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CCBE RESPONSE TO THE PROPOSAL OF THE EUROPEAN PARLIAMENT AND THE COUNCIL FOR A REGULATION ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II)

1. INTRODUCTION

The Council of Bars and Law Societies of the European Union (CCBE) is the representative body of over 700,000 European lawyers through its member bars and law societies. In addition to membership from EU bars, it has also observer representatives from a further 13 European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

This paper is the response of the CCBE to the proposal for a regulation on the law applicable to non-contractual obligations (COM (2003)0427). It has been prepared by one of the experts of the working group which had issued comments on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.

2. COMMENTS ON DRAFT PROPOSAL

a) Article 3: General rules

- Paragraph 1 - General rule

The CCBE considers that there are two issues here:

(i) The proposal should clearly allow for the possibility that more than one law may apply to the tort where the damage is incurred in more than one country. This principle is accepted in the Commentary ('Mosaikbetrachtung') but not alluded to in the Regulation itself. This would prevent the application of secondary rules applied to identify the damage relevant to the application of just one law. We believe that this is a fundamental issue that requires clarification. If 'Mosaikbetrachtung' is not in fact intended, then such a secondary rule would be needed.

(ii) Presumably indirect or secondary damage for which the person who committed the tort may be liable is relevant. For example, different jurisdictions may have different rules on the recoverability of certain kinds of indirect damage. We wonder if this

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provision does mean that where primary damage and indirect damage are incurred in different countries, the law of the country where the primary damage occurred will apply to determine the admissibility of the claim for indirect damage, or if the law of the country in which the indirect damage occurred will apply under the ‘Mosaikbetrachtung’ principle.

- Paragraph 2 - Law of the common place of residence

We suggest that it should be made clear that this rule is subject to the right to choose applicable law under Article 10.

- Paragraph 3 - General exception and secondary connection

We wonder the reasons why, in this instance, the applicable law of the contract (where a contract is the pre-existing relationship) is not relevant, while under Article 9, it is. Does this provision in effect create a presumption that where there is a pre-existing relationship linking the parties to a country, the tort is manifestly more closely connected with that country and not another?

Given the difficulties experienced in the interpretation of the Rome Convention with regard to the appropriate weight given to secondary considerations, it might be preferable to omit this wording and leave it to the courts to determine manifest connection taking into account the totality of the circumstances. Article 9 makes it clear that notwithstanding the pre-existing relationship, the court is free to determine that manifest connection with another country can still prevail (see Article 9(5)).

b) Article 4 - Product liability

It might be worth considering providing that, notwithstanding that the product in question was not marketed in the country of the claimant’s habitual residence, the claimant’s law may apply where the person alleged to be liable for the tort has an establishment in that country.

c) Article 5 - Unfair competition

Where there is a substantial effect across more than one country, it looks quite unclear whether the determination of the applicable law is a matter of degree or effect, and what criteria are to be applied if it is.

d) Article 6 - Violations of privacy and rights relating to the personality

We wonder why the stipulation with regard to freedom of expression is not covered by the mandatory rules principles under Article 12(2). Does this give rise to the inference that mandatory rules under 12(2) might be of a lesser importance than the ‘fundamental principles’ referred to in this Article?

This is an instance of a general difficulty of defining mandatory rules. In this proposal there are overriding foreign mandatory rules (Article 12(1)), mandatory rules of the forum (12(2)), rules that cannot be derogated from by contract (Article 10), Community public policy (Article 24), Community mandatory rules (referred to in the Commentary as being covered by Article 23) and ‘public policy of the forum’ (Article 22). We believe that there is a real potential for overlap and confusion between these apparently different concepts and we are quite concerned about this.¹ We would suggest incorporating definitions into the Regulation to ensure evenness of interpretation.

e) Article 9 - Law applicable to non-contractual obligations arising out of an act other than a tort or delict

It should be noted that under the Rome Convention, manifest closer connection will be irrelevant where an express choice of law is made. If the parties have made a choice of law in the contract, this could be taken to determine the totality of the obligations arising from that contractual relationship, and this should not be complicated or undermined by the overriding application of a closer connection criterion.

Where no express choice of law is made in the contractual relationship, then the applicable law will be determined under Rome Convention principles. A Judge applying Article 9(1) may therefore have to apply Rome Convention principles in order to determine the applicable law under Rome II, even where the applicable law of the contract strictly need not be otherwise determined for the purposes of the non-contractual obligation. Article 9(1) should therefore apply only where a choice of law has been made in accordance with the principles of the Rome Convention.

f) Article 10 - Freedom of choice

▪ Paragraph 2

There is some clarification in the commentary regarding the difference between ‘rules that cannot be derogated from by contract’ and mandatory rules which does not appear in the actual proposal (see comments above).

We wonder if the wording ‘all the other elements of the situation’ means the damage, the tort itself, and the habitual residence of the parties and what would happen in case only one of these is not applicable, (e.g. the claimant has a different habitual residence). Is it intended that this provision shall not apply in this case? Some further clarification is therefore suggested.

¹ The differences between these concepts may be more apparent in other languages

- Paragraph 3

We wonder if this paragraph intends to cover all the other elements of the situation (see comments above). This would be a significant derogation from freedom of will. We would suggest a reference instead to provisions of Community Law relating to the protection of either party.

g) Article 12 - Overriding mandatory rules

We wonder why there is a reference in this article to the law of “a specific third country”; maybe the wording should be changed as it leads to confusion.

h) Article 22 - Public policy of the forum

It would be sensible to make clear, e.g. through definitions, how this is differentiated from Article 12(2).

i) Article 24 - Non-compensatory damages

Some clarification of the nature and effect of ‘Community public policy’ should be made. The relationship with Article 23 (1) is not quite clear as stated. If non-compensatory damages are contrary to law (as opposed to policy), there is protection provided for in Article 8.

3. GENERAL COMMENTS ON THE CONTEXT OF THIS DRAFT PROPOSAL

The CCBE would like to express its concerns regarding the impact on this area of law of the proposal for a Directive on Services in the Internal Market issued by the European Commission on 13 January 2004.

The CCBE believes that the 'country of origin' principle set out in the new proposed Directive, could, on its broadest interpretation, re-write the basis of international private law in the Community despite the derogations in Article 17.

There is a derogation which specifically relates to Rome II in Article 17 paragraph 23 of the draft Directive. This paragraph refers to non-contractual liability relating to accidents. Accidents are of course only one form of potential tort liability and there is no reference to the other forms. If these are to be dealt with under the country of origin principle, then this directly contradicts the current draft for Rome II.

There is no doubt that the proposal will create new principles of private international law and would as a result render the law very complicated and confusing. It is important to consider this issue before going further.

4. CONCLUSION

The CCBE welcomes the opportunity to provide comments at this stage to the European Parliament concerning the proposal for a Regulation on the Law Applicable to Non-Contractual Obligations and would be happy to give further input.

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