

## Proposal for a European Convention on the law applicable to non-contractual obligations

(Text adopted at the Hague meeting of 27-28 September 1997, except for Articles 9 ff.)

### Title I – Scope of the Convention

#### Article 1 – Scope of the Convention

1. The rules of this Convention shall apply in any situation involving a choice between the laws of different countries:

a) to non-contractual obligations arising out of an event resulting in damage or injury;

[b] to non-contractual obligations arising out of an event other than an event resulting in damage or injury, in particular, management of the affairs of another (negotiorum gestio), payment which is not due, unjust enrichment, restitution. ]

2. They shall not apply to:

a) non-contractual obligations arising out of a family relationship, parentage, [marriage,] affinity or assimilated relationships;

[b] questions relating to injury or damage in the nuclear field;]

c) the personal liability of officers, members as such and persons responsible for statutory audits, for the obligations of a company and other body corporate or unincorporate;

d) the liability of the State or of other legal persons governed by public law, or to the liability of their organs or agents, for acts accomplished in the exercise of their public authority.

#### Article 2 – Application of law of non-Contracting States

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

### Title II – Uniform rules

#### Chapter I – Non-contractual obligations arising out of an event resulting in damage or injury

##### Article 3 – General rule for determination of the applicable law

1. A non-contractual obligation arising out of an event which has caused damage or injury shall be governed by the law of the country with which it is most closely connected.

2. Subject to the provisions of paragraph 4, when the author of the damage or injury and the person who suffers damage or injury are habitually resident in the same country at the time the damage or injury is suffered, it shall be presumed that the obligation is most closely connected with that country.

3. Subject to the provisions of paragraph 4, when the author of the damage or injury and the person who suffers the damage or injury are habitually resident in different countries at the time the damage or injury is suffered, it shall be presumed that the obligation is most closely connected with the country in which the event which caused the damage or injury and the damage or injury occurred or are likely to occur.

4. The presumptions in paragraphs 2 and 3 shall be disregarded if it appears from the circumstances as a whole that the obligation is more closely connected with another country.

5. In determining the country which has the closest connection, regard shall be had to any pre-existing or contemplated relationship between the parties.

#### Article 4 – Special presumptions

Notwithstanding the provisions of paragraphs 2 and 3 of Article 3, it shall be presumed that a non-contractual obligation is most closely connected:

a) in case of invasion of privacy or rights in personality, or defamation, with the country in which the damage occurred or is likely to occur; the damage shall be presumed to occur in the country in which the person who suffers the damage is habitually resident at the time the damage is suffered;

b) in case of unfair competition or restrictive trade practices, with the country whose market is affected by the harmful event;

c) in case of damage or injury caused to persons or goods, resulting from impairment of the environment, with the country in which the damage or injury occurred or is likely to occur.

#### Article 5 – Freedom of choice

The parties may choose the law applicable to a non-contractual obligation by an agreement entered into after the dispute has arisen. This choice must be express. It shall not adversely affect the rights of third parties.

#### Article 6 – Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention 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 7 – Rules of safety and conduct

Whatever may be the applicable law, in determining liability account shall be taken of rules of conduct and safety which were in force at the place and time of the occurrence of the event which resulted in damage or injury.

#### Article 8 – Scope of the law applicable to a non-contractual obligation

The law applicable to a non-contractual obligation by virtue of Articles 3 to 5 of this Convention shall govern in particular:

1° The basis and extent of liability including the determination of whether persons are liable for acts which they commit;

2° the grounds for exemption from liability, any limitation of liability and any division of liability;

3° the existence and kinds of damage or injury for which compensation may be due;

4° within the limits of the powers conferred on the court by its procedural law, the measures which the court can take to ensure the prevention or termination of damage or injury, or compensation for damage or injury;

5° the assessment of damages in so far as it is governed by rules of law;

6° the extent to which the heirs of the victim may exercise the victim's rights;

7° the persons who have a right to compensation for damage or injury which they personally have suffered;

8° liability for the acts of others;

9° rules of prescription or limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of this period;

10° rules which determine the burden of proof or which raise presumptions of law.

### Article 9 – Direct action against insurer

*[to be examined at the Luxembourg meeting in 1998]*

1. A person who has suffered injury or damage shall have a right of direct action against the insurer of the person liable if he has such a right under the law applicable to the non-contractual obligation.

2. If the law applicable to the non-contractual obligation does not provide for such a right, it shall nevertheless exist if it is available to the person who suffered damage or injury under the law applicable to the contract of insurance.

### Article 10 – Subrogation

*[to be examined at the Luxembourg meeting in 1998]*

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 the same non-contractual claim and one of them has satisfied the creditor.

## Chapter II – Non-contractual obligations arising out of an event other than an event resulting in damage or injury

### Article 11 – Quasi-contracts

*[to be examined at the Luxembourg meeting in 1998]*

1. A non-contractual obligation arising out of an event which does not result in damage or injury shall be governed by the law of the country with which it is most closely connected.

2. It shall be presumed that the obligation is most closely connected with the country in which the event occurs.

3. The presumption in paragraph 2 shall be disregarded if it appears from the circumstances as a whole that the obligation is more closely connected with another country.

4. In determining the country which has the closest connection regard shall be had to any pre-existing or contemplated relationship between the parties.

## Title III – General provisions

### Article 12 – Habitual residence of company, etc.

*[to be examined at the Luxembourg meeting in 1998]*

1. The habitual residence of a company or other body corporate or unincorporate shall be taken to be the place where its central administration is situated.

2. In a case in which damage or injury has been caused or suffered in the course of a trade or profession, the place of habitual residence shall be taken to be the place where the principal place of business is situated.

In a case where there is more than one establishment, the place of habitual residence shall be taken to be the establishment where the operations in consequence of which the damage or injury is caused or suffered, occurred.

### Article 13 – Exclusion of renvoi

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

#### Article 14 – Ordre public

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

#### Article 15 – No retrospective effect

This Convention shall apply in a Contracting State to non-contractual obligations arising out of events which occur after the date on which this Convention has entered into force with respect to that State.

#### Article 16 – Uniform interpretation

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

#### Article 17 – 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 Convention.

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 Convention to conflicts solely between the laws of such units.

#### Article 18 – Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations and which are or will be contained in acts of the institutions of the European Communities [or the European Union] or in national laws harmonised in implementation of such acts.

#### Article 19 – Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

#### Title IV – Final provisions