Scope of Application and Interaction between the Brussels I-bis, Rome I and Rome II Regulations

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Outline

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A. Objectives and Principles: Complementary goals and infrastructural differences

**Overarching goals**

- Decrease transaction costs and increase predictability
- Ensure the equal treatment of the market participants and individuals (see protection of structurally weaker parties)

**Individual goals**

**Bx I-bis:**

Provide access to the courts of the EU MS and governing procedural justice, while ensuring the greatest possible protection to the defendant

**Rome I & II:**

Provide the means to identify the law that governs obligations, primarily relying on party autonomy and proximity of the dispute to the court
A. Objectives and Principles: Complementary goals and infrastructural differences

Alignment of *forum* and *ius* is not an objective of the synergy of the Bx I-bis and Rome I&II Regulations

Universal character: Art. 2 Rome I and Art. 3 Rome II

Different criteria for jurisdiction and applicable law
A. Objectives and Principles: Complementary goals and infrastructural differences

**Interpretation: Systematic and consistent, yet not necessarily coinciding**

- CJEU, *Handte*, Case C-26/91, para. 15, and *Réunion Européenne and Others*, Case C-51/97, para. 17, the CJEU ruled that Article 5(1) of the 1968 Brussels Convention is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.

- Recital 7 of the Rome I & II Regulation advocating for consistent interpretation

- Recitals 17 and 24 Rome I

- Scope of Bx I-bis and Rome I: “matters relating to a contract” (Art. 7(1) Bx I-bis) / “contractual obligation” Rome I: the notion under the Bx I-bis it extends to a moment in the past and includes, e.g., cases in which the existence of a contract is questioned (see also CJEU, *Effer Spa*, Case C-38/81, paras 7-8); see, however, Art. 10 Rome I
B. Systematic Analysis: Predictability vs Flexibility

Court discretion vel non

Bx I-bis: CJEU, Kolassa, Case C- 375/13: the Bx I-bis Regulation sets out hard-and-fast rules, hence serving the interest of legal certainty and procedural economy: the plaintiff should be able to identify the court before which s/he may bring an action and the defendant should be able to foresee the court before which s/he may be sued. No space for forum non-conveniens.

Rome I & II: Escape clauses grant discretion of the court to pursue and advance proximity, and displace the law otherwise applicable, absent a choice of law. See Art. 4(5) Rome I and Article 4(3) Rome II. Similarly, see also Rome II at Art. 5(2) with regard to products liability; Article 10(4) on unjust enrichment; Article 11(4) on negotiorum gestio; and Article 12(2)(c) on pre-contractual liability.

Hence, while the Bx I-bis Regulation operates on the assumption that the rules on jurisdiction it provides are inherently the most appropriate, in the Rome I & II Regulations flexibility in individual cases fosters international harmonization.
B. Systematic Analysis: Predictability vs Flexibility

Party autonomy

Recital 11 Rome I describes party autonomy as “one of the cornerstones of the system of conflict-of-laws in matters of contractual obligations”.

Rome II Regulation, in turn, dedicates Art. 14 to party autonomy but, compared to Rome I, accords to party autonomy a less important role (Rome I is premised on party autonomy, Rome II is premised on proximity).

Bx I-bis is based on the same principles when, at Article 25, it provides for the possibility that the parties select the forum that is to decide their dispute (subject to the exceptions put forth in order to protect weaker parties and to the cases of exclusive jurisdiction).

N.B.: a forum selection agreement does not imply a choice of law: according to Recital 12 Rome I, an agreement between the parties to confer on one or more courts of a Member State exclusive jurisdiction to determine disputes under the contract is only one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.
B. Systematic Analysis: Predictability vs Flexibility

**Protection of the weaker party**

Rome I:
- Art. 6(2): in a consumer contract, choice of law is permitted but the chosen law cannot deprive the consumer of the protection that is assured by those provisions of the law that would have been applicable in the absence of the choice;
- Similarly, Art. 8 on individual employment contracts;
- See also Art. 4(1)(e) on franchise contracts in accordance to which the applicable law is that of the habitual residence of the franchisee.

Rome II, the idea of the protection of the weaker party initially seems to be less apparent. However,
- it becomes more apparent if we think that party autonomy before the dispute arises is reserved only to situations where both parties pursue commercial activity (Art. 14);
- This is also emphasized at Recital 31 of the Regulation;
- Similarly, Rome II provides protection to the weaker party in case of product liability (where the law of the country of habitual residence of the person harmed applies) and unfair competition (where the law of the country in whose territory competition or consumer interests were harmed applies).
C. Conclusions

Fundamentally different rationales of rules on jurisdiction and conflict of laws are preserved in the Regulations.

However

Complementary design, genetic similarities, and complementary material scope of application plead in favour of a systematic and teleological approach when interpreting the Regulations’ respective legal terms.
Selected readings


• A. DICKINSON (ed.), *The Rome II Regulation. The Law Applicable to Non-Contractual Obligations*, Oxford, 2010 and supplements


• F. FERRARI (ed.), *Concise Commentary on the Rome I Regulation*, Cambridge, 2020


Thank you for your attention!
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