

Judicial cooperation in civil and commercial matters: cross-border disputes, non-contractual obligations, Rome II

2003/0168(COD) - 21/02/2006 - Modified legislative proposal

The Commission accepts 16 amendments presented by Parliament since they make improvements relating either to the clarity of the instrument or to questions of detail, or add material that will be potentially useful in implementing the initial proposal.

The amendments accepted by the Commission **in substance and subject to redrafting** aim to:

- make reference to the Rome I Regulation. But until the Regulation has been adopted, it would be preferable to refer to the future Community instrument that will replace the Rome Convention of 1980;
- bring non-contractual obligations based on strict liability and the capacity to incur liability in tort/delict within the scope of the Regulation. While the Commission can accept this analysis, it prefers to combine all the points concerning the scope of the Regulation in a single recital – recital 5 – without repeating all the questions already covered expressly by Article 12 (scope of the applicable law);
- specify that unjust enrichment and administration of others' affairs without a mandate are to be considered as breaches of non-contractual obligations for the purposes of the Regulation. The Commission agrees with this. But to avoid making the text more cumbersome, it prefers to combine all the points concerning the scope of the Regulation in a single recital. Above all the Commission feels it is preferable to restate that there should be an autonomous and coherent interpretation of the legal concepts used in the Brussels I and Rome II instruments and the Rome Convention of 1980 – or the Community instrument that will replace it – by the Court of Justice rather than a long but inevitably incomplete list of details. This amendment also aims to exclude the liability of public administrations in respect of acts or omissions occurring in the performance of their duties from the scope of the Regulation. The Commission accepts the amendment as regards the substance but prefers the forms of words commonly used in international conventions.
- exclude non-contractual obligations governed by specific provisions of company law or specific provisions applicable to other bodies corporate such as associations. The Commission accepts this amendment as regards the substance but proposes drafting it in simpler terms;
- exclude non-contractual obligations arising from a trust. The Commission accepts the principle of the amendment but prefers to adopt the wording of the Hague Convention of 1 July 1985;
- exclude liability for acts of public authority, including liability of publicly appointed office-holders;
- allow certain parties who are already in a contractual relationship to choose the law applicable to their non-contractual obligation before the loss or damage is sustained. The Commission can accept the principle of an *ex ante* choice and agrees that the choice should be subject to strict conditions, in particular to protect the weaker party. But the conditions for the choice should be expressed in clear and simple terms. If the legal terms are not precise enough, parties might feel they were being given an incentive to litigate, which would make the procedure more cumbersome in terms of duration and cost and thus run counter to the objective pursued by the Regulation. The wording proposed by the Commission would both protect consumers and employees from ill-thought-out choices and exclude the

possibility of such choices being imposed in standard contracts;

- the Commission can accept the principle of the amendments which would change the structure and title of the sections to make a clearer distinction between the general rule and special rules for certain categories of liability. To reflect proceedings in the Council and the differences between the Member States' legal systems, the Commission proposal makes an additional distinction between the special rules applicable to certain categories of liability and the specific rules governing unjust enrichment and administration of others' affairs;

- replace the single rule of Article 9 of the initial Commission proposal, applicable to all quasi-contracts, by two specific rules, one applying to unjust enrichment and the other to administration of others' affairs. The Commission can accept this additional distinction. In its amended proposal, however, it wishes to reflect certain technical improvements in the text emerging from Council proceedings;

- seek to clarify the rule on direct actions against the insurer of the person liable without modifying it as to the substance. The Commission can accept the principle of redrafting the rule to make it easier to understand. But it prefers the form of words that emerged from the Council, which pursues the same objective;

- seek to clarify the place where a natural person working from home has his habitual residence. The Commission can accept the principle of this clarification, but it prefers a form of words that is closer to what emerged from the Council, whereby the court would prefer the actual place where an occupation is exercised rather than an official address which might turn out to be purely fictitious.

As regards the amendments accepted by the Commission **in part**, these refer to the following:

- adapting recital 7 of the initial proposal to the changes made by an amendment relating to the general rule in Article 3;

- the rules of safety and conduct in the country where the loss or damage is sustained serves two purposes: first, to add the words "in so far as is appropriate" so as to emphasise even further that the application of these rules is in the discretion of the court, and second, to exclude this possibility in matters of defamation and unfair competition. The Commission can accept the proposed clarification for the first sentence of the recital. But Parliament's report offers no justification for excluding the rule in matters of defamation and unfair competition. The Commission accordingly sees no reason for depriving the perpetrators of these two categories of liability of the protection which this rule gives them;

- the amendment relating to the general rule in Article 3 of the initial Commission proposal can be accepted as regards the drafting improvements to paragraph 1, which confirms the rule proposed by the Commission. On the other hand, the Commission cannot accept the changes to paragraphs 2 and 3. Paragraph 2 brings in a specific rule concerning traffic accidents which would subject to two different laws the non-contractual obligation and the amount of damages. The Commission appreciates Parliament's efforts to find a fair solution for so many people who are the victims of traffic accidents but this solution, which would diverge sharply from the law in force in the Member States, cannot be adopted without prior in-depth analysis. It is accordingly proposed that the question be considered in detail in the report on the application of the Regulation. As regards paragraph 3, the amendment would substantially alter the spirit of the instrument. While it is specified that the exception clause available to the court really would be applied "by way of exception", the current wording runs the risk of sending a message that is contrary to the foreseeability objective pursued by the Regulation. The mere fact that the paragraph lists no less than 5 factors that can be taken into consideration to justify activating the exception clause means that the parties and the courts will routinely check the justification for the solution that the general rule would have generated even where it is at first sight satisfactory. The Commission therefore cannot accept this part of

the amendment and maintains its initial approach, which the Council also appears to have endorsed. But the Commission does acknowledge the significance of some of the factors listed in paragraph 3, in particular as regards the parties' shared habitual residence, a pre-existing de facto or de jure relationship or the legitimate expectations of the parties. As the first two of these are already mentioned expressly in paragraphs 2 and 3 of the initial proposal, Article 5(3) of the amended proposal now contains an express reference to the legitimate expectations of the parties;

- the mechanism for the public policy (ordre public) exception, first inserts a new paragraph 1a) to spell out the concept of public policy of the forum by listing reference instruments. Even though the public policy of the Member States will inevitably contain common elements, there are variations from one to another. Consequently the Commission cannot accept such a list. The proposed new paragraph 1b) addresses the issue of damages in amounts regarded as excessive, such as certain types of exemplary or punitive damages, already covered by a specific rule in Article 24 of the initial Commission proposal. Subject to drafting changes to make clear that punitive damages are not ipso facto excessive, the Commission can accept this rule being incorporated in the Article concerning the public policy of the forum. Under the proposed new paragraph 1c), only the parties would be able to rely on the exception clause. But it is for the court to ensure compliance with the fundamental values of the forum, and that task cannot be delegated to the parties, especially as they are not always legally represented. The Brussels I Regulation provides for the possibility for the court to withhold the exequatur from a judgment given in another Member State if it would be contrary to the public policy of the forum. The Commission accordingly cannot accept the proposed paragraph 1c);

- the provision of an obligation for the Commission to report on the application of the Regulation after it is in force. While the Commission acknowledges the value of such a report, it cannot accept all the conditions provided for by the amendment. For one thing, the period of 3 years after adoption of the Regulation would not allow an adequate number of judgments to be given as the basis for an effective evaluation. As in the Brussels I Regulation, the Commission proposes a period of 5 years after the Regulation enters into force. As for the content of the report, the question of the amount of damages awarded by the courts and the elaboration of a code of ethics for the European media are way out of place in a conflict-of-laws regulation. The Commission accordingly cannot accept that these questions should be dealt with in a report on the application of this Regulation. On the other hand the Commission agrees with Parliament on the need to consider how to achieve a more uniform approach to applying foreign law in the courts of the Member States. It does not believe that the time is ripe for a legislative initiative in this respect, but it can accept the idea of looking into the question in depth in the application report.

The Commission has **rejected** the amendments aiming to:

- adapt the recitals to reflect the removal of several special rules for specific forms of liability;
- abolish the special rule for product liability;
- abolish the special rule for anti-competitive practices;
- change the substance of the rule applicable to violations of privacy, particularly by the press;
- bring in a new special rule concerning damage arising from the exercise of the right to strike by employed people;
- restate that, until such time as the Community adopts detailed legislation on the law applicable to traffic accidents, Member States will either apply the 1971 Hague Convention or the general rules of the Rome II Convention;

- delete the special rule for damage to the environment. The Commission cannot accept this amendment as the proposed rule reflects the “polluter pays” principle promoted by the Community and already applied in several Member States. The Greens, incidentally, abstained from voting on this amendment in plenary;
- raise the question of the evaluation of the damages, which would generally (except as regards traffic accidents) be governed by the lex fori;
- address the question of the application of foreign law by the court.