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NOTE

From : Finnish Presidency and incoming German Presidency
to : Committee on Civil Law Matters (Rome I)

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Subject : Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)

Delegations will find herewith the text as drafted by the Finnish Presidency and the incoming German Presidency on the basis of the meetings of the Committee on Civil Law Matters (Rome I) and the comments made by delegations (see 13035/06 JUSTCIV 196 CODEC 948 + ADD1 to 19 and 14708/06 JUSTCIV 240 CODEC 1219).

Chapter One – Scope

Article 1 – Material scope

1. This Regulation shall apply, in **situations** involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not **apply**, in particular, to revenue, customs or administrative matters.
2. The Regulation shall not apply to:
 - (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 12;
 - (b) obligations **arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects**, including maintenance obligations;¹
 - (c) obligations arising out of **matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession**;²
 - (d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
 - (e) arbitration agreements and agreements on the choice of court;

¹ **A new recital relating to paragraphs b and c will read as follows: "Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State where the court is seised."**

² See footnote 1.

- (f) questions governed by the law of companies and other bodies corporate or **unincorporated** such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or **unincorporated**, the personal liability of officers and members as such for the obligations of the company or body and the question whether a management body of a company or other body corporate or **unincorporated** can bind the company or body in relation to third parties;
 - (g) the constitution of trusts and the relationship between settlers, trustees and beneficiaries;
 - (h) evidence and procedure, without prejudice to Article 17;
 - (i) obligations arising out of **dealings prior to the conclusion of a contract**.¹
3. In this Regulation, the term “Member State” shall mean Member States with the exception of Denmark (...) and the United Kingdom². **[However, in Article 3(5) the term shall mean all the Member States.]**

Article 2 – Universal application

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

¹ **A recital shall explain that obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of the Common Position on the draft Rome II Regulation and therefore they are to be excluded from the scope of this Regulation.**

² **If the United Kingdom will later decide to accept the Rome I Regulation, a proper solution should be found in order to clarify that the content of this instrument will be applicable in the United Kingdom.**

Chapter II –Uniform rules

Article 3 – Freedom of choice

1. (...) A contract shall be governed by the law chosen by the parties.
The choice **shall be made** expressly or **clearly** demonstrated (...) by the terms of the contract (...) or (...) the circumstances of the case. (...) ¹
By their choice the parties can select the law applicable to the whole or only a part of the contract.
2. (...)
3. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 10 or adversely affect the rights of third parties.
4. (...) Where all other elements relevant to the situation at the time of the **choice are located in a country other than the country the law of which has been chosen, the choice of the parties shall not** prejudice the application of **provisions** of the law of that country which cannot be derogated from by **agreement**. ²

¹ **A recital shall clarify that an agreement of the parties to confer exclusive jurisdiction on one or more courts or tribunals of a Member State to determine disputes under the contract is a factor to be taken into account in determining whether a choice of law was clearly demonstrated.**

² **It should be further considered whether the wording should be brought more in line with Article 3(3) of the Rome Convention.**

5. Where (...) **all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate, as implemented in the Member State of the forum, which cannot be derogated from by agreement.**
6. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of [Articles 9, 10 and 12].

Article 4 – Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 **[and without prejudice to Articles 5 – 7], the law governing the contract** shall be determined as follows:
 - (a) a contract of sale **[of goods]**¹ shall be governed by the law of the country **where** the seller has his habitual residence;
 - (b) a contract for the provision of services shall be governed by the law of the country **where** the service provider has his habitual residence;²
 - (c) a contract of carriage shall be governed by the law of the country **where** the carrier has his habitual residence**[, provided that the place of departure or the place of destination of the carriage or the habitual residence of the consignor or the passenger is also situated in that country];**

¹ **This provision could be brought in line with Article 5 paragraph 1 point b) of the Brussels I-Regulation.**

² **A recital should indicate that the concept “provision of services” should be interpreted in the same way as when applying Article 5 paragraph 1 point b) of the Brussels I Regulation in so far as services are covered by that Regulation.**

- (d) a contract relating to a right in rem **in immovable property** or **to a tenancy of immovable property** shall be governed by the law of the country **where** the property is situated;
- (e) notwithstanding point (d), a **tenancy of immovable property concluded for temporary private use** for a period of no more than six consecutive months shall be governed by the law of the country **where** the **landlord** has his habitual residence, provided **that** the tenant is a natural person and has his habitual residence in the same country;
- (f) [a contract relating to intellectual or industrial property rights shall be governed by the law of the country **where** the person who transfers or assigns the rights has his habitual residence;]¹
- (g) a franchise contract shall be governed by the law of the country **where** the franchisee has his habitual residence;
- (h) a distribution contract shall be governed by the law of the country **where** the distributor has his habitual residence;²
- (...)
- (j) [a contract concluded at a financial market (...) and a contract of sale by auction shall be governed by the law applicable to the financial market (...) or the law of the country where the auction takes place;]³

¹ **It should be examined whether such a provision is needed and, if so, how it should be formulated.**

² **Further reflection is needed on whether this subparagraph is necessary.**

³ **Further reflection is needed on whether this subparagraph is necessary.**

- (k) any other contract shall be governed by the law of the country where the party who is required to effect the performance which is characteristic of the contract has his habitual residence, provided that such performance can be determined.¹

Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in one of the subparagraphs above, the law of that other country shall apply.²

2. Where the law applicable cannot be determined pursuant to paragraph 1, the contract shall be governed by the law of the country with which it is most closely connected.³

¹ A recital shall indicate that this paragraph covers *inter alia* contracts where various elements of the contract would fall under different types of contract enumerated in the list in paragraph 1 and lead to the application of different laws or which in any other way do not fit to one of the categories in that list.

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

³ A recital shall indicate that paragraph 2 applies where the contract does not fall within one of the categories set out in paragraph 1 points a) to j) and where the characteristic performance cannot be determined pursuant to paragraph 1 point k). A recital shall also indicate that, in order to determine whether the contract is most closely connected with another country pursuant to Article 4, it has to be taken into account whether the contract in question has a very close relationship to another contract or contracts governed by the law of another country.

1. **A contract concluded by a natural person (...) for a purpose which can be regarded as being outside his trade or profession ("the consumer"), with another person (...) acting in the exercise of his trade or profession ("the professional") shall be governed by the law of the country where the consumer has his or her habitual residence provided that:**
 - (a) **the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence or,**
 - (b) **by any means, directs such activities¹ to that country or to several countries including that country, and the contract falls within the scope of such activities.**

The law applicable pursuant to this paragraph may not be derogated from by a choice of law pursuant to Article 3.

- 1 a. **If the requirements in paragraph 1 (a) or (b) are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.**
2. (...)
3. Paragraph 1 shall not apply to:
 - (a) (...)

¹ A recital shall clarify what is meant by “directing activities” (see recital 10 of the Commission’s proposal).

- (b) **[a contract of carriage other than a contract relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;]**¹
- (c) **a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994² [;**
- (d) **a contract concluded at a financial market or a contract of subscription of a new issue of shares, bonds or other securities].**³

[Article 5 a – Insurance contracts

1. **An insurance contract covering a large risk within the meaning of paragraph 4 and a reinsurance contract shall be governed by the law of the country in which the insurer or re-insurer has his habitual residence, unless the applicable law has been chosen in accordance with Article 3.**

2. **An insurance contract covering a risk for which a country imposes compulsory insurance shall be governed by the law of that country. A choice of law in accordance with Article 3 shall be excluded in such cases.**

¹ See Article 4(1) (c)

² A recital should clarify that this exclusion is intended to cover, *inter alia*, contracts of mortgage.

³ Further consideration is needed whether this paragraph is necessary, having in mind that particularly international contracts related to securities seem to be only rarely concluded by consumers.

3. Option 1:

An insurance contract which is not subject to paragraphs 1 or 2 shall be governed by the law of the country in which the risk is situated at the time when the contract is concluded. If the policy holder, at the time the contract is concluded, has his habitual residence in a country other than where the risk is situated, the parties may choose to apply the law of that country, in accordance with the provisions of Article 3. In those cases, where the policy holder is not identical with the insured person, the applicable law chosen by the parties in accordance with sentence 2 of this provision may only be the law of the country where the insured person has his habitual residence.

Option 2:

An insurance contract which is not subject to paragraphs 1 or 2 shall be governed by the law of the country where the policy holder has his habitual residence. The parties may agree in accordance with Article 3 that their contract shall be governed by the law of the country where the risk is situated [at the time when the contract is concluded]. However, Article 5(1) shall apply to a contract between a consumer and a professional as defined there.

- 4. Large risks within the meaning of paragraph 1 are those risks enumerated in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance (other than life assurance) [as amended by Council Directives 88/357/EEC and 90/618/EEC]. This shall also apply when such risks are situated in a third country.**

5. **The country in which the risk is situated is**
- a) **for insurance of risks associated with immovable property, particularly buildings and facilities as well as the property located therein which are covered by the same insurance contract, the country in which such property is situated;**
 - b) **for insurance of risks associated with vehicles of all types which are subject to entry in an official or officially recognised register and to which a distinguishing sign is attached, the country of registration;**
 - c) **for insurance of travel or holiday risks in insurance contracts with an effective term of a maximum of four months, the country in which the policy holder has undertaken the legal transactions necessary for conclusion of the contract;**
 - d) **in all other cases, the country in which the policy holder or, if he is not identical with the insured person, this person has his habitual residence.]**

Article 6 – Individual employment contracts

1. **An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice may not, however, have the result of depriving the employee of the protection afforded to him by such provisions that cannot be derogated from by contract under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 2a and 3.**

2. **(...) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed** by the law of the country in or from which the employee habitually carries out his work in performance of the contract. **The country where the work is habitually carried out** shall not be deemed to have changed if he is temporarily employed in another country (...).¹
- 2a. **Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed** by the law of the country **where** the place of business through which he was engaged is situated.
3. **Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 2a, the law of that other country shall apply.**

[Article 7 – Contracts concluded by an agent]²

(...)

¹ **The following text could be included in the recitals: "Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer does not preclude the employee from being regarded as carrying out his work in another country temporarily."**

² **The Presidencies suggest to delete the text of Article 7 as proposed by the Commission as the large majority of delegations is unable to accept it. However, proposals by delegations are welcome. If the article on agency were deleted, the following new subparagraph would be added to Article 1(2): "the question whether an agent is able to bind a principal".**

Article 8 – Overriding mandatory provisions

1. **Overriding mandatory provisions** are **provisions** the respect for which is regarded as crucial by a country for safeguarding its **public interests, such as its** political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.¹
2. Nothing in this Regulation shall restrict the application of the **overriding mandatory provisions** of the law of the forum.
3. (...) ²

Article 9 – Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

¹ This provision has been aligned with Article 16 of the Common Position on the draft Rome II Regulation in combination with its recital 29.

² Paragraph 3 was worded as follows:
"3. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties."

2. Nevertheless a party may rely upon the law of the country **where** he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

Article 10 – Formal validity

1. A contract is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or the law of the country where **either** of the parties or **their agent** is present when it is concluded or the law of the country where **either** of the parties had his habitual residence at that time.
2. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation or of the law of the country where the act **was done** or the law of the country where the person who **effected** it had his habitual residence at that time.
3. Paragraphs 1 and 2 of this Article shall not apply to contracts that fall within the scope of Article 5. The form of such contracts shall be governed by the law of the country **where** the consumer has his habitual residence.
4. Notwithstanding paragraphs 1 to 3 of this Article, a contract the subject matter of which is a right **in rem** in immovable property or a **tenancy of** immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are **imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.**

Article 11 – Scope of applicable law

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
 - (a) interpretation;
 - (b) performance;
 - (c) within the limits of the powers conferred on the court by its procedural law, the consequences of the total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
 - (d) the various ways of extinguishing obligations, and prescription and limitation of actions;
 - (e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country where performance takes place.

Article 12 – Incapacity¹

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

¹ **It should be further reflected whether the Article should be extended to also cover companies and other judicial persons (cf. exclusion in Art. 1(2)(f)).**

Article 13 – Voluntary assignment [and contractual subrogation]¹

1. The mutual obligations of assignor and assignee under a voluntary assignment or contractual subrogation of a **claim** against another person (“**the debtor**”) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.²
2. The law governing **the assigned or subrogated claim** shall determine the effectiveness of contractual **and legal** limitations on assignment **or subrogation** as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor’s obligations have been discharged.
3. The question of **effectiveness of** the assignment or subrogation (...) against third parties **and priority of the assigned or subrogated claim over a right of another person** shall be governed by the law of the country where the assignor or the author of the subrogation has his habitual residence. (...) **For the purposes of this paragraph and notwithstanding Article 18(1), the habitual residence of a company or other body, incorporate or unincorporated, shall be its place of business or, if it has a place of business in more than one country, the place of its central administration.**³

¹ **It should be considered independently in relation to each language version, whether it is necessary to expressly mention the concept of “contractual subrogation” in this context.**

² **A recital/provision should be added to clarify that Article 13(1) also applies to the property aspects of an assignment as between assignor and assignee in legal orders where such aspects are treated separately from the aspects under the law of obligations.**

³ **It should be reflected whether the scope of this paragraph should be more restricted (as is the UNCITRAL Convention’s scope in this respect). Hence, for instance, funds held in an account (bank deposits etc.) and claims related to contracts concluded at financial market could be excluded.**

Article 14 – Legal subrogation

Where a person (“**the creditor**”) has a contractual claim **against** another (“**the debtor**”), and a third person has a duty to satisfy the creditor, **or has in fact satisfied the creditor in discharge of that duty**, the law which governs the third person’s duty to satisfy the creditor shall determine whether **and to what extent** the third person is entitled to **exercise** against the debtor **the rights which the creditor had against the debtor under the law governing their relationship**.

Article 15 – Multiple debtors

If a creditor has a claim **against** several debtors who are (...) liable **for the same claim**, and one of **the debtors** has **already** satisfied the **claim in whole or in part**, the law **governing the debtor’s obligation** towards the creditor **also** governs **the debtor’s right to claim recourse from the other debtors**. **The other debtors can rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor**.

Article 16 – Set-off

Where the right to set-off is not agreed by the parties, **set-off** shall be governed by the law applicable **to the claim against** which the right to **set-off** is asserted.

Article 17 – Burden of proof

1. The law governing **a contractual obligation** under this Regulation shall apply to the extent that, **in matters of contractual obligations**, it contains rules which raise presumptions of law or determine the burden of proof.
2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 10 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Chapter III – Other provisions

Article 18 – (...) Habitual residence

1. **For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.**

The habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

- 1a. Where the contract is concluded in the course of operation of a (...) branch, **agency** or any other establishment or if, under the contract, performance is the responsibility of such an establishment, **the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.**
2. (...) ¹
3. **When determining the habitual residence the relevant point of time shall be the time of the conclusion of the contract.**

Article 19 – Exclusion of renvoi

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

¹ See second subparagraph of paragraph 1.

Article 20 – Public policy of the forum

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

Article 21 – States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.
2. **A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.**

Article 22 – Relationship with other provisions of Community law

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

(...)

Article 22 A – Relationship with the Rome Convention

1. **This Regulation shall replace the Rome Convention in the Member States [, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.]¹**
2. **Insofar as this Regulation replaces the provisions of the Rome Convention, any reference to the Convention shall be understood as a reference to this Regulation.**

Article 23 – Relationship with existing international conventions²

1. **This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations. (...)**
2. **However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.**

¹ **An alternative would be to delete the text in brackets and to explain in a recital the territories of the Member States that fall within the territorial scope of the Convention but to which this Regulation does not apply.**

² **Article 23 was modified with a view to retaining the same wording as Article 28 of the common position on the draft Rome II Regulation (see 9751/06 JUSTCIV 137 CODEC 531). It should be recalled that the Commission made a declaration in this context and wishes to retain the text of its original proposal.**

Chapter IV – Final provisions

Article 24 – List of conventions

1. By ...¹, Member States shall notify the Commission of the conventions referred to in Article 23(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish in the *Official Journal of the European Union* within six months of receipt:
 - (i) a list of the conventions referred to in paragraph 1;

 - (ii) the denunciations referred to in paragraph 1.

Article 25 – Application in time

This Regulation shall apply to contracts concluded after its entry into force.

¹ 12 months after the date of the adoption of this Regulation.

Article 26 – Date of application

This Regulation shall apply from ...¹, **except for Article 24, which shall apply from ...**²

This Regulation shall be binding in its entirety and directly applicable in **the Member States in accordance with the Treaty establishing the European Community.**

Done at Brussels,

For the European Parliament

The President

For the Council

The President

¹ **18 months after the date of adoption of this Regulation.**

² **12 months after the date of adoption of this Regulation.**

ANNEX : List of bilateral conventions mentioned in Article 24

[...]
