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(Information)

COUNCIL

REPORT

on the Convention on the law applicable to contractual obligations [1]

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(1) The text of the Convention on the law applicable to contractual obligations was published in Official Journal No L 266 of 9 October 1980.

The Convention, open for signature in Rome on 19 June 1980, was signed on that day by the Plenipotentiaries of the following seven Member States: Belgium, Germany, France, Ireland, Italy, Luxembourg and the Netherlands.

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INTRODUCTION

1. Proposal by the Governments of the Benelux countries to the Commission of the European Communities

On 8 September 1967 the Permanent Representative of Belgium extended to the Commission, in the name of his own Government and those of the Kingdom of the Netherlands and the Grand Duchy of Luxembourg, an invitation to collaborate with the experts of the Member States, on the basis of the draft Benelux convention, in the unification of private international law and codification of the rules of conflict of laws within the Community.

The object of this proposal was to eliminate the inconveniences arising from the diversity of the rules of conflict, notably in the field of contract law. Added to this was 'an element of urgency', having regard to the reforms likely to be introduced in some Member States and the consequent 'danger that the existing divergences would become more marked'.

In the words of Mr T. Vogelaar, Director-General for the Internal Market and Approximation of Legislation at the Commission, in his opening address as chairman of the meeting of government experts on 26 to 28 February 1969: 'This proposal should bring about a complete unification of the rules of conflict. Thus in each of our six countries, instead of the existing rules of conflict and apart from cases of application of international Agreements binding any Member State, identical rules of conflict would enter into force both in Member States' relations *inter se* and in relations with non-Community States. Such a development would give rise to a common corpus of unified legal rules covering the territory of the Community's Member States. The great advantage of this proposal is undoubtedly that the level of legal certainty would be raised, confidence in the stability of legal relationships fortified, agreements on jurisdiction according to the applicable law facilitated, and the protection of rights acquired over the whole field of private law augmented. Compared with the unification of substantive law, unification of the rules of conflict of laws is more practicable, especially in the field of property law, because the rules of conflict apply solely to legal relations involving an international element' (1).

2. Examination of the proposal by the Commission and its consequences

In examining the proposal by the Benelux countries the Commission arrived at the conclusion that at least in some special fields of private international law the harmonization of rules of conflict would be likely to facilitate the workings of the common market.

Mr Vogelaar's opening address reviews the grounds on which the Commission's conclusion was founded and is worth repeating here:

'According to both the letter and spirit of the Treaty establishing the EEC, harmonization is recognized as fulfilling the function of permitting or facilitating the creation in the economic field of legal conditions similar to those governing an internal market. I appreciate that opinions may differ as to the precise delimitation of the inequalities which directly affect the functioning of the common market and those having only an indirect effect. Yet there are still legal fields in which the differences between national legal systems and the lack of unified rules of conflict definitely impede the free movement of persons, goods, services and capital among the Member States.

Some will give preference to the harmonization or unification of substantive law rather than the harmonization of rules of conflict. As we know, the former has already been achieved in various fields. However, harmonization of substantive law does not always contrive to keep pace with the dismantling of economic frontiers. The problem of the law to be applied will therefore continue to arise as long as substantive law is not unified. The number of cases in which the question of applicable law must be resolved increases with the growth of private law relationships across frontiers.

At the same time there will be a growing number of cases in which the courts have to apply a foreign law. The Convention signed on 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters uniformly governs the international jurisdiction of the courts within the

Community. It should help to facilitate and expedite many civil actions and enforcement proceedings. It also enables the parties. in many matters, to teach agreements assigning jurisdiction and to choose among several courts. The outcome may be that preference is given to the court of a State whose law seems to offer a better solution to the proceedings. To prevent this "forum shopping", increase legal certainty, and anticipate more easily the law which will be applied, it would be advisable for the rules of conflict to be unified in fields of particular economic importance so that the same law is applied irrespective of the State in which the decision is given.

To sum up, there are three main considerations guiding our proposal for harmonizing the rules of conflict for a few well-defined types of legal relations. The first is dictated by the history of private international law: to try to unify everything is to attempt too much and would take too long. The second is the urgent necessity for greater legal certainty in some sectors of major economic importance. the third is the wish to forestall any aggravation of the differences between the rules of private international law of the various Member States' (2).

These were in fact the motives which prompted the Commission to convene a meeting of experts from the Member States in order to obtain a complete picture of the present state of the law and to decide whether and to what extent a harmonization or unification of private international law within the Community should be undertaken. The invitation was accompanied by a questionnaire designed to facilitate the discussion (3).

3. Favourable attitude of Member States to the search for uniform rules of conflict, the setting of priorities and establishment of the working group to study and work out these rules

The meeting in question took place on 26 to 28 February 1969. It produced a first survey of the situation with regard to prospects for and possible advantage of work in the field of unification of rules of conflict among Member States of the European Communities (4).

However, it was not until the next meeting on 20 to 22 October 1969 that the government experts were able to give a precise opinion both on the advisability and scope of harmonization and on the working procedure and organization of work.

As regards advisability of harmonization the Member States' delegations (with the sole exception of the German delegation) declared themselves to be fundamentally in agreement on the value of the work in making the law more certain in the Community. The German delegation, while mentioning some hesitation on this point in professional and business circles, said that this difference of opinion was not such as to affect the course of the work at the present time.

As regards the scope of harmonization, it was recognized (without prejudice to future developments) that a start should be made on matters most closely involved in the proper functioning of the common market, more specifically:

1. the law applicable to corporeal and incorporeal property;
2. the law applicable to contractual and non-contractual obligations;
3. the law applicable to the form of legal transactions and evidence;
4. general matters under the foregoing heads (renvoi, classification, application of foreign law, acquired rights, public policy, capacity, representation).

As for the legal basis of the work, it was the unanimous view that the proposed harmonization, without being specifically connected with the provisions of Article 220 of the EEC Treaty, would be a natural sequel to the Convention on jurisdiction and enforcement of judgments.

Lastly, on the procedure to be followed, all the delegations were in favour of that adopted for work on the Conventions already signed or in process of drafting under Article 220 and of seeking the most suitable ways of expediting the work (5).

The results of the meeting were submitted through the Directorate-General for the Internal Market an Approximation of Legislation to the Commission with a proposal to seek the agreement of Member States for continuance of the work and preparation of a preliminary draft Convention establishing uniformity of law in certain relevant areas of private international law.

The Commission acceded to the proposal. At its meeting on 15 January 1970 the Committee of Permanent Representatives expressly authorized the Group to continue its work on harmonization of the rules of private international law, on the understanding that the preliminary draft or drafts would give priority to the four areas previously indicated.

Following the abovementioned decision of the Permanent Representatives Committee, the Group met on 2 and 3 February 1970 and elected its chairman, Mr P. Jenard, Director of Administration in the Belgian Ministry of Foreign Affairs and External Trade, and its vice-chairman, Prof. Miccio, Counsellor to the Italian Court of Cassation.

Having regard to the decision of the previous meeting that the matters to be given priority should be divided into four sectors, the Group adopted the principle that each of the four sectors should have its own rapporteur appointed as follows, to speed up the work:

1. in the case of the law applicable to corporeal and incorporeal property, by the German delegation;
2. in the case of the law applicable to contractual and extracontractual obligations, by the Italian delegation:
3. in the case of the law applicable to the form of legal transactions and evidence, by the French delegation;
4. in general matters, by the Netherlands delegation, in agreement with the Belgian and Luxembourg delegations.

As a result the following were appointed: Prof. K. Arndt, Oberlandsgerichtspräsident a.d.; Prof. M. Giuliano, University of Milan; Prof. P. Lagarde, University of Paris I; Mr T. van Sasse van Ysselt, Director in the Netherlands Ministry of Justice.

Other matters were dealt with at the same meeting, notably the kind of cenvention to be prepared, as to which the great majority of delegates favoured a universal convention not based upon reciprocity; the method of work; participation of observers from the Hague Conference on Private International Law and the Benelux Commission on Unification of Law (6).

4. Organization, progress and initial results of the Group's work at the end of 1972

The Group took as its starting point the examination and discussion of the questionnaires prepared by the rapporteurs, Messrs Giuliano, Lagarde and van Sasse van Ysselt in their respective fields. They were discussed at a meeting of the rapporteurs chaired by Mr Jenard on 1 to 4 June 1970. The three questionnaires were subjected to a thorough analysis, extending both to the rules of conflict (national or established by convention) in force in the Community Member States and to the evolutionary trends already apparent in case law and legal theory in certain countries or worthy of consideration in relation to certain present-day reqirements in international life. This oral analysis was further supplemented by the written replies given by each rapporteur on the basis of the statutes, case law and legal theory of his own country (of the three Benelux countries in the case of Mr van Sasse) to the questionnaires drawn up by his colleagues and himself (7).

This preliminary work and material enabled each of the rapporteurs to present an interim report, with draft articles on the matter considered, as a working basis for the Group meetings. It was agreed that these meetings would be devoted to an examination of Mr Giuliano's report on the law applicable to contractual and non-contractual obligations and to the subject matter of Mr Lagarde's and Mr van Sasse van Ysselt's report to the extent that this was relevant to Mr Giuliano's subject.

It was agreed that Mr Arndt's report on the law applicable to corporeal and incorporeal property would be discussed later, Mr Arndt having explained that a comparative study of the principal laws on security rights and interests should precede his report and that the need for such a study had been generally recognized.

Apart from the meeting of rapporteurs in June 1970, the work fully occupied 11 Group plenary sessions, each with an average duration of five days (8).

At its meeting in June 1972 the Group completed the preliminary draft convention on the law applicable to contractual and non-contractual obligations and decided that it should be submitted, together with the reports finalized at a meeting of rapporteurs on 27 and 28 September 1972, to the Permanent Representatives Commitee for transmission to the Governments of the Community Member States (9).

5. Re-examination of Group work in the light of observations by the Governments of original and new Member States of the EEC and results achieved in February 1979

It follows from the foregoing observations that the 1972 draft dealt both with the law applicable to contractual obligations and with that applicable to non-contractual obligations. At the same time it provided solutions relating to the law governing the form of legal transactions and evidence, questions of interpretation of uniform rules and their relationship

with other rules of conflict of international origin, to the extent to which these were connected with the subject of the preliminary draft.

Following the accession of the United Kingdom, Denmark and Ireland to the EEC in 1973 the Commission extended the Group to include government experts from the new Member States and the Permanent Representatives Commitee authorized the enlarged Group to re-examine in the light of observations from the Governments of the original and of the new Member States of the EEC, the preliminary draft convention which the Commission had submitted to it at the end of 1972. The Group elected Prof. Philip as vice-chairman.

Nevertheless the preliminary draft was not re-examined immediately. The need to allow the experts from the new Member States time to consult their respective Governments and interested parties on the one hand and the political uncertainties in the United Kingdom concerning membership of the European Communities (which were not settled until the 1975 referendum) on the other, resulted in a significant reduction (if not suspension) of the Group's activities for about three years. It was not until the end of 1975 that the Group was able properly to resume its work and proceed with the preparation of the Convention on the law applicable to contractual obligations. In fact the Group decided at its meeting in March 1978 to limit the present convention to contracts alone and to begin negotiations for a second Convention, on non-contractual obligations, after the first had been worked out. Most delegations thought it better for reasons of time to finish the part relating to contractual obligations first.

The original preliminary draft, with the limitation referred to, was re-examined in the course of 14 plenary sessions of the Group and three special meetings on transport and insurance contracts; each of the plenary sessions lasted two to five days ([10]). At the meeting in February 1979 the Group finished the draft convention, decided upon the procedure for transmitting the draft to the Council before the end of April and instructed Professors Giuliano and Lagarde to draw up the report; this was then finalized at a meeting of rapporteurs on 18 to 20 June 1979 in which one expert per delegation participated, and transmitted in turn to the Council and to the Governments by the chairman, Mr Jenard.

6. Finalization of the Convention within the Council of the European Communitees

On 18 May 1979 the Group's chairman, Mr Jenard, sent the draft Convention to the President of the Council of the European Communities with a request that the Governments make their comments on the draft by the end of the year so that the Convention could then be concluded during 1980.

On 20 July 1979 Mr Jenard sent the President of the Council a draft report on the Convention, which was the predecessor of this report.

The General Secretariat of the Council received written comments from the Belgian, Netherlands, Danish, Irish, German, Luxembourg and United Kingdom Governments. In addition, on 17 March 1980, the Commission adopted an opinion on the draft Convention, which was published in *Official Journal of the European Communities* No L 94 of 11 April 1980.

On 16 January 1980 the Permanent Representatives Commitee set up an *ad hoc* working party on private international law, whose terms of reference were twofold:

— to finalize the Convention text in the light of the comments made by Member States' Governments,

— to consider whether, and if so within what limits, the Court of Justice of the European Communities should be given jurisdiction to interpret the Convention.

The *ad hoc* working party met twice, from 24 to 28 March and 21 to 25 April 1980, with Mr Brancaccio from the Italian Ministry of Justice in the chair ([11]). Working from the Governments' written comments and others made orally during discussions, the working party reached general agreement on the substantive provisions of the Convention and on the accompanying report.

The only problems unresolved by the working party concerned the problem of where the Convention stood in relation to the Community legal order. They arose in particular in determining the number of ratifications required for the Convention to come into force and in drafting a statement by the Governments of the Member States on the conferral of jurisdiction on the Court of Justice.

Following a number of discussions in the Permanent Representatives Committee, which gradually brought agreement within sight, the Council Presidency deemed circumstances to be ripe politically for the points of disagreement to be discussed by the Ministers of Justice with a good chance of success at a special Council meeting on 19 June 1980 in Rome.

At that meeting, a final round of negotiations produced agreement on a number of seven Member States required to ratify in order for the Convention to come into force. Agreement was also reached on the wording of a joint statement on the interpretation of the Convention by the Court of Justice, which followed word for word the matching statement made by the Governments of the original six Member States of the Community when the Convention on jurisdiction and enforcement was concluded on 27 September 1968 in Brussels. In adopting the statement, the Representatives of Governments of the Member States, meeting within the Council, also instructed the *ad hoc* Council working party on private international law to consider by what means point 1 of the statement could be implemented and report back by 30 June 1981.

With these points settled, the President-in-Office of the Council, Tommaso Morlino, Italian Minister of Justice, recorded the agreement of the Representatives of the Governments of the Member States, meeting within the Council, on the following:

— adoption of the text of the Convention and of the two joint statements annexed to it,

— the Convention would be open for signing from 19 June 1980,

— the Convention and accompanying report would be published in the *Official Journal of the European Communities* for information.

The Convention was signed on 19 June 1980 by the plenipotentiaries of Belgium, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg and the Netherlands.

7. Review of the internal sources and nature of the rules in force in the EEC Member States relating to the law applicable to contractual obligations

The chief aim of the Convention is to introduce into the national laws of the EEC Member States a set of uniform rules on the law applicable to contractual obligations and on certain general points of private international law to the extent that these are linked with those obligations.

Without going here into details of positive law, though it may be necessary to return to it in the comments on the uniform rules, a short survey can now be given of the internal sources and the nature of the rules of conflict at present in force in the Community countries in the field covered by the Convention. This survey will bring out both the value and the difficulties of the unification undertaken by the Group and of which the convention is only the first fruit.

Of the nine Member States of the Community, Italy is the only one to have a set of rules of conflict enacted by the legislature covering almost all the matters with which the Convention is concerned. These rules are to be found for the most part in the second paragraph of Article 17 and in Articles 25, 26, 30 and 31 of the general provisions constituting the introduction to the 1942 Civil Code, and in Articles 9 and 10 of the 1942 Navigation Code.

In the other Member States of the Community, however, the body of rules of conflict on the law applicable to contractual obligations is founded only on customary rules or on rules originating in case law. Academic studies and writings have helped considerably to develop and harmonize these rules.

The position as just stated has not been altered substantially either by the French draft law supplementing the Civil Code in respect of private international law (1967) or by the Benelux Treaty establishing uniform rules of private international law signed in Brussels on 3 July 1969. These two texts are certainly an interesting attempt to codify the rules of conflict and also, in the case of the Benelux countries, to make these rules uniform on an inter-State level. The Group did not fail to take account of their results in its own work. However, the entry into force of the Benelux Treaty has not been pursued, and the French draft law seems unlikely to be adopted in the near future.

8. Universal application of the uniform rules

From the very beginning of its work the Group has professed itself to be in favour of uniform rules which would apply not only to the nationals of Member States and to persons domiciled or resident within the Community but also to the nationals of third States and to persons domiciled or resident therein. The provisions of Article 2 specify the universal application of the convention.

The Group took the view that its main purpose was to frame general rules such as those existing in legislative provisions currently in force in Italy and in the Benelux Treaty and the French draft law. In such a context these general rules, which would become the 'common law' of each Member State for settling conflicts of laws, would not prejudice the detailed regulation of clearly delimited matters

arising from other work, especially that of the Hague Conference on private international law. The application of these particular conventions is safeguarded by the provisions of Article 21.

9. On the normally general nature of the uniform rules in the Convention and their significance in the unification of laws already undertaken in the field of private international law

At the outset of its work the Group had also to determine the nature and scope of the uniform rules of conflict to be formulated. Should they be general rules, to be applied indiscriminately to all contracts, or would it be better to regulate contractual obligations by means of a series of specific rules applicable to the various categories of contract, or again should an intermediate solution be envisaged, namely by adopting general rules and supplementing them by specific rules for certain categories of contract?

Initially the rapporteur advocated the latter method. This provided that, in default of an express of implied choice by the parties, the contract would be governed (subject to specific provisions for certain categories) by one system of law.

When the Group tackled the question of whether to supplement the general rules for determining the law applicable to the contract by some specific rules for certain categories of contract it became clear that the point was no longer as significant as it had been in the context of the rapporteur's initial proposals. The Group's final version of the text of Article 4 provided satisfactory solutions for most of the contracts whose applicable law was the subject of specific rules of conflict in the rapporteur's proposals, notably because of its flexibility. The Group therefore merely provided for some exceptions to the rule contained in Article 4, notably those in Articles 5 and 6 concerning the law applicable respectively to certain consumer contracts and to contracts of employment in default of an express or implied choice by the parties.

The normally general nature of the uniform rules made it necessary to provide for a few exceptions and to allow the judge a certain discretion as to their application in each particular case. This aspect will be dealt with in the comments on a number of Articles in Chapter III of this report.

As declared in the Preamble, in concluding this Convention the nine States which are parties to the Treaty establishing the European Economic Community show their desire to continue in the field of private international law the work of unification already undertaken in the Community, particularly in matters of jurisdiction and enforcement of judgments. The question of accession by third States is not dealt with in the Convention (see page 41, penultimate paragraph).

TITLE I

SCOPE OF THE CONVENTION

Article 1

Scope of the Convention

1. As provided in Article 1 (1) the uniform rules in this Convention apply generally to contractual obligations in situations involving a conflict of laws.

It must be stressed that the uniform rules apply to the abovementioned obligations only 'in situations involving a choice between the laws of different countries'. The purpose of this provision is to define the true aims of the uniform rules. We know that the law applicable to contracts and to the obligations arising from them is not always that of the country where the problems of interpretation or enforcement are in issue. There are situations in which this law is not regarded by the legislature or by the case law as that best suited to govern the contract and the obligations resulting from it. These are situations which involve one or more elements foreign to the internal social system of a country (for example, the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the fact that the contract was made abroad, the fact that one or more of the obligations of the parties are to be performed in a foreign country, etc.), thereby giving the legal systems of several countries claims to apply. These are precisely the situations in which the uniform rules are intended to apply.

Moreover the present wording of paragraph 1 means that the uniform rules are to apply in all cases where the dispute would give rise to a conflict between two or more legal systems. The uniform rules also apply if those systems coexist within one State (cf. Article 19 (1)). Therefore the question whether a contract is governed by English or Scots law is within the scope of the Convention, subject to Article 19 (2).

2. The principle embodied in paragraph 1 is however subject to a number of restrictions.

First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original preliminary draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing as between the various legal system of the Member States of the Community.

3. There are also the restrictions set out in paragraph 2 of Article 1.

The first of these, at (a), is the status or legal capacity of natural persons, subject to Article 11; then, at (b), contractual obligations relating to wills and succession, to property rights arising out of matrimonial relationships, to rights and duties arising out of family relationships, parentage, marriage or affinity, including maintenance obligations in respect of illegitimate children. The Group intended this enumeration to exclude from the scope of the Convention all matters of family law.

As regards maintenance obligations, within the meaning of Article 1 of the Hague Convention on the law applicable to maintenance obligations, the Group considered that this exclusion should also extend to contracts which parties unter a legal maintenance obligation make in performance of that obligation. All other contractual obligations, even if they provide for the maintenance of a member of the family towards whom there are no legal maintenance obligations, would fall within the scope of the Convention.

Contrary to the provisions of the second paragraph of Article 1 in the original preliminary draft, the current wording of subparagraph (b) does not in general exclude gifts. Most of the delegations favoured the inclusion of gifts where they arise from a contract within the scope of the Convention, even when made within the family, provided they are not covered by family law. Therefore the only contractual gifts left outside the scope of the uniform