretion, the Commission can now accept the form of words proposed by Parliament;
- the amendment which clarifies the scope of the special rule on acts of unfair competition by adding a reference to Articles 81 and 82 of the Treaty;
- the Commission suggested two different recitals to give effect to Parliament's desire to reflect that Rome II also covers obligations based on strict liability, and that the Regulation will determine with precision the scope of the applicable law governing matters such as the determination of categories of person who can be held liable for the acts they commit.
- the Commission states that while it is basically in favour of clarifying the scope of the specific rule on environmental damage, it regrets that the definition adopted by Parliament is so restrictive, confining the scope so that the rule would not apply, for instance, to air pollution. The Commission can accept a definition only if it covers all non-contractual obligations in respect of environmental damage, irrespective of the nature of the damage;
- Parliament's amendment on the report on the application of the Regulation states that the latter should consider two questions in particular: the application of foreign law by the courts and tribunals of the Member States, and the law applicable to traffic accidents. While the Commission can basically accept the part concerning the application of foreign law, it considers that the problem of damages, extends beyond that question. This is a complex point of substantive civil law, and Rome II is not the proper place for addressing it. As to the part concerning traffic accidents, the Commission's working method in preparing its report would be dictated to it in great detail. Since the Commission has its own detailed rules governing its working method, it prefers to stand by the form of words used in the amended proposal, namely, that the report shall consider whether Community legislation specifically dealing with the law applicable to traffic accidents ought to be proposed.

The Commission did not accept 12 amendments, amongst which were the following:

- new specific rules governing invasions of privacy and rights relating to the individual. The Commission already had rejected this rule at first reading. Given the political impasse in the Council, the Commission would now prefer to exclude this tricky question from the scope of the Regulation, as in its amended proposal, especially since there is very little international litigation in this area;
- Parliament's amendment which makes provision for cases where the parties have not made an express choice of law and the court is empowered to have regard to other factors to infer a choice. The proposed form of words is not compatible with the legal certainty objective, which requires certainty as to the existence of a choice by the parties;
- the Commission does not accept amendments which would introduce the restitutio in integrum principle in quantifying damages for personal injury victims. While it agrees that this is a very interesting idea for improving the situation of road traffic victims, it considers that this constitutes harmonisation of the Member States' substantive civil law which is out of place in an instrument harmonising the rules of private international law;
- a new recital allowing a litigant who so wishes to raise the issue of the applicable law. The Commission already explained in its amended proposal that, while it supported the idea of easing the task of a court faced with international litigation, this was not something that could be expected of all the parties, in particular those who are not legally represented. However, the Commission is willing to look into the question of the application of foreign law in the courts of the Member States in the report on the application of the Regulation, as proposed in the amended proposal;
- similarly, the Commission rejects the amendment whereby the court should determine the content of the applicable foreign law of its own motion, although it could ask the parties to assist it. It believes that in the current situation most Member States would be unable to apply such a rule as the requisite structures are not in place. But it agrees that this is an avenue well worth exploring and that special attention should be paid to it in the implementation report;
- the Commission cannot accept an amendment which would abolish the specific rule relating to anti-competitive practices. Preserving this specific rule boosts certainty and foreseeability in the law since it anchors the place where the loss was sustained.
- the Commission cannot accept an amendment reinstating a rule on the relationship between Rome II and other Community instruments containing rules having an impact on the applicable law, in particular the internal market instruments. In view of the recent developments in the European Parliament and the Council in the context of negotiations of other proposals, such a specifically tailored provision in this instrument no longer seems necessary.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

In the framework of the codecision procedure, the Council decided not to approve all the European Parliament's amendments adopted in second reading concerning a draft Regulation on the law applicable to non-contractual obligations (ROME II). Consequently, in accordance with the EC Treaty and in agreement with the European Parliament, the Council decided to convene the Conciliation Committee.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

The European Parliament approved a conciliation agreement on the proposed regulation on the law applicable on non-contractual obligations ("Rome II"), which aims to facilitate litigation between citizens from different European countries on matters such as traffic accidents, product liability and environmental damage by harmonising Member States' conflict of law rules.

The main points of the agreement can be summarised as follows:

- road traffic accidents: the general rule introduced by "Rome II" is the "lex loci delicti" whereby the law applicable is the law of the country in which the damage occurs. In the case of cross-border road traffic accidents this broadly accepted rule can lead to unsatisfactory situations due to the widely differing levels of compensation awarded by national courts: when the victim of the accident is resident in another country than the one in which the accident occurred, the amount of the compensation to be awarded will have to be calculated according to the law and standards of the country of the accident and not the country of the residence of the victim, in which however he or she will have to recover from the injuries and possibly also live with the consequences of the accident. One of the EP Delegation's main priorities was therefore to ensure that the individual victim's actual circumstances are taken into consideration by the court seized when deciding on the level of the compensation to be awarded. For the short term, the EP Delegation succeeded in including a reference in the recitals of the Regulation whereby judges when quantifying personal injuries will take account of all relevant actual circumstances of the specific victim, including in particular the actual losses and cost of after-care and medical attention. For the long term, the EP Delegation succeeded in securing a public commitment by the Commission for a detailed study on all options, including insurance aspects, on the specific problems faced by victims of cross-border road traffic accidents. The study will be presented by 2008 the latest and would pave the way for a Green Paper. It is expected that the findings of the study will make the Commission and Member States realise the need for specific legislation in this field.
- unfair competition: at Parliament's insistence, the Council agreed to the Commission's proposal for a specific rule on unfair competition that respects the principle of the application of one single national law (an important point for judges and lawyers) while at the same time limiting to a large extent the danger of "forum shopping" (i.e. the possibility for plaintiffs to raise their law suit in the Member State of their choice);
- environmental damage: the Parliament succeeded in obtaining a definition of "environmental damage" to be introduced into the regulation. The definition is in line with other EU instruments, such as the Directive on Environmental Liability;
- defamation by the media: as part of an overall compromise, Parliament had to withdraw its amendments on the inclusion of rules on the violation of personal rights, particularly defamation in the press. However, it was agreed that, as part of the review of the regulation, the Commission would conduct a study by 2008 on the situation in this specific field;
- relationship with other Community instruments: on the controversial issue of the relationship between the "Rome II" regulation and other provisions of Community law, it was agreed that the application of provisions of the applicable law designated by the rules of the regulation should not restrict the free movement of goods and services as regulated by Community instruments such as the e-Commerce Directive;
- treatment of foreign law: it was agreed that the treatment of foreign law by national courts would be the subject of a detailed study to be carried out by the Commission as part of its report on the application of the regulation. The Commission pledged to publish the study no later than four years after the regulation's entry into force;
- review clause: at Parliament's insistence the review clause was split into two, consisting of a special section with a shorter timetable by 2008 to address the issue of defamation and a general section with the standard timetable whereby the Commission will present a report on the application of the regulation four years after its entry into force. As part of the general review clause the Commission will also carry out a study on the treatment and application of foreign law by the courts of the Member States and a second study on the effects of Article 28 of the Regulation ("Relationship with existing international conventions") with regard to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

PURPOSE: to harmonise the rules on law applicable to non-contractual obligations (Rome II).

LEGISLATIVE ACT: Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II).

BACKGROUND: within the context of establishing an area of freedom, security and justice the Community has adopted a number of judicial measures concerning co-operation in civil matters that affect cross-border transactions or that distort the good functioning of the internal market. The Treaty on European Union specifies that measures to create an internal area of freedom, security and justice should include making Member States' rules on the conflict of laws and jurisdiction compatible. This is because the EU's internal market requires predictable litigation, certainty as to the law applicable, the free movement of judgments and for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought. Prior to the adoption of this Regulation the Member States had no common rules to designate the applicable law in non-contractual matters, and each court observed its national rules. Accordingly, legal solutions varied widely from one Member State to another, and parties were tempted to refer disputes to the court which applied the most favourable law to them (a practice known as forum shopping). Indeed, the Member States have been trying to harmonise the rules concerning conflicts of laws in matters of tort/delict since 1972.

CONTENT: the purpose of this Regulation, therefore, is to lay down a uniform set of rules of law applicable to non-contractual obligations, irrespective of the country of the court in which an action is brought. This should increase certainty as to the applicable law and improve the predictability of legal disputes and the free movement of judgements. As a general rule, the draft Regulation states that the law applicable to a tort/delict is the law of the country where damage occurred. Only in certain limited, duly justified circumstances, the general rule will be derogated from and special rules applied.

The Regulation contains special rules on product liability, unfair competition, environmental damage, infringements of intellectual property and industrial action. The initiative more particularly concerns questions related to civil liability for damage caused to others, particularly in the event of an accident. It applies, for example, to road accidents, defective products and environmental pollution. Expanding trade and travel in the EU will mean that disputes of this nature are bound to become more frequent.

The Regulation, does not deal with the violation of personal privacy or rights. However, under the terms of the conciliation Agreement, the Commission has been asked to review this matter not later than 31 December 2008 and to commission 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. Violations of privacy resulting from the handling of personal data will be also dealt with in the Commission's study.

The Rome II rules aim to strike a reasonable balance between the interests of the alleged perpetrator of the damage and the victim. With Rome II, the Community harmonisation of the rules of private international law of civil and commercial obligations is complete. The international jurisdiction of courts and the recognition and enforcement of judgments given in another Member State are already governed by Council Regulation (EC) No 44/2001 of 22 December 2000, which applies to both contractual and non-contractual obligations. The rules concerning the law applicable to contracts have already been harmonised by the Rome Convention of 1980 on the law applicable to contractual obligations.

APPLY: 11 January 2009. The Regulation will apply only to events giving rise to damage which occurs after its entry into force.