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*****|** **REPORT**

on the proposal for a regulation of the European Parliament and of the Council
on the law applicable to non-contractual obligations ("Rome II")
(COM(2003)0427 – C5-0338/2003 – 2003/0168(COD))

Committee on Legal Affairs

Rapporteur: Diana Wallis

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")
(COM(2003)0427 – C5-0338/2003 – 2003/0168(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2003)0427)¹,
 - having regard to Articles 251(2) and 61(c) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0338/2003),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A6-0211/2005),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1
Recital 5

(5) The scope of *the* Regulation must be determined in such a way as to be consistent with Regulation (EC) No 44/2001 *and the Rome Convention of 1980*.

(5) The scope *and provisions* of *this* Regulation must be determined in such a way as to be consistent with *Council* Regulation (EC) No 44/2001 *of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Regulation (EC) No .../... on the law applicable to contractual obligations ("Rome I")*.

¹ OJ C ... / Not yet published in OJ.

Justification

It is self-evident that the Regulation should be consistent not only with the 1980 Rome Convention, which will continue in being owing to the fact that Denmark is not participating in the adoption of the Regulation, but also with the new regulation which will emerge from the Rome I project.

Amendment 2 Recital 5 a (new)

(5a) The concern for consistency in Community law requires that this Regulation be without prejudice to provisions relating to or having an effect on the applicable law, contained in instruments of secondary legislation other than this Regulation, such as conflict rules in specific matters, overriding mandatory rules of Community origin, and the basic legal principles of the internal market. As a result, this Regulation should promote the proper functioning of the internal market, in particular the free movement of goods and services.

Justification

This amendment, which is based on the wording of the Commission's recital 19, should be read together with the amendment to Article 1 (Material scope, which should read "substantive scope"). It is essential that the rules of this Regulation should not hamper the proper functioning of the Internal Market.

Amendment 3 Recital 7

(7) The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries is handled differently. This situation engenders

(7) It is necessary to have conflict rules which are as uniform as possible throughout the Member States in order to minimise uncertainty in the law. However, the need for legal certainty must always be subordinate to the overriding need to do justice in individual cases and consequently the courts must be able to exercise discretion. Furthermore, it is

uncertainty in the law.

necessary to respect the intentions of the parties where they have made an express choice as to the law applicable to an issue in tort or delict or where such a choice may reasonably be inferred by the court.

Justification

Whereas to select the lex loci delicti commissi as the basic solution has its attractions, more flexibility needs to be built into the rules so as to allow the courts to do justice in individual cases. Moreover, it is important to respect party autonomy.

Amendment 4
Recital 8

(8) *The uniform rule must* serve to improve the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. *A connection with the country where the direct damage occurred (lex loci delicti commissi) strikes a fair balance between the interests of the person causing the damage and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.*

(8) *This Regulation should* serve to improve the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. *It should also satisfy the reasonable expectations of the parties by allowing courts to take an approach to the question of the law applicable in a given dispute which satisfies the needs of international trade and transactions in a Community of States without internal borders.*

Justification

See the justification to the amendment to recital 7. Moreover, it is uncertain what the "modern approach to civil liability" is. Also it is not felt that the reference to systems of strict liability is necessary.

Amendment 5
Recital 8 a (new)

(8a) The conflict of laws rules set out in this Regulation also cover obligations based on strict liability and the harmonised rules on connecting factors also apply to the question of the capacity to incur liability in tort/delict.

Justification

In view in particular (but not only) of the obligations arising from traffic accidents based on the strict liability of the vehicle owner, it is important to make it plain that the conflict rules also cover strict liability. It is also worth making it clear that the harmonised rules on connecting factors apply to the question of the capacity to incur liability in tort/delict.

Amendment 6

Recital 9

(9) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake. ***deleted***

Justification

This recital is unnecessary in view of the new approach adopted herein.

Amendment 7

Recital 10

(10) Regarding product liability, the conflict rule must meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Connection to the law of the place where the person sustaining the damage has his habitual residence, together with a foreseeability clause, is a balanced solution in regard to these objectives. ***deleted***

Justification

It is considered that the general rules can cater perfectly well for product liability cases.

Amendment 8

Recital 11

(11) In matters of unfair competition, the conflict rule must protect competitors, ***deleted***

consumers and the general public and ensure that the market economy functions properly. The connection to the law of the relevant market generally satisfies these objectives, though in specific circumstances other rules might be appropriate.

Justification

It is considered that the general rules can cater perfectly well for cases involving unfair competition. Moreover, it is uncertain what exactly is intended to be covered by "matters of unfair competition". In the event that it should be regarded as imperative to have a special rule for "matters of unfair competition", a definition clause should be included.

Amendment 9
Recital 12

(12) In view of the Charter of Fundamental Rights of the European Union and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the conflict must strike a reasonable balance as regards violations of privacy and rights in the personality. Respect for the fundamental principles that apply in the Member States as regards freedom of the press must be secured by a specific safeguard clause.

(12) A specific rule is needed for violations of privacy and rights relating to the personality owing in particular to the role played by the media in society and in order to take account of the case-law of the Court of Justice of the European Communities¹. In particular, a manifestly closer connection with a particular country may be deemed to exist, having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size. Similar considerations should apply in respect of Internet publication.

¹ Case C-68/93 Fiona Shevill and Others [1995] ECR I-415.

Justification

See the justification to the first amendment to Article 6.

Amendment 10
Recital 12 a (new)

(12a) In a communications environment operating increasingly on a continent-wide basis, the various forms of law relating to the personality and historically established press traditions in the European Union suggest that, in this area too, more uniform prerequisites and rules for dispute resolution should be sought. The very nature, which merits safeguarding, of press freedom and its role in society would suggest, however, that in the process priority should be given to media which deal responsibly with rights relating to the personality and are prepared to establish autonomously, and on the basis of consensus, a self-obligating European Media Code and/or a European Media Council which can provide consolidating decision-taking guidelines for the relevant courts as well. The Commission is called on to provide support for such a process.

Amendment 11
Recital 13

(13) Regarding violations of the environment, Article 174 of the Treaty, which provides that there must a high level of protection based on the precautionary principle and the principle that preventive action must be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.

deleted

Justification

It is considered that the general rules can cater perfectly well for violations of the environment. Moreover, it is uncertain what is meant by "violations of the environment" and this Regulation should be concerned solely with what the applicable law should be, not with the substantive law on environmental liability. In the event that it should be regarded as imperative to have a special rule for "violations of the environment", a definition clause should be included.

Amendment 12

Recital 14

(14) Regarding **violations** of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of the present Regulation, the **term** intellectual property rights **means** copyright, related rights, sui generis right for the protection of databases and industrial property rights.

(14) Regarding **infringements** of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of the present Regulation, the **expression** intellectual property rights **should be understood as meaning** copyright **and** related rights, **the** sui generis right for the protection of databases and industrial property rights.

Justification

Seeks to improve the terminology of the English version.

Amendment 13
Recital 15

(15) **Similar** rules should be **provided** for **where damage is caused by an act other than a tort or delict, such as** unjust enrichment **and** agency without authority.

(15) **Special** rules should be **laid down** for **liability arising out of** unjust enrichment **or** agency without authority.

Justification

Special rules should be laid down for non-contractual liability arising out of unjust enrichment or agency without authority.

Amendment 14
Recital 18

(18) The concern to strike a reasonable balance between the parties means that account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligations is governed by another law.

(18) The concern to strike a reasonable balance between the parties means that, **in so far as is appropriate**, account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligations is governed by another law. **This should not apply to violations of law relating to the personality or of fair competition.**

Justification

It makes sense to take account of local rules of safety and conduct in connection with traffic

accidents, for instance, but not with competition violations or violations of law relating to the personality. In those areas, it is often difficult to establish which local rules of conduct should be taken into account. The reference to fair competition can be omitted if the rapporteur's Amendment 9 is adopted

.Amendment 15
Recital 18 a (new)

(18a) The law applicable to a non-contractual obligation arising out of any industrial action, pending or carried out, should be the law of the country in which the action is to be taken or has been taken.

Justification

The rights of workers to take collective action, including strike action, guaranteed under national law must not be undermined.

Amendment 16
Recital 18 b (new)

(18b) In the interests of ensuring that the issue of applicable law is properly considered by the parties and the court, the parties should be under a duty to inform the court in the document originating proceedings and the defence of the law or laws which they maintain are applicable to all or any parts of the claim.

Justification

This simple requirement will ensure that the issue of applicable law is duly considered by both the parties and the court, thus helping to ensure legal certainty.

Amendment 17
Recital 19

(19) The concern for consistency in Community law requires that this Regulation be without prejudice to *deleted*

provisions relating to or having an effect on the applicable law, contained in the treaties or instruments of secondary legislation other than this Regulation, such as the conflict rules in specific matters, overriding mandatory rules of Community origin, the Community public policy exception and the specific principles of the internal market. Furthermore, this regulation is not intended to create, nor shall its application lead to obstacles to the proper functioning of the internal market, in particular free movement of goods and services.

Justification

This recital has been amended and renumbered recital 5a.

Amendment 18
Article 1, paragraph 1

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.

It shall not apply to revenue, customs or administrative matters.

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. ***For the purposes of this Regulation only, unjust enrichment and administration of others' affairs without a mandate shall be considered as breaches of non-contractual obligations.***

It shall not apply to revenue, customs or administrative matters, ***or to the liability of public administrations in respect of acts or omissions occurring in the performance of their duties.***

Justification

The concepts referred to in the Regulation are in several legal systems considered as quasi-contractual and thus different in kind from extracontractual obligations in the strict sense. The aim of this first change is to include the former concepts while ensuring that they are not identified with the latter.

The second change entails excluding the liability of public administrations from the scope of the Regulation, so as to ensure that they are not subject to the law of another country. This is especially important for those Member States where, for purposes of obligation, acts under

the headings of both 'iure gestionis' and 'iure imperio' are governed by the same regime.

Amendment 19

Article 1, paragraph 2, point (b)

b) non-contractual obligations arising out of matrimonial property regimes and successions;

b) non-contractual obligations arising **or likely to arise** out of matrimonial property regimes, **property regimes of relationships deemed by the law applicable to such relationships as having comparable effects to marriage** and successions;

Justification

The amendment to point b) makes it clear that not only marital property regime questions, but also property regime questions in connection with similar relationships in law (e.g. extra-marital cohabitation) are excluded from the substantive scope of the regulation.

Amendment 20

Article 1, paragraph 2, point (d)

d) **the** personal **legal** liability of officers and members as such for the **debts** of a company or firm or other body corporate or incorporate, and the personal **legal** liability of **persons responsible for carrying out** the statutory audits of accounting documents;

d) **non-contractual obligations arising or likely to arise out of** personal liability of officers and members as such for the **obligations** of a company or firm or other body corporate or incorporate, and the personal liability of **auditors to a company or its members in** the statutory audits of accounting documents;

Justification

Technical, grammatical and terminological correction.

Amendment 21

Article 1, paragraph 2, point (e)

(e) non-contractual obligations among the **settlers**, trustees and beneficiaries of a trust;

(e) non-contractual obligations among the **settlers**, trustees and beneficiaries of a trust **created voluntarily**;

Justification

The first limb of this amendment reflects the concern that two different conflicts regimes might apply, say, where a potential purchaser of a company brings claims against the vendor's financial advisers and the company's auditors.

The second limb relating to trusts is designed to ensure greater consistency with the 1985 Hague Convention on recognition of trusts and to avoid difficulty or confusion arising from the employment of the trust in common-law jurisdictions as a device for dealing with situations such as unjust enrichment.

Amendment 22

Article 1, paragraph 2, point (f a) (new)

fa) evidence and procedure, without prejudice to Articles 16 and 17.

Justification

This amendment takes account of the universal principle of 'lex fori' within private international law that the law applicable to procedural questions, including questions of evidence, is not the law governing the substantive legal relationship ('lex causae'), but, rather, the procedural law of the forum.

Amendment 23

Article 1, paragraph 2, point (f b) (new)

fb) liability for acts of public authority, including liability of publicly appointed office-holders.

Justification

Legal certainty is served by excluding liability for acts of public authority from the scope of the regulation. The special nature of the liability of public office holders in some Member States for their actions should also be taken into account.

Amendment 24

Article 1, paragraph 2 a (new)

2a. This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:

(a) in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or

(b) lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or

(c) prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation; or

(d) lay down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of private international law.

Justification

It is better to deal with the substantive scope of the Regulation in a single article, clearly delimiting where Community law displaces the rules of private international law. The new indent (d) is intended to cover existing Internal Market instruments such as the television without frontiers and the e-commerce directives.

Amendment 25

Chapter II, Section 1, Article 2 a (new)

Article 2a

Freedom of choice

1. The parties may agree, by an agreement entered into after their dispute arose or, where there is a pre-existing arms-length commercial relationship between traders of equal bargaining power, by an agreement freely negotiated before the dispute arose, to submit non-contractual obligations to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights and obligations of third parties and shall be without prejudice to the application of mandatory rules within the meaning of Article 12.

2. A choice of law made by the parties shall not deprive an employee who is a party to a contract of employment of the protection that would be afforded to him by the mandatory rules

(a) of the country in which he habitually

carries out his employment in performance of the contract; or

(b) if the employee does not carry out his work in any one country, of the law of the country in which the place of business through which he was engaged is situated; or

(c) of the country with which the contract is most closely connected.

3. If all the other elements of the situation at the time when the loss or damage is sustained are located in one or more of the Member States, the parties' choice of the applicable law shall not debar the application of provisions of Community law.

Justification

It seems more logical to move the former Article 10 to the beginning of the Regulation, since it is clear that if the parties have reached an agreement between them as to the applicable law, account should be taken of the parties' intention before applying exogenous rules in order to determine the applicable law. This also promotes judicial economy.

*In addition, there seems to be no reason why parties in an arms-length commercial relationship should not be able to agree on the law applicable to any claim in tort/delict before any such claim arises. This may be convenient to businesses wishing to regulate all potential aspects of their relationship from the outset. However, the wording of this amendment is designed to exclude consumer contracts and agreements not freely negotiated (such as standard-form contracts - *contrats d'adhésion*) where the contracting parties do not have equal bargaining power (e.g. insurance, franchise and licensing contracts). There also seems to be no reason why such agreements cannot be concluded in relation to intellectual property.*

The new provisions relating to contracts of employment and consumer contracts reflect the position under the Rome Convention on contractual obligations.

Amendment 26 Article 3

1. **The** law applicable to a non-contractual obligation shall be the law of the country in which the damage *arises* or is likely to *arise*, irrespective of the country in which the event giving rise to the damage

1. **In the absence of an agreement within the meaning of Article 2a and unless otherwise provided for in this Regulation,** the law applicable to a non-contractual obligation *arising out of a tort or a delict*

occurred and irrespective of the country or countries in which the indirect consequences of that event arise.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.

3. Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.

shall be the law of the country in which the damage *occurs* or is likely to *occur*, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.

1a. In the case of personal injuries arising out of traffic accidents, however, and with a view to the motor insurance directive, the court seised and the liable driver's insurer should, for the purposes of determining the type of claim for damages and calculating the quantum of the claim, apply the rules of the individual victim's place of habitual residence unless it would be inequitable to the victim to do so.

With regard to liability, the applicable law shall be the law of the place where the accident occurred.

2. Notwithstanding paragraph 1 and by way of exception, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply.

The factors that may be taken into account as manifestly connecting a non-contractual obligation with another country include:

(a) as far as loss-distribution and legal capacity are concerned, the fact that the person(s) claimed to be liable and the person(s) sustaining loss or damage have their habitual residence in the same country or that the relevant laws of the country of habitual residence of the person(s) claimed to be liable and of the country of residence of the person(s) sustaining loss or damage are

substantially identical;

(b) a pre-existing legal or de facto relationship between the parties, such as, for example, a contract, that is closely connected with the non-contractual obligation in question;

(c) the need for certainty, predictability and uniformity of result;

(d) protection of legitimate expectations;

(e) the policies underlying the foreign law to be applied and the consequences of applying that law.

3. In resolving the question of the applicable law, the court seized shall, where necessary, subject each specific issue of the dispute to separate analysis.

Justification

For the sake of clarity, consistency and an appropriate measure of flexibility, the rapporteur has opted for a flexible general rule which should apply to all torts/delicts in the absence of a choice of law or of special rules set out in the succeeding articles, together with a provision indicating circumstances in which, exceptionally, that rule may be displaced by virtue of the existence of a manifestly closer connection with a country other than that indicated by the general rule. It is considered that this provision can cater for product liability, unfair competition and violations of the environment.

*The rapporteur considers that, in so far as it is provided that each specific issue of an international dispute requires separate analysis, courts can avoid all potentially applicable *statuta odiosa*, by applying, where necessary, *dépeçage* (see Friedrich K. Juenger, *The Problem with Private International Law, Rome 1999, Centro di studi e ricerche di diritto comparato e straniero*).*

This is reinforced by point 2(c), which enables the court seized to decline to apply a provision or provisions of foreign law whose consequences would be repugnant.

This approach is designed to maximise legal certainty while allowing courts to use their discretion in choosing the solution which best accords with the need to do justice to the victim and with the reasonable expectations of the parties, whilst minimising the risk of forum shopping.

Paradoxically, excessively rigid - ostensibly simple - rules do not necessarily lead to greater legal certainty or to predictability of outcome, which is so important for practitioners. For instance, such rules often result in the courts using recategorisation of issues as procedural in order to do justice in particular cases.

Under the provisions of the fourth and fifth motor insurance directives, a party sustaining damage in a traffic accident is at liberty, in cross-border cases, either to bring about an out-of-court settlement directly with the loss adjuster of the other party's insurer, in the home country of the party sustaining damage, or, failing agreement, to bring an action directly against the other party's insurer (also in the home country of the party sustaining damage). In traffic accident cases, then, applying the law of the state of the victim's place of habitual residence is more equitable (for the victim, e.g. where he or she needs lifelong care) and more practicable for insurers and the courts.

In the case of personal injuries, not only the level of compensation is important, i.e. the question of how much; rather, what FORM of compensation to be received by an injured party is also important (in particular whether there is an entitlement to damages for pain and suffering, a nursing and attendance allowance or certain pensions). Accordingly, the type of compensation should be governed by the law applicable at the injured party's place of habitual residence.

Amendment 27
Article 4

Article 4

deleted

Product liability

Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.

Justification

It is considered that liability for defective products can be dealt with under Article 3, as amended.

Amendment 28
Section 1A, Title (new)

SECTION 1A
SPECIAL RULES APPLICABLE TO
SPECIFIC TORTS/DELICTS AND
NON-CONTRACTUAL OBLIGATIONS

Amendment 29
Article 5

Article 5

deleted

Unfair competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(2) and (3) shall apply.

Justification

It is considered that unfair competition can be dealt with under Article 3, as amended. Moreover, in the absence of clarity as to what is covered by "acts of unfair competition", the rapporteur considers that this provision is best omitted. If, ultimately, it is decided that "acts of unfair competition" should be expressly catered for in this Regulation, the rapporteur considers that such acts should be defined in a definition clause.

Amendment 30
Article 6

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and

1. As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, but a manifestly closer connection with a

information.

2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster *or publisher* has its habitual residence.

particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors. This provision shall apply mutatis mutandis to Internet publication.

2. The law applicable to the right of reply or equivalent measures *and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast* shall be the law of the country in which the *publisher or* broadcaster has its habitual residence.

3. Paragraph 2 shall also apply to a violation of privacy or of rights relating to the personality resulting from the handling of personal data.

Justification

The amended version of Article 6 is consistent with the judgment in Case C-68/93 Fiona Shevill and Others [1995] ECR I-415. This rule has been formulated to cover situations in which a manifestly closer connection may be considered to exist with the country of the principal place of publication or broadcasting. This will make for more legal certainty for publishers and broadcasters and result in a straightforward rule applying to all publications, even those carried out on the Internet.

The amendment to the second paragraph relating to injunctive relief is more realistic, given that such relief has to be sought and granted swiftly and is interim in nature

This amendment is intended to fill a perceived lacuna in the proposal for a regulation..

Amendment 31
Article 6a (new)

Article 6a

Industrial action

The law applicable to a non-contractual obligation arising out of industrial action, pending or carried out, shall be the law of

the country in which the action is to be taken or has been taken.

Justification

The rights of workers to take collective action, including strike action, guaranteed under national law must not be undermined.

Amendment 32
Article 6 b (new)

Article 6b

Traffic accidents

1. Until such time as the Community adopts detailed legislation on the law applicable to traffic accidents, Member States shall either apply the general rules set out in this Regulation, subject to Article 13, or the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.

2. In the case of personal injuries arising out of traffic accidents the court seised should apply the rules relating to the quantum of damages of the individual victim's place of habitual residence, unless it would be inequitable to do so.

Amendment 33
Article 7

Article 7

deleted

Violation of the environment

The law applicable to a non-contractual obligation arising out of a violation of the environment shall be the law determined by the application of Article 3(1), unless the person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred.

Justification

It is considered that violations of the environment can be dealt with under Article 3, as amended. Moreover, in the absence of any definition of what is meant by "violations of the environment", the rapporteur prefers to make no express mention of such.

Amendment 34
Section 2, Title

SECTION 2 *deleted*

***RULES APPLICABLE TO NON-
CONTRACTUAL OBLIGATIONS
ARISING OUT OF AN ACT OTHER
THAN A TORT OR A DELICT***

Justification

This title is now redundant.

Amendment 35
Article 9

Article 9 *deleted*

Determination of the applicable law

- 1. If a non-contractual obligation arising out of an act other than a tort or delict concerns a relationship previously existing between the parties, such as a contract closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.***
- 2. Without prejudice to paragraph 1, where the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law applicable to the non-contractual obligation shall be the law of that country.***
- 3. Without prejudice to paragraphs 1 and 2, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place.***
- 4. Without prejudice to paragraphs 1 and***

2, the law applicable to a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person shall be the law of the country in which the beneficiary has his habitual residence at the time of the unauthorised action. However, where a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person relates to the physical protection of a person or of specific tangible property, the law applicable shall be the law of the country in which the beneficiary or property was situated at the time of the unauthorised action.

5. Notwithstanding paragraphs 1, 2, 3 and 4, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply.

6. Notwithstanding the present Article, all non-contractual obligations in the field of intellectual property shall be governed by Article 8.

Justification

Replaced by Articles 9a and 9b.

Amendment 36
Article 9 a (new)

Article 9a

Unjust enrichment

1. If a non-contractual obligation arising out of unjust enrichment concerns a relationship previously existing between the parties, such as a contract closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the applicable law cannot be

determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the applicable law shall be the law of that country.

3. Where the applicable law cannot be determined on the basis of paragraphs 1 and 2, the applicable law shall be the law of the country in which the event giving rise to unjust enrichment substantially occurred, irrespective of the country in which the enrichment occurred.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than the one indicated by paragraphs 1, 2 or 3, the law of that other country shall apply.

Justification

These rules closely accord with the general rules for torts/delicts. In addition, the rapporteur disagrees with the Commission's original idea that the law applicable in cases of unjust enrichment should be the law of the country in which enrichment takes place. The place where enrichment takes place may be entirely fortuitous (e.g. dependent upon where a fraudster chooses to open the bank account to which monies are fraudulently paid over).

Amendment 37
Article 9 b (new)

Article 9b

Negotiorum gestio

1. If a non-contractual obligation arising out of an action or actions performed without due authority in connection with the affairs of another person concerns a relationship previously existing between the parties, such as a contract closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the applicable law cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to the loss or damage occurs, the applicable law shall be the law of that country.

3. Where the applicable law cannot be determined on the basis of paragraphs 1 and 2, the applicable law shall be the law of the country in which the action took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an action or actions performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than the one indicated by paragraphs 1, 2 or 3, the law of that other country shall apply.

Justification

These rules closely accord with the general rules for torts/delicts.

Amendment 38

Article 10

Article 10

deleted

Freedom of choice

1. The parties may agree, by an agreement entered into after their dispute arose, to submit non-contractual obligations other than the obligations to which Article 8 applies to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights of third parties.

2. If all the other elements of the situation at the time when the loss is sustained are located in a country other than the country whose law has been chosen, the

choice of the parties shall be without prejudice to the application of rules of the law of that country which cannot be derogated from by contract.

3. The parties' choice of the applicable law shall not debar the application of provisions of Community law where the other elements of the situation were located in one of the Member States of the European Community at the time when the loss was sustained.

Justification

Covered by the new Article 2a.

Amendment 39
Article 11, point (a)

a) the **conditions** and extent of liability, including the determination of persons **who are liable for acts performed by them**;

a) the **basis** and extent of liability, including the determination of persons **whose acts give rise to liability**;

Justification

Corrects the English version to bring it into line with the other language versions and aligns the wording with existing private international law conventions.

Amendment 40
Article 11, point (c)

c) the existence **and kinds of injury or damage for which compensation may be due**;

c) the existence, **the nature and the assessment of damages or the redress sought**;

Justification

Technical, grammatical and terminological correction and distinction.

Amendment 41
Article 11, paragraph 1 a (new)

Except where otherwise provided in this Regulation or in a valid choice-of-law agreement, the court seised shall apply its national rules relating to the quantification of damages, unless the circumstances of the case warrant the application of another State's rules.

Justification

This clarifies the position relating to the quantification of damages. Normally, the court seised will apply its national law, but, in cases such as road accidents, it may apply the rules of another country.

Amendment 42
Article 11 a (new)

Article 11a

Contentions as to applicable law

Any litigant making a claim or counterclaim before a national court or tribunal which falls within the scope of this Regulation shall notify the court or tribunal and any other parties by statement of claim or other equivalent originating document of the law or laws which that litigant maintains are applicable to all or any parts of his/her claim.

Justification

This simple requirement will ensure that the issue of applicable law is properly considered by both the parties and the court thus helping to ensure legal certainty.

Amendment 43
Article 11 b (new)

Article 11b

Determination of the content of foreign law

1. The court seised shall establish the content of the foreign law of its own motion. To this end, the parties'

collaboration may be required.

2. If it is impossible to establish the content of the foreign law and the parties agree, the law of the court seised shall be applied.

Justification

This clarification should ensure a more uniform approach to the application of foreign law by courts throughout the EU.

Amendment 44

Article 12

1. Where the law of a specific third country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

1. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

2. Where the law of a specific country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Justification

The new order of the paragraphs seems more logical. The English text has been corrected to

align it with the other language versions.

Amendment 45
Article 13

Whatever may be the applicable law, in determining liability account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage.

Whatever may be the applicable law, in determining liability account shall be taken, ***as a matter of fact, and in so far as is appropriate***, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage.

Justification

This point is made by the Commission in its explanatory memorandum and should be reflected in the text of the Regulation itself.

The restriction allows for the fact that taking account of local rules of safety and conduct is a factor in connection with traffic accidents, for instance, but not in connection with violations of fair competition or of rights relating to the personality.

Amendment 46
Article 14

The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract.

The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract ***in so far as this possibility exists under one of those laws.***

Justification

Clarification requested by the insurance industry.

Amendment 47
Article 17, paragraph 2 a (new)

2a. Notwithstanding Articles 11a and 11b

and paragraphs 1 and 2 of this Article, the rules of this Regulation shall not apply to evidence and procedure.

Justification

This amendment corresponds to Article 1(2)(h) of the Rome Convention on the law applicable to contractual obligations.

Amendment 48
Article 19, paragraph 1

1. For companies or firms and other bodies or incorporate or unincorporate, the ***principal establishment*** shall be considered to be the ***habitual residence***. However, where the event giving rise to the damage occurs or the damage arises in the course of operation of a subsidiary, a branch or any other establishment, the establishment shall take the place of the habitual residence.

1. For companies or firms and other bodies or incorporate or unincorporate, the ***habitual residence*** shall be considered to be the ***principal establishment***. However, where the event giving rise to the damage occurs or the damage arises in the course of operation of a subsidiary, a branch or any other establishment, the establishment shall take the place of the habitual residence.

Justification

This distinction is necessary, as in some legal systems the concept of 'residence' is unknown except when applied to natural persons.

Amendment 49
Article 19, paragraph 2

2. Where the event giving rise to the damage occurs or the damage arises in the course of the business activity of a natural person, that natural person's establishment shall take the place of the habitual residence.

2. Where the event giving rise to the damage occurs or the damage arises in the course of the business activity of a natural person, that natural person's ***actual place of establishment*** shall take the place of the habitual residence. ***Where the activity in question is peripatetic or domiciliary, that natural person's officially registered address shall take the place of the habitual residence.***

Justification

A person's business activities are not always carried out at that person's principal establishment (as in the case of house-painters or itinerant salesmen).

Amendment 50
Article 22

The application of a rule 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.

I. The application of a rule 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.

1a. In particular, the application of a rule of law of any country specified by this Regulation may be refused and/or the law of the forum applied if such application would be in breach of fundamental rights and freedoms as enshrined in the European Convention on Human Rights, national constitutional provisions or international humanitarian law.

*1b. Furthermore, the application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded may be regarded as being contrary to the public policy ("*ordre public*") of the forum.*

1c. Where, under this Regulation, the law specified as applicable is that of a Member State, the public policy exception may only be applied at the request of one of the parties.

Justification

The new second paragraph is intended as a clarification of the meaning of public policy at Community level.

The new third paragraph has been added as it is thought beyond the scope of this Regulation to introduce a new concept of "Community public policy" and remove the possibility of awarding exemplary or punitive damages as the Commission proposed in Article 24. The rapporteur is conscious that the existence of such damages may act as an incentive for forum shopping and therefore has included in the new review clause a commitment on the part of the Commission to examine the whole question of damages in this context when it reviews the implementation of the Regulation.

In line with Regulation 44/2001 (Brussels I), which forbids the automatic application of such grounds for non-recognition, it appears undesirable that the public policy exception should be applied automatically by a judicial body to the applicable law.

Amendment 51

Article 23

Article 23

deleted

*Relationship with other provisions of
Community law*

1. This Regulation shall not prejudice the application of provisions contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which:

– in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or

– lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or

– prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances.

Justification

Corresponding provisions have been inserted into Article 1, paragraph 2a.

Amendment 52

Article 24

Article 24

deleted

Non-compensatory damages

The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy.

Justification

Whilst the rapporteur has sympathy with this provision, she has preferred to add an amended version to Article 22.

Amendment 53

Article 25

Relationship with *existing* international conventions

This Regulation shall not prejudice the application of international conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict of law rules relating to non-contractual obligations.

Relationship with international conventions

1. This Regulation shall not prejudice the application of international conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict of law rules relating to non-contractual obligations.

2. *The rules of this Regulation shall prevail over the rules of international conventions concluded between two or more Member States unless those conventions are listed in Annex 1.*

3. *If all the other elements of the situation at the time when the loss is sustained are located in one or more Member States, the rules of this Regulation shall take precedence over the rules of the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.*

Justification

The regulation should not prejudice the application of both existing and future international conventions. There are often conflict-of-laws rules in international conventions that are not

entirely dedicated to that field.

To date, only a few Member States have ratified the Hague Convention referred to. In this connection, the regulation should make it clear that the Hague Convention should be secondary to Rome II in terms of applicability.

Amendment 54
Article 26 a (new)

Article 26 a

Review

Not later than ...^{*}, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee, in respect of paragraphs 1 and 2, reports on the application of this Regulation and, if necessary, make further proposals to adapt it:

1. In making its report, the Commission shall pay particular attention to the effects of the way in which foreign law is treated in the different jurisdictions and the question of damages, including the possibility of awarding exemplary or punitive damages in certain jurisdictions.

2. It shall also consider whether Community legislation specifically dealing with the law applicable to traffic accidents ought to be proposed. The report shall include an analytical study of the extent to which courts in the Member States apply foreign law in practice, including recommendations as to the desirability of a common approach to the application of foreign law.

3. In a communications environment operating increasingly on a continent-wide basis, the various forms of law relating to the personality and historically established press traditions in the European Union point to the need for more uniform prerequisites and rules for dispute resolution. The very nature, which merits safeguarding, of press freedom and its role

in society would suggest, however, that in the process priority should be given to media which deal responsibly with rights relating to the personality and are prepared to establish autonomously, and on the basis of consensus, a self-obligating European Media Code and/or a European Media Council which can provide consolidating decision-taking guidelines for the relevant courts as well. The Commission is called on to consider what scope there is for providing support for such a process and to present recommendations, in a report, on what form more far-reaching steps should take.

** Three years after the date of adoption of this Regulation.*

Justification

A review clause would appear necessary and desirable. Paragraph 2 is self-explanatory.

EXPLANATORY STATEMENT

The amendments presented to the proposal for a regulation are intended to rationalise and simplify the original proposal. The rapporteur suggests that the best approach is first to consider whether the parties have agreed on what the applicable law should be (Article 2a). Indeed, she can see no reason why parties should not be able to agree to submit non-contractual obligations to the law of their choice before, and not only after, the dispute arises, where it is clear beyond doubt that the parties are in a pre-existing arms-length commercial relationship. She has also made it possible for such agreements to be made in respect of disputes relating to intellectual property rights. She is conscious that this is controversial, but considers that it warrants being debated.

Otherwise the courts should apply either the rules set out in Article 3 or the successive rules for specific non-contractual obligations.

Article 3 opts in the first place for the *lex loci delicti commissi*. But, exceptionally, where the non-contractual obligation is manifestly more closely connected with another country, the court should opt for the law of that country. The connecting factors specifically mentioned allow courts to apply the law of the place of habitual residence of the victim and the tortfeasor or to take account of a pre-existing legal or *de facto* relationship between them. This is designed, as points (c) and (d) make plain, to produce certainty, predictability and uniformity of result and protect legitimate expectations.

Your rapporteur takes the view that the complexity of many cases is such that a flexible regime is more appropriate than rigid rules for each class of non-contractual obligation. Small factual differences in cases can substantially alter the parties' expectations and the policy considerations at stake. Moreover, in disputes which take place in a Community of States without borders, all having different legal systems but sharing a common heritage of human rights provisions and Community law, justice will often be served by applying *dépeçage*. It is for this reason, that Article 3(3) provides that the court seised must, where necessary, subject each issue of the dispute to separate analysis. This may prove necessary, *inter alia*, in order to avoid having to apply *statuta odiosa* of non-Community countries. What is essential is that courts are provided with a clear instrument which allows them the necessary flexibility in order to do justice to the parties in individual cases.

As far as traffic accidents are concerned, the rapporteur considers that since several Member States have ratified the Hague Convention, they should be free to continue to apply it until such time as a Community instrument has been adopted. In addition, since it would in some cases plainly be equitable to award damages for personal injuries on the scale of the victim's country of residence and not on the scale of the country in which the accident occurred, a provision is included to this effect. In this connection, the rapporteur considers that it is important to include a reference to the Brussels I Regulation and the Fourth and Fifth Motor Insurance Directives, which allow the victim to bring a direct action against the insurers. The rapporteur has also made it clear that, except where specific reference is made thereto in the Regulation, the question of the quantum of any damages awarded should be dealt with under

the law of the forum.

Your rapporteur has provided for special rules for defamation, unjust enrichment, agency without authority and torts arising out of industrial disputes.

In contrast, she has deleted the special provisions on defective products, unfair competition and violations of the environment, on the ground that, in the absence of persuasive evidence to the contrary and clear definitions of the torts/delicts concerned, the general rules are adequate to cope with the situations concerned. Whereas the rapporteur might be persuaded that specific provisions on defective products should be included if a good case were made out for this, she would be loath to include provisions on unfair competition and violations of the environment in the absence of a definition clause clearly setting out what torts/delicts are meant by those expressions.

As far as violations of privacy and rights relating to the personality are concerned, the rapporteur takes the view that the *lex loci delicti commissi* should in principle apply, but that the court should be able to consider that a manifestly closer connection exists with the country of publication or broadcasting having regard to sales per Member State, audience figures and so on. In line with the Brussels I Regulation on the recognition and enforcement of judgments, the court may also take account of the audience to which the publication or broadcast is principally directed. Given that Internet publications are also covered, it will be possible to avoid a situation in which different rules apply to the same publication, depending on whether it is made off- or on-line. Your rapporteur considers that this should conduce to greater legal certainty. In order to take account of concerns expressed by publishers and broadcasters, she has also offered an alternative version of the provisions in question in order to allow full debate to take place in committee.

As far as other non-contractual obligations are concerned, your rapporteur has chosen to deal with unjust enrichment and agency without authority in two separate articles for the sake of simplicity.

The rapporteur is conscious that her approach diverges from that of traditional international conventions in the field of private international law, but would point out that the instrument in preparation is a piece of Community legislation and hence has to satisfy different requirements. In contrast to previous instruments where the Community has taken over an existing international convention on private law, in this instance there was no previous convention, which provides a unique opportunity to legislate in a specifically Community context. In particular, your rapporteur has taken pains to ensure that the regulation can co-exist with Internal Market legislation and promote, rather than hamper, the proper functioning of the Internal Market. Particular consideration has been given to the Regulation's relationship with the television without frontiers and the e-commerce directives. Your rapporteur has been anxious to suggest a principled holistic approach which should avoid the necessity for confusing carve-outs and special regimes, present or future, as these merely serve to make our legislation more complex to navigate and less transparent.

Attention has also been paid to public policy. Your rapporteur considers that it is important to make it clear that embryonic Community public policy exists, as reflected in the ECHR, the Charter of Fundamental Rights, national constitutional provisions and international

humanitarian law. The reference to international humanitarian law has been expressly added to avoid courts having to apply rules of law of a non-Community country which would be repugnant to European systems of values, even though it is implicit already in the rapporteur's reformulation of Article 3.

Your rapporteur has also made it clear that rules of evidence and procedure are outside the scope of this Regulation in accordance with the traditional rules of private international law. Nevertheless, she has included provisions designed to ensure that national procedures are such that courts do in fact consider the question of the applicable law when proceedings falling within the scope of the Regulation are brought. This is essential in order to ensure uniformity of approach throughout the Union.

In addition, the *ordre public* provision has been expanded to cover exemplary and punitive damages, since your rapporteur considers that it is not legally possible in an instrument such as this to legislate to prohibit the award of such damages. She has, however, added a review clause mandating the Commission to examine, three years after the adoption of the Regulation, the question of damages and its impact in terms of forum shopping.

Given the dissatisfaction which has been voiced about the Hague Convention on traffic accidents, your rapporteur proposes to ask the Commission to consider proposing a Community instrument for this area. Pending this, traffic accidents should be able to be dealt satisfactorily under this Regulation, which expressly allows those Member States which have ratified the Hague Convention to continue to apply it. In this connection, the rapporteur would point to the problems caused by the discrepancies in the level of damages awarded by courts in the various Member States, which she considers deserves attention.

Another key part of this review should be the issue of how national courts deal in practice with the application and use of foreign law; more evidence of this needs to be accumulated to ensure that there is equality of treatment with national law so as to encourage confidence in the use of foreign law in national courts and again discourage the perceived need for forum shopping.

Your rapporteur wishes to underline that this Regulation should be seen as both underpinning Member States' differing legal traditions in private law, which arise out of their individually unique historic cultural and social circumstances, but at the same time as providing clear guidance at a Community level as to how those differing traditions should be recognised when conflicts arise by giving proper weight to the priorities of the overall Community legal order. The rapporteur would conclude by stating that this Regulation should assist in ensuring that the Community principles of mutual recognition and trust between the courts of the Member States are upheld.

Lastly, the rapporteur wishes to thank all those who have assisted her by giving her their advice and criticism, especially those who have participated in the work of the Project Team. The rapporteur has studied closely the Swiss Federal Law on Private International Law, the US Second Restatement and other instruments of federal States before reaching her conclusions as to what approach should be adopted.

17.5.2005

OPINION OF THE COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

for the Committee on Legal Affairs

on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")
(COM(2003)0427 – C5-0338/2003 – 2003/0168(COD))

Draftswoman: Barbara Kudrycka

SHORT JUSTIFICATION

The Draftsman would call upon the draftsman of the Committee on Legal Affairs to include in the report the following amendments which fall in its remit.

Article 6 concerns violation of privacy and rights relating to the personality and its content has an enormous impact on fundamental principles as regards freedom of expression and right to information. By amending this Article the Draftsman tries to find a balance between the responsibility of publishers and broadcasters and the freedom of press as well as the predictability and foreseeability of law.

In the amended version of Article 25 the Draftsman takes into account the process of harmonisation of private international law in the EC. The Rome II Regulation together with Regulations Brussels I and II and measures taken in order to transform the Rome I Convention into a community instrument are aiming at the creation of a uniform system of rules concerning conflict of laws in the EC. Therefore, it seems appropriate to give the Regulation the widest possible scope of application.

Lastly the Draftsman wants to thank Ms. Diana Wallis, the Draftsman for the Committee of Legal Affairs, for her extended impact assessment and for her valuable draft report.

AMENDMENTS

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Legal

Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1
Article 6

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the *forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.*

2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the *broadcaster* or *publisher* has its habitual residence.

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the *country in which the most significant element or elements of the loss or damage occur or are likely to occur. However, a manifestly closer connection with a particular country may be deemed to exist, having regard to factors such as the country to which a publication or broadcast is principally directed, the language of the publication or broadcast, or the sales or audience size in a given country as a proportion of total sales or audience size, or a combination of these factors. This provision shall apply mutatis mutandis to internet publications.*

2. The law applicable to the right of reply or equivalent measures *and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast* shall be the law of the country in which the *publisher* or *broadcaster* has its habitual residence.

2a. Where this Regulation designates the law of a third country, the law of the forum shall apply if the application of the law of the third country would be contrary to the fundamental principles of the forum as regards freedom of expression and information.

¹ OJ C, 15.4.2005, p.

Justification

The aim of this amendment is to provide protection of individuals and grant publishers and broadcasters more legal certainty. This amendment covers all types of publications, even those carried out on the internet. It takes into account the case law of the European Court of Justice.

Amendment 2

Article 25, paragraph 1 a (new)

This Regulation shall prevail over the rules of international conventions concluded between two or more Member States, with the exception of the conventions listed in the Annex.

Justification

The amendment takes into account the process of harmonisation of private international law at Community level which is essential and would not be reached without this amendment.

Date tabled – A6	27.6.2005	A6-0211/2005
Comments	...	