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## The European Convention on Contractual Obligations

### Keywords

Obligations, Choice of Law, Contracts

## The European Convention on Contractual Obligations

On June 19, 1980, seven of the nine members of the European Economic Community<sup>1</sup> signed the Convention of the Law Applicable to Contractual Obligations.<sup>2</sup> The purpose of the Convention is to establish uniform rules on conflicts of law within the Community and to help solve commercial disputes between businesses and individuals from different states. A Joint Declaration attached to the Convention declares that member states are ready to examine the possibility of conferring jurisdiction on the European Court of Justice over matters covered by the Convention.<sup>3</sup> After the Convention is ratified by at least five national parliaments (which from past experience may take a number of years), it will become the law for the E.E.C. countries.<sup>4</sup>

The Convention has a broad scope with world-wide application. The courts of the member states will have to apply the rules of the Convention to decide the applicable substantive law for an individual case, or a choice of law between several member states, or of several non-member states, or of both member and non-member states.<sup>5</sup> Certain categories of matters are excluded from the scope of the Convention because there are other international conventions already in existence covering the subject, or because the excluded matter does not fall within the scope of a European Economic Community, or because instruments are already in force or being prepared which directly relate to the subject matter excluded.<sup>6</sup>

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1. Although the United Kingdom and Denmark were not among the original signatories, they are expected to sign shortly. [1980] 2 COMM. MKT. REP. (CCH), The Euromarket News, July 1, 1980, at 3.

2. [1980] 2 COMM. MKT. REP. (CCH) ¶ 6311 [hereinafter cited as the Convention].

3. *Id.* Common Declaration No. 3.

4. The Convention will enter into force on the first day of the third month after the seventh instrument of ratification has been deposited. For signatory states ratifying at a later date, the Convention will enter into force on the first day of the third month after deposit of the instruments of ratification. *Id.* art. 29.

5. This general rule is found in Article 1(1) of the Convention, which provides that "[t]he rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different legal systems." Article 2 adds that "[a]ny law specified by this Convention shall be applied whether or not it is the law of a Contracting State."

6. The Convention does not apply to the status or legal capacity of natural persons; to contractual obligations arising out of wills and succession; to property rights arising out of a multinational relationship; to rights and duties arising out of a family relationship or marriage, and the maintenance of illegitimate children; to bills of exchange, checks, promissory notes, and other negotiable instruments; to arbitration agreements or agreements on the choice of court; to the creation, organization, and dissolution of companies or to the relationship between agent and principal; to the creation of a trust and the relationship between settlors, trustees, and beneficiaries; or to contracts of insurance covering risks

The basic rule of the Convention is that the parties themselves may select the substantive law that is to be applied to their contract, or part of it, except where all the elements relevant to the situation are connected with one country only.<sup>7</sup> In this instance, the fact that the parties have chosen a foreign law should not prejudice the application of the mandatory rules of the law of that country. This rule is particularly innovative since it may result in the application of rules of law other than the Convention rules being applied to a contract.<sup>8</sup> Article 3(2) provides that the parties at any time may agree to make their contract subject to some law other than the one that previously governed it, provided that any variation made after the agreement shall not adversely affect the rights of third parties.

If the parties have made no election as to the applicable law, the contract will first be governed by the law of the country with which it is "most closely connected," and it allows for severance of any severable parts of the contract.<sup>9</sup> Thus, if a severable part of the contract has a closer connection with another country, it may be governed by the law of that other country. Second, the Convention provides, as a rebuttable presumption, that the "country with which the contract is most closely connected" is presumed to be the country where the party performing the contract has his habitual residence, or, if a firm, its central administration or principal place of business.<sup>10</sup> Third, if the subject matter of the property is immovable property, the "close connection" is presumed to be with the country where the immovable is situated.<sup>11</sup> Fourth, in a contract for the carriage of goods, the "close connection" in such contracts is presumed to be with the country where the carrier has his principal place of business if that country is also the country in which the place of loading or the place of discharge, or the principal place of business of the consignor is located.<sup>12</sup> In the absence of any of the previous rules being applicable, the contract may be deemed to be more closely connected with another country if the circumstances as a whole so dictate.<sup>13</sup>

Specific provision is made for choice of applicable law in the case of contracts of employment and certain contracts involving the interests of consumers.<sup>14</sup> In both cases, the choice of law made by the parties may not have the effect of depriving the employee or consumer of the protection he receives under the law that would normally be applicable or of the protection of the laws of the country in which he has his habitual resi-

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within the territory of the European Economic Community. Convention art. 1(2), note 2 *supra*.

7. *Id.* art. 3(3).

8. See Hartley, *Beyond the Proper Law*, 4 EUROPEAN L. REV. 236 (1979).

9. Convention art. 4(1), note 2 *supra*.

10. *Id.* art. 4(2).

11. *Id.* art. 4(3).

12. *Id.* art. 4(4).

13. *Id.* art. 4(5).

14. *Id.* arts. 5, 6.

dence.<sup>15</sup> With respect to the burden of proof and other legal presumptions, they are to be governed by the law applicable to the contract under the Convention.<sup>16</sup> Rules of evidence may be admissible under the law governing the substance of the contract or the law of the place where the contract was performed.<sup>17</sup>

Article 20 provides that the Convention shall not impair the application of the acts adopted by the institutions of the European Communities or harmonized national laws. In addition, the Convention does not bar the application of other Conventions that the member states may have entered into or may enter into in the future.<sup>18</sup> If a member state wishes to become a party to another convention that covers matters dealt with in the Convention, it may do so.<sup>19</sup>

The text of the Convention is the result of more than thirteen years work by the Commission of the European Communities and experts in private international law from the member states. The idea of a unification of private international law and codification of the rules on the conflicts of law within the Community date from about 1967, when the Benelux countries suggested to the Commission that conflicts of law rules in the then six member states should be unified.<sup>20</sup> A preliminary draft convention on the law applicable to contractual and non-contractual obligations was completed in 1972 and submitted to the governments of the member states, but the accession of three new member states necessitated its renegotiation.<sup>21</sup> The preliminary draft of the Convention was subsequently revised so as to limit its scope to contractual obligations.<sup>22</sup>

Article 3(h) of the Treaty of Rome states that the activities of the Community shall include "the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market."<sup>23</sup> Chapter Three of the treaty ("Approximation of Laws") which comprises Articles 100-102, provides that directives issued by the Commission are the instruments most commonly used to fulfill the objectives of Article 3(h). Article 220 implicitly provides for the use of Conventions,<sup>24</sup> with an eye towards "the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and

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15. *Id.* arts. 5(2), 6(1).

16. *Id.* art. 14.

17. *Id.*

18. *Id.* art. 20.

19. *Id.* art. 24.

20. See O. LANDO, *EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS* (1975); R. VANDER ELST, *JOURNAL DES TRIBUNAUX* 250 (1973).

21. Sollins, *Contractual Obligations—The E.E.C. Preliminary Draft Convention on Private International Law*, 25 *INT'L COMP. L.Q.* 35 (1976).

22. Thus, the original convention became two draft conventions, the first relating exclusively to contracts, and the other relating exclusively to non-contractual obligations. The latter draft convention is still in a preliminary stage. *Id.*

23. Treaty Establishing the European Economic Community, 298 U.N.T.S. 15 (1958).

24. See *id.* art. 220.

of arbitral awards.”<sup>25</sup>

In the past, the difference in private international law rules has given rise to discrimination and consequent hardship in individual cases, in the sense that two identical problems could be solved in two different ways, depending on the country or legal system in which each problem had been considered. The Convention aims to avoid such hardship by introducing in all member states a set of uniform rules governing conflicts, and thus, to standardize the method of determining the proper law to apply. Identical rules of conflicts will apply in the member states' relations both with one another and with non-Community states. By virtue of these sets of uniform rules, confidence in the stability of European legal relations will be strengthened, agreements on jurisdiction will be facilitated, and civil and commercial acts occurring in the context of this economic framework and containing a foreign element will become legally more certain. In the absence of the approval of the European Court of Justice as the final interpretative body, a substantive provision of the Convention risks being interpreted in different ways by national courts in the different member states.

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25. *Id.*