



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 9 December 1999

11982/99

LIMITE

JUSTCIV 150

NOTE

from :	General Secretariat of the Council
to :	Committee on Civil Law (Rome II)
No. prev. doc.:	10231/99 JUSTCIV 112
Subject :	Draft instrument on the law applicable to non contractual obligations (state of work)

1. During the second semester of 1999, the Committee examined in particular Articles 1(i), 3 to 3B and 19 of the draft instrument on the law applicable to non contractual obligations.
2. Delegations will find herewith the state of work. The outcome of proceedings of the meetings during the second semester are set out in docs 10875/99 JUSTCIV 130 and 11981/99 JUSTCIV 149.

DRAFT INSTRUMENT
ON THE LAW APPLICABLE TO NON CONTRACTUAL OBLIGATIONS

TITLE I

Scope

Article 1

(Scope)

1. The rules of this [instrument] shall determine the law applicable to non contractual obligations in any situation involving a choice between the laws of different countries.
2. This [instrument] shall not apply to :
 - a) [questions involving the status or legal capacity of natural persons]; ⁽¹⁾
 - b) non-contractual obligations relating to :
 - [- wills and succession,] ⁽²⁾
 - [- rights in property arising out of a matrimonial relationship,] ⁽³⁾
 - rights and duties arising out of a family or analogous relationship; ⁽⁴⁾
 - c) [obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;] ⁽⁵⁾

⁽¹⁾ Several delegations were of the opinion that this paragraph should be deleted.

⁽²⁾ Several delegations asked for the deletion of this indent whilst few of them considered that wills and succession should be maintained.

⁽³⁾ Several delegations asked for the deletion of this indent whilst few of them considered that rights in property arising out of a matrimonial relationship should be maintained.

⁽⁴⁾ One delegation considered that maintenance obligations should not be excluded from the scope of application.

⁽⁵⁾ Several delegations were of the opinion that this paragraph should be deleted taking into account the fact that the Geneva Convention already covers these obligations.

- d) [questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporated and] the personal liability of officers and members as such for the obligations of the company or body; ⁽¹⁾
- e) the non-contractual obligations between settlers, trustees and beneficiaries; ⁽²⁾
- f) evidence and procedure, without prejudice to Article 18; ⁽³⁾
- g) liability for acts or omissions performed in the exercise of public authority;
- h) [intellectual property rights;] ⁽⁴⁾
- i) liability for nuclear injury; ⁽⁵⁾

Article 2

(Application of law of non-contracting States)

Any law specified by this [instrument] shall be applied whether or not it is the law of a Contracting State.

(1) Several delegations suggested to delete the text in brackets.

(2) The UK and IRL delegations were invited to examine to which extent this paragraph is needed.

(3) The Committee agreed in principle on the idea of retaining this paragraph and decided to examine at a later stage whether this paragraph should be mentioned in Article 1 or Article 21.

(4) The Committee agreed to reexamine this paragraph at a later stage.

(5) Some delegations suggested excluding liability for nuclear injury only insofar as nuclear accidents are concerned. Other delegations proposed deleting point i). The Committee agreed to reexamine this paragraph at a later stage.

TITLE II

Obligations arising from delict

Article 3

(General rule)

1. The law applicable to a tort or delict shall be the law of the country where the injury occurs irrespective of where the consequences of that injury arise.
2. For the purpose of paragraph 1, the word "injury" includes [in particular] ¹ injury to a person or property as well as economic loss.
3. [If injury is sustained by a person in more than one country, and proceedings are brought before the courts of the country where the act or omission giving rise to injury occurred, the law of that country shall apply.]

Article 3 A

(Exceptional displacement)

1. If it appears from the circumstances that a tort or delict is substantially more closely connected with a country other than that identified in accordance with Article 3, the law of that other country shall apply.
2. A substantially closer connection to another country may, in particular, be based on:
 - the parties' common habitual residence [or, in the case of a legal person...] ² at the time when the injury occurred;
 - or
 - a special relationship between the parties, such as a contractual relationship related to the tort or delict in question.

¹ Many delegations were of the view that the word "in particular" should be deleted. For this reason, delegations were invited to examine if there are other elements that should be added to those already mentioned in paragraph 2.

² To be examined in a future meeting.

Article 3 B

(Freedom of choice)

1. The parties may choose the law applicable to a non contractual obligation [or to a reasonably separable part of it]¹ after the occurrence of an event giving rise to inquiry²
2. The choice must be expressed [or demonstrated with reasonable certainty by the circumstances of the case].³
3. The choice of law shall not affect the rights and obligations of third parties.
4. (Deleted) ⁴
5. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract.

Article 4

(Areas not subject to territorial sovereignty)

1. The law applicable to an injury taking [immediate] detrimental effect in areas not subject to territorial sovereignty of a State shall be the law of the country in which the means of carriage or the installation connected with the harmful event is registered or whose flag such means of carriage or the installation flies or to which it is linked by similar instances.
2. If there is no such connection with any country or if there is such connection with more than one country, the law of the country with which the case is most closely connected shall apply.

¹ The issue of depeçage will be examined in a future meeting.

² Some few delegations would prefer that the parties choose the law applicable at any time. Many delegations accept or prefer to limit this choice after the occurrence of the event given rise to a non contractual obligation.

³ Several delegations suggested to delete the text in brackets.

⁴ Some delegations suggested to set out a provision protecting the weaker party.

Article 5

(Product liability)

1. The law applicable to the liability for an injury caused by a product shall be the law of the country in which the person directly suffering injury has its habitual residence or principal place of business, if that country is also
 - the country of the principal place of business of the person claimed to be liable, or
 - the country where the product was acquired.
2. In all other cases, the law applicable shall be the law of the country in which the [harmful event] [injury] occurred.

Article 6

(Unfair competition and unfair practises)

Option 1

The law applicable to an obligation arising from unfair competition or unfair practices shall be the law of the country where the competitive action or unfair practices affects competitive relations or collective consumer interests.

Option 2

The law applicable to an obligation arising from unfair competition of restrictive trade practices shall be the law of the country where the competitive action or unfair practices affect competitive relations.

Article 7
(Defamation)

[P.M.]

TITLE III

Other non contractual obligations

Article 8

(Unjust enrichment)

1. The law applicable to an obligation arising from the unlawful use of goods or property shall be the law of the country in which the goods or property were used.
2. The law applicable to an obligation arising from [enrichment by] the unlawful transfer of property shall be the law of the country in which [the enrichment by] the transfer was finalised.
3. [Notwithstanding the provisions of paragraphs 1 and 2, the law applicable to an obligation arising from the unlawful use or transfer of goods or property shall be governed by the law of the country in which such use or transfer takes effect on the party of the obligation who has not [mainly contributed or given rise] to such use of transfer.]

Article 9

(Negotiorum gestio)

The law applicable to an obligation arising from negotiorum gestio shall be governed by the law of the Country in which the [immediate or direct] effects of the negotiorum gestio occurred.

Article 10

(Actio Pauliana)

The conditions and the effects arising from an obligation where a creditor may contest a contract concluded by a debtor with a third party, endangering the satisfaction of the creditor [fulfilment of the claim], shall be determined by the law applicable to the obligation existing between the creditor and his debtor.

Article 11

(Remaining non contractual obligations)

A non contractual obligation which is not covered by any of the provisions of Title II shall be governed by the law of the country with which it is most closely connected.

Title IV

Common provisions

Article 12

(Freedom of choice)

(See Article 3 B)

Article 13

(Displacement)

(See Article 3 A)

Article 14

(Subrogation)

1. Where a person, the creditor, has a non contractual claim upon another, the debtor, and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.
2. The same rule applies where several persons are subject to a non contractual claim arising from the same act or omission and one of them has satisfied the creditor.

Article 15

(Right of direct action)

A person having a non contractual claim, the creditor, against another person, the debtor, shall have a right of direct action against any third person insofar as this latter person has a duty vis à vis the debtor if, and to the extent, either the law applicable to the duty of the third party vis à vis the debtor or the law applicable under this [instrument] provides for such a right of direct action, notwithstanding Article 3B(3).

Article 16

(Safety and police regulations)

Notwithstanding the provisions provided for in Articles 3 to 14, regard shall be had to the safety and police regulations of the country where the action or omission giving rise to the obligation took place.

Article 17

(Formal validity)

An unilateral act or statement intended to have legal effect relating to an existing non contractual obligation or creating a non contractual obligation is formally valid if it satisfies the formal requirements of the law applicable to a non contractual obligation under this [instrument] or of the law of the country where the act was done or the statement was made.

Article 18

(Burden of proof)

1. The law governing the obligation under this [instrument] applies to the extent that it contains rules which raise presumptions of law or determine the burden of proof.
2. [Non contractual obligations, acts and missions intended to have legal effect on a] [A] non contractual obligation may be proved by any mode of proof recognised by the law of the forum or by any of the laws [applicable under this instrument] [referred to in Article 17] provided that such mode of proof can be administered by the forum.

Article 19

(Mandatory rules)

Nothing in this [instrument] shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non contractual obligation.

Article 20

(Public policy)

The application of a rule of the law of any country specified by this [instrument] may be refused only if such application is manifestly incompatible with the public policy of the forum.

Article 21

(Scope of the applicable law)

1. The law applicable under Articles 3 to 14 of this [instrument] shall determine, in particular :
 - [a) the interpretation]
 - b) the basis and extent of liability
 - c) the grounds for exemption from liability, any limitation of the obligation and any decision on the obligation
 - d) transfer of claims by other means than assignment
 - e) persons who may claim injuries in their own right
 - f) obligations resulting from the acts or omissions of others
 - g) the existence and the kinds of injury for which compensation may be due
 - h) the form of compensation and its extent
 - i) the various ways of extinguishing obligations and rules of prescription and limitation of actions, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Article 22

(Exclusion of renvoi)

The application of the law of any country specified by this [instrument] means the application of the rules of law in force in that country other than its rules of private international law.

Article 23

(No retrospective effect)

This [instrument] shall apply in a Member State to non contractual obligations occurred after the date on which this [instrument] has entered into force with respect to that State.

Article 24

(States with more than one legal system)

1. Where a State comprises several territorial units each of which has its own rules of law in respect of non contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this [instrument].
2. A State within which different territorial units have their own rules of law in respect of non contractual obligations shall not be bound to apply this [instrument] to conflicts solely between the laws of such units.

Article 25

(Uniform interpretation)

In the interpretation and application of the preceding uniform rules, regards shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application .

Article 26

(Relationship with other instruments)

[P.M.]

TITLE V

Final provisions

[P.M.]