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From : Presidency

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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)
– Compromise package by the Presidency¹

Delegations will find attached the compromise package as proposed by the Presidency.

¹ It is understood that, as the agreement does not cover the whole text of the Regulation, adjustments should not be precluded if, after finalising the discussion on the rest of the text, they turn out to be necessary for the coherence of the provisions concerned.

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.

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;¹

 - (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**;²

¹ A new recital relating to paragraphs b and c 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."

² See footnote 1.

- (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;¹
- (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 and** the personal liability of officers and members as such for the obligations of the company or body (...);²
- (f1) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporated, in relation to a third party;**
- (g) the constitution of trusts and the relationship between settlers, trustees and beneficiaries;
- (h) evidence and procedure, without prejudice to Article 17;
- (i) obligations arising out of **dealings prior to the conclusion of a contract.**³

3. In this Regulation, the term “Member State” shall mean Member States with the exception of Denmark (...) and the United Kingdom. **However, in Article 3(5) the term shall mean all the Member States.**

¹ If necessary, a recital could give clarification concerning bills of lading.

² The words “without prejudice to Article 12” should be added if that provision were to be extended to companies or other bodies corporate or unincorporated.

³ A recital shall explain that obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of the Common Position on the draft Rome II Regulation and therefore they are to be excluded from the scope of this Regulation.

Article 2 – Universal application

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

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 **made** expressly or **clearly** demonstrated (...) by the terms of the contract (...) or (...) the circumstances of the case. (...) ¹ By their choice the parties can select the law applicable to the whole or only a part of the contract.
2. (...)
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 A recital shall clarify that an agreement of the parties to confer exclusive jurisdiction on one or more courts or tribunals of a Member State to determine disputes under the contract is a factor to be taken into account in determining whether a choice of law was clearly demonstrated.

4. (...) Where all other elements relevant to the situation at the time of the **choice are located in a country other than the country whose law 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**.¹²
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.**²
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 Article[s 4a to] 6, the law governing the contract** shall be determined as follows:
 - (a) a contract of sale **of goods** shall be governed by the law of the country **where** the seller has his habitual residence;

¹ This rule shall be applicable whether or not the choice of law by the parties was accompanied by the choice of a foreign court or tribunal; a recital could indicate that no substantial change in relation to Article 3(3) of the Rome Convention is intended, but that the text has been aligned as far as possible on Article 14 of the Common position on the Rome II Regulation (9751/7/06).

² It is understood that once the discussions on Article 8, which is not part of the compromise, are finalised, a recital will address the relation between Article 3(4) and (5) and Article 8.

- (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
- (c) (...);²
- (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) (...)
- (g) a franchise contract shall be governed by the law of the country **where** the franchisee has his habitual residence;
- (h) a distribution contract shall be governed by the law of the country **where** the distributor has his habitual residence;

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 in so far as services are covered by that Regulation.

² The questions concerning contracts of carriage do not form part of this compromise.

- (i) (...)
- (j) **a contract of sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;**
- (j1) **[a contract concluded at a financial market (...) shall be governed by the law applicable to the financial market].¹**
2. **Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points a) to j1) of paragraph 1, the 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.**
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.²**
4. **Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.³**

¹ This provision needs to be discussed further and does not form part of this compromise.

² A recital shall explain the functioning of this paragraph and indicate that, in order to determine whether the contract is manifestly more closely connected with another country pursuant to Article 4, it has to be taken into account whether the contract in question has a very close relationship to another contract or contracts.

³ A recital shall indicate that paragraph 4 applies where the law applicable cannot be determined pursuant to paragraphs 1 or 2, because the contract is not covered by paragraph 1 or the elements of the contract would be covered by more than one of the points (a) to (j1) of paragraph 1, and, in either case, the characteristic performance cannot be determined pursuant to paragraph 2. A recital shall also indicate that in order to determine with which country the contract is most closely connected, it has to be taken into account whether the contract in question has a very close relationship to another contract or contracts.

*[Article 4a
Contracts of carriage¹]*

Article 5 – Consumer contracts²

[Article 5 a – Insurance contracts]³

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 to him by such provisions that cannot be derogated from by contract under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 2a and 3.⁴**

¹ The provision concerning contracts of carriage does not form part of this compromise.

² The provision concerning consumer contracts does not form part of this compromise.

³ Further discussion is needed whether a provision on insurance contracts should be included. This question is not part of the compromise.

⁴ A recital shall indicate that this paragraph should ensure that the employee shall not be deprived of the protection of provisions which cannot be derogated from or which only can be derogated from to his advantage.

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 **which** or, **failing that**, from which the employee habitually carries out his work in performance of the contract. **The country where the work is habitually carried out** shall not be deemed to have changed if he is temporarily employed in another country (...).¹
- 2a. **Where the law applicable 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.**

Article 7 – Contracts concluded by an agent

(deleted)

Article 8 – Overriding mandatory provisions²

¹ A recital will read as follows: "Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his 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."

² The provision concerning overriding mandatory provisions does not form part of this compromise.

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.

Article 10 – Formal validity

1. **A contract concluded between persons who or whose agents are in the same country at the time of conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.**
- 1a. A contract concluded **between persons who or whose agents are in different countries at the time of conclusion** is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or **of** the law of **either of the countries** where **either** of the parties or **their agent** is present at the time of conclusion, or **of** 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, **1a and 2** of this Article shall not apply to contracts that fall within the scope of Article 5 **paragraph 1**.¹ 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 (...) 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, and which cannot be derogated from by agreement**.

Article 11 – Scope of applicable law²

Article 12 – Incapacity³

Article 13 – Voluntary assignment [and contractual subrogation]⁴

¹ Depending on the wording of Article 5, which is not part of this compromise, a technical amendment might be necessary in order to give the correct reference.

² The provision concerning the scope of applicable law does not form part of this compromise.

³ The provision concerning incapacity does not form part of this compromise.

⁴ The provision concerning voluntary assignment and contractual subrogation does not form part of this compromise.

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 debtors

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**.

Article 16 – Set-off¹

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.

¹ A new recital shall clarify the meaning of set-off covered by this provision and the functioning of the rule.

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 residence¹

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.

¹ The provision concerning habitual residence does not form part of this compromise.

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 law¹

Article 22 A – Relationship with the Rome Convention²

Article 23 – Relationship with existing international conventions³

Chapter IV – Final provisions⁴

Article 24 – List of conventions

Article 25 – Application in time

Article 26 – Date of application

¹ The provision concerning the relationship with other provisions of Community law does not form part of this compromise.

² The provision concerning the relationship with the Rome Convention does not form part of this compromise.

³ The provision concerning the relationship with existing international conventions does not form part of this compromise.

⁴ The provisions of Chapter IV are not part of the compromise.