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THE LAW COMMISSION

and

THE SCOTTISH LAW COMMISSION

Private International Law

E.E.C. PRELIMINARY DRAFT CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL AND NON-CONTRACTUAL OBLIGATIONS

CONSULTATIVE DOCUMENT

(August 1974)

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INTRODUCTION

(i) The history of the draft Convention

1. The preliminary draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, which is set out in Appendix 1 to this Document (and is referred to as "the Convention" where appropriate), is the result of a proposal which the Benelux countries made in September 1967. They then invited the Commission of the European Communities to undertake the unification of the private international law of the States which were then members of the Community, leading to the modification of their rules of conflict of laws. The proposal stemmed from a convention which had already been prepared for unifying the rules of private international law of the Benelux countries. The object of the proposal was to abolish the drawbacks arising from the diversity of rules of the conflict of laws, particularly in relation to the law of contract. An

element of urgency was thought to attach to the proposal because of various reforms in this field of law which were imminent in some Member States and which contained the possibility of creating even more sharp divergencies.

2. The Commission of the European Communities, after consultation with a group of legal experts nominated by the governments of the States then forming the European Communities (hereinafter referred to as "the Brussels Working Group" or "the Group"), concluded that complete unification of the rules on conflict of laws might be too ambitious and lengthy an undertaking but that, at any rate in some sectors of private international law, the harmonization of the conflict rules of Member States would facilitate the working of the Common Market and would bring greater benefits in future as international legal and economic relationships multiplied. It was considered that a convention (or conventions) on the following subjects could be expected to make a practical contribution to the attainment of these ends:-

(i) the law applicable to corporeal and non-corporeal property;

(ii) the law applicable to contractual and non-contractual obligations;

(iii) the law applicable to the form of juridical acts and evidence;

(iv) general questions arising under the preceding heads (e.g. renvoi; characterization; application of foreign law; acquired rights; capacity; representation).

3. Accordingly in January 1970 the six Member States charged the Brussels Working Group with the task

of preparing a series of conventions designed to harmonize their private international law on the understanding that the drafts prepared should relate to the four matters mentioned in the preceding paragraph. It was left to the Group's discretion whether to put forward their proposals in the form of a single draft convention or in a number of separate drafts.

4. At its meeting in June 1972 the Group completed a draft convention on the law applicable to contractual and non-contractual obligations and decided that it should be submitted together with the Report of the Rapporteurs (referred to as "the Report") to the Committee of Permanent Representatives for transmission to the Governments of the Member States.

(ii) United Kingdom examination of the draft Convention

5. In this situation and in the light of the approaching enlargement of the E.E.C. the Lord Chancellor asked the Law Commission in December 1972 to consider how the draft conventions referred to above could best be subjected to a thorough examination. The Lord Advocate made a similar request to the Scottish Law Commission. In the light of these requests a Third Programme of Law Reform was submitted by each of the Commissions.

6. These recommended (in April 1973) that the Commissions in co-operation should take under review when considered appropriate rules of private international law relating to obligations, property, family relationships and to any other matter which may be the subject of negotiations or agreements between Member States of the E.E.C. or of the Hague Conference on Private International Law.

7. Meanwhile, the United Kingdom and the other new E.E.C. Member States were invited to appoint representatives

to participate in the work of the Brussels Working Group and officers of the Law Commissions have attended some of its meetings, including one in February 1973 which was devoted almost entirely to a preliminary discussion of the draft Convention which is the subject of this document.

8. In pursuance of the Third Programmes of the Law Commission (Law Com. No. 54; H.C. 293) and the Scottish Law Commission (Scot. Law Com. No. 29; H.C. 283), the Commissions have set up a Joint Working Group to consider the preliminary draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations. The membership of the Joint Working Group is set out in Appendix 2. The purpose of this Consultative Document is to invite you to consider and to make any observations on the draft Convention which you consider appropriate.

9. The Commissions will welcome comment not only on the detailed provisions of the several Articles of the Convention but also on the more fundamental questions of whether a Convention on the lines proposed is either necessary or desirable and whether, if there would be merit in such a Convention, it would be preferable to restrict its scope to either the law of contract or the law of tort/delict alone. In any case, it is for consideration whether it would not be better to deal with the matters proposed by the Convention in a series of more limited conventions dealing with each matter separately. Obviously, the narrower the scope the more likely it is that it will be possible to negotiate a satisfactory set of rules. In considering these broader aspects it is relevant to consider whether the provisions of the Convention represent an improvement on the existing laws of the United Kingdom such as would justify a change; whether the desirability of having uniform choice of law rules for the countries of the E.E.C. outweighs the dis-

advantages of departing from rules which have been adopted in other common law jurisdictions; whether it is appropriate to codify a branch of the law still undergoing judicial development; and whether any adverse effects in the sphere of international trade are to be apprehended from the changes which the Convention would require. In relation to these questions it is important to point out that, although the Convention has, as explained above, been produced under E.E.C. auspices, it will not take direct legal effect under the Treaty of Rome nor will it constitute a Convention to which, in accordance with the Act of Accession, the United Kingdom will be bound ultimately to adhere. But if it does adhere, the Convention would have to be implemented by Statute and would largely replace the present English and Scottish rules of private international law in relation to contract, tort or delict and quasi-contract. It must be emphasised that the new principles would apply whether the conflict of laws problem arose in relation to other Common Market countries or to any other country, including Commonwealth countries.

(iii) Arrangement of this Consultative Document

10. After this Introduction, in which the history of the draft Convention has been outlined and attention is drawn to a number of factors of general significance, each of the Articles of the draft Convention is examined seriatim. Except in the few cases of Articles which do not call for detailed consideration at present (mostly those of a formal nature related to the mechanics of entering into a multilateral convention), each Article is set out in English followed by passages headed "Background" and "Commentary". The background material is almost completely derived from the Report of the Rapporteurs of the Brussels Working Group (XIV/408/72). Although this adds to the length of this Consultative Document it is thought that only thus can a fair picture be given of the considerations present to those

who produced the draft Convention together with some indication of the concepts, many of them unfamiliar to British lawyers, which the Group had in mind. The extensive commentary contained in the Report has been severely compressed but it is hoped that the background passages in this Document adequately represent the views of the Rapporteurs. The commentary on each Article seeks to draw attention to various aspects of the Article which require consideration and to raise some of the questions on which the Law Commissions would value the views of those consulted. The commentaries cannot hope to be exhaustive of what is a very wide subject and those consulted are not asked to confine themselves to the points specifically referred to in the following pages but to draw attention to any matter relating to the draft Convention which it would be relevant for the Law Commissions to consider.

11. The full text of the draft Convention (XIV/398/72) is set out in Appendix 1 to this Document. The draft Convention was originally prepared in French and German. The English version has been prepared in consultation with the translation service of the Foreign and Commonwealth Office and takes account of both the French and German texts. It is suggested that the English text should be used in conjunction with the French text, which is also set out in the Appendix. A few difficulties of translation may still remain. The Law Commissions would be grateful for any suggestions for improving the translation which seem appropriate.

12. To assist ease of reference, the paragraphs in the Article by Article examination of the draft Convention have been numbered by reference to the number of the Article concerned followed by an indication of whether the paragraph is among those dealing with the background, i.e. the exposition of the Rapporteurs of the Brussels Working Group, or those constituting the commentary. For example, paragraph

10.1.3 indicates that it is the third paragraph dealing with the background of Article 10, while 12.2.1 would be the first paragraph of the commentary on Article 12.

(iv) General

13. The draft Convention deals not only with obligations but, so far as relevant, with the law relating to form and evidence (Articles 18 and 19) and certain general questions arising in the field of obligations (capacity: Article 20; renvoi: Article 21; "l'ordre public": Article 22). The Brussels Working Group is now considering the preparation of a draft convention on property, and it is possible, if such a draft is produced, that it will be conflated with the present draft. However at present this seems unlikely, and it is proposed to discuss this draft on the assumption that it will be finalised in the form of a separate convention.

14. The activities of the Brussels Working Group are regarded by its original members as a natural extension of the Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments concluded on 27th September 1968 ("the Judgments Convention"), which, in accordance with Article 220 of the Treaty of Rome, the original Member States of the E.E.C. had already concluded before the United Kingdom acceded to the Common Market, and have since ratified and brought into force between themselves. By virtue of Article 3(2) of the Act annexed to the Treaty of Accession, the United Kingdom undertook to accede to the conventions provided for in Article 220 of the E.E.C. Treaty and to that end to enter into negotiations to make the necessary adjustments thereto. Those negotiations have already started. It has been made clear that they are likely to take years rather than months, but the United Kingdom is bound in due course to accede to the Judgments Convention when the necessary adjustments have been agreed.

15. The Judgments Convention provides for a substantial unification of the grounds on which the courts of Member States may exercise jurisdiction and for the almost automatic enforcement throughout the Common Market of judgments given in any Member State. The courts of each such State are therefore faced with the prospect of possible increases in the number of cases involving foreign elements in which jurisdiction will have to be assumed, and of foreign (albeit Common Market) judgments to be enforced. Many of those cases and judgments will necessitate or result from the application of a choice of law rule, and therefore of a municipal law, which the enforcing country would not have applied. It seems that it was primarily a fear of the "forum shopping" that this might lead to which caused the Benelux countries to make their original proposal for general unification of the rules of private international law of the Member States of the E.E.C.

16. While, as stated above, the United Kingdom is not under a formal obligation to become a party to any convention on the lines of the present preliminary draft, it seems possible that the original Member States, at least, will reach agreement on such a convention. If they do, the United Kingdom together with the other new Member States may be regarded as being under a moral obligation, and will probably come under pressure, to accede to it.

THE DRAFT CONVENTION

TITLE ONE

Scope of the Convention

Article 1

The rules of private international law laid down in this Convention shall apply, in situations of an international character, to contractual and non-contractual obligations.

They shall not apply:

(a) to the status or capacity of natural persons, without prejudice however to Article 20; nor to the application of rules governing rights in property between husband and wife, wills, testate or intestate succession or gifts;

(b) to negotiable instruments, such as bills of exchange, cheques and promissory notes;

(c) to arbitration agreements and agreements on the choice of court;

(d) [to insurance contracts];

(e) to the formation, internal organisation or dissolution of companies or other legal persons or associations of natural or legal persons;

(f) to questions relating to damage or injury in the nuclear field.

[The draft Convention contains a footnote to this Article reading: "The question of the law applicable to agreements which restrict competition has not been examined." This, it is understood, is intended to relate to agreements covered by Article 85 of the E.E.C. Treaty.]

Background

1.1.1. The Report points out that the Convention does not define "situations of an international character". The existence in each case of elements likely to confer on it an international character must be for the judge to determine.

1.1.2. The Report emphasises that insofar as contracts within the purview of private law are involved, the Convention would apply to contracts between a State and a natural or juristic person.

1.1.3. The exclusion from the Convention of obligations stemming from negotiable instruments and nuclear damage is explained because these "are governed by conventions on the broadest international scale, some of which are now being reviewed".

1.1.4. With regard to agreements on the choice of court, some delegations pointed to the difficulties of allowing freedom of choice and of establishing a satisfactory conflict of laws rule. Others thought that such agreements were mainly procedural and a rule to govern them must be based on reciprocity. It was, therefore, thought better to exclude such agreements from the Convention although, it was pointed out, it would be valuable to find a solution in connexion with the Judgments Convention.

1.1.5. The exclusion of arbitration agreements is justified in the Report either on the ground that the subject is closely bound up with arbitral procedure and should be dealt with at the same time as that; or because of the intricacy of international conventions on the matter.

1.1.6. Despite the great importance of the regulation of companies (and the attention they receive in the E.E.C. Treaty), the Convention excludes this subject in the light of studies which are proceeding within the framework of the European Communities.

1.1.7. For a similar reason, insurance contracts are also excluded "as an interim measure" although they are often a valuable concomitant to other economic activities of great

importance in the life of the European Community, and therefore in principle should be included. Some of the provisions of the Convention (Articles 2 to 4 and, possibly, 6 and 7) might provide a satisfactory means of regulating insurance of transport, industrial and commercial risks. Other forms of insurance, notably life assurance, might require a special rule applying the law of the country in which the assured habitually resides.

1.1.8. No special exclusion is provided for social security arrangements. They might either be private contracts which ought not to be excluded or derive from administrative law and so, by reason of their nature, not fall within the transactions to which the Convention would apply.

1.1.9. So far as concerns transport contracts, much progress has been made in the international unification of the law concerning sea, air, rail and road transport so reducing, but not eliminating, the need for conflict rules in this field. The various multilateral conventions now in force have resulted in the creation of uniform substantive rules which are, however, not exhaustive and the necessity for invoking national conflict of laws rules has not been entirely eliminated. It was therefore decided that transport contracts should not be excluded from the Convention. The Group considered that the general provisions about contracts, notably Articles 2, 4, and 7 were sufficiently flexible to enable the most suitable law to be applied in any particular case.

Commentary

1.2.1. Although it cannot fairly be considered in isolation from the detailed provisions of the Convention, Article 1 clearly raises at the outset the question of whether the scope suggested for the Convention is not too wide. The phrase "contractual and non-contractual obligations" is apt

to embrace every situation which gives rise to an obligation of any sort including e.g., a trust. It might be preferable for the Convention to apply instead to "contractual, quasi-contractual and tortious or delictual obligations", and even this may, on full examination of the Convention, prove to be too ambitious. As it has been thought necessary expressly to exclude, e.g., rights of succession on death, it can be inferred that the Convention is not confined to contractual, quasi-contractual and tortious/delictual obligations. There may be something to be said for a Convention dealing with contract or tort/delict and not both. In any event the meaning of "non-contractual obligations" ought to be clarified.

1.2.2. Another fundamental problem will arise whichever of these formulations is adopted, i.e. the question of characterizing a factual situation as contractual, tortious/delictual or quasi-contractual (or, even on the present wording, as contractual or non-contractual). Some legal systems require a person to elect whether to sue in contract or in tort/delict and others allow claims to be framed in the alternative. (Matthews v. Kuwait Bechtel Corporation [1959] 2 Q.B. 57 is an example of this sort of situation in English law.) Further, some defences, such as exemption clauses, are allowed only in one or other of the types of action. The Convention seems largely to ignore the possibility of interaction between the various types of obligation which in practice can create difficulties in connexion with such matters as motor accident insurance (although this subject may be excluded from the Convention). (See Collins, "Interaction between Contract and Tort in the Conflict of Laws" (1967) 16 I.C.L.Q. 103).

1.2.3. The Convention is expressed to apply "in situations of an international character". The reason for the lack of definition of this phrase is referred to in paragraph 1.1.1 above and, at a meeting of the Brussels Working Group in

February 1973, the extreme generality of these words was defended on the ground that a detailed definition would almost certainly be inaccurate and that it must be left to the court to determine the character of the situation.

1.2.4. It is to be noted that, in accordance with Article 24, the Convention applies not merely to situations arising in an exclusively E.E.C. context but would apply to cases in which the international character of the situation is due to facts wholly or partly connected with countries outside the E.E.C.

1.2.5. Exclusion (a) does not expressly deal with maintenance. The exclusion refers to "rights in property between husband and wife" and it is questionable whether these words are meant to exclude maintenance payable by one spouse to another. The exclusion corresponds closely with Article 1(1) of the Judgments Convention but that Convention contains in Article 5(2) express provision with regard to jurisdiction in matters relating to maintenance. At the February 1973 meeting of the Group it was, however, admitted, in answer to an enquiry from the U.K. Delegation, that the present draft Convention is not well adapted to dealing with the subject. Its provisions on non-contractual obligations are not consistent with the 1956 Hague Convention on the law applicable to maintenance obligations in respect of children (to which the original six E.E.C. Member States are all parties). That Convention, which does not apply to contractual maintenance obligations, provides in principle for the application of the law of the habitual residence of the maintenance creditor. The 1972 Hague Convention on the law applicable to maintenance obligations, which extends to adults as well as children, retains this principle, but again does not apply to contractual maintenance obligations. The 1972 Convention is not yet in force. The United Kingdom has hitherto declined to adhere to either of the Hague Conventions, preferring instead to retain the existing law

in the United Kingdom providing for the application of the lex fori. Unless, therefore, it is considered that the existing law in the United Kingdom should be changed, it may be that maintenance should be added to the list of matters excluded from the draft Convention, at least as regards its provisions on non-contractual obligations.

1.2.6. It is for consideration whether exclusion (a) should be expanded so as to exclude obligations arising out of settlements and trusts including such matters as charities, debenture trusts, unit trusts and the like. The application of a foreign system of law to the obligations arising under an English trust could lead to serious anomalies. Alternatively, if trusts are not excluded they may require a special choice of law rule.

1.2.7. Exclusion (b) relates to "effets de commerce" which has been translated as "negotiable instruments". It does not include bills of lading and similar documents and there may be a case for excluding contracts of affreightment from the present Convention. Bills of lading are already subject to considerable international regulation (see paragraph 27.2.3, below), and the effect on charterparties of the detailed choice of law rules in the Convention will require close study.

1.2.8. Exclusion (c) needs clarification. The words "arbitration agreements" are somewhat ambiguous. Is it intended to exclude arbitration clauses (which may be a method of expressing a choice of law) or is it intended to exclude agreements relating primarily and not incidentally to arbitration? It can be argued that any agreement containing an arbitration clause would be excluded but presumably it is not the intention to exclude the entirety of an agreement just because it happens to contain an arbitration clause. Agreements on choice of court are the subject of Article 17 of the Judgments Convention.

1.2.9. It will be observed that the mention of insurance contracts in Exclusion (d) is only tentative. Consideration is being given to the possibility of introducing special rules by means of a directive under the E.E.C. Treaty as part of the programme of the Commission of the European Communities for freedom of establishment. The specialised character of these contracts suggests their exclusion from the present Convention in any event. Exclusion (d) should however, set out in more detail the types of insurance contract referred to. (Jurisdiction in matters relating to insurance is dealt with in Articles 7 to 12 of the Judgments Convention.)

1.2.10. Exclusion (e) might be clarified to show whether it is intended to exclude the status and capacity of corporations etc. (compare the wording of Exclusion (a)), and the power of their organs of management to bind them contractually.

1.2.11. The list of exclusions naturally raises the question of whether any other types of transaction should be expressly saved from the application of the Convention. It is clearly impossible, even if it were desirable, in this Consultative Document to deal exhaustively with this point and reference can only be made to a few other possible candidates for exclusion. The exclusions mentioned in Article 1 cannot be considered in isolation as it may be that Article 27 (which relates to existing conventions) will, in effect, exclude from the application of the Convention, transactions which are governed by bilateral or multilateral conventions already in force. Thus, the position with regard to contracts for the international carriage of passengers and goods, with regard to which there are existing conventions, should be examined on the basis that those conventions would not be affected by that now under consideration. Similarly, where the question of damage or injury caused in the air falls to be governed by the Warsaw and related Conventions it will

presumably be excluded by Article 27. Collisions at sea must also be considered but it should be pointed out that the question of how the Convention will operate in relation to a collision on the high seas has been left open (see paragraph 10.1.11, below). Other possible exclusions include bankruptcy (on which a special convention is proposed and to which Article 17 is relevant); patents; copyright; industrial property rights; and issues of and transactions in securities.

1.2.12. In examining the exclusions to be provided for in Article 1 careful consideration must be given to the consequences of an exclusion, which will presumably be to preserve the relevant choice of law rules now in force in the various parts of the United Kingdom either generally or, if there is a convention on the subject, in relation to cases involving countries not party to that convention. Of course the more exceptions there are the more problems will arise in classifying situations as ones to which this Convention does or does not apply and the more uncertainty is introduced into the subject.

1.2.13. It is a matter for consideration whether the Convention should apply to contractual obligations involving the State and public authorities. The Brussels Group (see paragraph 1.1.2, above) suggests that the Convention would apply to a contract between a State and an individual if the contract is "within the purview of private law". The dichotomy between public and private law is not generally made nor commonly applied in English and Scots law, and even if it were, the Convention does not expressly confine itself to private law situations. Article 14 makes a special exclusion with regard to the liability of the State and public authorities for non-contractual obligations and this leads to the inference that no similar exclusion is intended for contractual obligations. Some contracts of Governments, in particular, and of public authorities may present special features which may justify either their exclusion from the Convention or a special provision indicating the precise circumstances in which the Convention will apply to them.

TITLE TWO

Uniform rules

Article 2

A contract shall be governed by the law chosen by the parties.

Conditions governing the validity of the consent of the parties as to the applicable law shall be determined by that law.

[However, in relations between employer and employee, the choice of law made by the parties shall in no case prejudice the operation of mandatory rules for the protection of the employee which are in force in the country in which he habitually carries out his work.]

The Annex to the draft Convention contains the following:-

Article 2, fourth paragraph

First variant

[The effect of the silence of a party on a proposal as to the applicable law, made by the other party before or in connection with the conclusion of the contract, shall be determined in accordance with the law of the place of the habitual residence of that party. However, notwithstanding the provisions of that law, an agreement as to the choice of the applicable law may be deduced from silence on the part of a party if that interpretation follows from a previous course of dealing between the parties or from international trade usages of which the parties, by reason of their business activity, were or should have been aware.]

Second variant

[Agreement on the choice of applicable law may be deduced from the silence of one of the parties only if that interpretation follows from a previous course of dealing between the parties or from international trade usages. However, if the contract has already been concluded, the law which governs it shall determine whether the silence implies a choice of applicable law.]

Background

2.1.1. The first paragraph, states the Report, "simply restates a rule currently consecrated by the private international law of the Community countries, and most others", an assertion supported by reference to statutory provisions and judicial decisions in the founder States of the E.E.C. The proposal is also supported by reference to the (unratified) Benelux Treaty for a uniform private international law which, in Article 13, provides: "Contracts shall be governed by the law chosen by the parties in respect of both mandatory and dispositive provisions."; and by reference to Article 2 of the 1955 Hague Convention on the law applicable to the international sale of movables which provides "the sale shall be governed by the internal law of the country designated by the contracting parties." ("Dispositive" is used here to translate the French "supplétif")

2.1.2. Referring to the mention by Article 13 of the Benelux Treaty of "mandatory and dispositive provisions", the Report states that the reason for this wording was to make it clear that the old theory whereby the parties could only choose the applicable law in the context of dispositive rules had been abandoned. The Group considered there was no need to state expressly that the parties' choice of law included both mandatory and dispositive clauses.

2.1.3. The Report emphasises that the choice of law may be express or implied and claims that this is made clear by the wording of Articles 4, 5 and 6, each of which refers to "express or implied choice of law". However, the choice must really be that of the parties and not one which they had not thought of but which is imputed to them by the court. See, also, paragraph 4.1.1, below.

2.1.4. Although the Convention will only authorize the parties to select the law applicable to their contract "in situations of an international character" (see Article 1), their freedom of choice would in no way be limited by Article 2 and they would be able to "designate any law whatsoever even if it apparently has no connexion with their contract." It would, says the Report, be injudicious to consider such a choice to be "wilful" as the parties' choice is always the expression of their common interest.

2.1.5. The second paragraph of Article 2 (subjecting the validity of the parties' consent to the law chosen by them) is modelled on Article 2 of the 1955 Hague Convention on the law applicable to the international sale of movables (to which, however, the United Kingdom has not adhered). The argument that it is illogical to allow the validity of consent to the applicable law to be governed by that law is answered by saying that this is the will of the legislator and not of the parties. What is proposed in the Convention would, it is suggested, avoid subjecting the conditions as to the parties' consent to different laws according to whether they relate to the choice of applicable law or the formation of the contract as a whole. Before reaching the approach set out in Article 2, the Group examined two alternatives: the first (following Italian practice) would have submitted conditions as to the validity of the parties' consent to the choice of law to the lex fori; the second would have submitted them to the law of the place where the consent was reached (as suggested by a Belgian writer). The Group rejected both as possessing drawbacks which outweighed their advantages.

2.1.6. The parties' freedom of choice would be subject only to the limitation in the third paragraph of Article 2 relating to labour relations. This is linked with the special rule in Article 5 and is aimed at preventing the employer from escaping mandatory provisions in force for the protection of workers by choosing a law whose provisions offer less protection. The Report goes on to state: "Needless to say, if the parties choose a law whose mandatory clauses are as protective as, or even more protective than, that of the country in which the worker habitually carries out his work, the limitation of absolute discretion in Article 2, paragraph 3, lapses." The paragraph does not, it is explained, deviate from the principle of allowing the parties an absolute discretion save where, as is most commonly the case, the worker habitually carries out his work in a single country. The paragraph is enclosed in square brackets because it was unacceptable to one delegation which considered that it did not distinguish, as it ought, between mandatory provisions of public and private law respectively. The E.E.C. is currently giving consideration to a proposed Regulation on the conflict of laws regarding labour relations.

2.1.7. The two alternative versions of Article 2, paragraph 4, represent differences of opinion within the Group as to how the silence of one party as to the applicable law should be dealt with. One view was in favour of the matter being dealt with under the general rule laid down in paragraph 2 and that it should not be the subject of a special conflict of laws rule. Other delegations preferred an express provision but were unable to agree on selecting one of the alternative versions of paragraph 4.

2.1.8. Although the Group discussed the question of the application of different laws to different parts of a contract it was decided not to make any specific provision in the Convention.

Commentary

2.2.1. It appears from Articles 4, 5 and 6 that a choice of law can be made by implication as well as expressly; as a matter of drafting it might, however, be preferable to state this explicitly in Article 2. In fact, Article 4 is the first place in the Convention at which mention is made of "express or implied choice of law". What is meant precisely by an implied choice? Is it intended that, for example, the implication can only be derived from the wording of the contract and not from surrounding circumstances such as the course of dealing between the parties? It may be meant to exclude "imputed choice", as suggested in paragraph 2.1.3, above; and, in this context, reference may be made to paragraph 2 of Article 2 of the 1955 Hague Convention on the law applicable to the international sale of movables which requires the choice of law to be express or to result "without doubt" from the terms of the contract. It is also not clear whether a choice of forum, or of arbitrators or place of arbitration, would be deemed to constitute an implied choice of applicable law. Of course, the more frequently a choice can be implied, the less frequently will the special rules in paragraph 2 of Article 4 have to be invoked.

2.2.2. As the laws of the United Kingdom now recognize that, in general, the parties to a contract are free to choose the law which is to govern it, paragraph 1 of Article 2 is probably acceptable in principle. That choice must, however, be genuine and if any question as to its genuineness arises, should that question not be determined by reference to the law with which the transaction has the closest connexion? The justification given (see paragraph 2.1.5, above) for subjecting the validity of the choice of law to the law chosen is not particularly convincing and paragraph 2 of the Article does not appear to impose any effective control on an improper choice of law, e.g., where the object of the parties is to avoid some provision of the law with which the contract has

the closest objective connexion. However, in answer to these criticisms, it was argued at the February 1973 meeting of the Group that it made for simplicity to refer the validity of the choice of law and the validity of the substantive agreement to the same law and that the possibility of abuse was reduced by the provisions of Articles 7 and 22 of the Convention.

2.2.3. Paragraph 3 is, perhaps, only an illustration of the general principle that a choice of law clause does not affect the need for compliance, in the performance of the contract, with a compulsory rule which (a) belongs to the place of performance and (b) affects the manner of performance. The paragraph does, however, raise a number of points worth considering. There is some doubt as to what is intended here by "mandatory rules". Are these words to be restricted to provisions which relate directly to the contractual relationship as such, for example, a statutory minimum length of notice to terminate the agreement, or do they also extend to rules for the protection of the worker, such as the provisions of the Factories Act 1961, which do not depend on the contract? As noted in paragraph 2.1.6, above, at least one delegation to the Brussels Group considered that paragraph 3 does not adequately distinguish between mandatory provisions of public and private law, perhaps a formulation of the same or a similar problem but in terms familar to the continental lawyer. An example of the type of situation to which paragraph 3 might apply is contained in Brodin v. A/R Seljan 1973 S.L.T. 59 where it was held that whatever the law chosen by the parties to govern a contract may be, that law must yield to an Act of Parliament (in that case section 1(3) of the Law Reform (Personal Injuries) Act 1948) which has provided otherwise. Whatever may be the true construction of paragraph 3, consideration must be given to the desirability of this paragraph whose wording should be contrasted with the more flexible discretionary provisions of Article 7 about mandatory

rules. Presumably if the employee does not habitually work in any one country, it is the latter Article which may limit the ambit of the applicable law rather than paragraph 3 of this Article. Article 15 may also be relevant. While it may be reasonable in principle to make an exclusion of contracts of employment, it is difficult to see any justification for singling them out for treatment in this particular way. It may be argued that the implication to be drawn from the inclusion of this paragraph is that compulsory rules of the place of performance are normally displaced by the law chosen by the parties to govern a contract which does not relate to employment.

2.2.4. The question of whether a contract was validly concluded at all is dealt with in Article 8, which must be considered in conjunction with paragraph 2 of Article 2.

2.2.5. There seems to be no English authority on the question dealt with in the alternative versions of paragraph 4 about the silence of one party. The solution proposed in the first variant has been advanced by Wolff, Private International Law (2nd ed., 1950), para. 421, and seems to have the support of the editors of Dicey and Morris, The Conflict of Laws (9th ed., 1973), p. 764. It could however produce strange results. The second alternative is not open to this criticism but it does not seem to constitute a rule for the choice of the applicable law. It may be that it would be preferable to make no express provision on this matter.

2.2.6. Although some aspects of contracts are specifically dealt with (e.g. validity of consent in Article 8 and transfer of ownership in Article 9), the Convention does not specify or limit the aspects of "contractual obligations" (to use the phrase adopted in Article 1) which are to be governed by the applicable law in a way comparable with that attempted

for non-contractual obligations in the elaborate provisions of Article 11. This appears to be deliberate (see paragraph 15.1.4, below). While it may be that the scope of the applicable law is to some extent dealt with in Article 15, that Article applies to all types of obligation and its existence has not been thought to render Article 11 unnecessary. There would therefore seem to be reason to give careful consideration to specifying more precisely the ambit of the applicable law of a contract and particularly with regard to matters which are at present regarded by the English and Scottish courts as matters for the lex fori.

Article 3

The choice of the applicable law may be made by the parties either at the time of conclusion of the contract or at a later date. The choice may be varied at any time by agreement between the parties. Any variation in the choice of the applicable law which is made after the conclusion of the contract shall be without prejudice to the rights of third parties.

Background

3.1.1. The first and second sentences allow the parties the greatest liberty as to the time at which the choice of applicable law may be made and varied so that it may be made either at the time of contracting or at a later date and varied at any time.

3.1.2. Although this paragraph reflects the law as it is applied in some of the E.E.C. States, it does not represent the position in Italy where, the Report states, it has been held that the choice can only be made at the time of contracting and, once made, it is no longer open to the parties to agree on designating a law other than that chosen at the time of contracting.

3.1.3. Granted the principle of absolute discretion, and that the need of a choice of law by the parties may arise at the time of contracting or thereafter, it is, the Group argues, quite logical that the power to choose be not confined to the time of contracting only.

3.1.4. The Report seems to visualise the choice of law being made or varied during legal proceedings and refers to the limits within which this should be allowed. It is said that this is a point for the rules governing the proceedings and should be decided only be reference thereto.

3.1.5. Article 3 does not make specific provision for a choice of law made prior to the contract for, it is said, it is only at the time of contracting that the parties' choice would take effect.

Commentary

3.2.1. This Article must be considered as supplementary to the rules proposed in Article 2. Clearly any restriction on the right of the parties to select the applicable law in the first place ought to apply to the selection of that law after the contract has been made or to any alteration in the law applicable.

3.2.2. There may, perhaps, be limits to the application of this Article not merely on the grounds of public policy (e.g. Articles 7 and 22) but because it may be necessary to consider the validity of the contract by reference to a proper law which will apply with regard to the formation of the contract and to its operation up to the time when the parties expressly select a law to govern the transaction. It is not clear whether the Article visualises the alteration of an applicable law with retrospective effect to, say, the commencement of the contract.

Article 4

In the absence of an express or implied choice of law, the contract shall be governed by the law of the country with which it is most closely connected.

That country shall be:

(a) the country in which the party who is to effect the performance which is characteristic of the contract has his habitual residence at the time of conclusion of the contract;

(b) the country in which that party has his principal establishment at the time of conclusion of the contract, if the characteristic performance is to be effected under a contract concluded in the course of a business activity;

(c) the country in which that party's subsidiary establishment is situated, if it follows from the terms of the contract that the characteristic performance is to be effected by that establishment.

The preceding paragraph shall not apply if either the characteristic performance, the habitual residence or the establishment cannot be determined or if from the circumstances as a whole it is clear that the contract is more closely connected with another country.

Background

4.1.1. Although the laws of the E.E.C. countries generally allow the parties to a contract with international elements to select the applicable law, if no choice has been made expressly or impliedly there is no unanimity on the law

which should be applied. In Belgian and French law, failing an express choice the courts look for various pointers indicating that the contract is located in a given country. This may involve a subjective approach, i.e. what the parties would have stipulated had they made express provision, or an objective approach, asking with which country the transaction is most closely connected. Recent decisions incline to prefer the latter approach. In German law an attempt is first made to infer what would have been the will of the parties and if this produces no result the applicable law (or laws) is that of the place of performance of each of the contractual obligations. The Italian Codes, in the absence of choice by the parties, prescribe various applicable laws depending on the nature of the transaction (e.g. charters, freight and transport contracts by sea, inland waterway or air are governed by the national law of the ship or aircraft). All other contracts are governed by the national law of the contracting parties (if common to both) or the law of the place of contracting. The Benelux Uniform Law would provide that the contract would be governed by the law of the country with which it is most closely connected and, when this cannot be determined, by the law of the country in which it was concluded. It will be seen that flexibility varies from country to country with the Italian law representing the most rigid solution.

4.1.2. The Group rejected the Italian preference for the place of contracting and the common nationality of the parties as insufficiently important yardsticks and ones which may be wholly coincidental. However, the more flexible approach of other systems did not win complete acceptance. It was felt that "flexibility untempered by appropriate correctives might run counter to the requirements of legal certainty which are essential in the context of uniform rules .... inside the Community." The Group considered that "the country with which the contract is most closely connected" is a vague formula and might in practice simply mean leaving selection

of the applicable law to "the wisdom or arbitrary choice of the judge". This would not be easily acceptable in Italy where tradition favours sufficiently rigid connecting factors. In the light of these considerations the Group agreed on Article 4.

4.1.3. The flexibility of the general principle that the contract shall be governed by the law of "the country with which it is most closely connected" is considerably restricted by the special meanings given to this phrase by paragraph 2(a), (b) and (c). These revolve around the criterion of "characteristic performance" which, says the Report, defines the connexion of the contract from the inside, instead of from the outside by elements that are not of the essence of the obligation e.g. the nationality of the parties or the place of contracting. The "characteristic performance" concept links the contract to its economic background.

4.1.4. No difficulty arises over identification of the characteristic performance in unilateral contracts. In bilateral contracts, the payment of money is not regarded as a characteristic performance and it is the performance for which the payment is due which constitutes "the centre of gravity and socio-economic function of the contractual transaction." The Report goes on to state that as for the the geographical location of performance, it is quite natural that the country in which the party supplying it has his place of business or habitual residence .... should prevail over the one in which the contract is performed. Examples quoted are a banking contract which will be governed by the law of the country of the banking establishment; and an agency contract which, as the characteristic performance is effected by the agent, will be governed by the law of the country in which the agent has his establishment or habitual residence. Thus, it is argued, concrete meaning is given to the "unduly vague" concept of closest connexion and the

determination of the applicable law is considerably simplified. The place where the act is accomplished is unimportant and there is no need to embark on all the difficult problems involved in determining the place of contracting. For each category of contract what counts is the characteristic performance.

4.1.5. To avoid "running conflicts", residence or establishment has been restricted to that at the time of contracting. The Group did not consider it necessary in the case of corporations and juristic persons to refer to their registered offices.

4.1.6. Where the characteristic performance, habitual residence, or place of business cannot be determined, the contract will be governed by the law of the country with which it is most closely connected. It is also provided in paragraph 3 that if, from all the circumstances, the contract is more closely connected with another state the provisions of the second paragraph are displaced. Given the general nature of the rule laid down in Article 4 (to which only Article 5 and 6 are exceptions) it was considered necessary to provide for the possibility of applying the law of another country wherever the circumstances show the contract to be more closely connected with that country. Thus, in a carriage by sea contract, instead of the applicable law being that of the habitual residence or place of business of the party transporting the goods or passengers, it may be that the nationality of the vessel would indicate the country most closely connected with the contract. The provisions of paragraph 3 are said to leave the court a measure of discretion as to whether the circumstances justify a deviation from the rules laid down in paragraph 2.

4.1.7. The Group failed to agree on an express exclusion of the possibility of the court making different parts of the contract subject to different laws.

Commentary

4.2.1. Article 4 is clearly one of the most controversial provisions of the draft Convention. It is based on legal ideas which are not only unfamiliar to English and Scots lawyers but which may be difficult to apply in practice and which are capable of leading to unsatisfactory results.

4.2.2. The approach embodied in Article 4 is clearly based on the theory of "characteristic performance" which has been elaborated on the Continent but which has not influenced British thinking on the subject, although, like our attempts to systematize the search for the proper law, it is intended to indicate the law with which it is thought the contract has the closest connexion.

4.2.3. Before the rules in paragraph 2 could be accepted, it would be necessary to consider whether the theory of "characteristic performance" is acceptable and is capable to producing reasonably predictable results. This seems doubtful. It is said that one of the advantages of the doctrine is that a seller's contracts would always be subject to the same law because it is the obligation to transfer the property in the goods which is the characteristic obligation of a contract of sale. However, in string contracts sellers of goods are also buyers and the doctrine would result in the application of different laws to contracts which should be governed by the same law. What is the characteristic performance of a contract for barter? And why should the seller of goods always apparently be placed in what will probably be a favourable position with regard to choice of law as opposed to the buyer? It would seem that a consumer will usually have his rights determined by the law of the country of the supplier.

4.2.4. As the rules in paragraph 2 are expressly tied to the selection of the characteristic performance under the contract

and as this is, for British lawyers, a novel concept, it may be that it would be essential to insert in the Convention clear guidance as to the identification of the performance which is to be regarded as characteristic in various types of contracts.

4.2.5. Even if the theory of characteristic performance is accepted, it does not follow that it would be satisfactory to select the applicable law by reference to the residence or the place of the principal establishment of the party who has to make the characteristic performance. If characteristic performance is so important it might be thought that it would be more consistent to apply the law of the place where the characteristic performance is to take place. It may be noted that Article 5(1) of the Judgments Convention provides that a defendant domiciled in a Contracting State may, in another Contracting State, be sued in matters relating to a contract in the courts for the place where the contract has been, was to have been or is to be performed. If Article 4 were to be adopted in its present form there might therefore tend to be a divorce of jurisdiction and applicable law in the sense that a court assuming jurisdiction under the Judgments Convention would be required by the Convention now under consideration to apply a foreign law. (Contrast the position regarding non-contractual obligations referred to in paragraph 10.2.4, below.)

4.2.6. It is, perhaps, difficult to escape the conclusion that the adoption of the somewhat rigid rules set out in paragraph 2 would constitute a reversion to the type of connecting factor which has been adopted by British courts in the past but is now rejected as tending to unsatisfactory results. At an earlier state of the development of the conflict of laws rules, the lex loci contractus or the lex loci solutionis found favour as the law to be applied but they now figure as little more than factors to be taken into account in deciding on the proper law. However, the rules which, in

the absence of any express or implied choice of law by the parties, English courts apply mean that each case has had to be treated on its merits. While this method is calculated to produce a result carefully tailored to the facts of each case it leads to considerable uncertainty and makes it difficult for legal advisers to help their clients with any very confident opinion. The purpose of Article 4 is, therefore, one for which British lawyers may, perhaps, feel some sympathy. On the other hand, the connecting factors set out in paragraph 2 are quite unknown in English and Scots law, and their mere novelty may make them difficult of acceptance. However, it is understood that the solution proposed in the Article is as novel for some of the other E.E.C. States as it would be for the United Kingdom but is regarded by the experts representing those States in the Brussels Group as having the advantage of finding a connecting factor, i.e. characteristic performance, within the contract and not in some fact extraneous to it. It should be pointed out that Article 4 is probably both the most radical provision in the draft and the one of whose correctness the original Brussels Working Group seems most strongly persuaded.

4.2.7. So far as the drafting is concerned, even if it is accepted that some rigid pointers on the lines of paragraph 2 are desirable, the effect of paragraph 3 could well be almost completely to negative the effect of paragraph 2 and to face the court with the task of determining, unaided by presumptions, which country has the closest connexion with the contract. The interrelation between paragraphs 1 and 2, on the one hand, and paragraph 3 clearly requires careful consideration.

4.2.8. The interrelation of sub-paragraphs (a), (b) and (c) of paragraph 2 may also require attention. No definition is given of "a business activity" referred to in sub-paragraph (b). Presumably sub-paragraph (c) is also intended to refer to contracts concluded in the course of a business activity.

The words "principal establishment" are not defined. Are they, for example, intended to refer to a company's head or registered office or to its largest factory?

4.2.9. It must be made clear that the word "country" means, in relation to the United Kingdom, each part which has its own system of law i.e. England and Wales; Scotland; and Northern Ireland.

Article 5

In the absence of an express or implied choice of law, contracts of employment shall be governed by the law of the country

(a) in which the employee habitually carries out his work,

(b) in which the establishment which engaged the employee is situated, if the employee does not habitually carry out his work in any one country,

unless from the circumstances as a whole it is clear that the contract of employment is more closely connected with another country.

Background

5.1.1. This Article was inserted in the Convention because of "the importance of labour relations in the economic life of the Community" and because Article 4 is not suitable for application to employment contracts. The draft Regulation of the E.E.C. Commission on the subject was taken into account.

5.1.2. The Group considers the alternatives to be sufficiently flexibly worded to cover most situations. For example, in the event of a temporary and exceptional detachment of a worker to a country other than the one in which he habitually works there seem no grounds for excluding the application of alternative (a). The choice indicated in (b) would be appli-

cable only where the worker is subject to frequent changes of place of work.

5.1.3. The concluding words of the Article are in effect a repetition of the formula used in paragraph 3 of Article 4.

Commentary

5.2.1. The importance of labour relations in the context of the E.E.C. has been a factor in the adoption of this Article. This however is a somewhat dubious argument since the Convention would apply not merely to situations in which the only possible choice of law would be the law of one of the E.E.C. States, but to situations related to countries outside the E.E.C.

5.2.2. The choice of law applicable to a contract of employment is, as mentioned above (paragraph 5.1.1), the subject of a draft Regulation under Article 49 of the E.E.C. Treaty. The provisions of Article 5 are not easy to reconcile with those of the draft Regulation and it might be thought desirable not to deal with contracts of employment in this Convention. However, in view of Article 24, this would result in such contracts having connexions with countries outside the E.E.C. being dealt with in accordance with a law selected, not in accordance with this Convention, but under the existing English and Scottish conflict of laws rules.

5.2.3. It is questionable whether it is necessary or desirable to single out contracts of employment for special treatment in this way. The fact that Article 4 is apparently not considered sufficiently flexible to deal with them, suggests either that the theory of "characteristic performance" breaks down when applied to contracts of employment or that the extensive range of mandatory legislation applying to

employment contracts in each country would render it desirable to exclude such contracts from the application of the Convention. Obviously whatever form Article 4 ultimately takes must have an important bearing on Article 5.

5.2.4. The concluding words of Article 5 give rise to difficulties similar to those involved in paragraph 3 of Article 4 and referred to in paragraph 4.2.7. above.

Article 6

In the absence of an express or implied choice of law, contracts whose subject matter is immovable property shall, unless from the circumstances as a whole it is clear that the contract is more closely connected with another country, be governed by the law of the place where the immovable property is situated.

Background

6.1.1. The Report says that the principle of this Article "exists in most national private international law systems and answers wholly obvious needs".

6.1.2. It is suggested that the Article would seem to cover sales or transfers, rental and leasing.

Commentary

6.2.1. It is probably justifiable to single out this class of contract for specific mention because it has always been the subject of special treatment in most systems of conflict.

6.2.2. English law gives similar prominence to the lex situs. As stated in Dicey and Morris, The Conflict of Laws (9th ed., 1973), pp. 526 and 532, all rights over or in

relation to an immovable are, subject to exceptions, governed by the law of the country where the immovable is situated. The principal exception is that the validity, interpretation and effect of a contract regarding an immovable are governed by the proper law of the contract which, in general thought not necessarily, is the lex situs. Scottish law adopts the view that the law of the situs is of particular importance in contracts relating to immovables where there is a presumption that the proper law of the contract is the law of the situs: Anton, Private International Law (1967), p. 196.

6.2.3. The British rules reflect the view that effective jurisdiction over immovables can only be exercised by the courts for the place where the immovable is situated or in accordance with the law which such courts would apply. This is particularly so in relation to the actual title to immovable property and in this connexion Article 6 must be read subject to the provisions of Article 9.

6.2.4. A difficulty raised by Article 6 (and, indeed, by other provisions of the Convention) is that of the possible application of more than one law to different parts of a contract. From paragraph 2.1.8 above, it appears that the point has been left open deliberately. Article 6 relates to "contracts whose subject matter is immovable property" but a contract may deal with such property and also regulate other aspects of the relations between the parties. In this connexion it may be noted that while Article 1 of the Convention refers to "contractual obligations", Articles 2 to 7 provide for the law which is to be applicable to "the contract".

6.2.5. Similarly, it is for consideration whether it is necessary to subject all aspects of the contract to the same law. The British rule envisages that some aspects of a contract relating to immovables might be subject to the lex situs but others to the proper law of the contract. This

possibility does not seem to be clearly contemplated by Article 6.

6.2.6. In answer to an enquiry by the United Kingdom delegation at the February 1973 meeting of the Group, it was stated that the words in the French text "les contrats ayant pour objet des immeubles" were not meant to cover, e.g., work to be done to buildings and that the drafting is ambiguous and must be reconsidered.

Article 7

Where the contract is also connected with a country other than the country whose law is applicable under Articles 2, 4, 5, 6, 16, 17, 18 and 19, paragraph 3, and the law of that country contains mandatory rules which govern the matter in such a way as to exclude the application of every other law, these rules shall be taken into account to the extent that the exclusion is justifiable by the special nature and purpose of the rules.

Background

7.1.1. This is said to be the first restriction on the application of the law chosen by the parties or selected by the operation of Articles 4, 5 or 6. The incidence of laws of public order on the requirements governing contractual relations is in practically all countries a familiar aspect of economic life. Legal theory speaks of "policing of contracts" by the application of laws of public order.

7.1.2. The Group states that it is not possible to list laws of public order because what makes them such is not the matters to which they apply but the intention of the legislator. For example, a provision for an immediate minimum down payment in a deferred sale might in one country be considered a public order law applicable to all contracts

concluded on its territory, and in another a mere law of contract applicable only to contracts whose proper law is that containing the minimum payment provision.

7.1.3. Article 7 purports to provide a uniform solution to the question of to what extent laws of public order should be taken into account when they are mandatory in respect of certain effects or elements of the contract in a country with which it is connected but which is not that of the applicable law.

7.1.4. This Article does not provide for the automatic exclusion of the law normally applicable to the contract in accordance with Articles 2, 4, 5 and 6 (in comparison with the second paragraph of Article 15). The Article is framed in a sufficiently flexible way to allow the judge a discretion. Only insofar as the contract is connected with a country other than that of the applicable law, and the nature or purpose of the public order laws in force in it may, in the judge's view, justify exclusion of the applicable law, will the judge take account of their mandatory provisions by co-ordinating them with those of the applicable law.

7.1.5. The Group recognises that the rule contained in the Article would confer on the judges a delicate task and that its application by the courts may not produce uniform results. It is a matter of satisfactorily solving exceedingly intricate situations such as often arise in contracts of an international character.

Commentary

7.2.1. The enforcement of a contract may involve questions of public policy and illegality. Apart from the proper law, these difficulties may arise from the law of the forum or from the law of another country with which the contract is

connected. The former are dealt with in Article 22 which is purely negative and permits the exclusion of an applicable law only if it is "manifestly incompatible with public policy". But this may be insufficient to deal with the second type of case in which an aspect of the contract is affected by a law other than the proper law and the court has to determine to what extent effect should be given to that other law. A common example is of a contract whose performance would be illegal or subject to regulation in the country where it is to be executed although it is valid by its proper or applicable law. In such circumstances a departure from the proper law may not necessarily be dictated by the public policy of the court trying the case. Clearly in a comprehensive Convention such as this, it should be clearly stated what the court is to do in such a situation and Article 7 is intended to meet this requirement. It is for consideration to what extent the rule proposed is correct in principle or adequately formulated in detail. It is to be noted that Article 7 is not restricted to taking into account mandatory rules of the place of performance alone.

7.2.2. Whether any rule similar to Article 7 exists in English and Scots law at present is open to question. "It is, however, doubtful and highly controversial whether, according to the English rules of the conflict of laws, illegality according to the lex loci solutionis as such has any effect on the validity or operation of a contract governed by foreign law and to be performed in a third country, i.e. in a foreign country other than that of the proper law. Would an English court enforce a French contract for the payment in Spain of chartered freight beyond the maximum permitted by Spanish law? Would it hold that the consequences of such illegality are governed by Spanish law, the lex loci solutionis, or would it leave it to French law, the proper law of the contract, to determine whether illegality according to the lex loci solutionis has any, and if so what, effect upon the validity and operation of the contract?": Dicey

and Morris, The Conflict of Laws (9th ed., 1973), p.782. See also Anton, Private International Law (1967), pp. 214-215. The view favouring the reference of the matter to the proper law is expounded by Mann, "Proper Law and Illegality in Private International Law" (1937) 18 B.Y.I.L. 97, 107-113. See also Cheshire's Private International Law (8th ed., 1970), pp. 227-229. In Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft [1939] 2 K.B. 679, a contract whose proper law was English and which was to be performed in England was enforced by the English court although its performance might involve a breach of the exchange control regulations of Hungary, with which the contract was also connected. Article 7 would, pro tanto, overrule this decision by giving the court a discretion to take into account, and, in appropriate circumstances, apply the Hungarian law. Of course, whatever may be the correct view of English and Scots law at present, different considerations may apply to the question in the context of the Convention both because, if adopted, it might result in greater rigidity in the law than under the present somewhat flexible rules being evolved by the judges and because the limitations on the applicable law envisaged in other provisions, e.g. paragraph 2 of Article 15, and Article 22, are inadequate to deal satisfactorily with this type of situation.

7.2.3. Apart from these fundamental questions, this Article clearly gives rise to a number of difficulties both of interpretation and application. It is, for example, brought into play if the contract is connected with a country other than the country of the applicable law. It may be thought too indefinite to allow this overriding provision to apply whatever may be the connexion with another country without attempting to define the type of connexion which is sufficient. Particularly if there has been an express choice of law the contract may also be connected with a number of different countries according to the circumstances, e.g. the chosen applicable law may be A, the residence of the parties B

and the place of performance C. It would seem that it would be necessary to consider any mandatory provisions of laws B and C. It is also not entirely clear what is meant by "rules which govern the matter in such a way as to exclude the application of every other law". Does this refer to the whole contract or does "the matter" mean only an aspect of the contract, e.g., payment? Presumably the word "rules" is intended to be equivalent to "law".

7.2.4. No guidance is given as to the circumstances in which it is to be held that "the exclusion is justifiable by the special nature and purpose of the rules". It would seem that there is a danger of the courts being required to pronounce on the merits of legislation enacted in other countries. It may, however, be that it is intended to suggest that laws whose purpose is penal, fiscal or confiscatory will be disregarded, whereas domestic laws on exchange control and restrictive practices will be taken into account. This, however, is far from clear from Article 7.

7.2.5. In discussion of this Article at the meeting of the Group in February 1973, it appeared that the mandatory rules referred to may be intended to be those which French law characterizes as "règles de sécurité et de police" (a phrase adopted in Article 12). This is, no doubt, a concept well understood in French law but it does not exactly correspond with any like classification in English or Scots law and it is probably just as unfamiliar to the German lawyer. It was agreed at the meeting that Article 7 would require a French judge dealing with a contract for the sale of goods where the parties had chosen French law as the proper law but which had a close connection with English law to consider whether he should nevertheless give effect to the limitations on freedom of contract contained in the Supply of Goods (Implied Terms) Act 1973. The Article is variously regarded by members of the Group as a "safety valve" against the mechanical application of Article 2 and as the "internationalist" converse

of Article 22 in the sense that a judge sitting in country X should have proper respect for the "ordre public" of country Y, although it was generally agreed that the judge will have a wide discretion and be subject to a very heavy burden.

7.2.6. In the Group's discussion in February 1973, it was suggested that the European Court might have a valuable role to play in the interpretation and development of Article 7. Perhaps this suggestion stems from the Protocol of 3rd June 1971 on the interpretation of the Judgments Convention by the Court of Justice of the European Communities. The present Convention does not make provision for such interpretation but it is a suggestion whose adoption by the Group in future cannot be ruled out. (See also paragraph 23.2.3, below.)

7.2.7. Article 7 is not satisfactory as it gives no indication of how compulsory rules of one system can be "taken into account" when applying another law or what is to happen if there are inconsistent mandatory rules drawn from different laws all of which have a connexion with the contract.

7.2.8. Article 7 applies only to matters arising from a contract and it may be necessary to consider whether, if its purpose is approved, a provision on somewhat similar lines should be made for non-contractual obligations. Article 12 goes some way in this direction but it is not so generally expressed as Article 7. Subject to Article 22, the application of a law prescribed by the Convention may be refused as being incompatible with public policy. As the court is only required by Article 7 to "take into account" the mandatory rules referred to, it is presumably not necessary, at any rate on the present drafting of the Convention, to make it clear that Article 7 is subject to Article 22 so that a mandatory rule of another country is not to be applied if this would be contrary to the law of the forum. Of course,

if the court were required to give effect to mandatory rules without having any discretion in the matter it would be important to ensure that public policy was allowed full play.

Article 8

Conditions governing the validity of the consent of the parties to the contract shall be determined according to the law which is applicable under the preceding Articles.

The Annex to the draft Convention contains the following:-

Article 8, second paragraph

First variant

[The effect of the silence of a party on the conclusion of a contract shall be determined in accordance with the law of the place of habitual residence of that party. However, notwithstanding the provisions of that law, consent to the contract may be deduced from the silence of a party if that interpretation follows from a previous course of dealing between the parties or from international trade usages of which the parties, by reason of their business activity, were or should have been aware.]

Second variant

[The conclusion of a contract may not be deduced from the silence of a party unless that interpretation follows from a previous course of dealing between the parties or from international trade usages.]

Background

8.1.1. The Report points out that for the purposes of the Convention the applicable law covers in principle both the

formation and the effects of the contract and this Article merely spells this out in respect of the formation of the contract.

8.1.2. The alternative variants for the second paragraph reflect a difference of opinion in the Group about the effect of silence on the formation of the contract. One delegation thought the matter should be dealt with not in the Convention but under the rules of municipal law (including the rules of conflict of laws). Others, however, favoured explicit treatment in the Convention but opinions differed as between a rule of conflict and a substantive rule and no agreement could be reached. The alternative approaches are, therefore, set out as was done in the similar situation which prevailed with regard to Article 2, fourth paragraph.

Commentary

8.2.1. There may be some overlapping between this Article and paragraph 2 of Article 2 which provides that "Conditions governing the validity of the consent of the parties as to the applicable law shall be determined by that law". (See paragraph 2.2.2, above.)

8.2.2. It is not clear what precisely is intended to be covered by the words "the validity of the consent of the parties". It may be that what is meant is whether the contract has in fact been validly made. Alternatively it may be that the words refer to the capacity of the parties and the reality of the consent of each of them e.g. the presence of fraud, undue influence or mistake. Another possible factor is the validity of the communication of the offer and acceptance as showing that the parties were ad idem at the appropriate point in time. As pointed out in Dicey and Morris, The Conflict of Laws (9th ed., 1973), p. 763, cases

of offer and acceptance raise difficult problems because the question is whether an agreement has been concluded and it is arguing in a circle to refer the question either to the law of the place of contracting or to the proper law of the contract. There is, however, say the editors, no such difficulty in referring the question to the putative proper law, i.e. the law which would have been the proper law of the contract if it had been validly concluded. The problem is also considered in Anton, Private International Law (1967), pp. 205 et seq.

8.2.3. As to the alternative versions of paragraph 2, see paragraphs 2.1.7 and 2.2.5 above.

Article 9

Articles 2 to 8 shall not apply to the transfer of ownerhsip or to the effects of the contract on other rights in rem.

Background

9.1.1. This places a further restriction on the principle that the law of the contract extends to both its formation and effects. Such a restriction is generally accepted in the legal theory and practice of States of the E.E.C., and others. It is the law applicable to corporeal and non-corporeal property, not the law of contract which usually applies to the transfer of property and the effects in rem. These points will, it is anticipated, be dealt with in detail when the Group turns its attention to the framing of uniform conflict of laws rules in respect of property.

Commentary

9.2.1. It is understood from a discussion in the Group, which took place after the drafting of this Convention, that

Article 9 was inserted because the passing of property in rem was not a matter to be governed by the law of obligations but that it might be necessary to modify the Article so as to make it clear that the law applicable in accordance with the provisions of Articles 2 to 8 did govern the passing of property as between the parties to the contract. There is a provision to similar effect in Article 2 of the 1958 Hague Convention on the law applicable to the transfer of property in the international sale of goods (to which the United Kingdom has not acceded).

9.2.2. The effect of Article 9 would be that in advance of the proposed convention on property no provision would indicate which law was applicable to the transfer of ownership and other rights in rem and presumably the courts would be thrown back on the conflict of laws rules applicable at present in each country.

9.2.3. There seems no very strong reason why the proper law of the contract should not govern the transfer of rights in rem to movables, particularly when the moveables are in transit, if not in other cases as well. Article 9 may, perhaps, be more acceptable if it is made clear that it does not prevent the proper law from applying to the transfer of property in appropriate cases.

9.2.4. At the February 1973 meeting of the Group, the United Kingdom delegation asked for an example of "effets réels du contrat" (the phrase employed in the French version of Article 9). It was said that the power of a buyer in possession under section 25(2) of the Sale of Goods Act 1893 would be regarded as an instance of an "effet réel" of a contract for the sale of goods.

9.2.5. It may prove desirable to consider linking this Article with Article 6 (which deals with contracts regarding immovable property).

Article 10

Non-contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occurred.

However, if, on the one hand, there is no significant link between the situation arising from the event which has resulted in damage or injury and the country in which that event occurred and, on the other hand, the situation has a closer connexion with another country, then the law of that other country shall apply.

Such a connexion must normally be based on a connecting factor common to the victim and the author of the damage or injury or, if the liability of a third party for the acts of the author is at issue, it must normally be based on one which is common to the victim and the third party.

Where there are two or more victims, the applicable law shall be determined separately for each of them.

Background

10.1.1. The first paragraph conforms to a rule generally adopted in the laws of the original Member States of the E.E.C., although such laws are framed by reference not to "an event which has resulted in damage" but to "an illegal act".

10.1.2. The Group decided not to use the term "tortious/delictual act" ("fait illicite") as this might involve problems of characterization since the concept might not have the same content in the various laws and, in some circumstances, would fail to cover cases of liability not founded on fault. The French phrase "fait dommageable" (translated here as "an event

which has resulted in damage"), is based on the term used in Article 5(3) of the Judgments Convention. The Group thought it wise to use a formula which has already been adopted in the E.E.C.

10.1.3. Provided events resulting in damage are concerned, Article 10 covers all such events likely to subject their authors to the obligation to offer compensation and to grant their victims the entitlement to receive it. Thus, e.g. obligations arising from unfair or illicit competition will also be governed by the law applicable under this Article.

10.1.4. If the event occurs in one country but its damaging effects are felt in another there arises the question of which country is the one in which the event resulting in damage has occurred. Which country's law applies where a libellous letter is addressed to a person in another country? This point is not settled by the Convention. The Group decided to leave the matter open "in order not to impede ongoing developments in the jurisprudence of the Community countries".

10.1.5. Although the law of the country where the event occurs should remain the principal one to govern such obligations, it is necessary to envisage cases where the connexion between the situation caused by the event and the country in which it occurred will not be sufficiently significant. These may require that the applicable law be determined on the basis of some other connecting factor and various European legal systems have given effect to this. For example, in German jurisprudence, where both the wrongdoer and the victim are nationals of the same country, the municipal law of that country, rather than the lex loci delicti, determines liability. Article 14 of the Benelux Uniform Law provides an alternative to the lex loci delicti where the consequences of the illegal act belong to the legal sphere of another country.

An example of this is a traffic accident where all the persons involved are nationals of and domiciled in a country other than that in which the collision occurs. The law to be applied in such cases depends on all the circumstances and is not necessarily the law of the place of the accident. Further, Articles 4 and 6 of the 1971 Hague Convention on the law applicable to traffic accidents provide for several exceptions to the application of the law of the State in which the accident has taken place.

10.1.6. Paragraphs 2 and 3 of Article 10 are intended to indicate the circumstances in which the lex loci delicti will not apply.

10.1.7. The wording of paragraphs 2 and 3 is sufficiently flexible to leave the judge a measure of discretion as to whether the circumstances justify the application of another law; but the discretion is "limited by criteria that are as clear and precise as can be". For a law other than the lex loci delicti to be applicable both of the factors mentioned in paragraph 2 must be present. A balance is struck between the absence of a significant connecting factor and the presence of a preponderant one. It is impossible to compile a full list of connecting factors which would invoke paragraph 2. Sometimes it may be the common habitual residence of the parties; in others it may be a pre-existing juridical, contractual or legal relationship governed by the law of a country other than that in which the event occurred. But it must be emphasized that the connecting factors can only invoke the exception where there is a preponderance over the other factors and, in particular, over the link between the situation and the country where the damaging event occurs. Thus, if two Italian nationals habitually resident in Germany are the parties to a traffic accident in Italy during their stay there, the lex loci delicti could not normally be replaced by the law of the common habitual residence. In

such a case it would be hard to find no significant connecting factor between the country of the accident and the ensuing situation.

10.1.8. Instead of referring in Article 10 to "the consequences" of the event which has resulted in damage, the Group preferred to refer to "the situation arising from" the event. This is intended to bring out more clearly the purely material character of the situation envisaged, in contrast with "consequences" which has the sense of "legal consequences". It is only possible to speak about legal consequences when the applicable law has been determined.

10.1.9. The fourth paragraph (dealing with cases in which there is more than one victim) repeats the provision in Article 4 of the 1971 Hague Convention on the law applicable to traffic accidents. This answers the need to identify, in the case of more than one victim, the most suitable law to govern the situation and it is necessary because the lex loci delicti will not invariably be applicable.

10.1.10. The Group discussed the arguments in favour of having several applicable laws in cases in which there is more than one wrongdoer. The point was left open.

10.1.11. Article 10 can only operate if the place where the event occurs is known and forms part of the territory of a State. In none of paragraphs 1 to 3 is any guidance provided as to the applicable law if it is impossible to identify the place where the event occurs (e.g. a wrong committed in a train crossing a frontier) or where it lies outside the territorial jurisdiction of any State (e.g. ships colliding on the high seas). These points could only be settled by making specific provision in the Convention but the Group, after considering various alternative solutions, decided to leave the matter open.

Commentary

10.2.1. One of the obvious grounds on which this Article is open to critism is that it does not resolve the question of the country in which the event resulting in damage is to be regarded as having occurred or, put another way, what constitutes the "event" by reference to which the applicable law is to be selected in accordance with this Article. If faulty goods are manufactured in country A, sold in country B, consumed in country C and produce physical effects in country D, it is far from clear what would be the applicable law. However, as stated in paragraph 10.1.4 above, this appears to be a question which has been deliberately left open. Consideration will have to be given to whether this is a point which can be ignored in this way or whether some express provision should not be included in the Convention, even if it is a solution of an arbitrary nature.

10.2.2. Is the place where "the event which has resulted in damage or injury" occurred the right place? Would a rule specifying the law of the place where the defendant's wrongful conduct took place be any better? See George Monro Ltd. v. American Cyanamid and Chemical Corporation [1944] K.B. 432; Fermanagh County Council v. Farrendon [1923] 2 I.R. 180; and Fermanagh County Council v. Board of Education of Donegal Presbytery [1923] 2 I.R. 184. In Monaghan v. Swan & Co. Ltd. (1962) 96 I.L.T. 93 McLoughlin J. avoided the difficulty by holding that the tort in question (negligently contaminating oatmeal) was not completed until the plaintiff ate the porridge. What is important is that a clear cut and definite rule about the proper law of the tort/delict should be provided. If, as it seems, Article 10 is intended as a "place of injury" rule then it might be expressed in words which do not immediately invoke a chain of causation and which seem to cause quite unnecessary difficulty.

10.2.3. The other obvious difference between English and Scottish law and what is proposed in Article 10 seems to be that, once selected, only one law will be applicable. In English law, as a general rule an act done in a foreign country is only actionable as a tort in England if it is an act which, if done in England, would be a tort and which is actionable according to the law of the country where it was performed: see Dicey and Morris, The Conflict of Laws (9th ed., 1973), p. 938. A somewhat similar dual-law test applies in Scotland. "The Scots law on this topic may be summed up by saying that an action for reparation based on a delict committed outside Scotland will fail unless the pursuer can show that the specific jus actionis which he invokes is available and available to him both by Scots law and by the lex loci delicti" (Anton, Private International Law (1967), p. 243). Article 10 would clearly produce a radical change in the laws of the United Kingdom and its desirability must therefore, be carefully considered. Article 10 would appear to mean that a court would be required to give a remedy where the facts would not give rise to any cause of action under the lex fori. (An example might be the right to treble damages in a civil action for breach of United States anti-trust legislation.) Conversely, if the system of law which is applicable under Article 10 provides no remedy, the court would be precluded from granting a remedy even though a cause of action might exist under the lex fori.

10.2.4. In relation to E.E.C. countries, regard must be had to the provisions of Article 5(3) of the Judgments Convention, which will enable a defendant domiciled in a Contracting State to be sued in tort (delict or quasi-delict) in another such State if the damaging event has occurred there. Taken in conjunction with Article 10 of the present Convention this would produce the satisfactory result that the court would often be applying its own law to situations of an international character.

10.2.5. Despite the comments above, the first paragraph of Article 10 could at least form the basis (subject to improvement and possible exceptions) of a clear rule about the choice of law. Its value is, however, seriously impaired by the elaborate and somewhat complex provisions of paragraph 2 and 3 introducing an alternative rule based on closer connexion. Paragraphs 2 and 3 will, it is suggested, be very difficult to apply, involving, on the one hand, the situation arising from the event and, on the other, an unspecified connecting factor common to the victim and the author of the damage or to the victim and a third party claimed to be liable. There seems obvious scope for differences of approach to weighing the closeness of the various possible connecting factors. It is somewhat difficult to see what criteria are to be applied to determine that the country in which the event occurred has no significant link with the resulting situation. What is meant by "significant" in this context? It may be that it would be easier to discard the elaborate scheme of paragraph 2 and provide merely that, notwithstanding paragraph 1, if the situation has a closer connexion with a country other than that in which the event has occurred the law of the former country shall apply. Paragraph 3 would limit the range of circumstances in which this would be the result.

10.2.6. Paragraph 4 of Article 10 could give rise to difficulties in joining two or more plaintiffs in the same action. It is, in any event, questionable whether it is practicable to determine separately the applicable law for each of a number of "victims" injured simultaneously.

10.2.7. Insofar as Article 10 may apply to unfair competition (see paragraph 10.1.3. above) consideration will have to be given to whether what is intended relates to activities such as restrictive practices and the abuse of monopoly power.

10.2.8. This Article only applies where damage or injury has resulted. It is not clear what the applicable law would be if relief is sought quia timet to restrain an act which it is feared would cause damage. Article 13 may have application to such cases but it is far from certain that it does.

10.2.9. Actions for breach of statutory duty are a familiar feature of English tort law and presumably Article 10 extends prima facie to international situations in which damage has resulted from a breach of a foreign Statute irrespective of whether this would give rise to an action in tort in England.

Article 11

The law applicable to non-contractual obligations under Article 10 shall determine in particular:

1 the basis and extent of liability;

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

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

4 the form of compensation and its extent;

5 the extent to which the victim's heirs may exercise his right to compensation;

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

7 liability for the acts of others;

8 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.

Background

11.1.1. This Article corresponds with minor variations to Article 8 of the Hague Convention on the law applicable to products liability and Article 8 of the 1971 Hague Convention on the law applicable to traffic accidents. (The United Kingdom has not indicated that it proposes to accede to either of these two conventions.)

11.1.2. Whereas Article 10 deals with the selection of the applicable law for non-contractual obligations, this Article deals with its scope. It should be noted that this is not the only article dealing with the scope of the applicable law because Articles 12, 14 and 15 are also relevant inasmuch as their general nature makes them applicable to non-contractual obligations.

11.1.3. Article 11 is not intended by the Group to be exhaustive of all questions covered by the applicable law. As the words "in particular" indicate, it merely mentions the chief questions governed by the applicable law and does not exclude any other important matter.

11.1.4. Despite this, the Group stated that "all delegations recognized the need to determine the scope of the law applicable... with the utmost clarity and precision". They considered that Article 8 of the 1971 Hague Convention on traffic accidents answered this requirement on the whole very well.

11.1.5. Paragraph 1 is intended to deal with the intrinsic elements that go to make up the positive conditions of liability. By these is meant, for example, whether liability is based on fault or is strict liability, the definition of the fault, including whether it is due to an act or omission, the existence of a fault giving rise to liability, presumptions of liability, the causal relationship between the event and the damage caused, the persons liable etc. The "extent of liability" is intended to include reference to its legal limitations and any ceiling of liability. Questions of counter-claims are also covered.

11.1.6. Paragraph 2 refers to conditions for exoneration from liability including force majeure, necessity, Act of God, and the act of a third party. The "apportionment of liability"

may relate to concomitant fault of the victim and a third party where liability for damage is shared between author and victim, possibly in proportion to the gravity of their respective faults.

11.1.7. Paragraph 3 covers the questions of whether the injury is one capable of entailing liability and what types of injuries are appropriate for compensation e.g. bodily, material or moral. The applicable law will also determine what elements of damage or injury may support a claim for compensation.

11.1.8. The assessment of damages is covered by paragraph 4. The Group states: "This concerns the kinds and extent of damages. The point has to be expressly mentioned since, in some countries e.g. the United Kingdom, the extent of compensation is at present subject to the lex fori". The applicable law also determines the mode of compensation, whether in kind or in the form of damages.

11.1.9. Paragraph 5 differs from the corresponding provisions of the Hague Conventions referred to in paragraph 11.1.1, above, in that the latter relate to transmissibility of the right to compensation both by succession and otherwise i.e. "the question whether a right to damages may be assigned or inherited". Transfers otherwise than by succession are dealt with in Article 16 and Article 11 can therefore be confined to succession. This paragraph is not intended to cover the law applicable to the ascertainment of the victim's heirs. So far as concerns the exercise by the heirs of the victim's right to compensation a choice had to be made between the law of succession and the law applicable to liability. The Group preferred the latter. This point is said to be of interest because of the divergencies between the common law countries and those of the continent on the transmissibility of the right to compensation. Although the common law opposition to hereditary transmission has been subjected to many qualifica-

tionstions, there are still differences between the terms on which heirs may exercise such rights. The question of the inheritability of a right to compensation is referred to by Professor W.L.M. Reese (of Columbia University) in his Explanatory Report on the Hague Convention on the law applicable to products liability. What is involved, he writes, is the question whether the right of the person who has directly suffered damage to recover for such damage may be inherited, and this question may in turn be divided into two. The first is whether it is the claimant who is entitled to inherit from the person who directly suffered damage. This is a question of succession and should be determined by the law governing succession rather than by the law made applicable by the Convention. The second question is whether the particular right in question is capable of being transferred at death. This second question should be determined by the law made applicable by the Convention.

11.1.10. Paragraph 6 is aimed at determining whether a person other than the "direct victim" may seek compensation for the damage suffered by him as an indirect result of the injury done to the victim. The text is not intended to signify that a juristic person comprising a group of individuals may not seek compensation for injury to the interests it represents as a whole. The question of whether a claim by a juristic person is admissible also depends on the law applicable to liability.

11.1.11. Paragraph 7 relates to vicarious liability and is broader than the corresponding provisions of the Hague Conventions referred to in paragraph 11.1.1, above, which are restricted to the liability of the principal for his agent and of the master for his servant.

11.1.12. Paragraph 8 is regarded by the Group as a good ending to the old controversy between those who advocate subjecting the question of prescription or limitation to the

lex fori, as a matter of procedure, and those who favour the law applicable to liability on the ground that a substantive matter affecting liability is involved. By prescription is meant extinctive as opposed to acquisitive prescription.

11.1.13. After protracted discussion, the Group decided that, owing to divergent concepts of municipal law about actions brought directly against the insurer of the wrongdoer, the Convention should (unlike Article 9 of the 1971 Hague Convention on the law applicable to traffic accidents) not contain any specific provision as to such direct actions on the ground that a uniform solution is not feasible.

Commentary

11.2.1. This Article clearly raises a number of important questions but in deciding to what extent the various situations expressly specified can be accepted as being properly subjected to the applicable law the general form of this and Article 10 must be considered. As the Group points out, Article 11 does not purport to be exhaustive of the situations governed by the applicable law. Therefore if, for example, it was concluded that that law should not govern any of the matters mentioned in the list, it might be preferable to insert an express provision to this effect rather than merely delete that matter from Article 11 which would leave the matter open. As it is, Article 11 seems to extend the area of the lex causae considerably.

11.2.2. Paragraph 2 deals with exemptions from and limitation of liability. Liability in tort/delict may frequently be affected by a contract e.g. an exemption clause. Is the applicable law to be selected in accordance with the provisions of the Convention relating to contractual or to non-contractual obligations? If the effect of paragraph 2 is to subject the exemption clause to the law applicable under Article 10, is this acceptable?

11.2.3. Paragraph 4 may require reconsideration because it would appear to require a court to award remedies of a nature which it has no power to give in its internal jurisdiction. There are obvious practical objections to this course because when a court is required to go beyond merely determining the rights of the parties and to proceed to enforce those rights it can scarcely proceed in a manner for which its organization and powers make no provision. Further, as paragraph 4 deals also with the extent of compensation it may be that a court might have to award damages in excess of what would be granted in accordance with the law of the forum if such damages were appropriate by the applicable law. For instance, United States law provides for the recovery of treble damages in a civil action based on an infringement of anti-trust laws.

11.2.4. The language of paragraph 5 may be appropriate to the continental systems of transmission of rights on death but not to legal systems knowing the institution of executors. Its provisions should be considered in conjunction with paragraph 2(a) of Article 1 and Article 17.

11.2.5. Paragraph 6 is presumably apt to cover the question of whether compensation can be claimed not only by the person who directly suffers damage but also the person whose injury or damage is consequential on the damage done to the first person. Thus, whether a spouse or child can recover for the financial loss suffered by reason of the death or injury of the other spouse or of a parent, whether an employer can recover for loss caused by injury to an employee, and whether a bystander can recover damages for nervous shock would appear to be questions which will be governed by the applicable law. This paragraph would probably cover rights under the Fatal Accidents Acts 1846 to 1959.

11.2.6. Paragraph 8 would provide for a significant change in English law which, in general, treats limitation of actions as a matter of procedure rather than as a question of sub-

stantive right. Under the Convention questions of limitation would no longer be regulated by the lex fori. It is questionable whether the Group has fully appreciated the basically procedural nature of English rules as to the limitation of actions and the extent to which limitation as a defence will be ignored unless it is expressly invoked by the pleadings. Different considerations apply to the extinction of a right (as opposed to a bar on the remedy) such as that effected by section 3 of the Limitation Act 1939; reference may also be made to Article 15 (see paragraph 15.1.2, below). In Scotland, rules of prescription which merely affect the remedy, by barring rights of action or limiting modes of proof, will be applied as part of the lex fori: see Anton, Private International Law (1967), pp. 223-8, and 545.

11.2.7. Although Article 11 intentionally omits the question of directly suing the insurer of the wrongdoer, it is for consideration whether mention should not be made of rights of subrogation, another example of the interaction of contractual and non-contractual law. (Note Morris v. Ford Motor Co. Ltd. [1973] Q.B. 792).

Article 12

Irrespective of which law is applicable under Article 10, in the determination of liability, account shall be taken of such rules issued on grounds of security or public order as were in force at the place and time of occurrence of the event which resulted in damage or injury.

Background

12.1.1. This Article is mainly directed to situations where the applicable law is not the lex loci delicti. Although it is framed in very different terms, this Article is the equivalent for non-contractual obligations of Article 7 which applies to contractual obligations.

12.1.2. Article 12 is based on Article 7 of the 1971 Hague Convention on the law applicable to traffic accidents (which provides that "account shall be taken of rules relating to the control and safety of traffic").

12.1.3. The Group says of Article 12 that "the wording leaves some scope for interpretation as regards the rules to be taken into account in a given case".

Commentary

12.2.1. Although the Group states that this Article is mainly directed to cases in which the law is not that of the lex loci delicti, the wording of the Article is just as applicable to cases in which that law is the applicable law of the case. It might be preferable expressly to confine Article 12 to cases in which the applicable law is not that of the place of the event which resulted in damage or injury. Otherwise if the lex loci delicti is applicable the court may be somewhat puzzled as to precisely what significance to give to this Article, unless it is intended to refer to merely local bye-laws as distinct from the general law of the land.

12.2.2. The words "rules issued on grounds of security or public order" have been used to translate the phrase "règles de sécurité et de police" in the French version of the Convention. It is not clear, precisely, what is meant and there is no similar classification in United Kingdom law. Before this Article could be accepted it would be necessary to define the rules referred to in a way which would convey more meaning to the court.

12.2.3. It is far from clear what is meant by requiring that "account shall be taken" of the rules referred to. Is this intended to mean that the court shall apply the relevant rules or only that it is to examine them and, if it considers it appropriate to do so, apply them? Perhaps the rules envisaged

are rules such as foreign rules of the road which, while not "applied" as such, are taken into account in ascertaining whether the defendant was negligent.

12.2.4. Article 12 will be particularly relevant in cases in which the lex loci delicti is not the applicable law because of the operation of paragraph 2 of Article 10. It is therefore important to determine to which aspects of the case Article 12 will apply. It expressly relates only to "the determination of liability", and consideration should be given to whether this gives adequate scope to the relevant mandatory provisions of the lex loci delicti. The words "determination of liability" should be contrasted with the enumeration in Article 11 of matters to be determined by the applicable law. Does this mean that the rules referred to in Article 12 are only to be taken into account in regard to "the basis and extent of liability" (Article 11, paragraph 1) and not, for example, with respect to "the grounds for exemption from liability" etc. (Article 11, paragraph 2) and other matters mentioned specifically in Article 11? For example, is the question of contributory negligence to be affected by Article 12? Perhaps it is intended that whether contributory negligence is capable of limiting or excluding liability is to be determined by Article 11 and whether the defendant has in fact been guilty of such negligence is to be decided in the light of Article 12.

12.2.5. The difficulty of determining what is the relevant "event" has been referred to in relation to Article 10 (see paragraph 10.2.1, above) and a similar problem will arise under Article 12.

Article 13

Non-contractual obligations arising from an event which does not result in damage or injury shall be governed by the law of the country in which that event occurred. However, if, by reason of a connecting factor common to the interested parties,

there is a closer connexion with the law of another country, that law shall apply.

Background

13.1.1. This Article is said broadly to extend to non-contractual obligations stemming from an event other than one entailing damage the rule and exception provided for in Article 10.

13.1.2. Article 13 mainly concerns, it is said by the Group, quasi-contracts as well as obligations capable of being placed in the same category. An example of the latter is salvage of a vessel otherwise than in pursuance of a contract (provided always that the event takes place in territorial waters as explained in paragraph 10.1.11 above).

13.1.3. The exception provided by the second sentence of Article 13 is more flexible than that provided by the second and third paragraphs of Article 10 for other non-contractual obligations as Article 13 does not require the absence of a significant link with the country where the event occurred, and greater discretion is left to the judge as to the circumstances in which the law of another country might apply.

Commentary

13.2.1. It is, perhaps, tempting to regard earlier provisions of the Convention as having dealt with contract and with tort/delict and to conclude that Article 13 must, therefore, be concerned with quasi-contract. This is probably an over simplification. As pointed out in paragraph 1.2.1 above, the Convention is apt to apply to all obligations arising from situations of an international character since "contractual and non-contractual" is an all embracing phrase. That the Convention may have this very wide scope is confirmed by the fact that it has been considered necessary to exclude expressly

obligations which are not usually regarded as contractual, tortious/delictual, or quasi-contractual e.g. testate or intestate succession. Article 13 must therefore apply to all obligations which are not contractual and which do not arise from an event resulting in damage or injury. For example, a unilateral declaration of trust is not contractual and does not involve damage or injury. Is it intended that this Article shall apply to regulate the trust if it has the necessary international character?

13.2.2. The interpretation of Article 13 is not assisted by uncertainty as to what is meant by "damage or injury". The meaning of this phrase is crucial to an understanding of the distinction between Articles 10 and 13. If quasi-contractual obligations are regarded as involving an element of financial loss it may be that they are not dealt with by this Article because there is "damage or injury". In paragraph 10.2.8, above, reference has been made to restraining an act which it is apprehended will cause damage but which has not yet done so. Is such a situation governed by this Article because no damage or injury has resulted or is it excluded from this Article and from Article 10 as well because no event has occurred? It is not clear whether "damage or injury" includes a mere infringement of rights which does not constitute material or bodily detriment.

13.2.3. This Article raises the correctness of treating quasi-contractual situations on the same lines as obligations in tort or delict. In adopting analogies from the law of tort/delict, the draftsmen of the Convention differ from the views of United Kingdom commentators on this problem. For example, in Dicey and Morris, The Conflict of Laws (9th ed., 1973), p. 925, it is submitted that "like a contractual promise, an obligation to restore an unjust enrichment may be said to be governed by its proper law...."

13.2.4. Because many situations to which this Article may apply resemble more closely contractual than tortious or delictual situations it may be that particular difficulties will arise in identifying the "event" ("fait") by reference to which the applicable law is to be selected.

13.2.5. It may be that an overriding provision on the lines of Article 12 is also required for the obligations governed by this Article, together with a provision similar to Article 11 specifying more particularly the ambit of the applicable law.

13.2.6. Consideration will have to be given to whether any particular claims, such as salvage, should be excluded from this Article.

Article 14

The provisions of Articles 10 to 13 shall not apply to 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 of public authority performed by the organs or agents in the exercise of their official functions.

Background

14.1.1. The liability of the State, public law juristic persons and their organs can, asserts the Group, only be assessed within the framework of the law of and before the courts of the States whose liability is involved. Such liability does not, perhaps, really raise problems for private international law but it does involve questions of legal competence and, more specifically, immunity from jurisdiction. Despite this, however, it was thought preferable to avoid any uncertainty and insert this specific provision which is of particular importance in relation to German law.

14.1.2. One delegation would have preferred to provide that the exclusion concerned acts committed not only in the exercise but also within the limits of the official functions, but the Group thought that this was not necessary.

Commentary

14.2.1. This Article presents a number of problems. Its general effect is to exclude the application of the choice of law rules in Articles 10 to 13 in matters involving a State or its organs and so leave these matters to the existing choice of law rules of Member States. It would seem desirable to clarify the reasons for this approach and for the fact that a different approach is taken in relation to contractual obligations (see paragraph 1.2.13, above). Article 14 is capable of leading to unsatisfactory results. If there are co-defendants of whom one is a public authority, why should the applicable law in relation to the public authority be selected by the common law as it exists at present and the law applicable to the case of the other defendant be selected in accordance with the Convention?

14.2.2. Although phrases such as "other legal persons governed by public law" have no very precise meaning in British law, the difficulty of distinguishing between public and private law and of identifying legal persons governed by public law arises quite frequently in the context of Common Market law and will have to be faced in giving effect to the Judgments Convention, which by implication excludes matters of public law.

Article 15

The law governing an obligation shall also determine the conditions of performance, the consequences of non-performance and the various ways in which the obligation may be extinguished.

As regards the manner of performance, the law of the country in which performance takes place must be taken into account.

Background

15.1.1. According to the Group, "the conditions of performance" refers to all the conditions resulting from the law or contract by which the performance characteristic of any obligation is to be made except the manner of performance

(dealt with in paragraph 2 of Article 15); requirements as to the capacity of persons (excluded from the Convention by Article 1, but subject to Article 20); and requirements as to legal form (dealt with in Article 18). Thus the first paragraph of Article 15 would, it is suggested, cover the care or diligence with which the performance is to be accomplished, conditions as to time and place, the extent to which the obligation may be performed by a person other than the debtor, and the question of whether payment of a sum of money has been duly made.

15.1.2. The reference to extinguishing an obligation does not include performance but, more specifically, includes novation, set-off, remission of debts and extinctive prescription.

15.1.3. The "consequences of non-performance" are intended to be those flowing from failure to perform a contractual or non-contractual obligation under the law or under the contract whether in respect of the liability of the party in default or the possibility of rescinding the contract.

15.1.4. The Convention, it is pointed out, contains no provision in respect of contractual obligations comparable to that of Article 11. It was not considered necessary to state expressly and in general terms that the scope of the law applicable to a contract extends in principle to all its effects. In the case of contractual obligations, the scope of paragraph 1 of Article 15 is wider than it is for non-contractual obligations arising from an event occasioning damage. The word "also" is intended to indicate that this is not the only Article relevant to the scope of the law applicable to contractual and non-contractual obligations.

15.1.5. The restriction contained in paragraph 2 reflects the position in various municipal laws and in a few international conventions. The Group was unwilling to attempt to

define precisely what is meant by "manner of performance" and the concept will have to be classified in accordance with the lex fori. Among provisions normally falling in this category are rules relating to public holidays and the inspection of goods.

Commentary

15.2.1. It must be emphasised that this Article applies to both contractual and non-contractual obligations but the way in which it is worded, and, in particular, the emphasis on "performance" raise the question of whether it should not be confined to contractual and possibly quasi-contractual situations. It is difficult to speak of the law applicable to, say, negligently causing damage in a traffic accident in terms of "the conditions of performance" unless the obligation referred to is that of paying compensation to the victim.

15.2.2. The relationship of this Article with the long list of aspects of non-contractual relationships set out in Article 11 is worthy of careful consideration as there would seem to be some overlapping. For example, does this Article extend to cover limitation?

15.2.3. Does the "manner of performance" cover the present English rule that damages will not be awarded in a foreign currency and that the rate of exchange is that prevailing when the cause of action arose? A similar rule exists in Scotland: Anton, Private International Law (1967), p. 551.

15.2.4. The second paragraph requires the court merely to "take into account" the law of the place of performance so that the court would appear not to be bound to apply that law. A similar phrase is used in Articles 7 and 12.

Article 16

Obligations between the assignor and the assignee of a claim shall be governed by the law applicable under Articles 2 to 8.

The law governing the original claim shall determine its assignability and the relationship between the assignee and the debtor, as well as the conditions under which the assignment may be invoked against the debtor and third parties.

Background

16.1.1. After careful examination of the differing opinions in private international law about the assignment of obligations, the Group decided that the applicable law for voluntary assignments should be dealt with separately from assignments by operation of law. The former are therefore covered by this Article and the latter by Article 17.

16.1.2. The Group decided not to formulate paragraph 1 simply as "the assignment of a debt by contract shall be governed as between assignor and assignee by the law applicable to the contract" because this might have led to difficulties of interpretation in German law where the "assignment" of a debt includes the effects of it on the debtor, an aspect excluded by paragraph 2.

16.1.3. With regard to paragraph 2, the Group deemed it advisable for the sake of clarity to state that the scope of the law applicable to the original debt covers not only the extent to which it is assignable but also the relationship between the assignee and the debtor and the conditions under which the assignment can be invoked. The last mentioned matter is intended to cover measures prescribed by the municipal law of various countries, such as the delivery of a copy of the deed of assignment, which are regarded as essential preconditions to invoking the assignment against

the debtor and third parties.

16.1.4. Article 16 covers any voluntary assignment including those made in "factoring" transactions which are now very common.

Commentary

16.2.1. The word "claim" is a translation of the French word "créance", although "debt" might be another possible rendering. It may be that there is an inconsistency between the French and the English versions, the former purporting to deal with the whole question of an assignment/assignation of the right to enforce an obligation (including rights of action) whereas the English may be thought to refer merely to assignment/assignation of rights of action. In any event the Article might be more clearly drafted to indicate whether the governing law is that applicable to the assignment, which for this purpose is to be regarded as a contract, or that applicable to the claim which is the subject of the assignment.

16.2.2. Article 16 could mean English courts having to enforce an assignment of the proceeds or part of the proceeds of an action to the lawyer who undertakes to prosecute the claim, but it may be that in relation to foreign litigation there would be no harm in this. Such a result might, however, be avoided by the application of Article 7 (which expressly applies) or Article 22.

Article 17

The transfer of a claim by operation of law shall be governed by the law of the juridical institution for the purposes of which that transfer was provided.

The law governing the original claim shall nevertheless determine its assignability, as well as the rights and obligations of the debtor.

Background

17.1.1. As already mentioned in paragraph 16.1.1. this Article refers only to assignments by operation of law. Reference to transfer by operation of law was preferred to what the Group describes as the commoner "subrogation by operation of law" in order to avoid problems of characterization and to indicate that this Article refers to any kind of assignment of debt effected by law.

17.1.2. Paragraph 1 conforms with the latest developments in the jurisprudence of some Community States, especially Germany, Belgium and France; thus, for example, the assignment by operation of law to an insurer of the rights of the assured against the wrongdoer will be governed by the law governing the insurance contract. Other examples are Article 1251(3) of the French Civil Code and Article 1203(3) of the Italian Civil Code about the consequences of payment of a debt by one of several debtors.

17.1.3. The position of the debtor in relation to the statutory assignee ought not to be worse than his position in relation to the original creditor. Consequently paragraph 2 preserves the applicability of the law governing the original claim to the liability of the debtor as well as to the continuance of the debt.

Commentary

17.2.1. There is a point on the translation of this Article similar to that referred to in paragraph 16.2.1, above.

17.2.2. Claims (or obligations) can be transferred by operation of law in many circumstances and it is not completely clear to which Article 17 applies.

17.2.3. The concept of the "juridical institution" is not, at

least in these words, one which is familiar to the English lawyer. It immediately suggests a formalized body such as a court but it is presumably intended to refer to the legal relationship between the parties or to a set of rules or a legal concept, e.g. bankruptcy. Indeed it would appear from paragraph 17.1.2, above, that insurance may be regarded as a "juridical institution". The translation of this concept into United Kingdom terms will present considerable difficulties.

17.2.4. Consideration will have to be given to whether the differentiation between Articles 16 and 17 is sufficiently clear. An example of an assignment by operation of law which has been given is the insurer's right of subrogation. If the policy makes specific provision for the assured to assign the rights to the insurer and in pursuance of this there is an express assignment, would the applicable law be selected in accordance with Article 16 or 17? Presumably the former. It will be recalled, however, that in accordance with paragraph 2(d) of Article 1 insurance contracts may be completely excluded from the application of the Convention.

17.2.5. It will be noted that this Article is subject to the provisions of Article 7.

Article 18

A juristic act shall be formally valid if it is done in accordance with the conditions prescribed either by the law which governs the material validity of the act or which governed its material validity at the time when it was done, or by the law of the place where it was done. Where the act consists of several declarations the formal validity of each declaration shall be determined separately.

The preceding paragraph does not apply to the creation, assignment or extinction of rights in rem.

Background

18.1.1. This Article is concerned with form and is intended to deal with juristic acts ("actes juridiques") in the broad sense. It is not confined to contracts but extends to unilateral acts to which the Convention is applicable such as acknowledgements of debt and certain kinds of disclaimer.

18.1.2. No special provision is made with regard to public acts. This is deliberate because not all legal systems recognize such a concept and difficult questions of characterization might arise. Further, a special paragraph could only have restated the rule accepted by all States that a public officer draws up or deals with documents according to the law under which he is acting, i.e., except in the case of consuls, a public officer draws his authority from the law of the country in which he is functioning. In the case of consular documents, the validity of such acts under the law of the State which the consul represents is referable to consular Conventions whose application would be preserved by Article 27.

18.1.3. Paragraph 2 excludes aspects of rights in rem (but does not mention the contract concerning such a right). The reason for this is said to be that the forms prescribed in such cases, e.g. delivery of the thing, are usually to be judged by the law of the place where the thing is situated. Moreover, another Convention is intended to regulate conflicts of laws respecting rights in rem and consequently this Convention ought not to prejudge the issue.

18.1.4. No attempt is made to determine what is meant by "form" as it was thought more realistic not to attempt to reach a definite attitude towards so difficult a problem of characterization.

18.1.5. Article 18 represents a compromise and to obviate parties being taken by surprise by annulment of their act by

reason of an unexpected defect of form, a fairly flexible system founded on the alternative application of the lex causae and the lex loci actus has been adopted. It would suffice if the act is valid under either law even if void under the other. This seems, it is said, to provide an adequate range of applicable laws without falling back on other concepts such as the law of nationality or common habitual residence.

18.1.6. Application of the lex causae is already accepted by the original E.E.C. States and its use is "amply justified by the rational links uniting form and substance". In the case of contracts the lex causae is determined by Articles 2 to 6 of the Convention and paragraph 1 of Article 18 specifically deals with the possibility provided for in Article 3 of a change of law since the conclusion of the contract. Thus provision is made for the application of the law governing the substance of the act at the time of contracting or the one governing it at the time of its being challenged. Nevertheless, application to the formal validity of the latest lex causae must be without prejudice to the rights of third parties which are specifically preserved by Article 3 which, it is suggested by the Group, is sufficiently wide in scope to cover correlative changes in the law applicable to form.

18.1.7. Application of the law of the place where the act was done follows from the maxim locus regit actum which is also generally accepted by the law of the six original E.E.C. States. There are difficulties in determining where an act is completed in cases in which the act consists of various parts e.g. a contract by correspondence where there is a letter of offer and a letter of acceptance. Rather than adopt an artificial choice between the place where the offer was made and the place where it was accepted, Article 18 provides that the formal validity of each stage or "declaration" shall be determined separately by the formal requirements of the law of the place where the declaration was made. However, if the law of the place where the "declaration" was made requires a

bilateral formality to satisfy its requirements then this requirement should be met.

18.1.8. Article 7 refers to Article 18, and so the system of alternative application of the lex causae and lex loci actus may be set aside in favour of mandatory provisions of the law of another country. Examples of situations in which this might occur include the formalities indicated by the lex situs in the case of immovable property; the formalities of a labour contract required by the country of performance, and rules of form in relation to hire-purchase agreements. In accordance with Article 7 it would be for the judge in each case to determine whether those mandatory provisions are of such a character as to warrant the exclusion of the rules set out in Article 18.

Commentary

18.2.1. The wording of this Article should be contrasted with that of others in the draft Convention which generally state which law is to apply to the obligation in question. Article 18, however, adopts a different approach and expressly states that a juristic act shall be formally valid if it complies with any of the laws specified. A British precedent for such an approach to formal validity can be found in section 1 of the Wills Act 1963.

18.2.2. Although at first sight this Article appears to be making something approaching a substantive provision as opposed merely to selecting the applicable law, it is presumably restricted in its operation by the scope of the Convention indicated in Article 1.

18.2.3. It is for consideration to what extent it is correct to allow the formal validity of acts relating to all obligations covered by the Convention to be governed by more than one law, although in relation to contracts the proposed

Article may not differ greatly from the current law in England and Scotland: see Dicey and Morris, The Conflict of Laws (9th ed., 1973), pp. 771 et seq, and Anton, Private International Law (1967), pp. 204-205.

18.2.4. Article 18 is expressly subject to Article 7. If, therefore, rules about formal validity are imposed for the protection of a class of persons e.g. consumers, it would not necessarily follow that compliance with those rules would be rendered unnecessary because of the availability of another validating law under Article 18. In such circumstances it would be necessary to consider whether the rules for consumer protection were of a mandatory nature apt to exclude the application of the validating law.

18.2.5. It is far from clear that this Article will produce uniform results. To take the common example of a contract concluded by correspondence, what is the place of offer or acceptance? Is it the place where the letter is posted or where it is delivered?

Article 19

The existence and force of presumptions of law, together with the burden of proof, shall be determined by the law which is applicable to the legal relationship. However, the consequences to be drawn from the conduct of a party in the course of the proceedings shall be determined by the law of the forum.

The law of the forum shall determine the admissibility of the modes of proof of juristic acts. However, a party may also rely on a mode of proof which is admissible under any law referred to in Article 18 under which the act is formally valid, provided that the use of such mode of proof is not incompatible with the law of the forum.

The law which in accordance with Article 18 governs the formal validity of an act shall determine both how far an informally executed document which establishes obligations on the part of its signatory or signatories shall be sufficient proof of these obligations and also what modes of proof shall be admissible to add to or to contradict, the contents of the document. Where the document has probative value both according to the law governing the material validity of the act and according to the law of the place where it was executed, only the former of those two laws shall apply.

Background

19.1.1. This Article does not purport to lay down a rule about the principles applicable to proof in general. The Group was not prepared to adopt a general attitude on the legal nature of proof, which is on the borderline between procedural and substantive law, and preferred to regulate only certain points in the law of evidence.

19.1.2. The first paragraph should, it is suggested, create no difficulties because presumptions of law are points of substance which cannot be separated from the law governing the matter. For example, the presumption of fault on the part of the custodian of something which has caused damage and the circumstances in which the presumption can be displaced are clearly matters of substance depending on the law governing civil liability.

19.1.3. The second sentence of paragraph 1 is intended to refer to various provisions in the procedural laws of some countries, particularly Germany, which although classified as legal presumptions are closely connected with judicial procedure and so can only be determined by the lex fori. An example of this type of provision is the rule which presumes that silence by one party to the proceedings is equivalent to the admission of facts alleged by the other party.

19.1.4. Paragraph 2 of Article 19 is solely concerned with the admissibility of evidence of juridical acts and permits the alternative application of the lex fori or the law governing the formal validity of the act. This solution is already applied in France and the Benelux countries and, it is suggested, is the only one which is capable of reconciling the requirements of the lex fori with the need to respect the parties' legitimate expectations at the conclusion of their act. Thus, if the law governing the formal validity of a transaction is content with a verbal agreement and accepts evidence by witnesses, the expectations of the parties would be denied if such evidence were rejected for the sole reason that the law of the court seized of the case requires written proof of all juridical acts. However, because it was not thought right to require a court to accept kinds of evidence incompatible with its procedural laws, the proviso at the end of the second paragraph was added. It is to be noted that the parties may use a mode of proof permitted by a law applicable under Article 18 only if that law would regard the transaction as formally valid.

19.1.5. Paragraph 3 of Article 19 is intended to regulate various points relating to probatory force in civil law countries. Apparently the concept is not understood in the same way in the legislation of the original E.E.C. members and it was therefore deemed expedient to do no more than offer a few particular solutions to the more urgent problems. Only private documents creating obligations for those signing them are referred to and Article 19 concerns two closely interrelated points. Firstly, it deals with whether under the applicable law the court is compelled upon production of the document to hold the transaction proved or whether it can consider it inadequate and require further proof. Secondly, it concerns the extent to which the terms of the document must be accepted or to which evidence to supplement it or modify it may be given. Both these points are referred to the law applicable to formal validity under Article 18, but as this

provides for alternative possibilities a choice has been made, where both possible laws apply, in favour of the law governing the material validity of the act.

19.1.6. It should be noted that Article 7 refers to paragraph 3 and that consequently the provisions of that paragraph are subject to the application of laws of public order.

Commentary

19.2.1. With regard to paragraph 1 of Article 19 while the relevance of presumptions of law might appropriately be referred to the legal system governing the substance of the claim, it is more questionable whether issues relating to the burden of proof should be referable to that law. The onus of proof may be a shifting one and difficult to determine in certain cases, and it is for consideration whether the rules as to onus, traditionally regarded as the essence of the procedural law of the lex fori, should be a matter for another system of law.

19.2.2. Difficulties of characterization will clearly arise from the first paragraph as at present framed. English law recognises presumptions of fact, rebuttable presumptions of law and irrebuttable presumptions of law. The last named are generally regarded as rules of substance; for example, the presumption of survivorship provided for in section 184 of the Law of Property Act 1925 (or, in relation to Scotland, in section 31 of the Succession (Scotland) Act 1964). Difficult questions may arise as to whether a given rebuttable presumption of law is a rule of substance or of procedure. It may be, however, that such difficulties will arise in any event and their solution may be no more difficult in the context of Article 19 than in the context of the existing conflict of laws rules.

19.2.3. The proviso at the end of paragraph 2 of Article 19

may be difficult to apply in practice. It is not clear what would be regarded as incompatible for this purpose. A method of proof may be one which is not used by the particular forum but would this mean that it is incompatible with the law of that forum?

19.2.4. Although paragraph 3 is said to be relevant to certain points in civil law systems it is not applicable only to countries whose law is derived from Roman law and it is worded in general terms applicable to any law. It is obviously capable of application whenever a question arises of interpreting or varying a written document by means of extrinsic evidence. According to Dicey and Morris, The Conflict of Laws (9th ed., 1973), p. 1107, extrinsic evidence adduced to interpret a written document involves a question of interpretation and it is governed by the proper law of the contract, whereas evidence to add to, vary or contradict its terms is regarded as a question of evidence governed by the lex fori.

Article 20

No natural person may invoke his incapacity against a person who, in relation to a juristic act, in good faith and without acting imprudently, considered him to have capacity under the law of the place where the act was executed.

Background

20.1.1. The Convention contains no general provision about the law applicable to capacity, although such a rule might have been framed as in the original E.E.C. States a person's capacity or incapacity is referred to his national law. However, the role of nationality in relation to status is dwindling and in countries like the United Kingdom different rules apply. Consequently Article 20 merely specifies the circumstances in which incapacity, whether under the law of nationality or domicile, cannot be invoked. Similar provisions

protecting a person who has mistakenly contracted on the basis that the other party has full capacity figure in the Benelux Uniform Law and Italian and German law.

20.1.2. The terms of Article 20 would apply even if the parties have the same nationality.

Commentary

20.2.1. The first and most obvious criticism of this Article is that it is not a rule of private international law at all, save that it would presumably only be applicable (in accordance with Article 1) in situations of an international character. Discussion at the meeting of the Group in February 1973 indicates that the original members of the Group appear to be firm supporters of this provision and there may therefore be considerable resistance to changing or omitting it. However, at a colloquium on the draft Convention held in Copenhagen in April 1974 a number of commentators expressed the view that the protection of those under disability must take priority over the interests of another party.

20.2.2. Article 20 relates only to the capacity of natural persons and contains no corresponding rule relating to the capacity of juristic persons. The reason for this omission is not clear. It may have been because Council Directive 68/151/EEC dated 9th March 1968 (Official Gazette No. L65/8, 14th March 1968) provides in Article 9(1):

> "Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs."

The Directive also lays down in Article 9(2):

> "The limits on the powers of the organs of the company, acting under the statutes or from a

decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed."

Reference may also be made to section 9 of the European Communities Act 1972 which was intended to give effect to the Directive and to Article 67 of the Proposed Statute for the European Company, submitted to the Council on 30th June 1970 (Supplement to Bulletin 8-1970 of the European Communities). The existence of such provisions, however, within the Communities does not seem to preclude the necessity of a choice of law Article relating to the contractual capacity of companies and other juristic persons, both because that capacity may be limited by the general law of a country and because the Convention, by Article 24, applies even if the applicable law is not that of a Contracting State.

20.2.3. If any provision on the subject of relying on incapacity is to be inserted in the Convention it might be more acceptable if it were framed on the lines that the extent to which a person is entitled to rely on his own incapacity is to be determined by a specified law e.g. the law applicable to the essential validity of the transaction.

20.2.4. The circumstances in which incapacity may not be invoked are not altogether clear. According to the English translation, the party against whom incapacity is sought to be invoked will benefit from this Article if, in relation to a juristic act, he has in good faith and without imprudence believed the other party to have been of full capacity under the law of the place where that act was carried out. A literal reading of the French version, however, seems to indicate that it is the good faith and lack of imprudence of the party relying on the Article that are to be determined by the law of the place where the act was carried out, there being therefore no need to determine the law which governs the capacity of the other party.

Article 21

For the purposes of the preceding provisions, the law of a country means the rules of law in force in that country, other than the rules of private international law.

Background

21.1.1. The Group summarises this Article by tersely stating: "This excludes renvoi".

21.1.2. So far as contractual obligations are concerned, if the parties have chosen an applicable law, it must have been with the intention that only the internal aspects of the chosen law will apply and any renvoi to another law is thereby excluded.

21.1.3. Exclusion of renvoi is also essential where the parties to a contract have not expressly or impliedly chosen the applicable law. In such a case Article 4 would apply and it would not make sense for the judge in spite of the precise selection of a law by the operation of that Article to refer the contract to the law of another country on the sole pretext that the conflict rule of the country whose law is thus selected refers the matter to the law of another country.

21.1.4. So far as concerns non-contractual obligations, Article 10 itself effects the renvoi that might be required by the conflict rule of the lex loci delicti in accordance with paragraph 2 of that Article.

Commentary

21.2.1. It may be necessary to define what is meant by the word "country" so as to cover the situation of States whose boundaries include areas subject to different legal systems, such as the United Kingdom. (See, also, paragraph 4.2.9, above.)

21.2.2. While there may be much to be said for the exclusion of renvoi as between States all of which are applying uniform rules as to the conflict of laws, it is for consideration whether such exclusion is desirable as between a State which is a party to the Convention and one which is not and which may be applying conflict of laws rules which are completely different from those in the Convention.

21.2.3. The Convention in general provides what in the various circumstances specified "shall be" the applicable law, e.g. Article 2 states "A contract shall be governed by the law chosen by the parties". Because of this mandatory form of words the question arises of whether the court will be held to be under a positive obligation to apply the law made applicable by the Convention. If it is, it may then become important to make provision one way or another for the proof of foreign law. Is the court itself to be charged with the duty of ascertaining the relevant provisions of a foreign law or, if this task is to be undertaken by the parties, what is to happen if they fail to do so? English law regards foreign law as a question of fact to be pleaded and proved by expert testimony. If a foreign law is not proved the court will, in general, proceed as if the English domestic law on the point applies. The Scottish courts adopt a similar approach: see Anton, Private International Law (1967), pp. 567-571, and Bonnor v. Balfour Kilpatrick Ltd. 1974 S.L.T. 187. In any event there may be much to be said for including in the Convention some clear provision about the proof of foreign law and the respective duties in this regard of the court and the parties.

Article 22

The application of any law prescribed by the preceding provisions may be refused only if it is manifestly incompatible with public policy.

Background

22.1.1. This Article repeats with respect to public policy i.e. "l'ordre public", the form of words used since 1956 in the Conventions of the Hague Conference on Private International Law. It differs from Article 22 of the Benelux Uniform Law in omitting any mention of "fraude à la loi", a concept rendered by writers in English as "evasion of law".

22.1.2. It was agreed in discussion in the Group that public policy should not be invoked against foreign laws with the sole object of ensuring the application of internal provisions contrary to the provisions of the Treaties establishing the European Communities.

Commentary

22.2.1. The relationship of this Article to Articles 7 and 12 requires consideration.

22.2.2. The meaning and effects of this Article are not completely free from doubt. In the first place, it is not clear what is meant by "public policy". Nor is it clear whether reference is being made to the public policy of the court which is hearing the case or of the country whose law is applicable to the transaction. (In view of what is said in the Report (paragraph 22.1.2, above), is another possible meaning the public policy of the E.E.C.?)

22.2.3. Not only may it be impossible to define the limits of public policy in English and Scots law but there is clearly a difference in the scope of the concept as compared with the continental idea of "ordre public". As Anton says (Private International Law (1967), p. 88): "In general the domain of public policy is narrower in the legal systems of the United Kingdom than is the domain of ordre public in continental systems. The plea that the application of a foreign rule

would be inconsistent with public policy cannot be based merely upon its inconsistency with the substantive law of Scotland, nor even, it is thought, upon its inconsistency with the internal rules of public policy in Scots law. The foreign rule must be inconsistent with the Scottish court's view of public policy in international matters". If nothing else, there is the perennial difficulty to be faced of finding a form of words which has substantially the same meaning for United Kingdom courts as it has for courts on the continent.

22.2.4. The Article refers to "the application of any law" and this suggests that, on grounds of public policy, the court could depart from the selection of an applicable law made in pursuance of the provisions of the Convention. If this is the meaning, no guidance is given as to what law is to replace the applicable law. However it may be that what the Article is intended to refer to is, not the whole of an applicable law, but some obnoxious provision of the law which is otherwise to be applied.

Article 23

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.

Background

23.1.1. Article 23 is modelled on a form of words developed by the U.N. Commission on International Trade Law. That Commission's redraft of the uniform law on the international sale of goods incorporates a clause providing that in the interpretation and application of the convention account shall be taken of its international character and the need to promote uniformity.

23.1.2. The Article is intended to indicate to the court that it ought not to assimilate the provisions of the Convention, for the purposes of their interpretation, to purely internal law provisions. It is thought that an advantage of the Article might be to enable the parties to avail themselves in legal proceedings of judgments delivered in other countries.

23.1.3. The Group suggests that the problem of characterization, on which the Convention refrains from seeking to prescribe a particular rule, is to be dealt with in the spirit of this Article.

Commentary

23.2.1. As the Convention, if accepted by the United Kingdom, would have to be implemented by legislation, the method of interpretation sought by the Article would have to be expressly provided for in the Statute. The subject of the rules of interpretation to be applied by a British court to a treaty with which it has to deal, either as part of the enacting provisions of a United Kingdom statute or as part of the context in which a provision of a statute has to be read, was referred to in the Law Commission and the Scottish Law Commission's Report on the Interpretation of Statutes (Law Com. No. 21; Scots Law Com. No. 11: pages 44-45). This Report has not been implemented.

23.2.2. Regard may have to be had to the 1969 Vienna Convention on the Law of Treaties (Cmnd. 4818).

23.2.3. Some members of the Brussels Group appear to favour authorizing the European Court to entertain cases about the interpretation of the Convention (see paragraph 7.2.6, above). It may be that a provision comparable to section 3(1) of the European Communities Act 1972 would be necessary if the European Court were authorized to interpret the Convention.

However, the extent to which additional delay and expense would be incurred by conferring jurisdiction on that Court must be carefully considered.

23.2.4. Consideration should be given to the extent to which this Article will bind the courts in England and Wales and Scotland to follow precedents on the interpretation of the Convention created by courts of other E.E.C. countries. As the courts are merely required to have regard to the factors mentioned in the Article, it may, however, be that the text is sufficiently flexibly drafted. It seems likely that the courts will be required to do no more than deal with a situation with which the English and Scottish courts are already familiar in interpreting Acts of Parliament applying to both countries and on which the courts of another part of the United Kingdom have previously expressed an opinion: Cording v. Halse [1955] 1 Q.B. 63 (Road Traffic Act); Abbott v. Philbin [1960] Ch. 27 and Commissioners of Inland Revenue v. City of Glasgow Police Athletic Association 1953 S.C. (H.L.) 13 (both on revenue Statutes).

23.2.5. As this Article applies not merely to the interpretation of the Convention but also to its application, consideration should be given to whether and to what extent it is likely to be said that the courts should adopt similar procedures and techniques in dealing with conflict of laws cases. In particular, if it is the practice in some courts on the continent to take judicial notice of a relevant foreign law or to ascertain for themselves the provisions of such a law, would English and Scots courts be regarded as bound to take a similar view? This question of the proof of foreign law is also referred to in paragraph 21.2.3, above.

TITLE THREE

Final Provisions

Article 24

The application of Articles 1 to 23 of this Convention shall not be subject to any condition of reciprocity. The Convention shall apply even if the applicable law is not that of a Contracting State.

Background

24.1.1. In the contracting States, the provisions of Articles 1 to 23 will govern even if the law which they apply to an obligation is not the law of one of the Contracting States. The Convention therefore applies independently of any requirement of reciprocity.

24.1.2. This follows the approach adopted in the Hague Conventions on the conflicts of laws relating to the form of testamentary dispositions (Article 6), and on the law applicable to traffic accidents (Article 11).

Commentary

24.2.1. There are, from the point of view of a Contracting State, some advantages in applying the same rules as to choice of law to all international transactions which come before its courts. This will enable the rules contained in the Convention to be submitted to a more intense process of judicial interpretation than if the Convention applied only to some countries while the pre-Convention common law and statutory rules continued to apply to transactions involving non-Convention countries.

24.2.2. If the Convention did not apply generally it might be difficult, particularly in cases involving connexions with both

Convention and non-Convention countries, to decide whether the Convention did or did not apply. Before embarking on a choice of applicable law under the terms of the Convention the court would first have to consider whether the Convention applied at all. This would result in much additional complexity and uncertainty. It may be that in such an event additional provision would be required in the Convention to indicate in which cases it would apply.

Article 25

This Convention shall be without prejudice to the application of provisions of private international law relating to particular matters and contained in normative acts of the institutions of the European Communities or in national laws which have been harmonised in implementation of such acts.

This Convention shall not derogate from provisions of private international law contained in conventions to which the Contracting States are or will be parties within the framework of the Treaties establishing the European Communities.

Background

25.1.1. This Article is aimed at avoiding conflicts between the Convention and relevant provisions of acts issued by the E.E.C. institutions by giving the latter precedence over the former. This should give rise to no difficulties because the instruments which will take precedence over the Convention will be prepared in close consultation with the experts of the Member States.

25.1.2. If the contracting States conclude with one another, after the entry into force of this Convention, other agreements inconsistent therewith, the later agreements will prevail.

Article 26

If, after the date on which this Convention has entered into force in a Contracting State, that State wishes either to derogate from the provisions of the preceding Title on a particular matter or to supplement them in any way, it shall communicate its intention to the other signatory States through the intermediary of the Secretary-General.

Any State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach an agreement.

If no State has requested consultations within the period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the State concerned may amend its legislation in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States.

Background

26.1.1. The scheme provided for in Article 26 is based on the desire not to arrest the development of private international law, and to leave States the possibility of adapting their legislation to future developments and in the hope that the uniformity achieved if the Convention is approved and implemented will not too readily be discarded.

Commentary

26.2.1. It is not clear why the provisions of this Article relate only to "the preceding Title", which contains Articles 2 to 23. It is quite possible that a State might wish to modify the provisions of Article 1, which constitutes Title One.

Article 27

This Convention shall be without prejudice to the application in a Contracting State of bilateral or multilateral conventions which, with respect ot that State, have already entered into force.

Background

27.1.1. In adhering to this Convention the States do not intend to withdraw from their obligations under conventions which have entered into force previously. This is confirmed by Article 27.

Commentary

27.2.1. This Article is apt to impose considerable limitations on the operation of the Convention in relation to subjects already governed by international agreements. In some cases the effect may be similar to that which would be achieved by mentioning the subject among those excluded by the list in Article 1 (at least in relation to cases involving countries which are parties to the agreement).

27.2.2. The wording of Article 27 should be contrasted with that of Article 28 (which is set out in Appendix 1). The present Article relates to conventions generally whereas Article 28 refers to "a multilateral convention, whose principal aim or one of whose principal aims is to lay down rules of private international law concerning one of the matters governed by this Convention".

27.2.3. In a Consultative Document such as this it would not be practical to consider the likely effect on the draft Convention of the numerous conventions whose application would be preserved by Article 27. This must obviously depend on an

examination of the wording and circumstances of the individual agreements which can most effectively and conveniently be undertaken by those directly concerned with the relevant subject. An indication of the likely repercussions on the proposed Convention of any agreement referred to in Article 27 would be of assistance in considering what advice should be given by the Law Commissions to Her Majesty's Government. Without attempting to provide an exhaustive catalogue of existing conventions to which the United Kingdom is a party and which may be relevant, the following list contains examples of such conventions which may require consideration for this purpose. (The dates shown are those on which the respective conventions were opened for signature).

(i) Convention on the contract for the international carriage of goods by road, 19th May 1956. (Cmnd. 3455);

(ii) International Convention concerning the carriage of goods by rail, 25th February 1961. (Cmnd. 2810);

(iii) International Convention concerning the carriage of passengers and luggage by rail, 25th February 1961. (Cmnd. 2811);

(iv) Warsaw Convention for the unification of certain rules relating to international carriage by air, 12th October 1929. (Cmd. 4284);

(v) Hague Protocol to amend the Warsaw Convention, 28th September 1955. (Cmnd. 3356);

(vi) Guadalajara Convention supplementary to the Warsaw Convention, 18th September 1961. (Cmnd. 2354);

(vii) International Convention for the unification of certain rules of law relating to bills of lading, ("The Hague Rules"), 25th August 1924. (Cmd. 3806));

(viii) International Convention for the unification of certain rules of law with respect to collisions between vessels, 23rd September 1910. (Cd. 6677);

(ix) International Convention relating to the limitation of the liability of owners of sea going ships, 10th October 1957. (Cmnd. 3678);

(x) Convention relating to a uniform law on the international sale of goods, 1st July 1964. (Cmnd. 5029);

(xi) Convention relating to a uniform law on the formation of contracts for the international sale of goods, 1st July 1964. (Cmnd. 5030); and

(xii) Convention on the liability of hotel keepers concerning the property of their guests, 17th December 1962. (Cmnd. 3205).

Articles 28, 29 and 30

There is no commentary on these Articles.

Article 31

This Convention shall apply to the European territories of the Contracting States, to the French overseas departments and to the French overseas territories.

The Kingdom of the Netherlands may declare at the time of signature or ratification of this Convention or at any later time by notifying the Secretary-General of the European Communities that this Convention shall apply to Surinam and the Netherlands Antilles.

Commentary

31.2.1. Consideration will have to be given to amending this Article to make appropriate provision with regard to the Channel Islands, the Isle of Man and British Colonies and Protectorates.

Articles 32, 33 and 34

There is no commentary on these Articles.

Article 35

This Convention is concluded for an unlimited period.

Commentary

35.2.1. It may be thought that as the law covered by the Convention will develop rapidly, as a result of judicial interpretation, it would be appropriate for the Convention to provide for periodic review of its provisions. Article 30 (which is set out in Appendix 1), however, provides for a conference of revision to be convened at the request of a contracting State and it may be that this will suffice and, indeed, may be more flexible than a requirement for a review after a fixed period of time.

Article 36

There is no commentary on this Article.

APPENDIX 1

The English and French versions of the text of the Preliminary Draft Convention, the Annex relating to Articles 2 and 8 and the Joint Declaration

Preliminary Draft Convention
on the law applicable to contractual and non-contractual obligations

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PREAMBLE

The High Contracting Parties [to the Treaty establishing the European Economic Community],

-anxious to pursue, in the field of private international law, the work on the unification of laws undertaken within the Community;

-desiring to establish uniform rules concerning the law applicable to contractual and non-contractual obligations;

have decided to conclude this Convention and to this end have designated as their plenipotentiaries:

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Avant-projet de Convention sur la loi applicable aux obligations contractuelles et non contractuelles

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PREAMBULE

Les Hautes parties contractantes [au traité instituant la Communauté Economique Européenne].

-soucieuses de poursuivre, dans le domaine du droit international privé, l'oeuvre d'unification juridique entreprise au sein de la Communauté;

-desirant établir des règles uniformes concernant la loi applicable aux obligations contractuelles et non contractuelles;

ont décidé de conclure la présente Convention et ont désigné à cet effet comme plénipotentiaires:

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TITLE ONE

Scope of the Convention

Article 1 (*)

The rules of private international law laid down in this Convention shall apply, in situations of an international character, to contractual and non-contractual obligations.

They shall not apply:

(a) to the status or capacity of natural persons, without prejudice however to Article 20; nor to the application of rules governing rights in property between husband and wife, wills, testate or intestate succession or gifts;

(b) to negotiable instruments, such as bills of exchange, cheques and promissory notes;

(c) to arbitration agreements and agreements on the choice of court;

(d) [to insurance contracts];

(e) to the formation, internal organisation or dissolution of companies or other legal persons or associations of natural or legal persons;

(f) to questions relating to damage or injury in the nuclear field.

(*) The question of the law applicable to agreements which restrict competition has not been examined.

TITRE PREMIER

Champ d'application

Article premier (*)

Les règles de droit international privé de la présente convention sont applicables, dans les situations ayant un caractère international, aux obligations contractuelles et non contractuelles.

Elles ne s'appliquent pas:

(a) en matière d'état et de capacité des personnes physiques, sous réserve de l'article 20, ni en matière de régimes matrimoniaux, de successions, de testaments et de donations;

(b) aux effets de commerce, tels que lettre de change, chèque et billet à ordre;

(c) aux conventions d'arbitrage et d'élection de for;

(d) [aux contrats d'assurance];

(e) à la constitution, au fonctionnement interne et à la dissolution des sociétés et personnes morales;

(f) en matière de dommage dans le domaine nucléaire.

(*) La question de la loi applicable aux ententes n'a pas été tranchée.

TITLE TWO

Uniform rules

Article 2

A contract shall be governed by the law chosen by the parties.

Conditions governing the validity of the consent of the parties as to the applicable law shall be determined by that law.

[However, in relations between employer and employee, the choice of law made by the parties shall in no case prejudice the operation of mandatory rules for the protection of the employee which are in force in the country in which he habitually carries out his work.]

Article 3

The choice of the applicable law may be made by the parties either at the time of conclusion of the contract or at a later date. The choice may be varied at any time by agreement between the parties. Any variation in the choice of the applicable law which is made after the conclusion of the contract shall be without prejudice to the rights of third parties.

Article 4

In the absence of an express or implied choice of law, the contract shall be governed by the law of the country with which it is most closely connected.

That country shall be:

(a) the country in which the party who is to effect the performance which is characteristic of the contract has his habitual residence at the time of conclusion of the contract;

(b) the country in which that party has his principal establishment at the time of conclusion of the contract, if the characteristic performance is to be effected under a contract concluded in the course of a business activity;

TITRE SECOND

Règles uniformes

Article 2

Le contrat est régi par la loi choisie par les parties.

Les conditions relatives à la validité du consentement des parties quant à la loi applicable sont déterminées par cette loi.

[Toutefois, dans les relations de travail, le choix des parties ne peut en aucun cas porter atteinte aux dispositions impératives protectrices du travailleur, en vigueur dans le pays où il accomplit habituellement son travail.]

Article 3

Le choix des parties quant à la loi applicable peut intervenir aussi bien au moment de la conclusion du contrat qu'à une date ultérieure. Ce choix peut être modifié à tout moment par un accord entre les parties. Toute modification quant à la détermination de la loi applicable, intervenue posterieurement à la conclusion du contrat, ne porte pas atteinte aux droits des tiers.

Article 4

A défaut de choix explicite ou implicite, le contrat est régi par la loi du pays avec lequel il présente les liens les plus étroits.

Ce pays est:

(a) celui où la partie qui doit fournir la prestation caractéristique a sa résidence habituelle, au moment de la conclusion du contrat;

(b) celui où cette partie a son établissement principal au moment de la conclusion du contrat, si la prestation caratéristique doit être fournie en exécution d'un contrat conclu dans l'exercice d'une activité professionelle;

(c) the country in which that party's subsidiary establishment is situated, if it follows from the terms of the contract that the characteristic performance is to be effected by that establishment.

The preceding paragraph shall not apply if either the characteristic performance, the habitual residence or the establishment cannot be determined or if from the circumstances as a whole it is clear that the contract is more closely connected with another country.

Article 5

In the absence of an express or implied choice of law, contracts of employment shall be governed by the law of the country

(a) in which the employee habitually carries out his work,

(b) in which the establishment which engaged the employee is situated, if the employee does not habitually carry out his work in any one country,

unless from the circumstances as a whole it is clear that the contract of employment is more closely connected with another country.

Article 6

In the absence of an express or implied choice of law, contracts whose subject matter is immovable property shall, unless from the circumstances as a whole it is clear that the contract is more closely connected with another country, be governed by the law of the place where the immovable property is situated.

Article 7

Where the contract is also connected with a country other than the country whose law is applicable under Articles 2, 4, 5, 6, 16, 17, 18 and 19, paragraph 3, and the law of that country contains mandatory rules which govern the matter in such a way as to exclude the application of every other law, these rules shall be taken into account to the extent that the exclusion is justifiable by the special nature and purpose of the rules.

(c) celui où est situé l'établissement secondaire de cette partie, s'il résulte du contrat que la prestation caractéristique sera fournie par cet établissement.

L'application de l'alinéa précédent est écartée lorsque la prestation caractéristique, la residence habituelle ou l'établissement ne peuvent être déterminés ou qu'il résulte de l'ensemble des circonstances que le contrat présente des liens plus étroits avec un autre pays.

Article 5

A défaut de choix explicite ou implicite, les contrats de travail sont régis par la loi du pays

(a) où le travailleur accomplit habituellement son travail,

(b) où se trouve l'établissement qui a embauché le travailleur si ce dernier n'accomplit pas habituellement son travail dans un même pays,

à moins qu'il ne résulte de l'ensemble des circonstances que le contrat de travail présente des liens plus étroits avec un autre pays.

Article 6

A défaut de choix explicite ou implicite, les contrats ayant pour objet des immeubles sont régis par la loi du lieu où l'immeuble est situé, à moins qu'il ne résulte de l'ensemble des circonstances que le contrat présente des liens plus étroits avec un autre pays.

Article 7

Lorsque le contrat présente également des liens avec un pays autre que celui dont la loi est applicable en vertu des articles 2, 4, 5, 6, 16, 17, 18 et 19, 3ème alinéa, et que la loi de cet autre pays contient des dispositions réglant impérativement la matière d'une façon qui exclut l'application de toute autre loi, il sera tenu compte de ces dispositions dans la mesure où leur nature ou leur objet particuliers pourraient justifier cette exclusion.

Article 8

Conditions governing the validity of the consent of the parties to the contract shall be determined according to the law which is applicable under the preceding Articles.

Article 9

Articles 2 to 8 shall not apply to the transfer of ownership or to the effects of the contract on other rights *in rem*.

Article 10

Non-contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occurred.

However, if, on the one hand, there is no significant link between the situation arising from the event which has resulted in damage or injury and the country in which that event occurred and, on the other hand, the situation has a closer connexion with another country, then the law of that other country shall apply.

Such a connexion must normally be based on a connecting factor common to the victim and the author of the damage or injury or, if the liability of a third party for the acts of the author is at issue, it must normally be based on one which is common to the victim and the third party.

Where there are two or more victims, the applicable law shall be determined separately for each of them.

Article 8

Les conditions relatives à la validité du consentement des parties au contrat sont déterminées par la loi qui est applicable en vertu des articles précédents.

Article 9

Les dispositions des articles 2 à 8 ne s'appliquent pas au transfert de propriété ni aux effets réels du contrat.

Article 10

Les obligations non contractuelles dérivant d'un fait dommageable sont régies par la loi du pays où ce fait s'est produit.

Toutefois, lorsque d'une part, il n'existe pas de lien significatif entre la situation résultant du fait dommageable et le pays où s'est produit ce fait et que, d'autre part, cette situation présente une connexion prépondérante avec un autre pays, il est fait application de la loi de ce pays.

Cette connexion doit se fonder normalement sur un élément de rattachement commun à la victime et à l'auteur du dommage et, si la responsabilité d'un tiers pour l'auteur est mise en cause, commun à la victime et à ce tiers.

En cas de pluralité de victimes la loi applicable est déterminée séparément à l'égard de chacune d'entre elles.

Article 11

The law applicable to non-contractual obligations under Article 10 shall determine in particular:

1 the basis and extent of liability;

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

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

4 the form of compensation and its extent;

5 the extent to which the victim's heirs may exercise his right to compensation;

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

7 liability for the acts of others;

8 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.

Article 12

Irrespective of which law is applicable under Article 10, in the determination of liability, account shall be taken of such rules issued on grounds of security or public order as were in force at the place and time of occurrence of the event which resulted in damage or injury.

Article 11

La loi applicable aux obligations non contractuelles aux termes de l'article 10 détermine notamment:

1 les conditions et l'étendue de la responsabilité;

2 les causes d'exonération, ainsi que toute limitation et tout partage de responsabilité;

3 l'existence et la nature des dommages susceptibles de réparation;

4 les modalités et l'étendue de la réparation;

5 la mesure dans laquelle le droit de la victime à réparation peut être exercée par ses héritiers;

6 les personnes ayant droit à réparation du dommage qu'elles ont personnellement subi;

7 la responsabilité du fait d'autrui;

8 les prescriptions et les déchéances fondées sur l'expiration d'un délai, y compris le point de départ, l'interruption et la suspension des délais.

Article 12

Quelle que soit la loi applicable aux termes de l'article 10, il sera tenu compte, dans la détermination de la responsabilité, des règles de sécurité et de police en vigueur au lieu et au moment où le fait dommageable s'est produit.

Article 13

Non-contractual obligations arising from an event which does not result in damage or injury shall be governed by the law of the country in which that event occurred. However, if, by reason of a connecting factor common to the interested parties, there is a closer connexion with the law of another country, that law shall apply.

Article 14

The provisions of Articles 10 to 13 shall not apply to 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 of public authority performed by the organs or agents in the exercise of their official functions.

Article 15

The law governing an obligation shall also determine the conditions of performance, the consequences of non-performance and the various ways in which the obligation may be extinguished.

As regards the manner of performance, the law of the country in which performance takes place must be taken into account.

Article 16

Obligations between the assignor and the assignee of a claim shall be governed by the law applicable under Articles 2 to 8.

The law governing the original claim shall determine its assignability and the relationship between the assignee and the debtor, as well as the conditions under which the assignment may be invoked against the debtor and third parties.

Article 13

Les obligations non contractuelles dérivant d'un fait autre qu'un fait dommageable sont régies par la loi du pays où il s'est produit. Toutefois si, en raison d'un élément de rattachement commun aux parties intéressées, il existe une connexion prépondérante avec la loi d'un autre pays, cette loi est applicable.

Article 14

Les dispositions des articles 10 à 13 ne s'appliquent pas à la responsabilité de l'Etat ou d'autres personnes morales de droit public ainsi qu'à celle de leurs organes ou agents pour les actes relevant de la puissance publique et accomplis par eux dans l'exercice de leurs fonctions.

Article 15

La loi qui régit une obligation détermine également les conditions de son exécution, les divers modes de son extinction et les conséquences de son inexécution.

En ce qui concerne les modalités d'exécution, on aura égard à la loi du pays où l'exécution a lieu.

Article 16

Les obligations entre le cédant et le cessionnaire d'une créance sont régies par la loi applicable en vertu des articles 2 à 8.

La loi qui régit la créance originaire détermine le caractère transférable de celle-ci, ainsi que les rapports entre cessionnaire et débiteur et les conditions d'opposabilité de la cession au débiteur et aux tiers.

Article 17

The transfer of a claim by operation of law shall be governed by the law of the juridical institution for the purposes of which that transfer was provided.

The law governing the original claim shall nevertheless determine its assignability, as well as the rights and obligations of the debtor.

Article 18

A juristic act shall be formally valid if it is done in accordance with the conditions prescribed either by the law which governs the material validity of the act or which governed its material validity at the time when it was done, or by the law of the place where it was done. Where the act consists of several declarations the formal validity of each declaration shall be determined separately.

The preceding paragraph does not apply to the creation, assignment or extinction of rights in rem.

Article 19

The existence and force of presumptions of law, together with the burden of proof, shall be determined by the law which is applicable to the legal relationship. However, the consequences to be drawn from the conduct of a party in the course of the proceedings shall be determined by the law of the forum.

The law of the forum shall determine the admissibility of the modes of proof of juristic acts. However, a party may also rely on a mode of proof which is admissible under any law referred to in Article 18 under which the act is formally valid, provided that the use of such mode of proof is not incompatible with the law of the forum.

Article 17

Le transfert d'une créance par l'effet de la loi est régi par la loi de l'institution juridique pour laquelle il a été créé.

La loi qui régit la créance originaire détermine néanmoins le caractère transférable de celle-ci ainsi que les droits et les obligations du débiteur.

Article 18

Pour être valable quant à la forme, un acte juridique doit satisfaire aux conditions établies, soit par la loi qui le régit ou le régissait au fond au moment de sa passation, soit par celle du lieu où il est intervenu. Lorsqu'un acte juridique est formé de plusieurs déclarations, la validité quant à la forme de chacune d'elles est appréciée séparément.

Les dispositions du présent article ne s'appliquent pas à la constitution, au transfert et à l'extinction des droits réels portant sur une chose.

Article 19

L'existence et la force des présomptions légales ainsi que la charge de la preuve sont régies par la loi applicable au rapport juridique. Toutefois, les conséquences à déduire de l'attitude des parties au cours du procès sont régies par la loi du for.

Les modes de preuve des actes juridiques sont déterminés, quant à leur admissibilité, par la loi du for. Toutefois, les parties peuvent également se prévaloir des modes de preuve admis par toute loi, visée a l'article 18, selon laquelle l'acte est valable quant à la forme, pour autant que ces modes de preuve ne soient pas incompatibles avec la loi du for.

The law which in accordance with Article 18 governs the formal validity of an act shall determine both how far an informally executed document which establishes obligations on the part of its signatory or signatories shall be sufficient proof of these obligations and also what modes of proof shall be admissible to add to or to contradict, the contents of the document. Where the document has probative value both according to the law governing the material validity of the act and according to the law of the place where it was executed, only the former of those two laws shall apply.

Article 20

No natural person may invoke his incapacity against a person who, in relation to a juristic act, in good faith and without acting imprudently, considered him to have capacity under the law of the place where the act was executed.

Article 21

For the purposes of the preceding provisions, the law of a country means the rules of law in force in that country, other than the rules of private international law.

Article 22

The application of any law prescribed by the preceding provisions may be refused only if it is manifestly incompatible with public policy.

Article 23

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.

La mesure dans laquelle un document écrit sous seing privé, constatant des obligations à la charge de son ou de ses signataires, fait preuve suffisante de ces obligations, ainsi que les modes de preuve admis outre ou contre le contenu de ce document sont déterminés par la loi qui régit la validité en la forme de l'acte selon l'article 18. Si ce document vaut comme instrument de preuve tant selon la loi qui régit l'acte au fond que selon celle du lieu où il a été établi, la première de ces deux lois est seule applicable.

Article 20

Aucune personne physique ne peut invoquer son incapacité contre celui qui, dans un acte juridique, l'aura de bonne foi et sans imprudence, conformément à la loi du lieu de l'acte, considérée comme capable.

Article 21

Au sens des dispositions qui précèdent, la loi d'un pays s'entend les règles de droit en vigueur dans ce pays, à l'exclusion des règles de droit international privé.

Article 22

L'application de l'une des lois désignées par les dispositions qui précèdent ne peut être écartée que si elle est manifestement incompatible avec l'ordre public.

Article 23

Aux fins de l'interprétation et de l'application des règles uniformes qui précèdent, il sera tenu compte de leur caractère international et de l'opportunité de parvenir à l'uniformité dans la façon dont elles sont interprétées et appliquées.

TITLE THREE

Final Provisions

Article 24

The application of Articles 1 to 23 of this Convention shall not be subject to any condition of reciprocity. The Convention shall apply even if the applicable law is not that of a Contracting State.

Article 25

This Convention shall be without prejudice to the application of provisions of private international law relating to particular matters and contained in normative acts of the institutions of the European Communities or in national laws which have been harmonised in implementation of such acts.

This Convention shall not derogate from provisions of private international law contained in conventions to which the Contracting States are or will be parties within the framework of the Treaties establishing the European Communities.

Article 26

If, after the date on which this Convention has entered into force in a Contracting State, that State wishes either to derogate from the provisions of the preceding Title on a particular matter or to supplement them in any way, it shall communicate its intention to the other signatory States through the intermediary of the Secretary-General.

Any State may, within six months from the date of the communication made to the Secretary-General, request him to arrange consultations between signatory States in order to reach an agreement.

If no State has requested consultations within the period or if within two years following the communication made to the Secretary-General no agreement is reached in the course of consultations, the State concerned may amend its legislation in the manner indicated. The measures taken by that State shall be brought to the knowledge of the other signatory States.

TITRE TROISIEME

Dispositions finales

Article 24

L'application des articles 1 à 23 de la présente Convention est indépendante de toute condition de réciprocité. La Convention s'applique même si la loi applicable n'est pas celle d'un Etat contractant.

Article 25

La présente Convention ne préjuge pas de l'application des dispositions de droit international privé relatives à des matières speciales et contenues dans des actes normatifs émanant des institutions des Communautés européennes ainsi que dans le droit national harmonisé en exécution de ces actes.

La présente Convention ne déroge pas aux dispositions de droit international privé contenues dans les conventions auxquelles les Etats contractants sont ou seront parties dans le cadre des traités instituant les Communautés européennes.

Article 26

Si après la date d'entrée en vigueur de la présente Convention à son égard, un Etat contractant désire, soit déroger dans une matière speciale aux dispositions du titre précédent, soit leur apporter un complément, il communique son intention aux autres Etats signataires par l'intermédiaire du Secrétaire Général.

Dans un délai de six mois à partir de la communication faite au Secrétaire Général, tout Etat peut demander à celui-ci d'organiser des consultations entre Etats signataires en vue d'arriver à un accord.

Si, dans ce délai, aucun Etat n'a demandé la consultation ou si, dans les deux ans qui suivent la communication faite au Secrétaire Général, aucun accord n'est intervenu à la suite des consultations, l'Etat peut modifier sa législation dans le sens qu'il avait indiqué. La mesure prise par cet Etat est portée à la connaissance des autres Etats signataires.

Article 27

This Convention shall be without prejudice to the application in a Contracting State of bilateral or multilateral conventions which, with respect to that State, have already entered into force.

Article 28

If, after the date on which this Convention has entered into force with respect to a Contracting State, that State wishes to become a party to a multilateral convention, whose principal aim or one of whose principal aims is to lay down rules of private international law concerning one of the matters governed by this Convention, or if that State wishes to denounce such a convention, the procedure set out in Article 26 shall apply. However, the period of two years, referred to in the third paragraph of Article 26, shall be reduced to one year.

Article 29

If a Contracting State considers that the unification achieved by this Convention is prejudiced by the conclusion of agreements not covered by the preceding Article, that State may request the Secretary-General of the Council of the European Communities to arrange consultations between the signatory States of this Convention.

Article 30

Any Contracting State may, after consulting the other signatory States through the intermediary of the Secretary-General of the Council of the European Communities, request a revision of this Convention. In such a case, a conference of revision shall be convened by the President of the Council of the European Communities.

Article 27

La présente Convention ne porte pas atteinte à l'application dans un Etat contractant des conventions bilatérales ou multilatérales entrées antérieurement en vigueur à son égard.

Article 28

Si après la date d'entrée en vigueur de la présente Convention à son égard, un Etat contractant désire devenir partie à une convention multilatérale dont l'objet principal ou l'un des objets principaux est un règlement de droit international privé dans l'une des matières régies par la présente Convention ou dénoncer une telle convention, il est fait application de la procédure prévue à l'article 26. Toutefois le délai de deux ans, prévu au paragraphe 3 de l'article 26, est ramené à un an.

Article 29

Lorsqu'un Etat contractant considère que l'unification réalisée par la présente Convention est compromise par la conclusion d'accords non prévus à l'article précédent, cet Etat peut demander au Secrétaire Général du Conseil des Communautés européennes d'organiser une consultation entre les Etats signataires de la présente Convention.

Article 30

Chaque Etat contractant, après consultation des autres Etats signataires par l'intermédiaire du Secrétaire Général du Conseil des Communautés européennes, peut demander la révision de la présente Convention. Dans ce cas, une conférence de révision est convoquée par le Président du Conseil des Communautés européennes.

Article 31

This Convention shall apply to the European territories of the Contracting States, to the French overseas "départments" and to the French overseas territories.

The Kingdom of the Netherlands may declare at the time of signature or ratification of this Convention or at any later time by notifying the Secretary-General of the Council of the European Communities that this Convention shall apply to Surinam and the Netherlands Antilles.

Article 32

This Convention shall be ratified by the signatory States. The instruments of ratification shall be deposited with the Secretary-General of the Council of the European Communities.

Article 33

This Convention shall enter into force on the first day of the third month following the deposit of the fifth instrument of ratification. This Convention shall enter into force for each signatory State ratifying at a later date on the first day of the third month following the deposit of its instrument of ratification. EEC countries all on same day

Article 34

The Secretary-General of the Council of the European Communities shall notify the signatory States of:

(a) the deposit of each instrument of ratification;

(b) the date of entry into force of this Convention; to each signatory State

(c) communications made in pursuance of Articles 26, 28, 29, 30 and 31.

Article 31

La présente Convention s'applique au territoire européen des Etats contractants, aux départements français d'outre-mer ainsi qu'aux territoires français d'outre-mer.

Le Royaume des Pays-Bas peut déclarer au moment de la signature ou de la ratification de la présente Convention ou à tout moment ultérieur, par voie de notification au Secrétaire Général du Conseil des Communautés européennes, que la présente Convention sera applicable au Surinam et aux Antilles néerlandaises.

Article 32

La présente Convention sera ratifiée par les Etats signataires. Les instruments de ratification seront déposés auprès du Secrétaire Général du Conseil des Communautés européennes.

Article 33

La présente Convention entrera en vigueur le premier jour du troisième mois suivant le dépôt du cinquième instrument de ratification. La Convention entrera en vigueur pour chaque Etat signataire ratifiant postérieurement, le premier jour du troisième mois suivant le dépôt de son instrument de ratification.

Article 34

Le Secrétaire Général du Conseil des Communautés européennes notifiera aux Etats signataires:

(a) le dépôt de tout instrument de ratification;

(b) la date d'entrée en vigueur de la presente Convention;

(c) les communications faites en application des articles 26, 28, 29, 30 et 31.

Article 35

This Convention is concluded for an unlimited period.

Article 36

This Convention, drawn up in a single original in the German, French, Italian, Dutch ..... and ..... languages, these texts being equally authentic, shall be deposited in the archives of the Secretariat of the Council of the European Communities. The Secretary-General shall supply a certified copy thereof to the Government of each signatory State.

Accession clause ? — See Judgments Convention art 63

Article 35

La présente Convention est conclue pour une durée illimitée.

Article 36

La présente Convention, rédigée en un exemplaire unique en langue allemande, en langue française, en langue italienne, en langue néerlandaise, en langue ..... et en langue .... ces textes faisant également foi, sera déposée dans les archives du Secrétariat du Conseil des Communautés européennes. Le Secrétaire Général en remettra une copie certifiée conforme à chacun des Gouvernements des Etats signataires.

ANNEX

Article 2, fourth paragraph

First variant

[The effect of the silence of a party on a proposal as to the applicable law, made by the other party before or in connection with the conclusion of the contract, shall be determined in accordance with the law of the place of habitual residence of that party. However, notwithstanding the provisions of that law, an agreement as to the choice of the applicable law may be deduced from silence on the part of a party if that interpretation follows from a previous course of dealing between the parties or from international trade usages of which the parties, by reason of their business activity, were or should have been aware.]

Second variant

[Agreement on the choice of applicable law may be deduced from the silence of one of the parties only if that interpretation follows from a previous course of dealing between the parties or from international trade usages. However, if the contract has already been concluded, the law which governs it shall determine whether the silence implies a choice of applicable law.]

Article 8, second paragraph

First variant

[The effect of the silence of a party on the conclusion of a contract shall be determined in accordance with the law of the place of habitual residence of that party. However, notwithstanding the provisions of that law, consent to the contract may be deduced from the silence of a party if that interpretation follows from a previous course of dealing between the parties or from international trade usages of which the parties, by reason of their business activity, were or should have been aware.]

Second variant

[The conclusion of a contract may not be deduced from the silence of a party unless that interpretation follows from a previous course of dealing between the parties or from international trade usages.]

ANNEXE

Article 2, alinéa 4

Première variante

[La portée du silence d'une partie sur une proposition de la loi applicable, faite par l'autre partie avant la formation du contrat ou en connexion avec elle, est appréciée selon la loi de la résidence habituelle de cette partie. Toutefois, nonobstant les dispositions de cette loi, l'accord sur le choix de la loi applicable pourra être déduit du silence d'une des parties si cette interprétation résulte des habitudes précédemment établies entre les parties ou des usages du commerce international dont les parties ont ou devraient avoir connaissance en raison de leur profession.]

Deuxième variante

[L'accord sur le choix de la loi applicable ne peut être déduit du silence d'une des parties que si cette interprétation résulte des habitudes précédemment établies entre les parties ou des usages pratiqués dans le commerce international. Toutefois, si le contrat est déjà formé, la loi qui le régit déterminera si le silence comporte ou non choix de la loi applicable.]

Article 8, alinéa 2

Première variante

[La portee du silence d'une partie quant à la formation du contrat est appréciée selon la loi de la résidence habituelle de cette partie. Toutefois, nonobstant les dispositions de cette loi, le consentement au contrat pourra être déduit du silence d'une des parties si cette interprétation résulte des habitudes précédemment établies entre les parties ou des usages du commerce international dont les parties ont ou devraient avoir connaissance en raison de leur profession.]

Deuxième variante

[La formation du contrat ne peut être déduite du silence d'une des parties que si cette interprétation résulte des habitudes précédemment établies entre les parties ou des usages pratiqués dans le commerce international.]

JOINT DECLARATION

At the time of the signature of this Convention, the Governments.....

- anxious, as far as possible, to avoid dispersion of conflict rules among several instruments and differences between these rules;

- express the wish that the Institutions of the European Communities, in the exercise of their powers under the Treaties by which they were established, will, where the need arises, endeavour to adopt conflict rules which are as far as possible consistent with those of this Convention;

- express the wish that those Institutions will, in the drawing up of Community acts containing rules on the conflict of laws, obtain the opinion of governmental experts on private international law and use all appropriate means to ensure that the contribution of those experts is made fully effective.

DECLARATION COMMUNE

Au moment de procéder à la signature de la présente Convention, les Gouvernements .....

- soucieux d'éviter dans toute la mesure du possible la dispersion des règles de conflit de lois entre de multiples instruments et les divergences entre ces règles;

- souhaitent que les Institutions des Communautés européennes, dans l'exercice de leurs compétences sur la base des Traités qui les ont instituées, s'efforcent, lorsqu'il y a lieu, d'adopter des règles de conflit qui, autant que possible, soient en harmonie avec celles de la présente Convention;

- souhaitent que ces Institutions, pour la préparation des actes communautaires comportant des règles de conflit de lois, s'assurent de l'avis d'experts gouvernementaux de droit international privé et recherchent tous moyens propres à donner sa pleine efficacité au concours de ces experts.

APPENDIX 2

Membership of the Law Commissions' Working Group on Private International Law (Obligations)

Joint Chairmen: (The Hon. Mr. Justice Cooke (Law Commission)
(The Hon. Lord Hunter (Scottish Law Commission)

Mr. A.E. Anton, C.B.E. (Scottish Law Commission)
Miss F. Carmichael (Representative of Scottish Departments)
Mr. J.A.E. Davies (Law Commission)
Mr. Aubrey L. Diamond (Law Commission)
Mr. R.J. Holmes, Q.C. (Law Commission)
Dr. F.A. Mann (Messrs. Herbert Smith & Co.)
Mr. I.K. Mathers (Foreign and Commonwealth Office)
Mr. K.M.H. Newman (Lord Chancellor's Office)
Mr. W.J. Sandars (Messrs. Linklaters & Paines)
Mr. L.V. Wellard (Department of Industry)

Secretary: Miss Jane Richardson (Law Commission)