

# ROME I AND ROME II REGULATIONS – ALIES OR ENEMIES?

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## Abstrakt v rodném jazyce

Smysl tohoto příspěvku je zřejmý – posunout se od jednoduchého popisu nových instrumentů evropského mezinárodního práva soukromého směrem k šedé oblasti prolínání obou předpisů, kde se soupeřit na stejném poli. Definice smluvního a mimosmluvního závazku představuje zcela stěžejní otázku. Přitom situace není zřejmá v celé řadě oblastí a tak to bude Soudní dvůr, který brzy vstoupí na scénu, neboť oba nové předpisy se již záhy – jeden na začátku a druhý na konci roku 2009 – stanou účinnými.

## Klíčová slova v rodném jazyce

Smluvní závazek, mimosmluvní závazek, delikt, kvasidelikt, Římská úmluva, nařízení Řím I, nařízení Řím II, evropské mezinárodní právo soukromé, interpretace Evropským soudním dvorem, vnitřní trh, občanská a obchodní věc, autonomie vůle stran, volba práva, hraniční určovatel, ochrana slabší strany, imperativní normy, neexistence volby práva, právní jistota a předvídatelnost stran.

## Abstract

The aim of the contribution is clear – to move from the simple descriptive approach regarding the new instruments of European Private International Law such as Rome I and Rome II Regulations towards the problematic “grey area” of incursion where both instruments may possibly struggle at the same field. The definition of the contractual and non-contractual obligation is of utmost importance. Nevertheless, the situation is not clear in many particular areas and thus the European Court of Justice will come into play very soon since both new instruments are here to be applied in the near future, being that the beginning or the end of the year 2009.

## Key words

Contractual obligation, non-contractual obligation, delicts, quasi-delicts, Rome Convention, Rome I Regulation, Rome II Regulation, European Private International Law, interpretation of the European Court of Justice, internal market, commercial and civil matters, party autonomy, choice of law, connecting factors, weak party protection, mandatory rules, absence of the choice of law, legal certainty and predictability for private individuals.

## 1. INTRODUCTION

The new Rome I Regulation – Regulation (EC) No 593/2008 on the law applicable to contractual obligations (applicable for the contracts concluded after the December 2009) and Rome II Regulation – Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (applicable from January 2009) are the very new instruments of conflict-of-law rules in the area of Private International Law in Europe.<sup>1</sup> The substantive scope of both these Regulations should be consistent especially with the Brussels I Regulations while together

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<sup>1</sup> For the details on the new instruments of Private International Law in Europe see: Pauknerová, M.: Evropské mezinárodní právo soukromé. C.H. Beck, Praha 2008, 409 pages.

construing a solid legal basis for answering elementary questions which are arising in the area of internal common market and are of utmost importance for its proper functioning.<sup>2</sup>

The aim of this contribution is not a simple description of both above mentioned instruments when especially Rome II and the whole transformation process of the Rome Convention on the law applicable to contractual obligations into the instrument of secondary Community law had been subject of huge academic debate.

Both cover huge area of obligations in the area of commercial and civil matters – being them of contractual or non-contractual nature. The questions are: how do they cooperate or do they cooperate at all? Are they struggling over the same issues or the areas covered by them are of mutual exclusive relationship to each other? When should a Member State court look to the relevant Rome I and when to Rome II provisions to determine the applicable law?

## 2. ROME I REGULATION

Starting with the Rome I Regulation we found out that it is necessary to briefly describe how this new instrument differs from its predecessor – Rome Convention.<sup>3</sup>

On 15th December 2005, the EC Commission presented a proposal for a Regulation on the Law Applicable to Contractual Obligations. This proposal was preceded by extensive public consultations while the Green Paper was published in January 2003. The discussions in the Council were held during the Finnish (2006), German (2007) and Portuguese (2007) presidency, thus the situation was finally solved under the presidency of Slovenia (2008). The interesting aspects of the whole procedure were connected with major differences between the Commission and European Parliament regarding some questions of the new instrument. In the European Parliament the Regulation was approved in the 1st reading on 29th November 2007 accepting 3 sets of proposed amendments to the Commission's proposal. In Council was the Regulation adopted on its meeting in June this year and later on (4th July 2008) was published as the Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I).<sup>4</sup>

Rather than setting new set of rules, the Commission aspires to convert the existing Convention into the instrument of Community law. Proposal and final version of the Regulation introduces a number of amendments, some of them quite radical, with the intention to modernize the contents of the present conflict rules and coordinate them with other instruments of European Private International Law, especially Rome II Regulations and Brussels I Regulation.<sup>5</sup> According to me the most significant changes can be divided into three main groups – *solution of the situation of the absence of choice of law, weak party contracts and the mandatory rules problem*. Nevertheless we want to provide a complex view on this new instrument as such, pointing to the most important amendments and changed

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<sup>2</sup> See Rozehnalová, N., Týč, V.: Evropský justiční prostor v civilních otázkách. Masarykova univerzita Brno 2003, p. 18 et seq.

<sup>3</sup> For the details see for example: Stone, P.: EU Private International Law – Harmonization of Laws. Edward Elgar Publishing Limited, Cheltenham 2006, p. 263 et seq., Meussen, J., Pertegás, M., Straetsman, G.: Enforcement of International Contracts in the European Union, Intersentia 2004 or Bogdan, M.: Concise Introduction to the EU Private International Law, Europa Law Publishing, Groningen 2006.

<sup>4</sup> Details of the development can be seen at [www.conflictoflaws.net](http://www.conflictoflaws.net).

<sup>5</sup> See Pauknerová, M.: Evropské mezinárodní právo soukromé. C.H. Beck, Praha 2008, p. 254 et seq.

inserted into the original instrument by the Commission and by the European Parliament while preparing this instrument in so-called co-decision procedure with Council under the Art. 251 of the EC Treaty.

Starting with the scope of the new Regulation we can see that it is not substantially different from the Convention.<sup>6</sup> The positive delimitation in the Art. 1/1 was changed for example. Nowadays, the Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. The intention to coordinate the new instrument with other instruments of European law is obvious, here with Brussels I Regulation. But also in the negative delimitation of the scope of the new Regulation, for example new letter i) was inserted in the Article 1 of the Regulation which is dealing with the *culpa in contrahendo* (obligations arising out of dealings prior to the conclusion of contract) which is covered by the new Rome II Regulation about which you will hear later.

One of the substantial changes is clearly to be seen in the *new Article 3* of the Regulation. Again the basis of the whole Regulation is the party autonomy;<sup>7</sup> parties are thus free to choose the law that will govern their contract.<sup>8</sup> Nevertheless, Art. 3/1 of the Regulation speaks clearly about “law”, previous Proposal from the Commission (Art. 3/2 of the Proposal) was deleted. Thus simple choice of *lex mercatoria* for instance as such is not possible. Form of the choice of law is same as under the old Convention, the same is true about the possible use of depechage and change of applicable law in the future. In the Art. 3/3 of the new Regulation, finally the terminology problems of so called “mandatory rules” were solved while the distinction of the mandatory and supermandatory rules is now pretty clear. Rules which are to be used in the “internal contract” situation are now called “provisions of the law which cannot be derogated from by agreement”, the rules in the sense of the old Art. 7 of the Convention are called “overriding mandatory rules” (now in the Art. 9 of the Regulation). These new rules to which are references made in Art. 3/3, 6/2 (consumers contracts) and 8/1 (individual employment contracts) are then the old mandatory rules in the sense of Art.3/3 of the Convention and also Art. 7 of the Convention. This explanation is introduced by the Recital 37 of new Regulation which says: “*The concept of “overriding mandatory provisions” should be distinguished from the expression “provisions which cannot be derogated from by agreement” and should be construed more restrictively.* This in practical terms means, that in “*internal situation*” the choice of law of the parties cannot prejudice the application of the mandatory rules of the law of that country, be they mandatory or internationally mandatory rules. The same is true about “mandatory provisions” of Community law (Art.3/4 of the Regulation) that cannot be disregarded when the contract is connected with one or more Member States. We also really appreciate that the subparagraph 2 in Art. 3/1 of the Commission’s proposal was deleted. Simply, according to this Article the jurisdiction agreement was regarded as an implied choice of law in favor of the law of the forum state. In the Regulation the Recital 14 is talking about jurisdiction agreement as one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated. Nothing more, nothing less. I do agree with this solution because as a matter of a principle, choice of court and choice of law are two different things. They should be treated separately

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<sup>6</sup> See Rozehnalová, N., Týč, V.: *Evropský justiční prostor v civilních otázkách*. Masarykova univerzita Brno, 2003, p. 43 et seq.

<sup>7</sup> Rinze, J.: *The Scope of Party Autonomy under the 1980 Rome Convention on the Law Applicable to Contractual Obligations*. In: *The Journal of Business Law* 1994.

<sup>8</sup> See Pauknerová, M.: *Evropské mezinárodní právo soukromé*. C.H. Beck, Praha 2008, p. 259 et seq.

although it is true that the parallelism between choice of court and choice of law is cost saving, efficient and clearly preferred by business.

Regarding *the applicable law in the absence of choice*, new Art. 4 of the Regulation is to be seen also as a revolutionary one.<sup>9</sup> The old approach based on the “*close connection*” supported by presumptions and escape clause was changed. The most problematic under the old Convention was actually the relationship between the presumptions and the escape clause. Some of the countries were turning the old presumptions almost in hard fast rules (the Netherlands); on the other hand some Member States (England, France and Denmark) hold the presumptions to be soft. Consequently, they are to be disregarded if on balance a closer connection exists to another state. Attitude under the new Regulation can be described as follows: firstly, the hard and fast choice of law rules are provided for certain types of contracts (Art. 4/1 of the Regulation). Secondly, for the contracts not listed in this paragraph, the applicable law is the law of the country in which the party who is to perform the obligation characterizing the contract has his habitual residence at the time of the conclusion of the contract (Art. 4/2 of the Regulation). Nevertheless, the escape clause didn't disappear, it was narrowed (see the wording “*manifestly more closely connected*” and compare it to the old Art. 4/5 of the Convention “*more closely connected*”). When the law couldn't be determined under the previous rules (is not within the listed type or the characteristic performance cannot be established) the contract shall be governed by the law of the country with which is most closely connected (Art. 4/4 of the Regulation). It is clear that in the absence of the choice the inflexible approach (represented by hard fast rules) is combined with a flexible one (represented mainly by the escape clause). We are repeating that the escape clause was substantially narrowed to achieve more predictability. Mere presumptions known from the Convention were changed into the fixed rules.

Other change dwells in Art. 5, *contract of carriage* were separated into independent Article of the Regulation. Art. 5/1 provides the rules for the carriage of goods, Art. 5/2 for the carriage of passengers. With regard to passenger contracts the choice of law is limited according to the Art. 5/2. To keep the flexibility, the escape clause is also present in these types of contracts – Art. 5/3 of the Regulation.

The new Regulation also recognizes the needs of so called weak parties of the contracts<sup>10</sup> – consumers (Art. 6), insurance contracts (Art. 7) and employees (Art. 8). In the case of consumers the contract shall be governed by the law of his habitual residence (Art. 6/1) if the conditions under letters a+b are fulfilled (if not, general Art. 3 and 4 will apply to determine the applicable law). Choice of law may not result in depriving the consumers of the protection afforded to him by the law of his habitual residence (see Art. 6/2). Insurance contract were included taking into account the Brussels I Regulation and the regulation of this sector by secondary European law. In the case of individual employment contract, the rules are as follows: the law applicable can be freely chosen, the minimum standard is also introduced and in the absence of choice, the applicable law is the one of the country “*in which*” or “*from which*” the employee habitually carries out his work (this amendment in Art. 8/2 of the

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<sup>9</sup> See Pauknerová, M.: *Evropské mezinárodní právo soukromé*. C. H. Beck, Praha 2008, p. 262 et seq. and compare to the old approach in the Rome Convention – see See Rozehnalová, N., Týč, V.: *Evropský justiční prostor v civilních otázkách*. Masarykova univerzita Brno, 2003, p. 79 et seq.

<sup>10</sup> Bogdan, M.: *Concise Introduction to the EU Private International Law*, Europa Law Publishing, Groningen 2006, p. 68 et seq. or Nygh, P.: *Autonomy in International Contracts*, Claredon Press, Oxford 1999, p. 139 et seq.

Regulation was clear reaction to the situations where the work is carried out on planes or ships) or if the above mentioned is not able to be determined, the law of the country where the place of business of employer is situated.<sup>11</sup>

For the sake of predictability, I find very useful that the definition of the *overriding mandatory rules* is given in the new Art. 9 of the Regulation. These are "... provisions the respect for which is regarded by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract...". It is clear that the national legislation can be taken into account only in terms of exceptions of four fundamental freedoms of the Common Market; such exceptions need to be expressly provided in the EC Treaty. Art. 9/2 is regulating the *lex fori* overriding mandatory provisions and Art. 9/3 is working with what was in Convention known as foreign mandatory rules (Art. 7/1 of the Convention). Art. 9/3 is now much more precise assuming that the effect may be given to such norms of the country where the obligations arose or the law of the country where the contract had to be or had been performed. In comparison with the Art. 7/1 of the Convention and the close connection test there included, present situation (Art. 9/3) is much more predictable.<sup>12</sup>

To conclude the brief introduction of the Rome I Regulation we want to point to the Art. 28 and 29 concerning the application and entry into force of the new instrument and repeat again that from a practical point of view the old Rome Convention is not dead and will be applicable for quite some time all around the Europe.

### **3. ROME II REGULATION**

Regarding the applicability of the Rome II Regulation, we firstly need to consider the definition of the "delict"/"tort" itself. Without doubt it would be definitely more accurate to use the term "non-contractual obligation" which is used in the Rome II Regulation. Non-contractual obligation rises not from the contract but from the breach of a duty defined by the objective law while the only relationship that is between the parties is factual one, definitely not a legal one. As far as the delict is committed the responsibility obligation arises from this breach and this is already a relationship of legal character. Usually two divisions of non-contractual obligation are distinguished. The first case and a major group of delicts is a situation where the act of wrongfulness creates an essential presumption for the existence of "delict" and the second case (usually called quasi-delicts) where this presumption (wrongful act) is missing.

As well as the Rome I also the Rome II Regulation is based on the principle of autonomy. It is not typical for the purpose of conflict rules for delicts and is the evidence of receiving of the latest trends in PIL by the European PIL. Law elected by the parties represents the primary rule which can be used for both delicts and quasi-delicts. Choice can be performed both *ex ante* and *ex post* in relation to the wrongdoing with the condition that *ex ante* can be performed only between professionals. Settlement shall be expressed or demonstrated with

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<sup>11</sup> See Pauknerová, M.: *Evropské mezinárodní právo soukromé*. C. H. Beck, Praha 2008, p. 267 et seq.

<sup>12</sup> Bogdan, M.: *Concise Introduction to the EU Private International Law*, Europa Law Publishing, Groningen 2006, p. 70 et seq. or Nygh, P.: *Autonomy in International Contracts*, Clarendon Press, Oxford 1999, p. 199 et seq.

reasonable certainty by the circumstances of the case (comparable to the Rome I). The choice doesn't affect the rights of third parties. Additional restrictions result from art. 14(2) and 14(3) according to which the choice shall not prejudice the application of rules of country which cannot be derogated from by agreement if all elements relevant to the situation are located in this country. EC law if all elements relevant to the situation are located in EC state is treated likewise when the law on non-member state is chosen. Certain conflict rules which are mandatory can't be excluded by the choice made by the parties – unfair competition and acts restricting free competition and infringement of intellectual property rights.

For the situation when the parties don't choose the law for the non-contractual obligation (which we think will not happen in most cases) the general rule should be used. It uses the connecting factor *lex loci damni infecti*. It also follows the trends of PIL but we would like to remind that Brussels I Regulation according to the ECJ uses in art. 5(3) interpretation both *lex loci damni infecti* and *lex loci delicti commissi* for determination of the jurisdiction of the national courts within Community. This disproportion will be the subject of our research in future. The general conflict rule is succeeded by special conflict rules for product liability (art. 5), unfair competition and acts restricting free competition (art. 6), environmental damage (art. 7), infringement of intellectual property rights (art. 8) and industrial action (art. 9).

The general rule is not applicable for quasi-delicts as characterized above. Regulation formulates special conflict rules for *unjust enrichment* (art. 10), *negotiorum gestio* (art. 11) and *culpa in contrahendo* (art. 12).

#### **4. WHERE THEY MET AND WHERE THEY STRUGGLE?**

Trying to find how these two instruments can possibly cooperate we need to start with the premises that are known.<sup>13</sup>

The first guidance regarding the relationship between the Rome I and Rome II Regulations is to be found in the Recital 7 of the Rome I where the general aim is expressed very clearly. The primarily objective of all corner stone instruments in European Private International law is consistency of their substantive scope and the individual provisions. The overall goal is obvious – legal certainty and predictability for private individuals.

Both Regulations are dealing with the issues from civil and commercial matters area. Nevertheless, we are only interested in “obligations” being them contractual or non contractual in their nature. The matter of contractual/non-contractual character of obligations is subject to the problem of qualification (which is in common law known as characterization or classification of problem in the conflict of laws)<sup>14</sup> and is recently usually very much underestimated. While providing the qualification followed by the interpretation of single terms, the role of the European Court of Justice is very important. The ECJ already provided guidance in the following cases:

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<sup>13</sup> Regarding this issue we were strongly motivated by the speech („Oh Brother, Where Art Thou?“) held by Andrew Dickinson on the conference on Private International Law held in London in September this year (for the details see [www.conflictoflaws.net](http://www.conflictoflaws.net) and the information on Journal of Private International Law Conference – The Rome I Regulation: New Choice of Law Rules in Contract.

<sup>14</sup> See very interesting article Lorenzen, E.: The Qualification, Classification, or Characterization Problem in the Conflict of Laws. In: Yale Law Journal 50/1941, p. 743 et seq.

- Martin Peters (34/82) where the autonomous concept of contractual obligations was emphasized

*1. Obligations in regard to the payment of a sum of money which have their basis in the relationship existing between an association and its members by virtue of membership are „matters relative to a contract“ within the meaning of article 5(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.*

*2. It makes no difference in that regard whether the obligation in question arises simply from the act of becoming a member or from that act in conjunction with one or more decisions made by an organ of the association.*

- Jakob Handte (26/91) where the ECJ tried to define the contractual obligation as a freely assumed obligation from the one party towards the other

*Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose.*

- Just recently the Austrian Engler decision dealing with the same issue was published (27/02).<sup>15</sup>

*1. Legal proceedings by which a consumer seeks an order, under the law of the Contracting State in which he is domiciled, that a mail order company established in another Contracting State award a prize ostensibly won by him is contractual in nature for the purpose of Article 5(1) of that convention, provided that, first, that company, with the intention of inducing the consumer to enter a contract, addresses to him in person a letter of such a kind as to give the impression that a prize will be awarded to him if he returns the ‘payment notice’ attached to the letter and, second, he accepts the conditions laid down by the vendor and does in fact claim payment of the prize announced;*

*2. On the other hand, even though the letter also contains a catalogue advertising goods for that company and a request for a ‘trial without obligation’, the fact that the award of the prize does not depend on an order for goods and that the consumer has not, in fact, placed such an order has no bearing on that interpretation.*

Other sources, like the explanatory reports to the Rome Convention (Giuliano-Lagarde Report)<sup>16</sup> or other reports following the Brussels I Regulation are not providing very much guidance on the mutual relationship between these two Regulations. The reason for this is clear – they were not able to anticipate the future development of these instruments.

Finally, to distinguish the contractual and non-contractual nature of the obligations there are presumptions that need to be followed. Firstly, the source of the obligation must be irrelevant, and the same is valid for subjective intentions of the parties. The most important is definitely

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<sup>15</sup> All the decisions are available from: <http://curia.europa.eu/en/content/juris/index.htm>.

<sup>16</sup> See the Report from: [http://www.rome-convention.org/instruments/i\\_rep\\_lagarde\\_en.htm](http://www.rome-convention.org/instruments/i_rep_lagarde_en.htm).

the foundations of the obligation itself. In the case of contract, there will be always the offer and the acceptance present and thus the bilateral nature of the contractual obligation is characteristic.

The incursions over the borders between the two Regulations are clear (e.g. Art. 12 Rome I or Art. 18 Rome II) nevertheless, we must strictly refuse the view that there might be concurrent situations where both Rome I and Rome II will be possibly applicable. According to our view, these two instruments are more allies than enemies because the basis of the obligation falling under the Rome I or Rome II is very different in its nature – voluntary in the case of contractual obligations and non-voluntary – in the case of non-contractual obligations.

## 5. CONCLUSION

To conclude our overall statements about both of these new instruments in the area of Private International Law, they are according to us definitely more allies that are here to provide legal certainty and predictability in the area of civil and commercial matters in the current situation in the European Union where the substantive unification of law is still missing. Nevertheless, how the border questions will be decided is up to the ECJ which will face these problematic aspects very soon.

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