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WORKING DOCUMENT

on the proposal for a regulation of the European Parliament and the Council
on the law applicable to non-contractual obligations (“Rome II”)

Part 1 - Introduction and summary of Articles 1 to 8

Committee on Legal Affairs and the Internal Market

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Introduction

The purpose of this initial working document is to explore in very general terms how the proposal would work in determining the proper law in a number of typical cases. Before embarking on this exercise, however, a number of caveats have to be entered.

First, in order to have the full picture it is necessary first to indicate what court has jurisdiction under Brussels I¹. This is not always a straightforward matter bearing in mind, in particular, the rules on connexity, *lis pendens* - related actions and provisional, including, protective measures. Matters are further complicated by the existence of a substantial body of case-law of the Court of Justice and of national courts on Brussels I. There is also the fact that the Court of Justice has held that tort/delict cases are residual in relation to contract cases².

Secondly, Rome II should be seen in the light of the Rome Convention on the law applicable to contractual obligations ("Rome I")³. However, consultations are proceeding with a view to replacing that convention by a regulation, which is an additional complication. Indeed there is an argument for incorporating Rome I and Rome II in a single instrument.

Thirdly, regard has to be had to existing international conventions to which Member States are party and existing Community legislation (including legislation in preparation, such as the proposal on services in the Internal Market and the proposal on unfair commercial practices). In some cases, for instance, the fact that a measure of harmonisation of the substantive law (*e.g.* with regard to liability for defective products) has been achieved may have a bearing on the discussions.

One particular difficult case is that of the e-commerce directive⁴, which enshrines the country-of-origin principle particularly as regards the so-called "coordinated field", yet provides in Article 1(4) that "This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts". The Commission has sought to deal with this question through Article 23(2), which provides that Rome II "shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of goods or services to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances". As a result, where the application of the law designated by Rome II

¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001 L 12, p. 1 (consolidated version). Matters are complicated somewhat by the fact that the former Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated text in *OJ* 1998 C 27, p. 1) continues to apply as between Denmark and the other Member States of the European Union. Denmark is not participating in the adoption and application of the proposal under consideration: if the regulation is adopted the other Member States will apply the Rome II conflict-of-laws rules as regards the possible application of Danish law, Denmark will continue to apply its existing rules of private international law.

² *E.g.* Case -334/00 *Fonderie Officine Meccaniche Tacconi* [2002] ECR I-7357, where it was held that an action based on pre-contractual liability fell into the category of tort/delict cases for the purposes of Brussels I.

³ *OJ* 1998 C 27, p. 36 (consolidated version).

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJ* 2000 L 178, p. 1.

would result in an unjustified barrier to trade, the national court would be obliged, by virtue of the general principles of the Treaty, not to apply that law. This may allay certain fears.

Lastly, the lack of harmonisation of the substantive law potentially poses a problem. For instance, in several jurisdictions, where a criminal offence is involved, a party may claim damages as a civil party (*cf.* Brussels I, Article 5(4)). Defamation, which may be a criminal offence in some jurisdictions, may also raise difficult issues, as may the fact that in some jurisdictions, the same facts may found alternative claims, say in tort and contract.

The European Union has to deal with common-law jurisdictions, for which foreign law has to be proved as a fact, and civil-law jurisdictions, where foreign law does not have to be proven by the parties and judges are obliged to apply foreign law of their own motion if the case presents a sufficient amount of foreign elements¹. This need not be a problem (as witness the similar case of Canada), but may have to be specifically addressed in the course of discussion of the proposal for a directive.

Where can you sue/be sued?

The general rule under Brussels I is that persons² are to be sued in the courts of the Member State of their domicile.

However, Article 5(3) provides that a person domiciled in a Member State may, in another Member State, be sued, "in matters relating to tort, delict or quasi-delict, in the courts for *the place where the harmful event occurred or may occur*".

It should further be noted that under Article 6, a person may also be sued, where he is one of a number of defendants, in the courts for the place where one of them is domiciled, provide that the claims are so closely connected that it is expedient to deal with them together so to avoid the risk of irreconcilable judgments.

Moreover, where a person can join himself to criminal proceedings as a civil party, the court having jurisdiction is that of the criminal proceedings, which may have an important bearing on the impact of Rome II (Article 5(4)).

Under Article 9, an insurer may be sued (a) in the courts of his domicile, (b) in the policyholder's, insured person's or beneficiary's courts or (c) in the courts where proceedings are brought against a lead insurer. However, in the case of liability insurance or insurance of immovable property, the insurer may also be sued in the courts of the place where the harmful event occurred.

An insurer may sue only in the courts where the defendant policyholder/insured person/beneficiary is domiciled.

However, the rules on insurance may be departed from by an agreement entered into after the

¹ See Thünken, *Multi-State Advertising over the Internet and the Private International Law of Unfair Competition (2002)* 5 ICLQ 909-942.

² Non-nationals are treated in the same way as nationals of the Member State of their domicile. Persons not domiciled in a Member State are subject to the rules of jurisdiction of each Member State.

dispute. Furthermore, where the policyholder and the insurer are domiciled or habitually resident in the same Member State, they may agree to confer jurisdiction on the courts of that State even if the harmful event were to occur abroad. The rules may also be departed from in the case of seagoing ships and aircraft.

As regards *intellectual property rights* having to be deposited or registered, proceedings concerning their registration of validity have to be brought in the courts of the place where they were deposited or registered.

In cases of *consumer contracts*, the consumer can sue in either his own or the supplier's courts, but may be sued only in his own courts, where the supplier operates in the Member State of the consumer's domicile or directs his activities to that State or to several Member States and the contract falls within the scope of such activities. This does not apply to transport contracts, apart for inclusive contracts for travel and accommodation. The provisions on consumer contracts may be relevant to the discussions where claims in contract and tort are pleaded in the alternative.

The possibility of an *agreement conferring jurisdiction/jurisdiction clause* may be relevant where the tortfeasor and the victim are parties to a contract.

The above is necessarily only a sketch of the provisions of Brussels I which may be relevant to the discussion of Rome II, bearing in mind that they have to be read together with the abundant case-law of the Court of Justice.

What law should the court apply when Rome I applies?

The first point to note is that the applicable law can be **the law of any State in the world**, not just the law of a Member State of the European Union (Article 1).

Secondly, Rome II applies to non-contractual obligations (which include such categories as quasi-delict, quasi-contract, pre-contractual relations, *negotiorum gestio* and unjust enrichment), but excludes certain specific matters (see Article 2).

Article 3 purports to set out a **general rule**, although it is hedged about with so many qualifications that it is difficult to categorise it as such.

The general rule

The applicable law is the law of the **country in which the damage arises or is likely to arise**¹, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country/countries in which the indirect consequences of that event arise.

This immediately raises the question of the relationship with Brussels I, which provides that you either sue in the courts of defendant's domicile or in the court **where the harmful event occurred or may occur**. But the notion of "harmful event" has been construed broadly by

¹ This would cover injunctive relief.

the Court of Justice¹.

*Example*²

A pig farm in Belgium accidentally releases effluent which floods premises over the border in France. French law is applicable. If the effluent also causes damage in Luxembourg, Luxembourg law should be applied as regards that damage. However, if this damage is regarded as environmental, the claimant can elect to have Belgian law apply (see Article 7).

Example

A traffic accident occurs in Germany between a car driven by a Belgian and a truck driven by an Italian. The German courts have jurisdiction and German law applies, even if the truck company claims that it suffered financial loss in Italy as a result of the accident³.

Example

A citizen of Totalitaria who was imprisoned and tortured in that country comes to England where he suffers mental injuries as a result of his ill-treatment in Totalitaria. Assuming the English courts have jurisdiction over any action for assault, do the English courts have to apply the laws of Totalitaria, or is the situation saved by Article 22 (public policy of the forum)? The question arises whether there is not a need for specific provision covering actions brought for reparation of violations of human rights.

The qualifications of the general rule

(a) Under Article 3(2), where both the tortfeasor and the victim have their habitual residence in the same country when the damage occurs, that country's law is to be applied by the courts.

Example

A traffic accident in England between a Dutchman habitually resident in the USA and an American habitually resident in USA, the English court will have to apply US law, subject to Article 13 on rules on safety and conduct.

(b) Under Article 3(3), where a non-contractual obligation is manifestly more closely connected with another country, the law of that country is to apply. Such manifestly closer connection may be based on a pre-existing (*e.g.* contractual) relationship between the parties.

Examples

Where a non-contractual obligation is allegedly breached by parties in a pre-contractual

¹ See Case 21/76 *Mines de Potasse d'Alsace* [1976] ECR 1735, from which it appears that where the place where the harmful act occurred and the place where loss is sustained are different, the defendant can be sued, at the claimant's election, in the courts for either place.

² *N.B.*, after the dispute has arisen, the parties may agree on the applicable law in accordance with the provisions of Article 10.

³ *N.B.* Under Article 14, where the victim sues the insurer directly, he may elect to have the law applicable to the insurance contract apply.

relationship or where a contract exists and a claim is possible in tort.

Product liability

Without prejudice to Article 3(2)¹ and (3)², the law applicable to a case involving damage caused by a defective product is that of the country of habitual residence, unless the alleged tortfeasor can show that the product was marketed in that country without his consent, in which case the law of the latter's country is to apply (Article 4).

Example

A person resident in Scotland purchases a locally manufactured hairdryer in Italy when on holiday. The particular model is not sold in the UK and is designed for use on 220 volts not on 240 volts. The seller is not aware that the product is intended to be used outside Italy. The purchaser gives the hairdryer to his girl friend as a birthday present, it overheats and burns her house down. She can sue in Scotland, but Italian law will be applied.

This provision needs to be read in the light of the partial approximation of product liability law effected by Directive 85/374³. It must also be borne in mind that the Hague Convention of 1973 on the law applicable to products liability will continue to apply in those countries which have ratified it⁴.

Unfair competition

Article 5 is intended to cover such matters as misleading advertising, forced sales, disruption of deliveries by competitors, enticing away a competitor's staff and passing off. In England this would cover such torts as passing off, malicious falsehood and trade libel. The provision would cover an action brought by a consumer organisation to prevent a trader from using unfair contract terms⁵.

The rule has two limbs: the applicable law is either the law of the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected or, where the act of unfair competition affects exclusively the interests of a specific competitor, the law of the country where both parties have their habitual place of residence or the law of the country with which the non-contractual obligation is manifestly more closely connected.

Violations of privacy and rights relating to the personality

a. Jurisdiction

¹ Tortfeasor and victim habitually resident in the same country.

² Possibility of showing a manifestly closer connection with another country.

³ Council Directive 85/674/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, *OJ* 1985 L 210, p. 29, as amended.

⁴ Finland, France, Luxembourg, the Netherlands and Spain.

⁵ See Case C-167/00 *Verein für Konsumenteninformation v. Henkel* [2002] ECR I-8111.

In *Fiona Shevill*¹, the Court of Justice held where a claimant has been defamed in two or more Member States, he may sue in the courts of the place where the defendant is established (place where the harmful event occurred) or in the courts of the place where the loss was suffered.

Example

UK newspaper circulated in the UK (1,000,000 papers), France (2000) and Germany (3000) libels a German Minister. The Minister can either sue in the UK courts, in which case he can claim damages for the whole of the damage wherever incurred or, for instance, in the German courts but only for the damage incurred in that State (*i.e.* in respect of the 3000 newspapers sold in Germany). Hence the victim has an interest in suing in the country of origin so as to avoid suing in several Member States.

b. Applicable law

At present, English law differs from the approach taken in any other Member State. Under the "double actionability rule", the law of the place where the damage occurs is applied but, before any award of damages is made, it is checked whether the application of UK law would have resulted in the award of damages.

Under Rome II, the Commission has sought to introduce a compromise. The law of the place where the damage arises is applied **unless the application of that law would be contrary to the fundamental principles of the law of the forum.**

Example

Same facts as the previous example. If the Minister sues in the UK and the application of German law would be contrary to the fundamental principles of UK law relating to freedom of the press/freedom of expression, the British court would set aside the application of those laws and apply national law. If the Minister sues in Germany, German law would apply but only as respects the losses arising in Germany.

Violation of the environment

Here the general rule in Article 3(1) applies, unless the person sustaining the damage elects to base his claim on the law of the country in which the harmful event occurred (Article 7).

Infringement of intellectual property rights

The applicable law with regard to a non-contractual obligation arising from an infringement of an intellectual property right is the law of the country for which infringement is sought (Article 8). Where a unitary Community industrial property act exists, the applicable law is governed by that instrument. For questions not covered by such an instrument, the applicable law is the law of the Member State in which the infringement is committed.

The question arises here as to whether provision should be made for choice-of-law agreements.

¹ Case C-68/93 *Fiona Shevill* [1995] ECR I-415.