

# The Relationship between the Rome II Regulation and the 1973 Hague Convention

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## ABSTRACT

An analysis of the 1973 Hague Convention on the law applicable to product liability and the Rome II Regulation leads to the conclusion that the former takes precedence. What is more, both the explanatory report to the Hague Convention and case law from the Court of Justice of the European Union agree that in case there is lacunae in the Hague Convention, the answer should be sought in the Rome II Regulation.

## Key words

Rome II Regulation, product liability, 1973 Hague Convention on the law applicable to product liability

## I. WHICH OF THE TWO TAKES PRECEDENCE? A QUESTION OF DOUBLE SUBSIDIARITY

Article 28(1) of the Rome II Regulation stipulates that it is subsidiary to any international conventions to which one or more Member States are parties when the Regulation is adopted, and contains choice-of-law rules for non-contractual obligations. The 1973 Hague Convention on the Law Applicable to Products Liability is (1) an international convention, (2) to which Croatia, Finland, France, Luxembourg, the Netherlands, Slovenia and Spain were parties when the Rome II Regulation was adopted, and (3) it contains choice-of-law rules for non-contractual obligations, viz product liability. Article 28(2) makes an exception from this rule if the only parties to the international convention are EU Member States, but since there are four so-called third countries that are also parties to the Hague

Convention – one of which is Norway<sup>1</sup> – it would appear that in those Member States that have ratified the Hague Convention, within its substantive scope, its rules take precedence over those of the Rome II Regulation.

A complicating factor is that in its Article 15, the Hague Convention *also* stipulates that it is subsidiary to conventions ‘in special fields’ to which the Contracting States are or may become parties and which contain provisions concerning products liability. The Rome II Regulation is not a convention in itself, but as an outflow of the EC Treaty (and now the TFEU) it is submitted that the rule is still relevant. If both instruments yield to other instruments, which of them takes precedence?

There are two ways of reasoning and both lead me to the conclusion that the 1973 Hague Convention takes precedence. The first way of looking at the problem is to conclude that even though the Hague Convention states that it does not take precedence over other instruments, it will only yield to such instruments that claim precedence. Since Rome II does not, the Hague Convention takes precedence.

The second way of looking at the problem is more complicated. Article 15 of the Hague Convention only states that it gives precedence to ‘other Conventions in *special fields*’ (emphasis added). The interpretation hangs on what meaning is affixed to the expression ‘special fields’. The explanatory report to the Convention by Willis Reese (the Reese Report) notes that the provision ‘would leave the Contracting States free to adhere in the future to conventions dealing with such special subjects as maritime law, aircraft and pollution [whereas] it would not permit two Contracting States’ to enter into a bilateral convention on the law governing products liability in general, since such a convention would cover exactly the same ground as does the present Convention.<sup>2</sup>

It is clear that the Rome II Regulation covers products liability in general. The fact that it also covers a number of non-contractual obligations other than those arising out of product liability does not change this. Therefore, we again come to the conclusion that the 1973 Hague Convention takes precedence.<sup>3</sup> However, there are limits set by the CJEU concerning the extent to which international conventions may be given precedence. The case law in question is given in the application of the Brussels I Regulation<sup>4</sup> but there is nothing that would indicate that it would not also be relevant here. In *TNT Express* the Court held that the application of an international convention given precedence ‘cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union.’<sup>5</sup> The Court has repeated this position in *Nickel & Goeldner Spedition* and *Brite Strike Technologies*.<sup>6</sup>

1. The others are Macedonia, Montenegro and Serbia.

2. Willis L M Reese, *Explanatory Report on the 1973 Hague Products Liability Convention* (1974), 28 <<https://assets.hcch.net/upload/expl22.pdf>> accessed 19 January 2019.

3. This is the general conclusion in legal writing and I have yet to see a dissenting opinion.

4. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1. The case concerned the former Brussels I Regulation, but the relevant provision is unchanged.

5. Case C-533/08 *TNT Express* [2010] OJ C44/32, para 49.

6. Case C-157/13 *Nickel & Goeldner Spedition* [2014] OJ C395/11; Case C-230/15 *Brite Strike Technologies* [2016] OJ C335/21.

Even so, given that the Court has specified the relevant principles as (1) free movement of judgments in civil and commercial matters, (2) predictability as to the courts having jurisdiction, (3) sound administration of justice (whatever that means), (4) minimisation of the risk of concurrent proceedings, and (5) mutual trust in the administration of justice in the European Union, it is unlikely that anything in the 1973 Hague Convention could be considered as violating those principles. One should note that in the aforementioned *Nickel & Goeldner Spedition* and *Brite Strike Technologies* cases, the Court found no violation of the principles, and the relevant provisions of the CMR Convention<sup>7</sup> and the Benelux Convention on Intellectual Property<sup>8</sup> could take priority over the Brussels I Regulation.

## 2. LACUNAE IN THE 1973 HAGUE CONVENTION

In spite of being a general convention on the law applicable to product liability, there are a number of questions that are left unanswered. Among the questions that are left unanswered by the Convention are (1) the effect of choice-of-law clauses, (2) the law applicable to the right to take direct action against insurers, (3) subrogation, (4) multiple liability, and (5) overriding mandatory provisions (internationally mandatory rules). However, these questions are explicitly addressed in the Rome II Regulation. If, in the application of the Hague Convention in a Member State bound by the Rome II Regulation, a question concerning one of these questions should arise, should the explicit rules of Rome II be applied, or are courts of Member States free to interpret the Hague Convention as best they can in order to fill in the lacunae?

Luckily, the message from both the Hague and Luxembourg are one and the same: apply the explicit rules in the Rome II Regulation. The explanatory report to the Hague Convention makes it clear that the drafters of the Convention left such questions to the private international law rules of the forum.<sup>9</sup> That would now be the Rome II Regulation in the EU Member States bound by it.<sup>10</sup> The Court of Justice has also made it clear that in the case that an international convention given precedence before rules of EU law does not contain rules concerning a specific question, the EU rules apply.<sup>11</sup>

In theory, the fact that the CJEU is not competent to interpret the Hague Convention to decide whether a particular matter is covered by the Convention or not could be problematic.<sup>12</sup> However, there is widespread agreement that Article 5 of the Rome II Regulation and the 1973 Hague Convention have the same substantive scope. What is more, the explanatory report to the convention is clear about which legal questions are excluded from the scope of the Convention, and it is unlikely that this should cause any practical problems.

7. Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956).

8. Benelux Convention on Intellectual Property (Trade Marks and Designs) (The Hague, 25 February 2005).

9. Reese (n 2) 23 f.

10. In all Member States with the exception of Denmark.

11. Case C-406/92 *Tatry* [1994] ECR I-5439; Case C-533/08 *TNT Express* (n 5).

12. See Case C-533/08 *TNT Express* (n 5) paras 61-63 with further references to earlier case-law.