

Crossing Borders: What Happens When Rome Meets The Hague

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Antoinette Collignon-Smit Sibinga looks at the complexities that can arise in road accidents with a jurisdictional flavour and, in particular, the different ways that cases can be dealt with depending on whether Rome II or the Hague Convention is applicable. She concludes that whilst two contradictory conventions can apply there will continue to be unnecessary uncertainty and complexity.

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Introduction

John Bull, an English national holidaying in the Netherlands, was involved in a traffic accident. On January 2, 2014, his car with English registration plates was hit by a car, also bearing English plates, driven by Andrew McCloud, a Scot living in Edinburgh, who had borrowed the car from a friend in England. John sustained serious injuries and demanded damages from the English motor liability insurer. Under Council Regulation 44/2001 (“Brussels I”),¹ John may start proceedings against those insurers in either England (as the place of business of the insurers) or in the Netherlands (where the accident took place).

The competent court will then decide which law applies, based on the rules of private international law. Although Council Regulation 64/2007 (“Rome II”)² applies within Europe, it does not mean that all countries in Europe apply that regulation to traffic accidents. The Netherlands for instance, unlike England, is a contracting State to the Hague Traffic Accident Convention.³ This convention supersedes Rome II,⁴ and what’s more, courts apply this convention even if the applicable law is not that of a Contracting State.⁵ If John turns to the English court, Rome II will be applied and, in consequence, Dutch law.⁶ A Dutch Court will apply the Hague Traffic Accident Convention. As both cars bear English registration plates, this will lead to English law.⁷

Before deciding where to sue the Scottish driver, John will have to appraise where he stands the best chance of success. In his decision he should consider differences in procedural law, such as evidentiary rules, how expert opinions are obtained and assessed, the extent of extrajudicial costs and procedural costs. Substantive law including liability, causality, loss, limitation periods and time limits also varies per country.

This article discusses the main differences between Rome II and the Hague Traffic Accident Convention, in terms of object and scope, governing law, choice of law and the law of evidence. It will be clear that the differences are major and that the choice of court may have a major impact on the outcome and the size of damages.

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¹ Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

² Regulation 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (“Rome II”).

³ Convention on the Law Applicable to Traffic Accidents, May 4, 1971 Trb. 1971, 118. The Convention can be found at www.hcch.net under “Conventions”. [Accessed January 28, 2014.]

⁴ Rome II art.28.1 stipulates that the Regulation does not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted.

⁵ Hague Traffic Accident Convention art.11. This article stipulates that the Convention shall be independent of any requirement of reciprocity. It shall be applied even if the applicable law is not that of the contracting state.

⁶ Rome II art.4.1.

⁷ Hague Traffic Accident Convention art.1.

Object of Rome II and the Hague Traffic Accident Convention

The sixth recital of Rome II shows its object is to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments. For this purpose a set of conflict-of-law rules has been included designating the same national law irrespective of the country of the court in which an action is brought.

The object of the Hague Traffic Accident Convention is to create a set of clear and simple rules to determine which law governs international traffic accidents.⁸

Scope of application of Rome II

European Regulation 865/2007 (“Rome II”) applies to all EU Member States with the exception of Denmark, with regards to non-contractual obligations from January 11, 2009,⁹ onwards. This means that the Regulation applies in 27 European countries.

It follows from the preamble to Rome II (recital 7) that the substantive scope should be consistent with Brussels I and Rome I.¹⁰ The term non-contractual obligation should be understood as an autonomous concept.¹¹ The definition of the concept of obligations arising out of tort can be tied in with the interpretation of this concept in Brussels I.

Scope of application of the Hague Traffic Accident Convention

At the time of writing 22 States have ratified the Hague Traffic Accident Convention.¹² Of these 18 are EU Member States.

The Hague Traffic Accident Convention only determines the law applicable to civil non-contractual liability arising from traffic accidents.¹³ As each country has its own definition of the term “non-contractual”, there may be differences. An example: an English passenger in a taxi gets injured in a traffic accident outside England. Depending on the country where it is filed, the claim may be qualified as contractual or non-contractual if that country applies the Hague Traffic Accident Convention.

The Hague Traffic Accident Convention understands traffic accidents as accidents that involve one or more vehicles, whether motorised or not, and are connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access.¹⁴

It is evident from the explanatory report on the Hague Traffic Accident Convention that almost any means suitable to carry people, animals or things is a vehicle in the sense of the Convention. The concept of “road” should be broadly interpreted. This means that almost every collision or crash is covered by the Convention, except for skiing accidents involving ski tows.¹⁵

⁸ See also www.hcch.net under “Conventions”: Overview of the Hague Convention of May 4, 1971 on the Law Applicable to Traffic Accidents. [Accessed January 28, 2014.]

⁹ Rome II Recital 20 preamble. In *Homawoo v GMF Assurances SA*, November 17, 2011 the EU Court of Justice held that Rome II governed non-contractual disputes after January 11, 2009 (*Homawoo v GMF Assurances SA* (C-412/10) [2012] I.L.Pr. 2).

¹⁰ Recital 7 in preamble to Rome II.

¹¹ Recital 11 in preamble to Rome II. In *Kalfelis v Bankhaus Schroder Munchmeyer Hengst & Co (t/a HEMA Beteiligungsgesellschaft mbH)* (189/87) [1988] E.C.R. 5565, the Court of Justice ruled in 18 that the term “matters relating to tort, delict or quasi-delict” within the meaning of art.5(3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a “contract”.

¹² The contracting states are: Belgium, Bosnia and Herzegovina, France, Croatia, Latvia, Lithuania, Luxemburg, Macedonia, Morocco, Montenegro, Netherlands, Ukraine, Austria, Poland, Serbia, Slovenia, Slovakia, Spain, Czech Republic, Belarus and Switzerland.

¹³ Hague Traffic Accident Convention art.1.1.

¹⁴ Hague Traffic Accident Convention art.1.2.

¹⁵ See Dutch Supreme Court, November 23, 2001, RvdW 2001, 90.

The Hague Traffic Accident Convention does not apply to recourse actions¹⁶ and subrogation, actions against parties maintaining roads and the liability of manufacturers, sellers or repairers of vehicles.¹⁷ Those actions are governed by Rome II.¹⁸

Applicable law under Rome II

General rule

The general rule of Rome II is *lex loci damni*.¹⁹ This means the law of the place where the damage occurs, regardless of the country in which the event causing the loss has occurred and regardless of the countries in which the indirect consequences of that event occur.²⁰ As the preamble²¹ shows, in cases of personal injury or damage to property the country in which the damage occurs or injury is sustained is leading. This means that to a single-vehicle traffic accident in Germany in which an English national sustains injuries, German law applies.

Exceptions

The Regulation provides for several exceptions to the general rule, the first one being art.4.2: if the party whose liability is at issue and the party sustaining damage both have their habitual residence in the same country at the time when the damage occurred, the law of that country will apply.

Thus, if two English holidaymakers, who both have rented cars in Germany, collide in France, English law will apply by virtue of art.4.2.

The second exception to the general rule is contained in art.4.3: if it is clear from all circumstances that the tort is manifestly closer connected with a country other than that referred to in paras 1 and 2, the law of that other country will apply. A closer connection, so the article explains, could arise from a pre-existing relationship between the parties that is closely connected with the tort, such as a contract.

Recital 18 cautions that art.4.3 should be considered an escape clause from paras 1 and 2, where it is apparent from all circumstances of the case that the tort has a manifestly closer connection with another Member State.

Applicable law under Hague Traffic Accident Convention

As mentioned earlier, the Hague Traffic Accident Convention lays down an entirely different set of rules.

General rule

The general rule contained in art.3 is that the internal law of the State where the accident occurred applies (*lex loci delicti*).²² This means that in case of a traffic accident in Spain involving an English car and a Spanish car Spanish law would apply.

¹⁶ Hague Traffic Accident Convention art. 2(4).

¹⁷ Hague Traffic Accident Convention art. 2(1).

¹⁸ In product liability cases such as exploded airbags, the Hague Product Liability Convention may apply (Convention on the Law Applicable to Products Liability of October 2, 1973. Contracting parties are Finland, France, Croatia, Luxemburg, Macedonia, Montenegro, the Netherlands, Norway, Serbia, Slovenia and Spain).

¹⁹ Rome II art.4.1.

²⁰ See also Rome II recital 17.

²¹ See Rome II recital 17 second sentence.

²² See, e.g. Court of Amsterdam July 26, 2012, LJN BX4272, para.4.5.

Exceptions

Articles 4, 5 and 6 of the Convention list several cases in which *lex loci delicti* has to give way to a different legal system i.e. that of the State in which the vehicle involved has been registered (*lex vehiculi*).

If a vehicle has not been registered (such as bicycles) or registered in more than one state, the law of the state in which the vehicle is usually stationed (*lex loci stabuli*)²³ takes the place of the law of the State of registration.

Of course, there are exceptions:

Single-Vehicle Accidents (article 4 part a)

If in an accident just one vehicle is involved that is registered in another country, *lex vehiculi* governs liability towards three categories of persons, i.e.:

- Towards the driver, holder, owner or any other person having control of or an interest in the vehicle, regardless of his habitual residence;
- Towards a passenger, provided that his habitual residence is in a state other than the one where the accident occurred; and
- Towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.

The applicable law is determined for each victim separately.²⁴ However, if more than one person may be liable for the consequences of the accident one and the same law applies to all of them, so art.4 implies.

Multiple Vehicles Registered in Same State (article 4 part b)

Lex vehiculi also applies if all the vehicles involved in a traffic accident are registered in the same State, so art.4 pt b stipulates. If they are not, the general rule of *lex loci delicti* applies.

The word “involved” does not presume “at fault”. Case law is quick to assume that another vehicle, even if it has not collided with another vehicle, is “involved” in the accident. An example is a driver who has to swerve to avoid a lorry that fails to yield right of way. Although the two vehicles do not collide, the lorry is considered to have played a significant part in the accident and it is no longer a single-vehicle accident as understood by art.4 pt a. In that case the general rule of art.3 is applicable. Even a properly parked car or motorcycle could be “involved” in the sense of this article.²⁵

Multiple Persons Outside Vehicle Having Habitual Residence in the State of Registration (art.4 pt c)

If multiple persons outside the vehicle are involved and possibly liable, *lex vehiculi* applies only if all those persons have their habitual residence in the State in which the vehicles involved are registered; if not, the general rule is applicable (*lex loci delicti*). This holds true also if those persons are victims of the accident. In Spain, a lorry with English plates hits a motorcycle that is registered in England, but whose driver lives in France. The driver of the motorcycle gets injured. The accident was caused by two Spanish nationals living in England, who did not look before suddenly crossing the road. In this case English law applies.

²³ Hague Traffic Accident Convention art.6.

²⁴ Hague Traffic Accident Convention art.4 pt a, final sentence.

²⁵ See, e.g. Arnhem Court of Appeal, May 18, 2004, NIPR 2004, 238 and Arnhem Court of Appeal May 18, 2004, LJN AP0037.

Damage to Other Goods (article 5)

The Convention furthermore provides for several rules on liability for goods carried in the vehicle. A distinction is made between goods belonging to the passengers, other goods carried and other goods outside the vehicle.

Liability for passenger goods is governed by the same law that pursuant to arts 3 and 4 governs liability towards the passenger (*lex vehiculi*) unless the passenger resides in the state in which the accident occurred. Damage to other goods carried is governed by the same law as the one applicable to liability towards the owner of the vehicle (arts 3 and 4). In other words: in terms of the law applicable damage to those goods is equated to damage to the vehicle. To other goods outside the vehicle *lex loci* applies, with the exception of damage to personal property of a victim outside the vehicle. Here the law governing the victim's claims is applicable.

Examples

The above outlines the differences in the rules of Rome II and the Hague Traffic Accident Convention. How those differences can influence the outcome in practice is illustrated below.

John is touring the Netherlands in a car with French plates that he has borrowed from Gregory, also a resident of England. The car hits a tree. No other vehicles are involved in the accident. Not only John is hurt in the accident, but also his passenger, Natasha, who lives in Belgium. As he lay unconscious under the tree Peter, an English national living in France, is hurt as well.

Upon application of Rome II the liability of driver John towards the owner of the car is governed by English law.²⁶ John's liability towards Natasha is governed by Dutch law,²⁷ which is also applicable to Peter's claim.²⁸ If Peter had had his habitual residence in England, English law would be applicable.²⁹

If the court applies the Hague Traffic Accident Convention, the liability of driver John towards the owner of the car would be subject to French law.³⁰ His liability towards his passenger Natasha would be governed by French law.³¹ Had Natasha been living in the Netherlands, Dutch law would have been applicable under *lex loci delicti*.³² And finally, his liability towards Peter would be subject to French law.³³

A road accident occurs in Austria when Rudolf, a resident of Germany, driving his car with German plates, commits an error. He hits a car with German plates rented by an English family taking a winter sports holiday. The English family sustains injuries. The application of Rome II indicates that Austrian law³⁴ should be applied to the English family's claims, while the Hague Traffic Accident Convention would point to German law.

Choice of law

Rome II

Under Rome II the parties can make a choice of law. The preamble³⁵ explains that:

²⁶ Rome II art.4.2.

²⁷ Rome II art.4.1 *lex loci damni* Rome II.

²⁸ Rome II art.4.1 Rome II.

²⁹ Rome II art.4.2 Rome II.

³⁰ Hague Traffic Accident Convention art.4 pt a.

³¹ Hague Traffic Accident Convention art.4 under pt a as Natasha lives in Belgium, after all.

³² In that case Hague Traffic Accident Convention art.3 applies.

³³ Hague Traffic Accident Convention art.4 under a as Peter resides habitually in France, the State where the car is registered.

³⁴ Rome II art.4.1.

³⁵ Rome II Preamble Recitals 31 and 32.

“To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.”

The agreement may be concluded only after the event giving rise to the damage has occurred.³⁶

That a choice of law can be implied is apparent from a judgment of the Court of Zutphen of August 15, 2012³⁷ in a case in which the correspondence between the parties referred to Dutch law and Dutch case law. This was enough to assume an implicit choice of law in favour of Dutch law, as the other party did not argue that the law of another country applied.

Hague Traffic Accident Convention

Although the Hague Traffic Accident Convention does not say so in so many words, Dutch case law allows an implicit choice of law, and even before the accident occurs.³⁸ Another interpretation suggests that in events not provided for by the Hague Traffic Accident Convention, Rome II applies. In that case a choice of law can be made only after the accident. The object and purpose of Rome II lead me to agree with this latter interpretation.

Evidence

Rome II

According to Rome II art.1.3 does not apply to evidence and procedure, without prejudice to arts 21 and 22. Article 22.1 stipulates that the law governing a non-contractual obligation under Rome II applies to the extent that it contains rules which raise presumptions of law or determine the burden of proof in matters of non-contractual obligations. The reason that presumptions of law and the division of the burden of proof come within the scope of Rome II is that they are part of substantive rules of evidence that in non-contractual obligations help to specify the obligations between parties and therefore cannot be isolated from the law governing those non-contractual obligations.³⁹

Hague Traffic Accident Convention

The Hague Traffic Accident Convention does not contain any articles on evidence. Again, it is fair to assume that failing such regulation Rome II applies. In applying the convention the Dutch courts in practice, therefore, make a distinction between formal and substantive rules of evidence. The procedural rules are decided based on *lex fori* while the substantive law of evidence is subject to the rules of *lex causae*.

³⁶ Rome II art.14.1a. Only if the parties have commercial dealings with each other, may the choice of law be laid down in a clause before the event giving rise to the damage has occurred.

³⁷ Court of Zutphen August 15, 2012, ECLI:NL:RBZUT:2012:BX4722.

³⁸ See Court of Amsterdam April 12, 1993, NIPR 1994, No.147, Court of The Hague December 13, 1995, NIPR 1997, No.102, Court of Zwolle February 4, 1998, NIPR 1998, No.305, Court of Arnhem February 18, 2009, LJN BH3775, para.4.3.

³⁹ See interpretation of the Convention on the Law applicable to Contractual Obligations that is valid for Rome II as well as Rome II: M. Giulano and P. Lagarde, “Report on the Convention on the law applicable to contractual obligations” OJ 1980, C 282, p.36.

Review Clause

Article 30 of Rome II contains a review clause requiring the Commission to submit a report on the application of the regulation and proposals to amend the regulation, if necessary. Part of the report is a study of the effects of art.28 regarding the Hague Traffic Accident Convention.

That study has meanwhile been performed and was published in 2012.⁴⁰ The author made a comparison between Rome II, the Hague Traffic Accident Convention and the Motor Insurance Directives (“MID”). One of the conclusions was that application of the conventions leads to forum shopping, and is not in the interest of victim protection. Several suggestions were made for amending Rome II, such as applying the law of the country in which the victim lives to compensation of the loss, should the victim wish to file claims in his or her own country based on direct action against the insurer. To my knowledge the European Commission has not yet taken any further action in this respect.

Conclusion

Under art.28.1, the Hague Traffic Accident Convention prevails over Rome II. The Hague Traffic Accident Convention is valid in 18 European countries, which is almost half of all EU Member States.

The objects of the two conventions are not the same. The rules applied to decide on the applicable law are essentially different. While Rome II applies *lex loci damni* principle, linking up with the parties’ habitual residence, the Hague Traffic Accident Convention generally starts from *lex loci delicti* and in some cases the country in which the vehicle(s) involved are registered.

Side-by-side application of the two conventions has produced a system within Europe in which cross-border road accidents are subject to the law of different countries, depending on the court where the action is filed. This holds particularly true in single-vehicle accidents, or accidents in which both parties have their residence in the same country or involving cars registered in the same country.

In cross-border cases it is vital, therefore, to first establish whether Rome II or The Hague Traffic Accident Convention applies and then decide where it would be best to launch the action with the most suitable governing law. For this purpose lawyers handling such cases should consult their counterparts abroad in time about the procedural and substantive aspects, including loss and time limits, to allow for a balanced consideration.

As long as both conventions exist side by side, this complex and confusing system will continue, in my opinion. This is counter to the objective of Rome II to create unity and clarity within Europe. Article 28.1 of Rome II should be deleted and Rome II applied to cross-border road accidents.

⁴⁰ J.. Papettas, “Choice of law for cross-border road traffic accidents” at <http://www.europa.eu/studies>. [Accessed January 28, 2014.]