Council of the European Union / European Parliament: “Rome II” Regulation on Law Applicable to Non-Contractual Obligations Passed Without Media Clause

IRIS 2007-7:1/3

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At the conciliation meeting of 15 May 2007, the Council and European Parliament have agreed on the “Rome II” Regulation, which sets out rules for determining the applicable law in international civil cases in the area of torts, delicts and other non-contractual obligations. As was reported earlier, there was substantial disagreement between the European Commission, Council and Parliament on how to deal with cross-border defamation and other infringements of personality rights by the media (see IRIS Plus 2006-10).

After the European Parliament had again asked for substantive amendments to the “Rome II” proposal in second reading, the subsequent conciliation procedure produced an agreement to disagree. As a result, “Rome II” now excludes “non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation” (art.1(2)(g)). Although the considerations give no guidance on the issue, it would seem that this includes all publicity rights which derive from interests in personality. The right of reply is also outside the scope of “Rome II”.

The exclusion means that parties to a dispute over unlawful communications in said areas need to determine under the various private international law rules of the individual Member States whether certain communications are actionable in tort. In some Member States the place of publication is the primary connecting factor to determine the applicable law, whereas in others it is the place of reception or distribution, or that of the common habitual residence of parties. Yet other Member States allow parties varying degrees of freedom to choose the applicable law themselves.

In the other areas of “Rome II” with special significance for actors in information industries, the final text contains no significant changes. For unfair competition and restrictions of competition the applicable law is in principle the law of the country where the market is affected. Infringements of intellectual property rights are governed by the law of the country for which protection is claimed. The generic rule for torts/delicts remains the same: parties to a dispute may choose the applicable law. If no choice has been made, the law of the common habitual residence of plaintiff and injured party applies. If there is no common habitual

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residence, the *lex loci damni* governs the non-contractual obligation(s), i.e. the governing law is that of the place where the harmful event took place. If the damage caused by the act arises in another jurisdiction, the latter law applies.

The defamation issue is still on the table. By the end of 2008 the European Commission must report on a rule for non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation (art. 30(2)). It remains to be seen whether positions change sufficiently to make possible inclusion of such a rule. The "Rome II" Regulation will take effect at the beginning of 2009.

"European Union brings in harmonised rules on law applicable to civil liability ("Rome II" Regulation)", Press release of 16 May 2007, IP/07/679

http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/679&format=HTML&aged=0&language=EN&guiLanguage=en

Common Position (EC) No 22/2006 of 25 September 2006 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (ROME II)

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006AG0022:EN:HTML

Joint text approved by the Conciliation Committee, of 25 June 2007, provisional version, C6-0142/2007

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+JOINT-TEXT+C6-2007-0142+0+DOC+PDF+V0//EN&language=EN

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