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from : Presidency
to : Committee on Civil Law Matters (Rome I)

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6847/07 JUSTCIV 37 CODEC 158 and ADD

No. Cion prop. : 5203/06 JUSTCIV 3 CODEC 18

Subject : Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)
– Article 5a (Insurance contracts)

I. INTRODUCTION

1. At the meeting of the Committee on Civil Law Matters (Rome I) of 25 January 2007, the Presidency invited delegations to submit written comments on the issue of insurance contracts. Many delegations have made such comments (documents 6847/07 JUSTCIV 37 CODEC 158 and ADD). However, due to time constraints, it has not been possible to take those comments into account when preparing the Presidency text in document 6935/07 JUSTCIV 44 CODEC 168). As indicated in that document (footnote 4 on page 13), those comments have been analysed separately. The aim of this document is to take those comments and the oral comments made in the meetings of 25 January and of 12 March 2007 into account.

II. PRESIDENCY PROPOSAL FOR ARTICLE 5A AND GENERAL COMMENTS

2. In the light of the comments made by delegations, the Presidency suggests the wording for Article 5a set out in the Annex to this document.
3. This proposal is based on the provisions of the directives 88/357/EEC and 2002/83/EC. Thus, the proposed provision would not lead to fundamental changes of the existing rules, although it does differ in some details. In particular, the Presidency would like to highlight with respect to Article 5a(3), first sentence, that, due to the definition in Article 5a(5)(d), which corresponds to Article 2(d) of directive 88/357/EEC, the country where the risk is situated is in most of the cases identical to the country where the policy holder has his habitual residence. For this reason, Article 5a(3) is in line with Article 7(1)(a) and (b) of directive 88/357/EEC and with Article 32(1) and Article 1(1)(g) of directive 2002/83/EC.
4. With respect to the problem of territorial scope, the Presidency notes that many delegations stressed the need for simplifying the existing regime which leads to the application in parallel of the national law transposing the insurance directives, the 1980 Rome Convention and purely national law of the Member States. According to those delegations, including a provision on insurance contracts into the Rome I Regulation would improve this situation for the Member States of that Regulation and be an issue of better law making. However, several delegations were concerned that certain States for which the directive is applicable do not take part in the adoption and application of this Regulation.
5. The Presidency considers that it were regrettable if the fact that not all Member States take part in the adoption of the Regulation should hinder those taking part to achieve a higher level of integration and/or to improve the existing regime which is highly complex at the moment. It therefore suggests to explore whether the following way of proceeding would be feasible:

- (a) Article 5a could replace, for those Member States that are participating in the adoption of the Regulation, the relevant provisions of the insurance directives (Articles 7, 8(2), (3) and (4)(a) and (c) of directive 88/357/EEC and Article 32 of directive 2002/83/EC). As the UK and Denmark as well as the EEA States Iceland, Norway and Liechtenstein are not participating in the adoption of the Regulation, those provisions of the directives would continue to apply in the States mentioned without any change.
 - (b) If at a later stage the legislator decides to modify the directives, it could do so on the basis of Article 95 EC, but should provide at the same time either that the provision of the Rome I Regulation governing the relationship between this instrument and the directives remains unchanged, or refer to the rules of the Regulation thus ensuring a maximum of uniformity within the Community. In that way, the higher level of integration that would be achieved by the future Rome I Regulation could be preserved for its Member States.
6. The Presidency would like to discuss the new text (see Annex) at the meeting of the Committee on Civil Law Matters (Rome I) of 30 April 2007.

Article 5a – Insurance contracts

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

1a. 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).¹ This shall also apply when such risks are situated in a third country.

¹ It is understood that this reference concerns the directive as amended.

2. An insurance contract covering a risk for which a country imposes compulsory insurance shall be governed by the law of that country.

If this country, in the case of a contract covering a risk within the meaning of paragraph 1, grants a free choice of the law applicable to the contract, the parties may choose any law in accordance with the provisions of Article 3 and, irrespective of the law chosen, with the provisions of the law of this country which cannot be derogated from by agreement.¹

3. An insurance contract which is not subject to paragraphs 1 or 2 shall be governed by the law of the country where the risk is situated at the time of the conclusion of the contract.

The parties may choose as the law applicable to the insurance contract in accordance with Article 3:

(a) the law of any country where a risk is situated at the time of the conclusion of the contract;²

(b) the law of the country where the policy holder has his habitual residence at the time of the conclusion of the contract[, if that habitual residence is in a country other than that where the risk is situated];

¹ The second subparagraph takes up the concerns of Cyprus and other delegations especially with respect to specific insurance contracts covering large risks (maritime sector in particular). It also aims at clarifying the relationship between paragraphs 1 and 2. However, as in Directive 88/357/EEC, it should be specified that, whatever the law applicable to the contract, the content of the compulsory insurance must meet the conditions set out by the law of the country whose law imposes the obligation to take out insurance (see in particular Article 8(2) and (3) of that directive, which are worded: “(2) When a Member State imposes an obligation to take out insurance, the contract shall not satisfy that obligation unless it is in accordance with the specific provisions relating to that insurance laid down by that Member State. (3) When, in the case of compulsory insurance, the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail.”)

² A recital could indicate that this provision covers both cases where the insurance contract covers a risk situated in only one country and cases where it covers risks situated in more than one country.

(c) [in the case of a life insurance,] the law of the country of which the policy holder is a national, if the policy holder is a natural person and if, at the time of the conclusion of the contract, he has his habitual residence in a country other than that of which he is a national;

[(d) for an insurance contract limited to an event occurring in one country, the law of that country].

3a. For the purposes of applying paragraph 2 and the first subparagraph of paragraph 3, where the insurance contract covers risks situated in more than one country, the contract is considered as constituting several contracts each relating to only one country.¹

4. (...) ²

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 (...) has his habitual residence.

¹ See Article 7(2) and Article 8(4)(a) of Directive 88/357/EEC.

² See paragraph 1a.