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NOTE

from : Presidency
to : Committee on Civil Law Matters (Rome I)

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Subject : Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)

Delegations will find herewith the text as drafted by the Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome I) and the comments made by delegations (see 13035/06 JUSTCIV 196 CODEC 948 + ADD 1 to ADD 17).

Chapter One – Scope

Article 1 – Material scope

1. This Regulation shall apply, in **situations** involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not **apply**, in particular, to revenue, customs or administrative matters.¹

2. The Regulation shall not apply to:
 - (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 12;
 - (b) obligations **arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects**, including maintenance obligations;²
 - (c) obligations arising out of **matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession**;³
 - (d) 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;⁴

¹ **The Presidency considers that a reference to the contracts concluded by the state in the exercise of state authority seems not to be necessary.**

² **A new recital will read as follows: “Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State where the court is seised.”**

³ **See the previous footnote.**

⁴ **It is suggested that the present wording is intended to cover, for instance, bills of lading. Consequently, the relationship between an issuer and a transferee of a bill of lading would be excluded from the scope of the Regulation. Be that as it may, it should be further explored which categories of negotiable/transferrable instruments should be excluded from the scope of the Regulation.**

- (e) arbitration agreements and agreements on the choice of court;
 - (f) questions governed by the law of companies and other bodies corporate or **unincorporated** such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or **unincorporated**, the personal liability of officers and members as such for the obligations of the company or body and the question whether a management body of a company or other body corporate or **unincorporated** can bind the company or body in relation to third parties;
 - (g) the constitution of trusts and the relationship between settlers, trustees and beneficiaries;
 - (h) evidence and procedure, without prejudice to Article 17;
 - (i) **contractual** obligations arising out of **dealings prior to the conclusion of a contract**.¹
3. In this Regulation, the term “Member State” shall mean Member States with the exception of Denmark (...) [and the United Kingdom].

Article 2 – Universal application

Any law specified by this **Regulation** shall be applied whether or not it is the law of a Member State.

¹ Cf. Art. 12 of the draft Rome II Regulation, see 9751/06 JUSTCIV 137 CODEC 531.

Chapter II –Uniform rules

Article 3 – Freedom of choice

1. (...) A contract shall be governed by the law chosen by the parties.
The choice **shall** be expressed or demonstrated with **[sufficient]**¹ certainty by the terms of the contract [, behaviour of the parties] or **[other] [the]** circumstances of the case. (...)²
By their choice the parties can select the law applicable to the whole or **only** a part of the contract.
2. (...)³
3. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 10 or adversely affect the rights of third parties.

¹ **All language versions should be brought into line. One option could be to qualify “certainty” with the word sufficient in English/suffisant in French/hinreichend in German.**

² **A recital shall clarify that a choice of court in itself shall not imply the choice of the law of the country of the court. However, if the second sentence of this paragraph as proposed by the Commission is to be maintained, the Presidency suggests to reformulate it as follows: “If the parties have agreed to confer exclusive jurisdiction on one or more courts or tribunals of a country to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that country.”**

³ **The Presidency suggests deleting para 2 that was worded as follows: “The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.”**

4. (...) Where all other elements relevant to the situation at the time of the **choice are located in a country other than the country the law of which has been chosen, the choice of the parties shall not** prejudice the application of **provisions** of the law of that country which cannot be derogated from by **agreement**.
5. Where (...) **all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate, as implemented in the Member State of the forum, which cannot be derogated from by agreement.**
6. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of [Articles 9, 10 and 12].

Article 4 – Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 **[and without prejudice to Articles 5 – 7], the law governing the contract** shall be determined as follows:
 - (a) a contract of sale shall be governed by the law of the country **where** the seller has his habitual residence;
 - (b) a contract for the provision of services shall be governed by the law of the country **where** the service provider has his habitual residence;¹

¹ **A recital should indicate that the concept “provision of services” should be interpreted in the same way as when applying Article 5(1)(b) of the Brussels I Regulation.**

- (c) a contract of carriage shall be governed by the law of the country **where** the carrier has his habitual residence, **[provided that the place of departure or the place of destination of the carriage or the habitual residence of the consignor or the passenger is also situated in that country;]**¹
- (d) a contract relating to a right in rem **in immovable property** or to a **tenancy of immovable property** shall be governed by the law of the country **where** the property is situated;
- (e) notwithstanding point (d), a **tenancy of immovable property concluded for temporary private use** for a period of no more than six consecutive months shall be governed by the law of the country **where** the **landlord** has his habitual residence, provided **that** the tenant is a natural person and has his habitual residence in the same country;
- (f) a contract relating to intellectual or industrial property rights shall be governed by the law of the country **where** the person who transfers or assigns the rights has his habitual residence;²
- (g) a franchise contract shall be governed by the law of the country **where** the **franchisee** has his habitual residence;³
- (h) a distribution contract shall be governed by the law of the country **where** the distributor has his habitual residence;⁴
- (i) **[a lease contract shall be governed by the law of the country where the lessor has his habitual residence;]**
- (j) **[stock exchange transactions, contracts concluded at fairs and sales by auction shall be governed by the law of the country where the stock exchange is located, the fair is held or the auction takes place;]**

¹ **The proposed addition is based on the Rome Convention extended to passenger transport. The Presidency suggests to have a debate on c) taking into account also the restriction in Article 5(2) b).**

² **It should be examined whether such a provision is needed and, if so, how it should be formulated.**

³ **It should be examined whether such a provision is needed and, if so, how it should be formulated.**

⁴ **It should be examined whether such a provision is needed and, if so, how it should be formulated.**

- (k) any other contract shall be governed by the law of the country where the party, who is required to effect the performance which is characteristic of the contract, has his habitual residence.¹
2. Where the applicable law cannot be determined pursuant to paragraph 1, the contract shall be governed by the law of the country with which it is most closely connected.
3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on the contract being very closely related to another contract or a series of contracts governed by a law other than that indicated in paragraphs 1 or 2.

Article 5 – Consumer contracts

1. A contract concluded by a natural person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, with another person ("the professional") acting in the exercise of his trade or profession shall be governed by the law of the country where the consumer has his or her habitual residence provided that:
- (a) the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence or,
- (b) by any means, directs such activities² to that country or to several countries including that country, and the contract falls within the scope of such activities.
- (...)

¹ A recital shall indicate that this subparagraph covers contracts other than those referred to in subparagraphs a)-j), including contracts where various elements of the contract would fall under different types of contract and lead to the application of different laws or which in any other way do not fit to one of the categories in that list.

² A recital should be introduced to clarify what is meant by "directing activities". The starting point for such a recital should be the text of the Council Declaration on Art. 15 of Brussels I Regulation.

Failing that, the law applicable to a consumer contract shall be determined pursuant to Article 4.

2. (...) ¹

3. Paragraph 1 shall not apply to:
 - (a) (...)
 - (b) [**a contract** of carriage other than **a contract** relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;]²
 - (c) **a contract** relating to a right in rem in **immovable property** or a **tenancy of immovable property** other than **a contract relating to the right to use immovable properties on a timeshare basis** within the meaning of Directive 94/47/EC of 26 October 1994.³
 - (d) [**a contract relating to financial instruments within the meaning of Directive 2004/39/EC**]⁴

¹ See paragraph 1.

² See Article 4(1) c).

³ A recital should clarify that this exclusion is intended to cover, *inter alia*, contracts of mortgage.

⁴ Directive 2004/39/EC of the European Parliament and the Council on markets in financial instruments amending Council Directive 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, Article 4(1)(17) and Annex I (Section C).

Article 5 a – Insurance contracts¹

Article 6 – Individual employment contracts

1. **An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3.**

Such a choice may not, however, have the result of depriving the employee of the protection afforded him by such provisions that cannot be derogated from by contract under the law that would have been applicable pursuant to paragraphs 2 and 3 in the absence of choice.

¹ **It should be examined whether the Regulation should include a provision on insurance contracts. If so, the Presidency suggests the Committee to reflect on the basis of the following text:**

1. **An insurance contract shall be governed by the law of the country where the policy holder has his habitual residence, unless otherwise provided for in paragraphs 2–4.**
2. **If taking out an insurance policy is compulsory, the insurance contract shall be governed by the law of the country which imposes the obligation to take out insurance.**
3. **Notwithstanding paragraph 1, the parties may choose in accordance with Article 3 that their contract shall be governed by the law of the country where the risk is situated [at the time when the contract is concluded]. However, Article 5(1) shall apply to a contract between a consumer and a professional as defined therein.**
4. **Paragraphs 1 – 3 shall not apply to contracts of re-insurance or contracts covering large risks as defined in Council Directives 88/357/EC and 90/618/EC, as amended.**

2. **(...) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed** by the law of the country in or from which the employee habitually carries out his work in performance of the contract. The place of performance shall not be deemed to have changed if he is temporarily employed in another country. Work carried out in another country shall be regarded as temporary if the employee is expected to resume working¹ in the country of origin after carrying out his **specific** tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer does not preclude the employee from being regarded as carrying out his work in another country temporarily (...).
- 2a. **Where the country in or from which the employee habitually carries out his work cannot be determined pursuant to paragraph 2, the contract shall be governed** by the law of the country **where** the place of business through which he was engaged is situated.
3. **Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 2a, the law of that other country shall apply.**

¹ **Further elaboration on the concept "expected to resume working" should be provided for in a recital. It should also be considered whether a fixed time limit could be introduced for what can be regarded to be "temporary".**

[Article 7 – Contracts concluded by an agent]¹

1. In the absence of a choice under Article 3, a contract between principal and agent shall be governed by the law of the country where the agent has his habitual residence, unless the agent exercises or is to exercise his main activity in the country where the principal has his habitual residence, where case the law of that country shall apply.
2. The relationship between the principal and third parties arising out of the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power, shall be governed by the law of the country where the agent had his habitual residence when he acted. However, the applicable law shall be the law of the country where the agent acted if either the principal on whose behalf he acted or the third party has his habitual residence in that country or the agent acted at an exchange or auction.
3. Notwithstanding paragraph 2, where the law applicable to a relationship covered by that paragraph has been designated in writing by the principal or the agent and expressly accepted by the other party, the law thus designated shall be applicable to these matters.
4. The law designated by paragraph 2 shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power.]

¹ **Thorough consideration of this issue seems necessary. The Commission representative has indicated that it would present further clarifications on this draft provision. If a separate article on agency were deleted, the Presidency suggests that the first paragraph of the COM proposal could be covered by a new subparagraph in Article 4(1): “a contract between principal and agent shall be governed by the law of the country where the agent has his habitual residence.” Furthermore, a new subparagraph would be added to Article 1(2): “the question whether an agent is able to bind a principal”.**

Article 8 – Overriding mandatory provisions

- [1. Mandatory rules are rules the respect for which is regarded as crucial by a country for safeguarding its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.]¹
2. Nothing in this Regulation shall restrict the application of the **overriding mandatory provisions** of the law of the forum.
3. (...) ²

Article 9 – Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
2. Nevertheless a party may rely upon the law of the country **where** he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

¹ The Presidency suggests deleting this paragraph.

² Paragraph 3 was worded as follows:

"3. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties."

Article 10 – Formal validity

1. A contract is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or the law of the country where **either** of the parties or **their agent** is present when it is concluded or the law of the country where **either** of the parties had his habitual residence at that time.
2. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation or of the law of the country where the act **was done** or the law of the country where the person who **effected** it had his habitual residence at that time.
3. Paragraphs 1 and 2 of this Article shall not apply to contracts that fall within the scope of Article 5. The form of such contracts shall be governed by the law of the country **where** the consumer has his habitual residence.
4. Notwithstanding paragraphs 1 to 3 of this Article, a contract the subject matter of which is a right **in rem** in immovable property or a **tenancy of** immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are **imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.**

Article 11 – Scope of applicable law

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
 - (a) interpretation;
 - (b) performance;

- (c) within the limits of the powers conferred on the court by its procedural law, the consequences of the total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
 - (d) the various ways of extinguishing obligations, and prescription and limitation of actions;
 - (e) the consequences of nullity of the contract.
2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country where performance takes place.

Article 12 – Incapacity¹

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 13 – Voluntary assignment [and contractual subrogation]²

1. The mutual obligations of assignor and assignee under a voluntary assignment or contractual subrogation of a **claim** against another person (“**the debtor**”) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.³

¹ **It should be further reflected whether the Article should be extended to also cover companies and other judicial persons (cf. exclusion in Art. 1(2)(f)).**

² **It should be considered independently in relation to each language version, whether it is necessary to expressly mention the concept of “contractual subrogation” in this context.**

³ **A recital should be added to clarify that Article 13(1) also applies to the property aspects of an assignment as between assignor and assignee in legal orders where such aspects are treated separately from the aspects under the law of obligations.**

2. The law governing **the assigned or subrogated claim** shall determine the effectiveness of contractual **and legal** limitations on assignment **or subrogation** as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment **or subrogation** can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The question **of effectiveness of** the assignment or subrogation against third parties **and priority of the assigned or subrogated claim over a right of another person** shall be governed by the law of the country where the assignor or the author of the subrogation has his habitual residence. **For the purposes of this paragraph and notwithstanding Article 18(1), the habitual residence of a company or other body, incorporate or unincorporated, shall be its place of business or, if it has a place of business in more than one country, the place of its central administration.**

Article 14 – Legal subrogation

Where a person ("**the creditor**") has a contractual claim **against** 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 **and to what extent** 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.**

Article 15 – Multiple debtors¹

If a creditor has a claim **against** several debtors who are (...) liable **for the same claim**, and one of **the debtors** has **already** satisfied the **claim in whole or in part**, the law **governing the debtor's obligation** towards the creditor **also** governs **the debtor's right to claim recourse from the other debtors. The other debtors can rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.**

¹ **The Presidency invites delegations to consider whether there are practical examples which justify retaining this provision.**

Article 16 – Set-off

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

Article 17 – Burden of proof

1. The law governing **a contractual obligation** under this Regulation shall apply to the extent that, **in matters of contractual obligations**, it contains rules which raise presumptions of law or determine the burden of proof.
2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 10 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Chapter III – Other provisions

Article 18 – (...) Habitual residence

1. **For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.**
Where the contract is concluded in the course of operation of a branch, **agency** or any other establishment, **the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.**

2. For the purposes of this Regulation, **the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.**
3. **When determining the habitual residence the relevant point of time shall be the time of the conclusion of the contract.**

Article 19 – Exclusion of renvoi

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

Article 20 – Public policy of the forum

The application of a **provision** of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (“ordre public”) of the forum.

Article 21 – 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 contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.
2. **A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.**

Article 22 – Relationship with other provisions of Community law

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

(...)

Article 22 A – Relationship with the Rome Convention

- 1. This Regulation shall replace the Rome Convention in the Member States [, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.]¹**
- 2. Insofar as this Regulation replaces the provisions of the Rome Convention, any reference to the Convention shall be understood as a reference to this Regulation.**

Article 23 – Relationship with existing international conventions²

- 1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations. (...)**

¹ An alternative would be to delete the text in brackets and to explain in a recital the territories of the Member States that fall within the territorial scope of the Convention but to which this Regulation does not apply.

² Article 23 was modified with a view to retaining the same wording as Article 28 of the common position on the draft Rome II Regulation (see 9751/06 JUSTCIV 137 CODEC 531). It should be recalled that the Commission made a declaration in this context and wishes to retain the text of its original proposal.

2. **However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.**

Chapter IV – Final provisions

Article 24 – List of conventions

1. **By ...¹, Member States shall notify the Commission of the conventions referred to in Article 23(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.**

2. **The Commission shall publish in the *Official Journal of the European Union* within six months of receipt:**
 - (i) **a list of the conventions referred to in paragraph 1;**

 - (ii) **the denunciations referred to in paragraph 1.**

Article 25 – Application in time

This Regulation shall apply to contracts concluded after its entry into force.

¹ **12 months after the date of the adoption of this Regulation.**

Article 26 – Date of application

This Regulation shall apply from ...¹, **except for Article 24, which shall apply from ...**²

This Regulation shall be binding in its entirety and directly applicable in **the Member States in accordance with the Treaty establishing the European Community.**

Done at Brussels,

For the European Parliament
The President

For the Council
The President

¹ **18 months after the date of adoption of this Regulation.**

² **12 months after the date of adoption of this Regulation.**

ANNEX : List of bilateral conventions mentioned in Article 24

[...]
