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(Information)

COUNCIL

REPORT

on the Convention on the law applicable to contractual obligations [1]

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(1) The text of the Convention on the law applicable to contractual obligations was published in Official Journal No L 266 of 9 October 1980.

The Convention, open for signature in Rome on 19 June 1980, was signed on that day by the Plenipotentiaries of the following seven Member States: Belgium, Germany, France, Ireland, Italy, Luxembourg and the Netherlands.

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INTRODUCTION

1. Proposal by the Governments of the Benelux countries to the Commission of the European Communities

On 8 September 1967 the Permanent Representative of Belgium extended to the Commission, in the name of his own Government and those of the Kingdom of the Netherlands and the Grand Duchy of Luxembourg, an invitation to collaborate with the experts of the Member States, on the basis of the draft Benelux convention, in the unification of private international law and codification of the rules of conflict of laws within the Community.

The object of this proposal was to eliminate the inconveniences arising from the diversity of the rules of conflict, notably in the field of contract law. Added to this was 'an element of urgency', having regard to the reforms likely to be introduced in some Member States and the consequent 'danger that the existing divergences would become more marked'.

In the words of Mr T. Vogelaar, Director-General for the Internal Market and Approximation of Legislation at the Commission, in his opening address as chairman of the meeting of government experts on 26 to 28 February 1969: 'This proposal should bring about a complete unification of the rules of conflict. Thus in each of our six countries, instead of the existing rules of conflict and apart from cases of application of international Agreements binding any Member State, identical rules of conflict would enter into force both in Member States' relations *inter se* and in relations with non-Community States. Such a development would give rise to a common corpus of unified legal rules covering the territory of the Community's Member States. The great advantage of this proposal is undoubtedly that the level of legal certainty would be raised, confidence in the stability of legal relationships fortified, agreements on jurisdiction according to the applicable law facilitated, and the protection of rights acquired over the whole field of private law augmented. Compared with the unification of substantive law, unification of the rules of conflict of laws is more practicable, especially in the field of property law, because the rules of conflict apply solely to legal relations involving an international element' (1).

2. Examination of the proposal by the Commission and its consequences

In examining the proposal by the Benelux countries the Commission arrived at the conclusion that at least in some special fields of private international law the harmonization of rules of conflict would be likely to facilitate the workings of the common market.

Mr Vogelaar's opening address reviews the grounds on which the Commission's conclusion was founded and is worth repeating here:

'According to both the letter and spirit of the Treaty establishing the EEC, harmonization is recognized as fulfilling the function of permitting or facilitating the creation in the economic field of legal conditions similar to those governing an internal market. I appreciate that opinions may differ as to the precise delimitation of the inequalities which directly affect the functioning of the common market and those having only an indirect effect. Yet there are still legal fields in which the differences between national legal systems and the lack of unified rules of conflict definitely impede the free movement of persons, goods, services and capital among the Member States.

Some will give preference to the harmonization or unification of substantive law rather than the harmonization of rules of conflict. As we know, the former has already been achieved in various fields. However, harmonization of substantive law does not always contrive to keep pace with the dismantling of economic frontiers. The problem of the law to be applied will therefore continue to arise as long as substantive law is not unified. The number of cases in which the question of applicable law must be resolved increases with the growth of private law relationships across frontiers.

At the same time there will be a growing number of cases in which the courts have to apply a foreign law. The Convention signed on 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters uniformly governs the international jurisdiction of the courts within the

Community. It should help to facilitate and expedite many civil actions and enforcement proceedings. It also enables the parties. in many matters, to teach agreements assigning jurisdiction and to choose among several courts. The outcome may be that preference is given to the court of a State whose law seems to offer a better solution to the proceedings. To prevent this "forum shopping", increase legal certainty, and anticipate more easily the law which will be applied, it would be advisable for the rules of conflict to be unified in fields of particular economic importance so that the same law is applied irrespective of the State in which the decision is given.

To sum up, there are three main considerations guiding our proposal for harmonizing the rules of conflict for a few well-defined types of legal relations. The first is dictated by the history of private international law: to try to unify everything is to attempt too much and would take too long. The second is the urgent necessity for greater legal certainty in some sectors of major economic importance. the third is the wish to forestall any aggravation of the differences between the rules of private international law of the various Member States' (2).

These were in fact the motives which prompted the Commission to convene a meeting of experts from the Member States in order to obtain a complete picture of the present state of the law and to decide whether and to what extent a harmonization or unification of private international law within the Community should be undertaken. The invitation was accompanied by a questionnaire designed to facilitate the discussion (3).

3. Favourable attitude of Member States to the search for uniform rules of conflict, the setting of priorities and establishment of the working group to study and work out these rules

The meeting in question took place on 26 to 28 February 1969. It produced a first survey of the situation with regard to prospects for and possible advantage of work in the field of unification of rules of conflict among Member States of the European Communities (4).

However, it was not until the next meeting on 20 to 22 October 1969 that the government experts were able to give a precise opinion both on the advisability and scope of harmonization and on the working procedure and organization of work.

As regards advisability of harmonization the Member States' delegations (with the sole exception of the German delegation) declared themselves to be fundamentally in agreement on the value of the work in making the law more certain in the Community. The German delegation, while mentioning some hesitation on this point in professional and business circles, said that this difference of opinion was not such as to affect the course of the work at the present time.

As regards the scope of harmonization, it was recognized (without prejudice to future developments) that a start should be made on matters most closely involved in the proper functioning of the common market, more specifically:

1. the law applicable to corporeal and incorporeal property;
2. the law applicable to contractual and non-contractual obligations;
3. the law applicable to the form of legal transactions and evidence;
4. general matters under the foregoing heads (renvoi, classification, application of foreign law, acquired rights, public policy, capacity, representation).

As for the legal basis of the work, it was the unanimous view that the proposed harmonization, without being specifically connected with the provisions of Article 220 of the EEC Treaty, would be a natural sequel to the Convention on jurisdiction and enforcement of judgments.

Lastly, on the procedure to be followed, all the delegations were in favour of that adopted for work on the Conventions already signed or in process of drafting under Article 220 and of seeking the most suitable ways of expediting the work (5).

The results of the meeting were submitted through the Directorate-General for the Internal Market an Approximation of Legislation to the Commission with a proposal to seek the agreement of Member States for continuance of the work and preparation of a preliminary draft Convention establishing uniformity of law in certain relevant areas of private international law.

The Commission acceded to the proposal. At its meeting on 15 January 1970 the Committee of Permanent Representatives expressly authorized the Group to continue its work on harmonization of the rules of private international law, on the understanding that the preliminary draft or drafts would give priority to the four areas previously indicated.

Following the abovementioned decision of the Permanent Representatives Committee, the Group met on 2 and 3 February 1970 and elected its chairman, Mr P. Jenard, Director of Administration in the Belgian Ministry of Foreign Affairs and External Trade, and its vice-chairman, Prof. Miccio, Counsellor to the Italian Court of Cassation.

Having regard to the decision of the previous meeting that the matters to be given priority should be divided into four sectors, the Group adopted the principle that each of the four sectors should have its own rapporteur appointed as follows, to speed up the work:

1. in the case of the law applicable to corporeal and incorporeal property, by the German delegation;
2. in the case of the law applicable to contractual and extracontractual obligations, by the Italian delegation:
3. in the case of the law applicable to the form of legal transactions and evidence, by the French delegation;
4. in general matters, by the Netherlands delegation, in agreement with the Belgian and Luxembourg delegations.

As a result the following were appointed: Prof. K. Arndt, Oberlandsgerichtspräsident a.d.; Prof. M. Giuliano, University of Milan; Prof. P. Lagarde, University of Paris I; Mr T. van Sasse van Ysselt, Director in the Netherlands Ministry of Justice.

Other matters were dealt with at the same meeting, notably the kind of cenvention to be prepared, as to which the great majority of delegates favoured a universal convention not based upon reciprocity; the method of work; participation of observers from the Hague Conference on Private International Law and the Benelux Commission on Unification of Law (6).

4. Organization, progress and initial results of the Group's work at the end of 1972

The Group took as its starting point the examination and discussion of the questionnaires prepared by the rapporteurs, Messrs Giuliano, Lagarde and van Sasse van Ysselt in their respective fields. They were discussed at a meeting of the rapporteurs chaired by Mr Jenard on 1 to 4 June 1970. The three questionnaires were subjected to a thorough analysis, extending both to the rules of conflict (national or established by convention) in force in the Community Member States and to the evolutionary trends already apparent in case law and legal theory in certain countries or worthy of consideration in relation to certain present-day reqirements in international life. This oral analysis was further supplemented by the written replies given by each rapporteur on the basis of the statutes, case law and legal theory of his own country (of the three Benelux countries in the case of Mr van Sasse) to the questionnaires drawn up by his colleagues and himself (7).

This preliminary work and material enabled each of the rapporteurs to present an interim report, with draft articles on the matter considered, as a working basis for the Group meetings. It was agreed that these meetings would be devoted to an examination of Mr Giuliano's report on the law applicable to contractual and non-contractual obligations and to the subject matter of Mr Lagarde's and Mr van Sasse van Ysselt's report to the extent that this was relevant to Mr Giuliano's subject.

It was agreed that Mr Arndt's report on the law applicable to corporeal and incorporeal property would be discussed later, Mr Arndt having explained that a comparative study of the principal laws on security rights and interests should precede his report and that the need for such a study had been generally recognized.

Apart from the meeting of rapporteurs in June 1970, the work fully occupied 11 Group plenary sessions, each with an average duration of five days (8).

At its meeting in June 1972 the Group completed the preliminary draft convention on the law applicable to contractual and non-contractual obligations and decided that it should be submitted, together with the reports finalized at a meeting of rapporteurs on 27 and 28 September 1972, to the Permanent Representatives Commitee for transmission to the Governments of the Community Member States (9).

5. Re-examination of Group work in the light of observations by the Governments of original and new Member States of the EEC and results achieved in February 1979

It follows from the foregoing observations that the 1972 draft dealt both with the law applicable to contractual obligations and with that applicable to non-contractual obligations. At the same time it provided solutions relating to the law governing the form of legal transactions and evidence, questions of interpretation of uniform rules and their relationship

with other rules of conflict of international origin, to the extent to which these were connected with the subject of the preliminary draft.

Following the accession of the United Kingdom, Denmark and Ireland to the EEC in 1973 the Commission extended the Group to include government experts from the new Member States and the Permanent Representatives Commitee authorized the enlarged Group to re-examine in the light of observations from the Governments of the original and of the new Member States of the EEC, the preliminary draft convention which the Commission had submitted to it at the end of 1972. The Group elected Prof. Philip as vice-chairman.

Nevertheless the preliminary draft was not re-examined immediately. The need to allow the experts from the new Member States time to consult their respective Governments and interested parties on the one hand and the political uncertainties in the United Kingdom concerning membership of the European Communities (which were not settled until the 1975 referendum) on the other, resulted in a significant reduction (if not suspension) of the Group's activities for about three years. It was not until the end of 1975 that the Group was able properly to resume its work and proceed with the preparation of the Convention on the law applicable to contractual obligations. In fact the Group decided at its meeting in March 1978 to limit the present convention to contracts alone and to begin negotiations for a second Convention, on non-contractual obligations, after the first had been worked out. Most delegations thought it better for reasons of time to finish the part relating to contractual obligations first.

The original preliminary draft, with the limitation referred to, was re-examined in the course of 14 plenary sessions of the Group and three special meetings on transport and insurance contracts; each of the plenary sessions lasted two to five days ([10]). At the meeting in February 1979 the Group finished the draft convention, decided upon the procedure for transmitting the draft to the Council before the end of April and instructed Professors Giuliano and Lagarde to draw up the report; this was then finalized at a meeting of rapporteurs on 18 to 20 June 1979 in which one expert per delegation participated, and transmitted in turn to the Council and to the Governments by the chairman, Mr Jenard.

6. Finalization of the Convention within the Council of the European Communitees

On 18 May 1979 the Group's chairman, Mr Jenard, sent the draft Convention to the President of the Council of the European Communities with a request that the Governments make their comments on the draft by the end of the year so that the Convention could then be concluded during 1980.

On 20 July 1979 Mr Jenard sent the President of the Council a draft report on the Convention, which was the predecessor of this report.

The General Secretariat of the Council received written comments from the Belgian, Netherlands, Danish, Irish, German, Luxembourg and United Kingdom Governments. In addition, on 17 March 1980, the Commission adopted an opinion on the draft Convention, which was published in *Official Journal of the European Communities* No L 94 of 11 April 1980.

On 16 January 1980 the Permanent Representatives Commitee set up an *ad hoc* working party on private international law, whose terms of reference were twofold:

— to finalize the Convention text in the light of the comments made by Member States' Governments,

— to consider whether, and if so within what limits, the Court of Justice of the European Communities should be given jurisdiction to interpret the Convention.

The *ad hoc* working party met twice, from 24 to 28 March and 21 to 25 April 1980, with Mr Brancaccio from the Italian Ministry of Justice in the chair ([11]). Working from the Governments' written comments and others made orally during discussions, the working party reached general agreement on the substantive provisions of the Convention and on the accompanying report.

The only problems unresolved by the working party concerned the problem of where the Convention stood in relation to the Community legal order. They arose in particular in determining the number of ratifications required for the Convention to come into force and in drafting a statement by the Governments of the Member States on the conferral of jurisdiction on the Court of Justice.

Following a number of discussions in the Permanent Representatives Committee, which gradually brought agreement within sight, the Council Presidency deemed circumstances to be ripe politically for the points of disagreement to be discussed by the Ministers of Justice with a good chance of success at a special Council meeting on 19 June 1980 in Rome.

At that meeting, a final round of negotiations produced agreement on a number of seven Member States required to ratify in order for the Convention to come into force. Agreement was also reached on the wording of a joint statement on the interpretation of the Convention by the Court of Justice, which followed word for word the matching statement made by the Governments of the original six Member States of the Community when the Convention on jurisdiction and enforcement was concluded on 27 September 1968 in Brussels. In adopting the statement, the Representatives of Governments of the Member States, meeting within the Council, also instructed the *ad hoc* Council working party on private international law to consider by what means point 1 of the statement could be implemented and report back by 30 June 1981.

With these points settled, the President-in-Office of the Council, Tommaso Morlino, Italian Minister of Justice, recorded the agreement of the Representatives of the Governments of the Member States, meeting within the Council, on the following:

— adoption of the text of the Convention and of the two joint statements annexed to it,

— the Convention would be open for signing from 19 June 1980,

— the Convention and accompanying report would be published in the *Official Journal of the European Communities* for information.

The Convention was signed on 19 June 1980 by the plenipotentiaries of Belgium, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg and the Netherlands.

7. Review of the internal sources and nature of the rules in force in the EEC Member States relating to the law applicable to contractual obligations

The chief aim of the Convention is to introduce into the national laws of the EEC Member States a set of uniform rules on the law applicable to contractual obligations and on certain general points of private international law to the extent that these are linked with those obligations.

Without going here into details of positive law, though it may be necessary to return to it in the comments on the uniform rules, a short survey can now be given of the internal sources and the nature of the rules of conflict at present in force in the Community countries in the field covered by the Convention. This survey will bring out both the value and the difficulties of the unification undertaken by the Group and of which the convention is only the first fruit.

Of the nine Member States of the Community, Italy is the only one to have a set of rules of conflict enacted by the legislature covering almost all the matters with which the Convention is concerned. These rules are to be found for the most part in the second paragraph of Article 17 and in Articles 25, 26, 30 and 31 of the general provisions constituting the introduction to the 1942 Civil Code, and in Articles 9 and 10 of the 1942 Navigation Code.

In the other Member States of the Community, however, the body of rules of conflict on the law applicable to contractual obligations is founded only on customary rules or on rules originating in case law. Academic studies and writings have helped considerably to develop and harmonize these rules.

The position as just stated has not been altered substantially either by the French draft law supplementing the Civil Code in respect of private international law (1967) or by the Benelux Treaty establishing uniform rules of private international law signed in Brussels on 3 July 1969. These two texts are certainly an interesting attempt to codify the rules of conflict and also, in the case of the Benelux countries, to make these rules uniform on an inter-State level. The Group did not fail to take account of their results in its own work. However, the entry into force of the Benelux Treaty has not been pursued, and the French draft law seems unlikely to be adopted in the near future.

8. Universal application of the uniform rules

From the very beginning of its work the Group has professed itself to be in favour of uniform rules which would apply not only to the nationals of Member States and to persons domiciled or resident within the Community but also to the nationals of third States and to persons domiciled or resident therein. The provisions of Article 2 specify the universal application of the convention.

The Group took the view that its main purpose was to frame general rules such as those existing in legislative provisions currently in force in Italy and in the Benelux Treaty and the French draft law. In such a context these general rules, which would become the 'common law' of each Member State for settling conflicts of laws, would not prejudice the detailed regulation of clearly delimited matters

arising from other work, especially that of the Hague Conference on private international law. The application of these particular conventions is safeguarded by the provisions of Article 21.

9. On the normally general nature of the uniform rules in the Convention and their significance in the unification of laws already undertaken in the field of private international law

At the outset of its work the Group had also to determine the nature and scope of the uniform rules of conflict to be formulated. Should they be general rules, to be applied indiscriminately to all contracts, or would it be better to regulate contractual obligations by means of a series of specific rules applicable to the various categories of contract, or again should an intermediate solution be envisaged, namely by adopting general rules and supplementing them by specific rules for certain categories of contract?

Initially the rapporteur advocated the latter method. This provided that, in default of an express of implied choice by the parties, the contract would be governed (subject to specific provisions for certain categories) by one system of law.

When the Group tackled the question of whether to supplement the general rules for determining the law applicable to the contract by some specific rules for certain categories of contract it became clear that the point was no longer as significant as it had been in the context of the rapporteur's initial proposals. The Group's final version of the text of Article 4 provided satisfactory solutions for most of the contracts whose applicable law was the subject of specific rules of conflict in the rapporteur's proposals, notably because of its flexibility. The Group therefore merely provided for some exceptions to the rule contained in Article 4, notably those in Articles 5 and 6 concerning the law applicable respectively to certain consumer contracts and to contracts of employment in default of an express or implied choice by the parties.

The normally general nature of the uniform rules made it necessary to provide for a few exceptions and to allow the judge a certain discretion as to their application in each particular case. This aspect will be dealt with in the comments on a number of Articles in Chapter III of this report.

As declared in the Preamble, in concluding this Convention the nine States which are parties to the Treaty establishing the European Economic Community show their desire to continue in the field of private international law the work of unification already undertaken in the Community, particularly in matters of jurisdiction and enforcement of judgments. The question of accession by third States is not dealt with in the Convention (see page 41, penultimate paragraph).

TITLE I

SCOPE OF THE CONVENTION

Article 1

Scope of the Convention

1. As provided in Article 1 (1) the uniform rules in this Convention apply generally to contractual obligations in situations involving a conflict of laws.

It must be stressed that the uniform rules apply to the abovementioned obligations only 'in situations involving a choice between the laws of different countries'. The purpose of this provision is to define the true aims of the uniform rules. We know that the law applicable to contracts and to the obligations arising from them is not always that of the country where the problems of interpretation or enforcement are in issue. There are situations in which this law is not regarded by the legislature or by the case law as that best suited to govern the contract and the obligations resulting from it. These are situations which involve one or more elements foreign to the internal social system of a country (for example, the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the fact that the contract was made abroad, the fact that one or more of the obligations of the parties are to be performed in a foreign country, etc.), thereby giving the legal systems of several countries claims to apply. These are precisely the situations in which the uniform rules are intended to apply.

Moreover the present wording of paragraph 1 means that the uniform rules are to apply in all cases where the dispute would give rise to a conflict between two or more legal systems. The uniform rules also apply if those systems coexist within one State (cf. Article 19 (1)). Therefore the question whether a contract is governed by English or Scots law is within the scope of the Convention, subject to Article 19 (2).

2. The principle embodied in paragraph 1 is however subject to a number of restrictions.

First, since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property are not covered by these provisions. An Article in the original preliminary draft had expressly so provided. However, the Group considered that such a provision would be superfluous in the present text, especially as this would have involved the need to recapitulate the differences existing as between the various legal system of the Member States of the Community.

3. There are also the restrictions set out in paragraph 2 of Article 1.

The first of these, at (a), is the status or legal capacity of natural persons, subject to Article 11; then, at (b), contractual obligations relating to wills and succession, to property rights arising out of matrimonial relationships, to rights and duties arising out of family relationships, parentage, marriage or affinity, including maintenance obligations in respect of illegitimate children. The Group intended this enumeration to exclude from the scope of the Convention all matters of family law.

As regards maintenance obligations, within the meaning of Article 1 of the Hague Convention on the law applicable to maintenance obligations, the Group considered that this exclusion should also extend to contracts which parties unter a legal maintenance obligation make in performance of that obligation. All other contractual obligations, even if they provide for the maintenance of a member of the family towards whom there are no legal maintenance obligations, would fall within the scope of the Convention.

Contrary to the provisions of the second paragraph of Article 1 in the original preliminary draft, the current wording of subparagraph (b) does not in general exclude gifts. Most of the delegations favoured the inclusion of gifts where they arise from a contract within the scope of the Convention, even when made within the family, provided they are not covered by family law. Therefore the only contractual gifts left outside the scope of the uniform

rules are those to which family law, the law relating to matrimonial property rights or the law of succession apply.

The Group unanimously affirmed that matters relating to the custody of children are outside the scope of the Convention, since they fall within the sphere of personal status and capacity. However, the Group thought it inappropriate to specify this exclusion in the text of the Convention itself, thereby intending to avoid an *a contrario* interpretation of the Convention of 27 September 1968.

To obviate any possibility of misconstruction, the present wording of subparagraphs (a) and (b) uses the same terminology as the 1968 Convention on jurisdiction and enforcement of judgments.

4. Subparagraph (c) excludes from the scope of the uniform rules in the first instance obligations arising from bills of exchange, cheques, promissary notes.

In retaining this exclusion, for which provision had already been made in the original preliminary draft, the Group took the view that the provisions of the Convention were not suited to the regulation of obligations of this kind. Their inclusion would have involved rather complicated special rules. Moreover the Geneva Conventions to which several Member States of the Community are parties govern most of these areas. Also, certain Member States of the Community regard these obligations as non-contractual.

Subparagraph (c) also excludes other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character. If a document, though the obligation under it is transferable, is not regarded as a negotiable instrument, it falls outside the exclusion. This has the effect that such documents as bills of lading, similar documents issued in connection with transport contracts, and bonds, debentures, guarantees, letters of indemnity, certificates of deposit, warrants and warehouse receipts are only excluded by subparagraph (c) if, they can be regarded as negotiable instruments; and even then the exclusion only applies with regard to obligations arising out of their negotiable character. Furthermore, neither the contracts pursuant to which such instruments are issued nor contracts for the purchase and sale of such instruments are excluded. Whether a document is characterized as a negotiable instrument is not governed by this Convention and is a matter for the law of the forum (including its rules of private international law).

5. Arbitration agreements and agreements on the choice of court are likewise excluded from the scope of the Convention (subparagraph (d)).

There was a lively debate in the Group on whether or not to exclude agreements on the choice of court. The majority in the end favoured exclusion for the following reasons: the matter lies within the sphere of procedure and forms part of the administration of justice (exercise of State authority); rules on this matter might have endangered the ratification of the Convention. It was also noted that rules on jurisdiction are a matter of public policy and there is only marginal scope for freedom of contract. Each court is obliged to determine the validity of the agreement on the choice of court in relation to its own law, not in relation to the law chosen. Given the nature of these provisions and their fundamental diversity, no rule of conflict can lead to a uniform solution. Moreover, these rules would in any case be frustated if the disputes were brought before a court in a third country. It was also pointed out that so far as concerns relationships within the Community, the most important matters (valitidity of the clause and form) are governed by Article 17 of the Convention of 27 September 1968. The outstanding points, notably those relating to consent, do not arise in practice, having regard to the fact that Article 17 provides that these agreements shall be in writing. Those delegations who thought that agreements on choice of court should be included within the Convention pointed out that the validity of such an agreement would often be dealt with by the application of the same law that governed the rest of the contract in which the agreement was included and should therefore be governed by the same law as the contract. In some systems of law, agreement as to choice of court is itself regarded as a contract and the ordinary choice of law rules are applied to discover the law applicable to such a contract.

As regards arbitration agreements, certain delegations, notably the United Kingdom delegation, had proposed that these should not be excluded from the Convention. It was emphasized that an arbitration agreement does not differ from other agreements as regards the contractual aspects, and that certain international Conventions do not regulate the law applicable to arbitration agreements, while others are inadequate in this respect. Moreover the international Conventions have not been ratified by all the Member States of the Community and, even if they had been, the problem would not be solved because these Conventions are not of universal applications. It was added that there would not be unification within the Community on this important matter in international commerce.

Other delegations, notably the German and French delegations, opposed the United Kingdom proposal,

emphasizing particularly that any increase in the number of conventions in this area should be avoided, that severability is accepted in principle in the draft and the arbitration clause is independent, that the concept of 'closest ties' difficult to apply to arbitration agreements, that procedural and contractual aspects are difficult to separate, that the matter is complex and the experts' proposals show great divergences; that since procedural matters and those relating to the question whether a dispute was arbitrable would in any case be excluded, the only matter to be regulated would be consent; that the International Chamber of Commerce — which, as everyone knows, has great experience in this matter — has not felt the need for further regulation.

Having regard to the fact that the solutions which can and have been considered generally for arbitration are very complex and show great disparity, a delegate proposed that this matter should be studied separately and any results embodied in a Protocol. The Group adopted this proposal and consequently excluded arbitration agreements from the scope of the uniform rules, subject to returning to an examination of these problems and of agreements on the choice of court once the Convention has been finally drawn up.

The exclusion of arbitration agreements does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements. Where the arbitration clause forms an integral part of a contract, the exclusion relates only to the clause itself and not to the contract as a whole. This exclusion does not prevent such clauses being taken into consideration for the purposes of Article 3 (1).

6. Subparagraph (e) provides that the uniform rules shall not apply to questions governed by the law of companies, and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding-up of companies, and other bodies corporate or unincorporate and the personal legal liability of officers and members as such for the obligations of the company or body.

This exclusion in no way implies that this aspect was considered unimportant in the economic life of the Member States of the Community. Indeed, this is an area which, by virtue of its economic importance and the place which it occupies in many provisions of the Treaty establishing the EEC, appears to have the strongest possible reasons for not being separated from Community work in the filed of unification of private international law, notably in conflicts of laws pertaining to economic relations.

Notwithstanding the foregoing considerations, the Group had thought it inadvisable, even in the original preliminary draft, to include companies, firms and legal persons within the scope of the Convention, especially in view of the work being done on this subject within the European Communities ([12]).

Confirming this exclusion, the Group stated that it affects all the complex acts (contractual, administrative, registration) which are necessary to the creation of a company or firm and to the regulation of its internal organization and winding-up, i.e. acts which fall within the scope of company law.

On the other hand, acts or preliminary contracts whose sole purpose is to create obligations between interested parties (promoters) with a view to forming a company or firm are not covered by the exclusion.

The subject may be a body with or without legal personality, profit-making or non-profit-making. Having regard to the differences which exist, it may be that certain relationships will be regarded as within the scope of company law or might be treated as being governed by that law (for example, société de droit civil, nicht-rechtsfähiger Verein, partnership, Vennootschap onder firma, etc.) in some countries but not in others. The rule has been made flexible in order to take account of the diversity of national laws.

Examples of 'internal organization' are: the calling of meetings, the right to vote, the necessary quorum, the appointment of officers of the company or firm, etc. 'Winding-up' would cover either the termination of the company or firm as provided by its constitution or by operation of law, or its disappearance by merger or other similar process.

At the request of the German delegation the Group extended the subparagraph (e) exclusion to the personal liability of members and organs, and also to the legal capacity of companies or firms. On the other hand the Group did not adopt the proposal that mergers and groupings should also be expressly mentioned, most of the delegations being of the opinion that mergers and groupings were already covered by the present wording.

As regards legal capacity, it should be made clear that the reference is to limitations, which may be imposed by law on companies and firms, for example in respect of acquisition of immovable property, not

to *ultra vires* acts by organs of the company or firm, which fall under subparagraph (f).

7. The solution adopted in subparagraph (f) involves the exclusion from the scope of the uniform rules of the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party.

The exclusion affects only the relationships between the principial and third parties, more particularly the question whether the principal is bound *vis-à-vis* third parties by the acts of the agent in specific cases. It does not affect other aspects of the complex field of agency, which also extends to relationships between the principal and the agent and to agent-third party relationships. The exclusion is justified by the fact that it is difficult to accept the principle of freedom of contract on this point. On the other hand, principal-agent and agent-third party relationships in no way differ from other obligations and are therefore included within the scope of the Convention in so far as they are of a contractual nature.

8. The exception in subparagraph (g) concerns 'trusts' in the sense in which they are understood in the common law countries. The English word 'trust' is properly used to define the scope of the exclusion. On the other hand similar institutions under continental laws falls within the provisions of the Convention because they are normally contractual in origin. Nevertheless it will be open to the judge to treat them in the same way as the institutions of the common law countries when they exhibit the same characteristics.

9. Under subparagraph (h) the uniform rules do not apply to evidence and procedure, subject to Article 14.

This exclusion seems to require no comment. The scope and extent to which the exclusion is subject to limitation will be noted in the commentary on Article 14.

10. The question whether contracts of insurance should or should not be included in the sope of the uniform rules was discussed at length by the Group. The solution finally adopted was that which appears in paragraph 3.

Under this paragraph the provisions of the Convention do not apply to contracts of insurance covering risks situated in the territories of Member States of the European Economic Community. This exclusion takes account of work being done within the Community in the field of insurance. Thus the uniform rules apply to contracts of insurance covering risks situate outside those territories. The States are nevertheless free to apply rules based on those in the Convention even to risks situate in the Community, subject to the Community rules which are to be established.

Insurance contracts, where they cover risks situate outside the Community, may also, in appropriate cases, fall under Article 5 of the Convention.

To determine whether a risk is situate in the territories of the Member States of the Community the last phrase of paragraph 3 states that the judge is required to apply his own national law. This expression means the rules in force in the judge's country, to the exclusion of the rules of private international law as stated by Article 15 of the Convention.

11. By virtue of paragraph 4 of Article 1 the exclusion provided for in paragraph 3 does not affect reinsurance contracts. In fact these contracts do not raise the same problems as contracts of insurance, where the need to protect the persons insured must necessarily be taken into account. Thus the uniform rules apply to reinsurance contracts.

Article 2

Application of law of non-Contracting States

This Article underlines the universal character of the uniform rules laid down in this Convention. The Convention does not apply only in situations involving some form of connection with one or other of the Contracting States. It is of universal application in the sense that the choice of law which it lays down may result in the law of a State not party to the Convention being applied. By way of example, under Article 3, parties to a contract may opt for the law of a third State, and in the absence of any choice, that same law may be applied to the contract under Articles 4 and 5 if it is with that State that the contract has the closest links. In other words, the Convention is a uniform measure of private international law which will replace the rules of private international law in force in each of the Contracting States, with regard to the subject matter which it covers and subject to any other convention to which the Contracting States are party (see Article 21).

The solution is consistent with that adopted in most of the Hague Conventions on private international law that deal with choice of laws *(stricto sensu)*. The text follows that of the Hague Convention drafted during the XIIIth session (Conventions of 14 March 1978 on the law applicable to matrimonial property regimes, Article 2, and on the law applicable to agency, Article 4).

TITLE II

UNIFORM RULES

Article 3

Freedom of choice

1. The rule stated in Article 3 (1) under which the contract is governed by the law chosen by the parties simply reaffirms a rule currently embodied in the private international law of all the Member States of the Community and of most other countries.

In French law the rule conferring this power (or 'autonomie de la volonté' as it is called) upon the parties is founded on case law dating back to the judgment delivered on 5 December 1910 by the Court of Cassation in *American Trading Company v. Quebec Steamship Company Limited.* The French draft law of 1967 to supplement the Civil Code in matters of private international law merely confirms the state of French law in this matter by providing in the first paragraph of Article 2312: 'Contracts of an international character and the obligations arising from them shall be subject to the law under which the parties intended to place themselves.'

The firm establishment of the rule in French case law was accompanied by corresponding developments in legal theory. The most eminent contemporary writers declare themselves fundamentally in favour of the principle of the parties' freedom of contract in determining the law applicable to the contract, or, according to the opinion of some legal writers, the 'localization' of the contract in a specific legal system ([13]).

The same applies to the law of the German Federal Republic, where the subject of contractual obligations was not dealt with by the legislature in the final version of the 'introductory law' of 1896. The rule conferring upon the parties the power to specify the law applicable to their contract is nevertheless founded on case law which has been developed and strengthened in recent decades despite the opposition of the great majority of earlier German legal theorists. At all events present-day theory is in entire agreement with the position taken by the case law ([14]).

Unlike the situation in France and Germany, in Italy the principle of freedom of contract of the contracting parties was expressly enacted as early as 1865 in the preliminary provisions of the Civil Code. It is currently based upon the first paragraph of Article 25 of the preliminary provisions of the 1942 Civil Code, in which the freedom of the parties to choose the law applicable to their contract is formally accepted, as in Articles 9 and 10 of the Navigation Code, where it is provided that the power of the parties to designate the applicable law may also be exercised in seamen's contracts and in contracts fot the use of ships, boats and aircraft. According to the preponderant view of theorists and consistent decisions by the Court of Cassation, the law applicable to the contract must be determined primarily on the basis of the express will of the parties; only in default of such a nomination will the law of the contract be determined by the connecting factors stipulated in the abovementioned provisions ([15]).

As regards Belgium, Luxembourg and the Netherlands, the rule that the contracting parties enjoy freedom of contract in choosing the applicable law has also been sanctioned by judicial practice and by contemporary legal writers.

In its judgment of 24 February 1938 in *SA Antwerpia v. Ville d'Anvers* the Belgian Court of Cassation stated for the first time, in terms clearly suggested by the French judgment of 5 December 1910, that: 'the law applicable to contracts, both to their formation and their conditions and effects, (is) that adopted by the parties' ([16]). Several Belgian writers have contributed to the firm establishment of the rule in theory and in practice ([17]).

In the Netherlands the Hoge Raad put the finishing touches to the developments in case law in this field in its judgment of 13 May 1966 in the *Alnati* case. The previous decisions of the Supreme Court and the differing views of writers on the precise scope of the freedom of contract rule would not have permitted definition of the state of Netherlands law in this matter with sufficient certainty ([18]).

At all events the 1969 Benelux Treaty on uniform rules for private international law, even though the signatory States have not pursued its entry into force, is clear evidence of their present views on this subject. Article 13 (1) of the uniform law states: 'Contracts shall be governed by the law chosen by the parties as regards both essential and ancillary provisions'.

English law recognizes that the parties to a contract are free to choose the law which is to govern it ('the proper law of the contract'). This principle of freedom of choice is founded on judicial decisions ([19]). In *Vita Food Products Inc. v. Unus Shipping Co. Ltd* ([20]) Lord Wright indicated that the parties' choice must be *bona fide* and legal and could be avoided on the ground of public policy. In certain areas the parties' freedom of choice is subject to limitations imposed by statute ([20a]), the most important of these being in the field of exemption clauses ([20b]).

The law of Scotland is to similar effect ([20c]) and Irish law draws its inspiration from the same principles as the English and Scottish legal systems.

Under English law (and the situation is similar in Scots law and Irish law), in the case where the parties have not expressly chosen the law to govern their contract ([20d]), the court will consider whether the parties' choice of law to be applied can be inferred from the terms of the contract. The most common case in which the court may infer a choice of the proper law is where the contract contains an arbitration or choice of jurisdiction clause naming a particular country as the seat of arbitration or litigation. Such a clause gives rise to an argument that the law of the country chosen should be applied as the proper law of the contract. This inference however is not conclusive and can be rebutted by any contrary inferences which may be drawn from the other provisions of the contract and the relevant surrounding circumstances ([20e]).

Finally, as regards Denmark, the principle of the freedom of contracting parties to choose the law applicable to their contract already seems to have inspired several opinions by Supreme Court judges during this century. Today at all events this principle forms the basis of Danish case law, as can be seen from the judgment in 1957 in *Baltica v. M. J. Vermaas Scheepvaart bedrijf*, with full support from legal writers ([21]).

2. The principle of the parties' freedom to choose the law applicable is also supported both by arbitration decisions and by international treaties designed to unify certain rules of conflict in relation to contracts.

The rule, which had already been cited in 1929 by the Permanent Court of International Justice in its judgment in the case of the *Brazilian Loans* ([22]), very clearly underlay the award made by the arbitration tribunal on 29 August 1958 in *Saudi Arabia v. Arabian American Oil Company (Aramco)* in which it was stated that the 'principles of private international law to be consulted in order to find the law applicable are those relating to freedom of choice, by virtue of which, in an agreement which is international in character, the law expressly chosen by the parties must be applied first . . .' ([23]). Similarly in the arbitration findings given on 15 March 1963 in *Sapphire International Petroleums Ltd v. National Iranian Oil Company*, the sole arbitrator, Mr Cavin, affirmed that it is the will of the parties that determines the law applicable in matters of contract ([24]). The rule was reaffirmed even more recently by the sole arbitrator, Mr Dupuy, in the award which he made on 19 January 1977 in *Libyan Arab Republic v. California Asiatic Oil Company and Texaco Overseas Petroleum Company* ([25]).

As regards international treaties, the rule of freedom of choice has been adopted in the Convention on the law applicable to international sales of goods concluded at the Hague on 15 June 1955 which entered into force on 1 September 1964. Article 2 of this Convention, which is in force among several European countries, provides that: 'The sale shall be governed by the internal law of the country nominated by the contracting parties.'

Article VIII of the European Convention on international commercial arbitration concluded at Geneva on 21 April 1961, which entered into force on 7 January 1964, provides that the parties are free to determine the law which the arbitrators must apply in a dispute.

The same principle forms the basis of the 1965 Convention for the settlement of disputes relating to investments between States and nationals of other States, which entered into force on 14 October 1966, when it provides in Article 42 that 'the Tribunal shall rule on the dispute in accordance with the rules of law adopted by the parties'.

The Hague Convention of 14 March 1978 on the law applicable to agency provides in Article 5 that 'the internal law chosen by the principal and the agent is to govern the agency relationship between them' ([26]).

3. The parties' choice must be express or be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. This interpretation, which emerges from the sesond sentence of Article 3 (1), has an important consequence.

The choice of law by the parties will often be express but the Convention recognizes the possibility that the Court may, in the light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract. For example, the contract may be in a standard form which is known to be governed by a particular system of law even though there is no express statement to this effect, such as a Lloyd's policy of marine insurance. In other cases a previous course of dealing between the parties under contracts containing an express choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties. In some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum, but this must always be subject to the other terms of the cntract and all the circumstances of the case. Similarly references in a contract to specific Articles of the French Civil Code may leave the court in no doubt that the parties have deliberately chosen French law, although there is no expressly stated choice of law. Other matters that may impel the court to the conclusion that a real choice of law has been made might include an express choice of law in related transactions between the same parties, or the choice of a place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of that place.

This Article does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice. Such a situation is governed by Article 4.

4. The last sentence of Article 3 (1) acknowledges that the parties' choice of the law applicable may relate to the whole of the contract or to only part thereof. On the question whether severability (dépeçage) was to be allowed, some experts observed that the contract should in principle be governed by one law, unless that contract, although apparently a single contract, consists in reality of several contracts or parts which are separable and independent of each other from the legal and economic points of view. In the opinion of these experts, no reference to severability should have been made in the text of the Convention itself. In the view of others, on the contrary, severability is directly linked with the principle of freedom of contract and so would be difficult to prohibit. Nevertheless when the contract is severable the choice must be logically consistent, i. e. it must relate to elements in the contract which can be governed by different laws without giving rise to contradictions. For example, an 'index-linking clause' may be made subject to a different law; on the other hand it is unlikely that repudiation of the contract for non-performance would be subjected to two different laws, one for the vendor and the other for the purchaser. Recourse must be had to Article 4 of the Convention if the chosen laws cannot be logically reconciled.

In the opinion of these experts the danger that the argument of severability might be used to avoid certain mandatory provisions is eliminated by the operation of Article 7. The experts concerned also emphasized that severability should not be limited to cases of express choice of law.

The solution adopted in the last sentence of Article 3 (1) is prompted by exactly this kind of idea. The Group did not adopt the idea that the judge can use a partial choice of law as the basis for a presumption in favour of one law invoked to govern the contract in its entirety. Such an idea might be conducive to error in situations in which the parties had reached agreement on the choice of law solely on a specific point. Recourse must be had to Article 4 in the case of partial choice.

5. The first sentence of Article 3 (2) leaves the parties maximum freedom as to the time at which the choice of applicable law can be made.

It may be made either at the time the contract is concluded or at an earlier or later date. The second sentence of paragraph 2 also leaves the parties maximum freedom as to amendment of the choice of applicable law previously made.

The solution adopted by the Group in paragraph 2 corresponds only in part to what seems to be the current state of the law on this point in the Member States of the Community.

In the Federal Republic of Germany and in France the choice of applicable law by the parties can apparently be made even after the contract has been concluded, and the courts sometimes deduce the applicable law from the parties' attitude during the proceedings when they refer with clear agreement to a specific law. The power of the parties to vary the choice of law applicable to their contract also seems to be very widely accepted ([27]).

Case law in the Netherlands seems to follow the same line of interpretation ([28]).

In Italy, however, the Court of Cassation (sitting as a full court) stated in its judgment of 28 June 1966 No 1680 in *Assael Nissim v. Crespi* that; 'the parties' choice of applicable law is not admissible if made after the contract has been drawn up' ([29]).

According to this dictum, which Italian commentators do not wholly support ([30]) the choice can be made only at the time the contract is concluded. Once the choice is made, the parties no longer have the option of agreeing to nominate a law other than that nominated at the time of concluding the contract.

In the laws of England and Wales, Scotland, Northern Ireland and Ireland, there is no clear authority as to the law which governs the possibility of a change in the proper law.

6. The liberal solution adopted by the Group seems to be in accordance with the requirement of logical consistency. Once the principle of freedom of contract has been accepted, and having regard to the fact that the requirement of a choice of law by the parties may arise both at the time of conclusion of the contract and after that time, it seems quite logical that the power of the parties should not be limited solely to the time of conclusion of the contract. The same applies to a change (by a new agreement between the parties) in the applicable law previously chosen.

As to the way in which the choice of law can be changed, it is quite natural that this change should be subject to the same rules as the initial choice.

If the choice of law is made or changed in the course of proceedings the question arises as to the limits within which the choice or change can be effective. However, the question falls within the ambit of the national law of procedure, and can be settled only in accordance with that law.

7. The second sentence of Article 3 (2) states that a change in the applicable law after the contract has been concluded shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties. The purpose of the reservation concerning the formal validity of the contract is to avoid a situation whereby the agreement between the parties to subject the contract to a law other than that which previously governed it could create doubts as to the validity of the contract during the period preceding the agreement between the parties. The preservation of third-party rights appears to be entirely justified. In certain legal systems, a third party may have acquired rights in consequence of a contract concluded betwen two other persons. These rights cannot be affected by a subsequent change in the choice of the applicable law.

8. Article 3 (3) provides that the choice of a foreign law by the parties, whether or not accompanied by the choice of a foreign tribunal, shall not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'.

This solution is the result of a compromise between two lines of argument which have been diligently pursued within the Group: the wish on the one hand of certain experts to limit the parties' freedom of choice embodied in this Article by means of a correcting factor specifying that the choice of a foreign law would be insufficient *per se* to permit the application of that law if the situation at the moment of choice did not involve another foreign element, and on the other the concern of other experts, notably the United Kingdom experts, that such a correcting factor would be too great an obstacle to the freedom of the parties in situations in which their choice appeared justified, made in good faith, and capable of serving interests worthy of protection. In particular these experts emphasized that departures from the principle of the parties' freedom of choice should be authorized only in exceptional circumstances, such as the application of the mandatory rules of a law other than that chosen by the parties; they also gave several examples of cases in which the choice of a foreign law by the parties was fully justified, although there was apparently no other foreign element in the situation.

The Group recognized that this concern was well founded, while maintaining the principle that the choice by the parties of a foreign law where all the other elements relevant to the situation at the time of the choice are connected with one country only shall not prejudice the application of the mandatory rules of the law of that country.

9. Article 3 (4) merely refers questions relating to the existence and validity of the parties' consent as to the choice of the law applicable to the provisions of Articles 8, 9 and 11. We will return to these matters in the comments on those Articles.

Article 4

Applicable law in the absence of choice

1. In default of an express or implied choice by the parties, there is at present no uniform way of determining the law applicable to contracts in the legal systems of the Member States of the Community (31).

In French and Belgian law no distinction is to be drawn between the express and hypothetical (or presumed) will of the parties. Failing an express choice of applicable law, the courts look for various 'pointers' capable of showing that the contract is located in a particular country. This localization is sometimes regarded subjectively as equivalent to the probable wish of the parties had such a wish been expressed, sometimes objectively as equivalent to the country with which the transaction is most closely connected (32).

The objective concept seems to be receiving more and more support from legal writers and from case law. Following this concept, the Paris Court stated in its judgment of 27 January 1955 *(Soc. Jansen v. Soc. Heurtey)* that, in default of an indication of the will of the parties, the applicable law 'is determined objectively by the fact that the contract is located by its context and economic aspects in a particular country, the place with which the transaction is most closely connected being that in which the contract is to be performed in fulfilment of the obligation characteristic of its nature' (33).

It is this concept of the location of the contracts that is referred to, in terms clearly modelled on the above judgment, in the second paragraph of Article 2313 of the French draft, which states that in default of the expressed will of the parties 'the contract is governed by the law with which it is most closely connected by its economic aspects, and notably by the main place of performance'.

Similarly, in German law the solution adopted by the courts in determining the law of the contract in the absence of choice by the parties is based largely upon the search for 'pointers' capable of showing the 'hypothetischer Parteiwille', the presumed will of the parties, having regard to the general interests at stake in each particular case. If this gives no result, the law applicable to the contract according to German case law is determined by the place of performance: more precisely, by the place of performance of each of the obligations arising from the contract, because the German courts take the view that if the various contractual obligations are to be performed in different countries, each shall be governed by the law of the country in which it is performed (34).

In English law where the parties have not expressly chosen the proper law and no choice can be inferred, the law applicable to the contract is the system of law with which the transaction has its 'closest and most real connection' (35). In such a case the judge does not seek to ascertain the actual intensions of the contracting parties, because that is non-existent, but seeks 'to determine for the parties what is the proper law which, as just and reasonable persons, they ought to have intended if they had thought about the question when they made the contract' (36). In this inquiry, the court has to consider all the circumstances of the case. No one factor is decisive; instead a wide range of factors must be taken into account, such as for instance, the place of residence or business of the parties, the place of performance, the place of contracting and the nature and subject-matter of the contract.

Scots law adopts a similar approach (36a), as does the law of Ireland.

In Italian law, where the presumed will of the parties plays no part, the matter is settled expressly and directly by the legislature. Failing a choice of law by the parties, the obligations arising from the contract are governed by the following:

(a) contracts for employment on board foreign ships or aircraft, by the national law of the ship or aircraft (Naval Code Article 9);

(b) marine, domestic and air hiring contracts, charters and transport contracts, by the national law of the ship or aircraft (Naval Code Article 10);

(c) all other contracts, by the national law of the contracting parties, if common to both; otherwise by the law of the place where the contract was concluded (preliminary provisions of the Civil Code, Article 25, first subparagraph).

The abovementioned laws are of subsidiary effect only; they apply only in default of an expression of the parties' will as to the law applicable. Italian case law so holds and legal writers concur with this view (37).

To conclude this short survey, only the provisions of the third and fourth paragraphs of Article 13 of the 1969 Benelux Treaty which has not entered into force remain to be mentioned. According to the third paragraph, in default of a choice by the parties 'the

contract shall be governed by the law of the country with which it is most closely connected', an according to the fourth paragraph 'when it is impossible to determine that country, the contract shall be governed by the law of the country in which it was concluded'. One may note a tendency in Netherlands case law to formulate special rules of reference for certain types of contract (see 'Journal du Droit Int. 1978, pp. 336 to 344' and 'Neth. Int. Law Rev. 1974, pp. 315 to 316'), i.e. contracts of employment, agency contracts and contracts of carriage.

The foregoing survey has shown that, with the sole exception of Italy, where the subsidiary law applicable to the contract is determined once and for all by hard-and-fast connecting factors, all the other Community countries have preferred and continue to prefer a more flexible approach, leaving the judge to select the preponderant and decisive connecting factor for determining the law applicable to the contract in each specific case among the various elements of the contract and the circumstances of the case.

2. Having considered the advantages and disadvantages of the solutions adopted by the legislatures and the case law of the Member States of the Community and after analyzing a range of ideas and alternatives advanced both by the rapporteur and by several delegates, the Group agreed upon the uniform rule embodied in Article 4.

The first paragraph of this Article provides that, in default of a choice by the parties, the contract shall be governed by the law of the country with which it has the closest connection.

In order to determine the country with which the contract is most closely connected, it is also possible to take account of factors which supervened after the conclusion of the contract.

In fact the beginning of the first paragraph does not mention default of choice by the parties; the expression used is 'to the extent that the law applicable to the contract has not been chosen in accordance with Article 3'. The use of these words is justified by reference to what has been said in paragraph 4 of the commentary on Article 3.

However, the flexibility of the general principle established by paragraph 1 is substantially modified by the presumptions in paragraphs 2, 3 and 4, and by a strictly limited exception in favour of severability at the end of paragraph 1.

3. According to Article 4 (2), it is presumed that the contract has the closest connection with the country in which the party who is to effect the performance which is characteristic of the contract has his habitual residence at the time when the contract is concluded, or, in the case of a body corporate or unincorporate, its central administration. If the contract is concluded by that party in the course of his trade or profession, the country concerned is that in which his principal place of business is situated or, if the contract is to be performed through a place of business other than the principal place of business, the country in which that other place of business is situated. Article 4 (2) establishes a presumption which may be rebutted in accordance with Article 4 (5).

The kind of idea upon which paragraph 2 is based is certainly not entirely unknown to some specialists. It gives effect to a tendency which has been gaining ground both in legal writings and in case law in many countries in recent decades ([18]). The submission of the contract, in the absence of a choice by the parties, to the law appropriate to the characteristic performance defines the connecting factor of the contract from the inside, and not from the outside by elements unrelated to the essence of the obligation such as the nationality of the contracting parties or the place where the contract was concluded.

In addition it is possible to relate the concept of characteristic performance to an even more general idea, namely the idea that his performance refers to the function which the legal relationship involved fulfils in the economic and social life of any country. The concept of characteristic performance essentially links the contract to the social and economic environment of which it will form a part.

Identifying the characteristic performance of a contract obviously presents no difficulty in the case of unilateral contracts. By contrast, in bilateral (reciprocal) contracts whereby the parties undertake mutual reciprocal performance, the counter-performance by one of the parties in a modern economy usually takes the form of money. This is not, of course, the characteristic performance of the contract. It is the performance for which the payment is due, i.e. depending on the type of contract, the delivery of goods, the granting of the right to make use of an item of property, the provision of a service, transport, insurance, banking operations, security, etc., which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction.

As for the geographical location of the characteristic performance, it is quite natural that the country in

which the party liable for the performance is habitually resident or has his central administration (if a body corporate or unincorporate) or his place of business, according to whether the performance in question is in the course of his trade or profession or not, should prevail over the country of performance where, of course, the latter is a country other than that of habitual residence, central administration or the place of business. In the solution adopted by the Group the position is that only the place of habitual residence or of the central administration or of the place of business of the party providing the essential performance is decisive in locating the contract.

Thus, for example, in a banking contract the law of the country of the banking establishment with which the transaction is made will normally govern the contract. It is usually the case in a commercial contract of sale that the law of the vendor's place of business will govern the contract. To take another example, in an agency contract concluded in France between a Belgian commercial agent and a French company, the characteristic performance being that of the agent, the contract will be governed by Belgian law if the agent has his place of business in Belgium ([39]).

In conclusion, Article 4 (2) gives specific form and objectivity to the, in itself, too vague concept of 'closest connection'. At the same time it greatly simplifies the problem of determining the law applicable to the contract in default of choice by the parties. The place where the act was done becomes unimportant. There is no longer any need to determine where the contract was concluded, with all the difficulties and the problems of classification that arise in practice. Seeking the place of performance or the different places of performance and classifying them becomes superfluous.

For each category of contract it is the characteristic performance that is in principle the relevant factor in applying the presumption for determining the applicable law, even in situations peculiar to certain contracts, as for example in the contract of guarantee where the characteristic performance is always that of the guarantor, whether in relation to the principal debtor or the creditor.

To counter the possibility of changes in the connecting factor ('conflits mobiles') in the application of paragraph 2, it has been made clear that the country of habitual residence or of the principal place of business of the party providing the characteristic performance is the country in which he is habitually resident or has his central administration or place of business, as appropriate, 'at the time of conclusion of the contract'.

According to the last part of paragraph 2, if the contract prescribes performance by an establishment other than the principal place of business, it is presumed that the contract has the closest connection with the country of that other establishment.

4. Article 4 (3) establishes that the presumption in paragraph 2 does not operate to the extent that the subject of the contract is a right in immovable property or a right to use immovable property. It is presumed in this case that the contract is most closely connected with the country in which the immovable property is situated.

It is advisable to state that the provision in question merely establishes a presumption in favour of the law of the country in which the immovable property is situate. In other words this is a presumption which, like that in paragraph 2, could also be rebutted if circumstances so required.

For example, this presumption could be rebutted if two persons resident in Belgium were to make a contract for renting a holiday home on the island of Elba (Italy). It might be thought in such a case that the contract was most closely connected with the country of the contracting parties' residence, not with Italy.

Finally it should be stressed that paragraph 3 does not extend to contracts for the construction or repair of immovable property. This is because the main subject-matter of these contracts is the construction or repair rather than the immovable property itself.

5. After a long and animated discussion the Group decided to include transport contracts within the scope of the convention. However, the Group deemed it inappropriate to submit contracts for the carriage of goods to the presumption contained in paragraph 2, having regard to the peculiarities of this type of transport. The contract for carriage of goods is therefore made subject to a presumption of its own, namely that embodied in paragraph 4. This presumption may be rebutted in accordance with Article 4 (5).

According to this fourth paragraph it is presumed in the case of contracts for the carriage of goods that if the country in which the carrier has his principal place of business at the time the contract is concluded is also the country of the place of loading or unloading or of the principal place of business of the consignor, the contract is most closely connected with that country. The term 'consignor' refers in general to any person who consigns goods to the

carrier (Afzender, Aflader, Verzender, Mittente, Caricatore, etc.).

Thus the paragraph 4 presumption rests upon a combination of connecting factors. To counter the possibility of changes in the connecting factor in applying the paragraph, it has been made clear here also that the reference to the country in which the carrier has his principal place of business must be taken to refer to the carrier's place of business 'at the time the contract is concluded'.

It appears that for purposes of the application of this paragraph the places of loading and unloading which enter into consideration are those agreed at the time when the contract is concluded.

It often happens in contracts for carriage that a person who contracts to carry goods for another does not carry them himself but arranges for a third party to do so. In Article 4 (4) the term 'the carrier' means the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

In addition, the third sentence of paragraph 4 provides that in applying that paragraph single-voyage charterparties and other contracts whose main purpose is the carriage of goods shall be treated as contracts for the carriage of goods. The wording of paragraph 4 is intended to make it clear that charterparties may be considered to be contracts for the carriage of goods in so far as that is their substance.

6. Contracts for the carriage of passengers remain subject to the general presumption, i.e. that provided for in Article 4 (2).

This solution was adopted by majority vote within the Group. Certain delegations favoured the special presumption emodied in paragraph 4, arguing that, as with other types of transport, the need was for a combination of connecting factors, in view of the fact that reference solely to the place where the carrier, who provides the characteristic performance, has his principal place of business may not be a significant connecting factor: by way of example they cited the case of transportation of French or English passengers between London and Paris by an American airline. It was also emphasized that in a mixed contract (passengers and goods) the difficulty of applying two different laws would arise.

Nevertheless the other delegations were against the special presumption, their principal arguments being: the application of several laws to passengers on the same journey would involve serious difficulties; the formulation of paragraph 4 is such that it would hardly ever apply to carriage of passengers, so recourse would usually be had to the first paragraph of Article 4, which does not give the judge sufficiently precise criteria for decision; contracts of carriage normally contain a clause conferring jurisdiction on the court of the carrier's principal place of business, and paragraph 2 would operate so that the law of the court of competent jurisdiction would coincide with the applicable law.

In any event it should be stated that the judge will not be able to exclude consideration of the country in which the carrier has his principal place of business in seeking the places with which the contract is most closely connected.

Finally it is useful to note that the Group repeatedly stressed in the course of the discussions on transport problems that the international conventions took precedence in this matter.

7. Article 4 (2) does not apply when the characteristic performance connot be determined. The case then falls under paragraph 1, i.e. the contract will be governed by the law of the country with which it is most closely connected.

The first part of Article 4 (5) contains precisely that provision.

However, that paragraph also provides for the possibility of disregarding the presumptions in paragraphs 2, 3, and 4 when all the circumstances show the contract to have closer connections with another country. In this case the law of that other country is applied.

The grounds for the latter provision are as follows. Given the entirely general nature of the conflict rule contained in Article 4, the only exemptions to which are certain contracts made by consumers and contracts of employment, it seemed essential to provide for the possibility of applying a law other than those referred to in the presumptions in paragraphs 2, 3 and 4 whenever all the circumstances show the contract to be more closely connected with another country.

Article 4 (5) obviously leaves the judge a margin of discretion as to whether a set of circumstances exists in each specific case justifying the non-application of the presumptions in paragraphs 2, 3 and 4. But this is the inevitable counterpart of a general conflict rule intended to apply to almost all types of contract.

8. Article 4 (1) allows parts of the contract to be severed under certain conditions. The last sentence of this paragraph provides that if one part of the contract can be separated from the rest and is more closely connected with another country, then by way of exception the law of that other country can be applied to that part of the contract.

Discussion of the matter within the Group revealed that no delegation wished to encourage the idea of severability (dépeçage). However, most of the experts were in favour of allowing the court to effect a severance, by way of exception, for a part of the contract which is independent and separable, in terms of the contract and not of the dispute, where that part has a closer connection with another country (for example, contracts for joint venture, complex contracts).

As to whether or not the possibility of severance should be mentioned in the text of the convention itself most delegations were in favour of its being mentioned. It was emphasized in particular that mere reference to the matter in the report would be insufficient by itself, because in some Member States of the Community it is not usual to take account of the report. It was also emphasized that to include it in the text would reduce the risk of variation in the application of the convention on this point, because the text would specify the conditions under which severance was allowed.

The wording of the last sentence in paragraph 1 embodies precisely this idea. The words 'by way of exception' are therefore to be interpreted in the sense that the court must have recourse to severance as seldom as possible.

9. It should be noted that the presumptions mentioned in paragraphs 2, 3 and 4 of Article 4 are only rebuttable presumptions.

Article 5

Certain consumer contracts

1. Article 5 of the convention establishes a specific conflict rule for certain contracts made by consumers. Most of the experts who have participated in the Group's work since 1973 have taken the view that consumer protection, the present aim of several national legislatures, would entail a reversal of the connecting factor provided for in Article 4 or a modification of the principle of freedom of choice provided for in Article 3. On the one hand the choice of the parties should not adversely affect the mandatory provisions of the State in which the consumer is habitually resident; on the other, in this type of contract it is the law of the buyer (the weaker party) which should normally prevail over that of the seller.

2. The definition of consumer contracts corresponds to that contained in Article 13 of the Convention on jurisdiction and enforcement of judgments. It should be interpreted in the light of its purpose which is to protect the weaker party and in accordance with other international instruments with the same purpose such as the Judgments Convention. Thus, in the opinion of the majority of the delegations it will, normally, only apply where the person who supplies goods or services or provides credit acts in the course of his trade or profession. Similarly, the rule does not apply to contracts made by traders, manufacturers or persons in the exercise of a profession (doctors, for example) who buy equipment or obtain services for that trade or profession. If such a person acts partly within, partly outside his trade or profession the situation only falls within the scope of Article 5 if he acts primarily outside his trade or profession. Where the receiver of goods or services or credit in fact acted primarily outside his trade or profession but the other party did not know this and, taking all the circumstances into account should not reasonably have known it, the situation falls outside the scope of Article 5. Thus if the receiver of goods or services holds himself out as a professional, e.g. by ordering goods which might well be used in his trade or profession on his professional paper the good faith of the other party is protected and the case will not be governed by Article 5.

The rule extends to credit sales as well as to cash sales, but sales of securities are excluded. The Group has specifically avoided a more precise definition of 'consumer contract' in order to avoid conflict with the various definitions already given by national legislation. The rule also applies to the supply of services, such as insurance, as well as supply of goods.

3. Paragraph 2 embodies the principle that a choice of law in a consumer contract cannot deprive the consumer of the protection afforded to him by the law of the country in which he has his habitual residence. This principle shall, however, only apply under certain conditions set out in the three indents of paragraph 2.

The first indent reales to situations where the trader has taken steps to market his goods or services in the

country where the consumer resides. It is intended to cover *inter alia* mail order and door-step selling. Thus the trader must have done certain acts such as advertising in the press, or on radio or television, or in the cinema or by catalogues aimed specifically at that country, or he must have made business proposals individually through a middleman or by canvassing. If, for example, a German makes a contract in response to an advertisement published by a French company in a German publication, the contract is covered by the special rule. If, on the other hand, the German replies to an advertisement in American publications, even if they are sold in Germany, the rule does not apply unless the advertisement appeared in special editions of the publication intended for European countries. In the latter case the seller will have made a special advertisement intended for the country of the purchaser.

The Group expressly adopted the words 'steps necessary on his part' in order to avoid the classic problem of determining the place where the contract was concluded. This is a particularly delicate matter in the situations referred to, because it involves international contracts normally concluded by correspondence. The word 'steps' includes *inter alia* writing or any action taken in consequence of an offer or advertisement.

According to the second indent Article 5 shall apply in all situations where the trader or his agent has received the order of the consumer in the country in which the consumer has his habitual residence. This provision is a parallel to Article 3 (2) of the 1955 Hague Convention on international sales.

There is a considerable overlap between the first and the second indents. This overlap is, however, not complete. For example, the second indent applies in situations where the consumer has addressed himself to the stand of a foreign firm at a fair or exhibition taking place in the consumers country or to a permanent branch or agency of a foreign firm established in the consumer's country even though the foreign firm has not advertised in the consumer's country in a way covered by the first indent. The word 'agent' is intended to cover all persons acting on behalf of the trader.

The third indent deals with a situation which is rather special but where, on the other hand, a majority of delegations found a clear need for protecting the consumer under the provisions of Article 5. It covers what one might describe as 'border-crossing excursion-selling', i.e. for example, a situation where a store-owner in country A arranges one-day bus trips for consumers in a neighbouring country B with the main purpose of inducing the consumers to buy in his store. This is a practice well-known in some areas. The situation is not covered by the first indent because there it is required that the consumer has taken in his own country all the steps necessary on his part for the conclusion of the contract. The third indent is, unlike the rest of paragraph 2, limited to contracts for the sale of goods. The condition that the journey was arranged by the seller shall not be understood in the narrow way that the seller must himself have taken care of the transportation. It is sufficient that the seller has arranged the journey by way of an agreement with the transportation company.

In describing the situation in which Article 5 applies to consumer contracts, the Group has not followed the text of Article 13 (1) of the Judgments Convention as amended by the Accession Convention. On the one hand Article 5 contains no special provision for hire purchase contracts and loans on deferred terms. On the other hand, Article 13 of the Judgments Convention has no provisions parallel to the second and third indents of Article 5 (2).

4. Article 5 (3) introduces an exception to Article 4 of the Convention. According to this paragraph, notwithstanding the provisions of Article 4 and in the absence of choice in accordance with Article 3, a contract made by a consumer shall 'be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in the second paragraph of Article 5'.

The wording of paragraph 3 is sufficiently clear, and calls for no additional examination.

5. Under the terms of paragraph 4 thereof, Article 5 applies neither to contracts of carriage (a) nor to contracts relating to the supply of services provided exclusively in a country other than that in which the consumer is resident (b). The exclusion of contracts of carriage is justified by the fact that the special protective measures for which provision is made in Article 5 are not appropriate for governing contracts of this type. Similarly, in the case of contracts relating to the supply of services (for example, accommodation in a hotel, or a language course) which are supplied exclusively outside the State in which the consumer is resident, the latter cannot reasonably expect the law of his State of origin to be applied in derogation from the general rules of Articles 3 and 4. In the cases referred to under (b) the contract is more closely connected with the State in

which the other contracting party is resident, even if the latter has performed one of the acts described in paragraph 2 (advertising, for example) in the State in which the consumer is resident.

6. The intention of paragraph 5 is to ensure that Article 5, notwithstanding the exclusions made in paragraph 4, shall apply to contracts providing for what is in English normally called a 'package tour', i.e. an ordinary tourist arrangement consisting of a combination of travel and accommodation for an inclusive price. If a package tour starts with transportation from the country in which the consumer has his habitual residence the contract would not be excluded according to paragraph 4. The importance of paragraph 5 is, therefore, that it ensures application of Article 5 also in situations where the services provided for under a package tour start with transportation from another country. However, Article 5 of course only applies to package tours where the general conditions of paragraphs 1 and 2 are fulfilled, i.e. that the contract can be regarded as a consumer contract and that it is entered into in one of the situations mentioned in paragraph 2.

When formulating paragraph 5, the Group met with difficulty in defining a 'package tour'. The Group confined itself to a definition which underlines the main elements of this type of contract well known in practice, leaving it to the courts to solve any possible doubt as to the exact delimitation. The accommodation which is a part of a package tour must normally be separate from the transportation, and so paragraph 5 would not apply to the provision of a sleeper on a train.

Article 6

Individual employment contracts

1. Re-examination of the specific conflict rule in the matter of contracts of employment led the Group to make fundamental changes to this Article, which already appeared (as Article 5) in the original preliminary draft, and to harmonize its approach with that of the present Article 5 on consumer contracts.

In both cases the question was one of finding a more appropriate arrangement for matters in which the interests of one of the contracting parties are not the same as those of the other, and at the same time to secure thereby more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship.

2. On this basis, Article 6 (1) sets a limit on the parties' freedom to choose the applicable law, as permitted by Article 3 of the convention, affirming that this choice in contracts of employment 'shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice'.

The purpose of this text is as follows:

if the law applicable pursuant to paragraph 2 grants employees protection which is greater than that resulting from the law chosen by the parties, the result is not that the choice of this law becomes completely without effect. On the contrary, in this case the law which was chosen continues in principle to be applicable. In so far as the provisions of the law applicable pursuant to paragraph 2 give employees better protection than the chosen law, for example by giving a longer period of notice, these provisions set the provisions of the chosen law aside and are applicable in their place.

The mandatory rules from which the parties may not derogate consist not only of the provisions relating to the contract of employment itself, but also provisions such as those concerning industrial safety and hygiene which are regarded in certain Member States as being provisions of public law.

It follows from this text that if the law of the country designated by Article 6 (2) makes the collective employment agreements binding for the employer, the employee will not be deprived of the protection afforded to him by these collective employment agreements by the choice of law of another State in the individual employment contract.

Article 6 applies to individual employment contracts and not to collective agreements. Consequently, the fact that an employment contract is governed by a foreign law cannot affect the powers which an employee's trade union might derive from collective agreements in its own country.

The present wording of Article 6 speaks of 'contract of employment' instead of 'employment relationship' as in the original preliminary draft. It should be stated, however, that the rule in Article 6 also covers

the case of void contracts and also *de facto* employment relationships in particular those characterized by failure to respect the contract imposed by law for the protection of employees.

3. According to Article 6 (2), in the absence of choice by the parties and notwithstanding the provisions of Article 4, the contract of employment is governed as follows:

(a) by the law of the country in which the employee habitually carries out his work in performance of his contract, even if he is temporarily employed in another country; or

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

unless it appears from the cirumstances as a whole that the contract of employment is more closely connected with another country, in which case the law of that other country applies.

After a thorough examination of the various problems raised by contracts of employment in private international law, in the course of which particular consideration was given both to the draft Regulation prepared in this connection by the EEC Commission and to the latest trends in the legal literature and case law of the Member States of the Community, the Group finally adopted the following solution. If the employee habitually works in one and the same country the contract of employment is governed by the law of that country even if the employee is temporarily employed in another country. This is the rule which appears in subparagraph 2 (a). On the other hand, if the employee does not habitually work in one and the same country the contract of employment is governed by the law of the country in which the place of business through which he was engaged is situated. This is the rule which appears in subparagraph 2 (b).

These solutions obviously differ substantially from those which would have resulted from the Article 4 presumption.

However, the last sentence of Article 6 (2) provides that if it appears from the cirumstances as a whole that the contract is more closely connected with another country, the law of the latter country is applied.

4. As regards work done outside the jurisdiction of any State, the Group considered that the rule adopted in Article 6 could in principle be applied. In the case of work on an oil-rig platform on the high seas, the law of the country of the undertaking which engaged the employee should be applied.

The Group did not seek a special rule for the work of members of the crew on board a ship.

Article 7

Mandatory rules

1. The wording of Article 7 of the original preliminary draft has been considerably improved in the course of the Group's re-examination of the text of the convention since 1973, in order to permit a better interpretation in the various situations in which it will have to be applied.

The Group reiterated at its last meeting that Article 7 merely embodies principles which already exist in the laws of the Member States of the Community.

The principle that national courts can give effect under certain conditions to mandatory provisions other than those applicable to the contract by virtue of the choice of the parties or by virtue of a subsidiary connecting factor, has been recognized for several years both in legal writings and in practice in certain of our countries and elsewhere.

For example, the principle was recognized in the abovementioned 1966 judgment of the Netherlands Supreme Court in the *Alnati* case (cited *supra*, commentary on Article 3 (1)) in which the Court said that, although the law applicable to contracts of an international character can, as a matter of principle, only be that which the parties themselves have chosen, 'it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract'.

This judgment formed the basis for the second paragraph of Article 13 of the non-entered-into-force Benelux Treaty of 1969 on uniform rules of private international law, which provides that 'where the contract is manifestly connected with a particular country, the intention of the parties shall not have the effect of excluding the provisions of the law of that country which, by reason of their special nature and subject-matter, exclude the application of any other law'.

The same attitude, at any event, underlies Article 16 of the Hague Convention of 14 March 1978 on the law applicable to agency, whereby, in the application of that convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and to the extent that, by the law of that State, those rules are applicable irrespective of the law indicated by its confluct rules.

On the other hand, despite the opinion of some jurists, it must be frankly recognized that no clear indication in favour of the principle in question seems discernible in the English cases (*Ralli Bros v. Sota y Aznar; Regazzoni v. Sethia*; *Rossano v. Manufacturers Life Insurance Co.*) (40).

2. The wording of Article 7 (1) specifically provides that in the application of the convention 'effect may be given to the mandatory rules of the law of another country with which the situation has a close connection if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract'.

The former text did not specify the nature of the 'connection' which must exist between the contract and a country other than that whose law is applicable. Several experts have observed that this omission might oblige the court in certain cases to take a large number of different and even contradictory laws into account. This lack of precision could make the court's task difficult, prolong the proceedings, and lend itself to delaying tactics. Accepting the force of these observations, the Group decided that it is essential that there be a genuine connection with the other country, and that a merely vague connection is not adequate. For example, there would be a genuine connection when the contract is to be performed in that other country or when one party is resident or has his main place of business in that other country. Among the suggested versions, the Group finally adopted the word 'close' which seemed the most suitable to define the situation which it wished to cover.

The connection in question must exist between the contract as a whole and the law of a country other than that to which the contract is submitted. The Group rejected the proposal by one delegation designed to establish a connection between the point in dispute and a specific law. In fact this proposal would have given rise to a regrettable dismemberment of the contract and would have led to the application of mandatory laws not foreseeable by the parties. Nevertheless the Group preferred to replace the word 'the contracts' by 'the situation'.

Since the former text seemed to some delegations to be lacking in clarity, the Group decided to improve the wording. In the new text it has therefore stated that the legal system of the country of which these mandatory provisions are an integral part must be examined to find out whether these provisions apply in the particular case whatever the law applicable to the contract. Furthermore, in the French text the word 'loi' has been replaced by the word 'droit' in order to avoid any doubts as to the scope of the rule, which is to cover both 'legislative' provisions of any other country and also common law rules. Finally, after a long discussion, the majority of the Group, in view of the concern expressed by certain delegations in relation to constitutional difficulties, decided that it was preferable to allow the courts a discretion in the application of this Article.

3. Article 7 (1) adds in relation to the mandatory rules that their nature and purpose, and the consequences of their application or non-application, must be taken into account in order to decide whether effect should be given to them.

Thus the application of the mandatory provisions of any other country must be justified by their nature and by their purpose. One delegation had suggested that this should be defined by saying that the nature and purpose of the provisions in question should be established according to internationally recognized criteria (for example, similar laws existing in other countries or which serve a generally recognized interest). However, other experts pointed out that these international criteria did not exist and that consequently difficulties would be created for the court. Moreover this formula would touch upon the delicate matter of the credit to be given to foreign legal systems. For these reasons the Group, while not disapproving this idea, did not adopt this drafting proposal.

Additionally, in considering whether to give effect to these mandatory rules, regard must be had to 'the consequences of their application or non-application'.

Far from weakening the rule this subsequent element — which did not appear in the original preliminary draft — defines, clarifies and strengthens it. In fact, the judge must be given a power of discretion, in particular in the case where contradictory mandatory rules of two different countries both purport simultaneously to be applicable to one and the same situation, and where a choice must necessarily be made between them.

To complete the comments on Article 7 (1) it only remains to emphasize that the words 'effect may be

given' impose on the court the extremely delicate task of combining the mandatory provisions with the law normally applicable to the contract in the particular situation in question. The novelty of this provision, and the fear of the uncertainty to which it could give rise, have led some delegations to ask that a reservation may be entered on Article 7 (1) (see Article 22 (1) (a)).

4. Article 7 (2) states that 'nothing in this Convention 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 contract'.

The origin of this paragraph is found in the concern of certain delegations to safeguard the rules of the law of the forum (notably rules on cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage) which are mandatory in the situation whatever the law applicable to the contract may be.

Thus the paragraph merely deals with the application of mandatory rules (lois d'application immédiate; leggi di applicazione necessaria, etc) in a different way from paragraph 1 ([40a]).

Article 8

Material validity

1. Article 8 (1) provides that the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

The paragraph is intended to cover all aspects of formation of the contract other than general validity. As we have emphasized previously in paragraph 9 of the comments on Article 3, this provision is also applicable with regard to the existence and validity of the parties' consent as to choice of the law applicable.

The word 'term' has been adopted to cover cases in which there is a dispute as to the validity of a term of the contract, such as a choice of law clause.

2. Notwithstanding the general rule in paragraph 1, paragraph 2 provides a special rule which relates only to the existence and not to the validity of consent.

According to this special rule a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

The solution adopted by the Group in this respect is designed *inter alia* to solve the problem of the implications of silence by one party as to the formation of the contract.

The word 'conduct' must be taken to cover both action and failure to act by the party in question; it does not, therefore, relate solely to silence.

The words 'if it appears from the circumstances' mean that the court must have regard to all the circumstances of the case, not solely to those in which the party claiming that he has not consented to the contract has acted. The Court will give particular consideration to the practices followed by the parties *inter se* as well as their previous business relationships.

According to the circumstances, the words 'a party' can relate either to the offeror or to the offeree.

The application of paragraph 2 can result in a decision releasing a party who would have been bound under the terms of paragraph 1, but it can never produce the opposite effect of holding that a contract exists which is non-existent by its proper law.

Article 9 (4) contains a special rule relating to acts intended to have legal effect, such as, in accordance with the law of many countries, an offer. Such acts have not been mentioned in Article 8. Nonetheless, the rules in Article 8 apply to such acts by way of analogy.

Article 9

Formal validity

Article 9 deals with the formal validity of contracts and acts intended to have legal effect. The first four paragraphs lay down rules governing all contracts and acts intended to have legal effect. The last two paragraphs lay down special rules peculiar to certain types of contract.

I. **General rules** (paragraphs 1 to 4 inclusive)

The scope of these general rules needs to be specified before indicating the various laws which they declare to be applicable.

A. The scope of the general rules

1. Acts to which they apply

Article 9 applies to contracts and unilateral acts intended to have legal effect. The preliminary draft of 1972 used only the term 'act intended to have legal effect' (acte juridique) which, in the terminology originating from Roman law, includes both categories. The inclusion in Article 9 of both contracts and acts intended to have legal effect, mentioned successively, is due merely to a wish to ensure clarity, since the rules to be applied are based on the same principles in both cases.

Unilateral acts intended to have legal effect which fall within the scope of the Article are those which are related to an existing or contemplated contract. Acts relating to a concluded contract can be extremely varied: notice of termination, remission of a debt, declaration of rescission or repudiation, etc.

But the act must be connected with a contract. A unilateral undertaking, unconnected with a contract, as for example, in some legal systems, a recognition of a debt not arising under a contract, or a unilateral act creating, transferring or extinguishing a right *in rem*, would not fall within the scope of Article 9 or of any other provision in the Convention since the latter is concerned only with contractual obligations.

Such an act must also, quite clearly, relate to a contract falling within the scope of the convention. Article 9 does not apply to the formal validity of acts relating to contracts excluded from the convention under Article 1 (2) and (3).

There is no provision expressly referring to 'public acts'. This omission is intentional. First, the concept of a public act is not recognized in all the legal systems and could raise awkward problems of definition. Moreover, it seems wrong for there to be special provisions governing the formal validity of private law acts concluded before public officials. Indeed, as has recently been pointed out ([41]), it is because a public official can draw up an instrument only in accordance with the law from which he derives his authority that the formal validity for the act concluded before him is necessarily subject to that law. If, for example, a notary has not observed the law from which he derives his authority, the contract he has drawn up will not of course be a valid notarial act. But it will not be entirely void if the law which governs its substance (and which may also determine its formal validity by virtue of Article 9) does not require a special form for that type of contract.

The general rules accordingly apply to 'public acts'. This has the advantage of validating acts drawn up by a public official who has thought it appropriate, as happens in the Netherlands, to follow the forms laid down by the foreign law which governs the substance of the contract.

2. Article 9 does not define what is to be understood by the 'formal validity' of acts. It seemed realistic to leave open this difficult problem of definition, especially as its importance has been slightly reduced in consequence of the solutions found for the problem of the connecting factor which to some extent equate formal and material validity.

It is nevertheless permissible to consider 'form', for the purposes of Article 9, as including every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective([42]). This definition does not include the special requirements which have to be fulfilled where there are persons under a disability to be protected, such as the need in French law for the consent of a family council to an act for the benefit of a minor, or where an act is to be valid against third parties, for example the need in English law for a notice of a statutory assignment of a chose in action.

B. Laws to be applied

1. The principle of applying in the alternative the *lex causae* or the *lex loci actus*.

The system contained in Article 9 is a compromise between *favor negotii*, which tends to take a liberal attitude regarding the formalities required for acts, and the due observance of formalities which, most often, is merely giving effect to requirements of substance.

In supporting the former attitude, it did not seem possible to follow the example of the Hague Convention of 5 October 1961 concerning conflict of laws with regard to testamentary dispositions. *Favor testamenti* is justified by the fact that a will is an act of final disposition which by definition cannot be reenacted if its validity is challenged after the testator's death. This consideration does not affect other acts intended to have legal effect in the case of which excessive freedom with regard to formalities would result in

robbing of all effect the requirements in this field which are specified by the various legal systems, very often with a legitimate aim in view. Moreover, the connection between questions of form and questions of evidence (Article 14) makes it desirable to limit the number of laws applicable to formal validity.

On the other hand, in order to avoid parties being caught unawares by the annulment of their act on the ground of an unexpected formal defect, Article 9 has, nonetheless, laid down a fairly flexible system based on applying in the alternative either the law of the place where the contract was entered into (or in the case of a unilateral act the law of the country where the act was done) or else the law which governs its substance.

This choice of applicable laws appears to be sufficient and this is why the possibility of applying the law of the common nationality or habitual residence of the parties was rejected (43). On the other hand no priority has been accorded either to the *lex causae* or to the *lex loci actus*. If the act is valid to one of these two laws, that is enough to prevent defects of form under the other from affording grounds for nullity (44).

The Group did not examine the question of which of the two laws would apply to an action brought to annul the contract for formal defect in a case where the contract would be null and void according to both these laws. If, for example, the limitation period for bringing an action for annulment on the ground of a formal defect is not the same in the two legal systems, it may seem to be in keeping with the spirit of this Article to apply the law which provides for the shorter period and, in this respect, is more favourable than the other to the validity of the act.

Renvoi must be rejected as regards formal validity as in all other matters governed by the Convention (cf. Article 15).

2. Problems raised by applying the law governing the substance of the contract to the question of formal validity

The *lex causae* is already recognized as applicable, either as the principal law or as a subsidiary option, to the question of formal validity by the law of the Contracting States and its application is fully justified by the logical connection between substance and form (45).

The law governing the substance of the contract must be determined by reference to Articles 3, 4 and 6 of the Convention (for contracts provided for under Article 5, see II below, Special rules peculiar to certain contracts). Article 3 (2) specifically governs the formal consequences of a voluntary change by the parties in the law governing the substance of the contract. This text means that, on this assumption of changes in the connecting facts, it is enough for the contract to be formally valid in accordance with one or other of the laws successively called upon to govern the substance of the contract.

A difficulty will arise when a contract is subject to several laws, either because the parties have selected the law applicable to a part only of their contract (Article 3 (1)), or because the court itself, by way of exception, has proceeded to sever the contract (Article 4 (1)). Which of the laws governing the substance of the contract is to determine its formal validity? In such a case it would seem reasonable to apply the law applicable to the part of the contract most closely connected with the disputed condition on which its formal validity depends.

Article 8 (1), dealing with material validity, says that the existence and validity of a contract or of any term of a contract shall be determined by the law which would govern it under the Convention if the contract or term were valid. This is to avoid the circular argument that where there is a choice of the applicable law no law can be said to be applicable until the contract is found to be valid. A similar point arises in relation to formal validity under Article 9, and although the text does not expressly say so it is intended that 'the law which governs it under this Convention' should be the law which would govern the contract if it were formally valid.

3. Problems raised by applying the *locus regit actum* rule to the question of formal validity

The application of the law of the country in which a contract was entered into or in which a unilateral act was done, in order to determine the formal validity of the contract or act, results from the age-old maxim *locus regit actum*, recognized alike, usually as a principal rule, by the law of the Contracting States (46).

However a classic difficulty arises in determining the country in which the contract was entered into when the contract has been made between persons in different countries.

To resolve this difficulty it is first necessary to describe exactly what is meant by persons being or not being in the same country. Where the contract is concluded through the offices of one or more agents, Article 9 (3) indicates clearly that the place to be taken into consideration is where the agents are acting at the time when the contract is concluded. If the parties' agents (or one party and the agent of the other) meet in a given country and conclude the contract there, this contract is considered, within the meaning of paragraph 1, to be concluded between persons in

that country, even if the party or parties respresented were in another country at the time. Similarly, if the parties' agents (or one party and the agent of the other) are in different countries at the time when they conclude the contract, this contract is considered, within the meaning of paragraph 2, to be concluded between persons in different countries even if both the parties represented were in fact in the same country at the time.

The question of finding which law is the law of the place where the contract was entered into and therefore determines the formal validity of a contract made between persons in different countries, in the sense just indicated, has been very widely debated. Solutions consisting in fixing the conclusion of the contract either in the place where the offer was made or in the place where the acceptance was made have been rejected as rather artificial([47]). The solution consisting in applying to offer and acceptance separately the law of the country in which each was made, directly based on the Frankenstein draft for a European code of private international law and retained in the preliminary draft of 1972, and by the 1978 Swiss draft of Federal law on private international law, Article 125 (2), was also rejected. It is clear that there are numerous requirements as to formal validity which are laid down with regard to the contract itself, taken as a whole and not stage by stage. This is the case where, for example, two signatures are required or where the contract has to be made in duplicate. Accordingly, rather than split the law determining the formal validity of a contract, it seemed preferable to look for a law which would be applicable to the formal validity of the contract as a whole.

The choice was therefore between a liberal solution, retaining the application in the alternative of the law of one or other of the countries which the persons concluding the contract were at the time it was entered into, and a strict solution, requiring the cumulative application of these various laws. The liberal solution was adopted by Article 9 (2). When a contract is concluded between persons in different countries, it is formally valid if it satisfies the requirements as to form laid down by the law of one of those countries or of the law governing the substance of the contract.

4. Reservation regarding mandatory rules

Article 7 of the Convention, which contains a reservation in favour of the application of mandatory rules, may lead to the rejection of the liberal system based on the application in the alternative of either the law governing the substance of the contract or the law of the place where it was entered into. It may happen that certain formal requirements laid down by the law of the country with which a contract or act has a close connection have a mandatory character so marked that they could be applied even though the law of that country is not one of those which would normally determine formal validity under Article 9.

In this connection mention was made of the rules regarding form laid down by the law of the country where an employment contract is to be carried out, especially the requirement that a non-competition clause should be in writing, even though the oral form is permitted by the law of the place where the contract was entered into or under the law chosen by the parties.

Of course, under the system established by Article 7, it will be for the court hearing the case to decide whether it is appropriate to give effect to these mandatory provisions and consequently to disregard the rules laid down in Article 9.

II. **Special rules peculiar to certain contracts** (paragraphs 5 and 6)

Paragraphs 5 and 6 provide special rules for the formal validity of certain contracts made by consumers and of contracts the subject matter of which is a right in immovable property or a right to use immovable property. It would have been conceivable with regard to such contracts merely to apply Article 7 quite simply and, as an exception to Article 9, to allow, for example, the application of certain formal provisions for consumer protection laid down by the law of the consumer's habitual place of residence, or of certain mandatory requirements as to form imposed by the law of the country where the immovable property is situated.

This solution, however, was not thought adequate to ensure the effective application of these laws because of the discretionary power which Article 7 gives to the court hearing the case. It was accordingly decided to exclude the first four paragraphs of Article 9 completely in the case of contracts of these kinds.

The fifth paragraph of Article 9 deals with the contracts mentioned in Article 5 (1), entered into in the circumstances described in Article 5 (2), taking into account Article 5 (4) and (5).

Just as Article 5 protects the consumer, despite any choice of law specified in the contract, by imposing, as regards substance, the mandatory rules of the law of the country in which he has his habitual residence

(Article 5 (3)), Article 9 (5) imposes the rules of that same country with regard to formal validity. This is justified by the very close connection, in the context of consumer protection, between mandatory rules of form and rules of substance.

For the same reasons, it might have been expected that the formal validity of employment contracts would also have been made subject to mandatory attachment to the rules of a particular national law.

This idea, though at first contemplated, was finally rejected. Indeed, contrary to Article 5 which provides explicitly that consumer contracts, in the absence of any choice by the parties, shall be subject as regards formal validity to the law of the country where the consumer has his habitual residence, for the purpose of determining the connecting factors applying to employment contracts Article 6 of the Convention only introduces rebuttable presumptions which must be disregarded in cases where it appears from the circumstances that the employment contract is more closely connected with a country other than that indicated by these presumptions. Consequently, if it had been decided that the law governing the substance of the contract should be mandatory for determining the formal validity of employment contracts, it would have been impossible, at the time a contract was entered into, to determine the law governing its formal validity because of the uncertainty caused by Article 6. Therefore no special rule was laid down regarding the formal validity of employment contracts, but thanks to Article 7, it is to be expected that the mandatory rules regarding formal validity laid down by the law of the country where the work is to be carried out will frequently be found to apply.

The sixth paragraph of Article 9 deals with contracts the subject matter of which is a right in immovable property or a right to use immovable property. Such contracts are not subject to a mandatory connecting factor as regards substance, Article 4 (3) merely raising a presumption in favour of the law of the country where the immovable property is situated. It is clear, however, that if the law of the country where the immovable property is situated lays down mandatory rules determining formal validity, these must be applied to the contract, but only in the probably rather rare cases where, according to that law, these formal rules must be applied even when the contract has been entered into abroad and is governed by a foreign law.

The scope of this provision is the same as that of Article 4 (3).

Article 10

Scope of the applicable law

1. Article 10 defines the scope of the law applicable to the contract under the terms of this Convention [48].

The original preliminary draft contained no specific rule on this point. It confined itself to the provision in Article 15 that the law which governs an obligation also governs the conditions for its performance, the various ways in which it can be discharged, and the consequences of non-performance. However, since Article 11 of the preliminary draft defined in detail the scope of the law applicable to non-contractual obligations, the principal subject of Article 15 was the scope of the law of the contract.

2. Article 10 (1) lists the matters which fall within the scope of the law applicable to the contract. However, this list is not exhaustive, as is indicated by the words 'in particular'.

The law applicable to the contract under the terms of his Convention governs firstly its interpretation (subparagraph (a)).

Secondly the law applicable to the contract governs the performance of the obligations arising from the contract (subparagraph (b)).

This appears to embrace the totality of the conditions, resulting from the law or from the contract, in accordance with which the act is essential for the fulfilment of an obligation must be performed, but not the manner of its performance (in so far as this is referred to in the second paragraph of Article 10 or the conditions relating to the capacity of the persons who are to perform it (capacity being a matter excluded from the scope of the uniform rules, subject to the provisions of Article 11) or the conditions relating to the form of the act which is to be done in performance of the obligation.

The following therefore fall within the provisions of the first paragraph of Article 10: the diligence with which the obligation must be performed; conditions relating to the place and time of performance; the extent to which the obligation can be performed by a person other than the party liable; the conditions as to performance of the obligation both in general and in relation to certain categories of obligation (joint and several obligations, alternative obligations, divisible and indivisible obligations, pecuniary obligations); where performance consists of the payment of a sum of money, the conditions relating to the discharge of the debtor who has made the

payment, the appropriation of the payment, the receipt, etc.

Within the limits of the powers conferred upon the court by its procedural law, the law applicable to the contract also governs the consequences of total or partial failure to perform these obligations, including the assessment of damages insofar as this is governed by rules of law.

The assessment of damages has given rise to some difficulties. According to some delegations the assessment of the amount of damages is a question of fact and should not be covered by the Convention. To determine the amount of damages the court is obliged to take account of economic and social conditions in its country; there are some cases in which the amount of damages is fixed by a jury; some countries use methods of calculation which might not be accepted in others.

Other delegations countered these arguments, however, by pointing out that in several legal systems there are rules for determining the amount of damages; some international conventions fix limits as to the amount of compensation (for example, conventions relating to carriage); the amount of damages in case of non-performance is often prescribed in the contract and grave difficulties would be created for the parties if these amounts had to be determined later by the court hearing the action.

By way of compromise the Group finally decided to refer in subparagraph (c) solely to rules of law in matters of assessment of damages, given that questions of fact will always be a matter for the court hearing the action.

The expression 'consequences of breach' refers to the consequences which the law or the contract attaches to the breach of a contractual obligation, whether it is a matter of the liability of the party to whom the breach is attributable or of a claim to terminate the contract for breach. Any requirement of service of notice on the party to assume his liability also comes within this context.

According to subparagraph 1 (d), the law applicable to the contract governs the various ways of extinguishing obligations, and prescription and limitation of actions. This Article must be applied with due regard to the limited admission of severability (dépeçage) in Articles 3 and 4.

Subparagraph (e) also makes the consequences of nullity subject to the applicable law. The working party's principal objective in introducing this provision was to make the refunds which the parties have to pay each other subsequent to a finding of nullity of the contract subject to the applicable law.

Some delegations have indicated their opposition to this approach on the grounds that, under their legal systems, the consequences of nullity of the contract are non-contractual in nature. The majority of delegations have nevertheless said they are in favour of including such consequences within the scope of the law of contracts, but in order to take account of the opposition expressed provision had been made for any Contracting State to enter a reservation on this matter (Article 22 (1) (b)).

3. Article 10 (2) states that in relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

This is a restriction which is often imposed in the national law of many countries as well as in several international conventions. Many jurists have supported and continue to support this restriction on the scope of the law applicable to the contract even when the contractual obligation is performed in a country other than that whose law is applicable.

What is meant, however, by 'manner of performance' of an obligation? It does not seem that any precise and uniform meaning is given to this concept in the various laws and in the differing views of learned writers. The Group did not for its part wish to give a strict definition of this concept. It will consequently be for the *lex fori* to determine what is meant by 'manner of performance'. Among the matters normally falling within the description of 'manner of performance', it would seem that one might in any event mention the rules governing public holidays, the manner in which goods are to be examined, and the steps to be taken if they are refused(49).

Article 10 (2) says that a court may have regard to the law of the place of performance. This means that the court may consider whether such law has any relevance to the manner in which the contract should be performed and has a discretion whether to apply it in whole or in part so as to do justice between the parties.

Article 11

Incapacity

The legal capacity of natural persons or of bodies corporate or unincorporate is in principle excluded from the scope of the Convention (Article 1 (2) (a)

and (e)). This exclusion means that each Contracting State will continue to apply its own system of private international law to contractual capacity.

However, in the case of natural persons, the question of capacity is not entirely excluded. Article 11 is intended to protect a party who in good faith believed himself to be contracting with a person of full capacity and who, after the contract has been entered into, is confronted by the incapacity of the other contracting party. This anxiety to protect a party in good faith against the risk of a contract being held voidable or void on the ground of the other party's incapacity on account of the application of a law other than that of the place where the contract was concluded is clearly present in the countries which subject capacity to the law of the nationality ([50]).

A rule of the same kind is also thought necessary in the countries which make capacity subject to the law of the country of domicile. The only countries which could dispense with it are those wich subject capacity to the law of the place where the contract was entered into or to the law governing the substance of the contract.

Article 11 subjects the protection of the other party to the contract to very stringent conditions. First, the contract must be concluded between persons who are in the same country. The Convention does not wish to prejudice the protection of a party under a disability where the contract is concluded at a distance, between persons who are in different countries, even if, under the law governing the contract, the latter is deemed to have been concluded in the country where the party with full capacity is.

Secondly, Article 11 is only to be applied where there is a conflict of laws. The law which, according to the private international law of the court hearing the case, governs the capacity of the person claiming to be under a disability must be different from the law of the country where the contract was condcluded.

Thirdly, the person claiming to be under a disability must be deemed to have full capacity by the law of the country where the contract was concluded. This is because it is only in this case that the other party may rely on apparent capacity.

In principle these three conditions are sufficient to prevent the incapacitated person from pleading his incapacity against the other contracting party. This will not however be so 'if the other party to the contract was aware of his incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence'. This wording implies that the burden of proof lies on the incapacitated party. It is he who must establish that the other party knew of his incapacity or should have known of it.

Article 12

Voluntary assignment

1. The subject of Article 12 is the voluntary assignment of rights.

Article 12 (1) provides that the mutual obligations of assignor and assignee under a voluntary assignment of a right against another person (the debtor) shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

Interpretation of this provision gives rise to no difficulty. It is obvious that according to this paragraph the relationship between the assignor and assignee of a right is governed by the law applicable to the agreement to assign.

Although the purpose and meaning of the provision leave hardly any room for doubt, one wonders why the Group did not draft it more simply and probably more elegantly. For example, why not say that the assignment of a right by agreement shall be governed in relations between assignor and assignee by the law applicable to that agreement.

Such a form of words had in fact been approved initially by most of the delegations, but it was subsquently abandoned because of the difficulties of interpretation which might have arisen in German law, where the expression 'assignment' of a right by agreement includes the effects of it upon the debtor: this was expressly excluded by Article 12 (2).

The present wording was in fact finally adopted precisely to avoid a form which might lead to the idea that the law applicable to the agreement for assignment in a legal system in which it is understood as 'Kausalgeschäft' also determines the conditions of validity of the assignment with respect to the debtor.

2. On the contrary, under the terms of Article 12 (2) it is the law governing the right to which the assignment relates which determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

The words 'conditions under which the assignment can be invoked' cover the conditions of

transferability of the assignment as well as the procedures required to give effect to the assignment in relation to the debtor.

Notwithstanding the provisions of paragraph 2, the matters which it covers, with the sole exception of assignability, are governed, as regards relations between assignor and debtor if a contract exists between them, by the law which governs their contract in so far as the said matters are dealt with in that contract.

Subrogation

1. The substitution of one creditor for another may result both from the voluntary assignment of a right (or assignment properly so called) referred to in Article 12 and from the assignment of a right by operation of law following a payment made by a person other than the debtor.

According to the legislation in various Member States of the Community, 'subrogration' involves the vesting of the creditor's rights in the person who, being obliged to pay the debt with or on behalf of others, had an interest in satisfying it: this is so under Article 1251—3 of the French Civil Code and Article 1203—3 of the Italian Civil Code. For example, in a contract of guarantee the guarantor who pays instead of the debtor succeeds to the rights of the creditor. The same occurs when a payment is made by one of a number of debtors who are jointly and severally liable or when an indivisible obligation is discharged.

Article 13 of the Convention embodies the conflict rule in matters of subrogation of a third party to the rights of a creditor. Having regard to the fact that the Convention applies only to contractual obligations, the Group thought it proper to limit the application of the rule adopted in Article 13 to assignments of rights which are contractual in nature. Therefore this rule does not apply to subrogation by operation of law when the debt to be paid has its origin in tort (for example, where the insurer succeeds to the rights of the insured against the person causing damage).

2. According to the wording of Article 13 (1), where a person (the creditor) has a contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

The law which governs the third person's duty to satisfy the creditor (for example, the law applicable to the contract of guarantee, where the guarantor has paid instead of the debtor) will therefore determine whether and to what extent the third person is entitled to exercise the rights of the creditor against the debtor according to the law governing their contractual relations.

In formulating the rule under analysis the Group made a point of considering situations in which a person has paid without being obliged so to do by contract or by law but having an economic interest recognized by law as anticipated by Article 1251—3 of the French Civil Code and Article 1203—3 of the Italian Civil Code. In principle the same rule applies to these situations, but the court has a discretion in this respect.

As regards the possibility of a partial subrogation such as that provided for by Article 1252 of the French Civil Code and by Article 1205 of the Italian Civil Code, it seems right that this should be subject to the law applicable to the subrogation.

In addition, when formulating Article 13 the Group envisaged the possibility that the legal relationship between the third party and the debtor was governed by a contract. This contract will obviously be governed by the law which is applicable to it by the terms of this Convention. Article 13 in no way affects this aspect of the relationship between the third party and the debtor.

3. Article 13 (2) extends the same rule in paragraph 1 to cases in which several person are liable for the same contractual obligation (co-debtors) and the creditor's interest has been discharged by one of them.

4. As well as the problem of voluntary assignment of rights and the problem of assignment of rights by operation of law (Articles 12 and 13), there exists the problem of assignment of duties. However, the Group did not wish to resolve this problem, because it is new and because there are still many uncertainties as to the solution to be given.

Article 14

Burden of proof, etc.

Article 14 deals with the law to be applied to certain questions of evidence.

There is no rule of principle dealing with evidence in general. In the legal systems of the Contracting States, except as regards the burden of proof,

questions of evidence (both as regards facts and acts intended to have legal effect and as regards foreign law) are in principle subject to the law of the forum. This principle is, however, subject to a certain number of exceptions which are not the same in all these legal systems. Since it was decided that only certain questions of evidence should be covered in Article 14, it was thought better not to bind the interpretation thereof by a general provision making the rules of evidence subject to the law of the forum on questions not decided by the Convention, such as, for example, the taking of evidence abroad or the evidential value of legal acts. In order that there should be no doubt as to the freedom retained by the States regarding questions of evidence not decided by the Convention, Article 1 (2) (h) excludes evidence and procedure from the scope of the Convention, expressly without prejudice to Article 14.

Two major questions have been covered and are each the subject of a separate paragraph. These are the burden of proof on the one hand and the recognition of modes of proving acts intended to have legal effect on the other. After considerable hesitation the Group decided not to deal with the problem of evidential value.

A. Burden of proof

The first paragraph of Article 14 provides for the application of the law of the contract 'to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof'. Presumptions of law, relieving the party in whose favour they operate from the necessity of producing any evidence, are really rules of substance which in the law of contract contribute to making clear the obligations of the parties and therefore cannot be separated from the law which governs the contract. By way of example, where Article 1731 of the French Civil Code provides that 'where no inventory of the state of the premises has been taken, the lessee shall be deemed to have received them in good tenantable repair and must, in the absence of proof to the contrary, restore them in such condition', the Article is in reality determining the obligation of the lessee to restore the let premises. It is therefore logical that the law of the contract should apply here.

The same observation applies to rules determining the burden of proof. By way of example, Article 1147 of the French Civil Code provides that a debtor who has failed to fulfil his obligation shall be liable for damages 'unless he shows that this failure is due to an extraneous cause outside his control'. This text determines the burden of proof between the parties. The creditor must prove that the obligation has not been fulfilled, the debtor must prove that the failure is due to an extraneous cause. But in dividing the burden, the text establishes the debtor's obligations on a vital point, since the debtor is liable for damages even if the failure to fulfil is not due to a proven fault on his part. The rule is accordingly a rule of substance which can only be subject to the law of the contract.

Nevertheless the text of the first paragraph of Article 14 does contain a restriction. The burden of proof is not totally subject to the law of the contract. It is only subject to it to the extent that the law of the contract determines it with regard to contractual obligations ('in the law of contract'), that is to say only to the extent to which the rules relating to the burden of proof are in effect rules of substance.

This is not always the case. Some legal systems recognize rules relating to the burden of proof, sometimes even classed as presumptions of law, which clearly are part of procedural law and which it would be wrong to subject to the law of the contract. This is the case, for example, with the rule whereby the claim of a party who appears is deemed to be substantiated if the other party fails to appear, or the rule making silence on the part of a party to an action with regard to facts alleged by the other party equivalent to an admission of those facts.

Such rules do not form part of 'the law of contract' and accordingly do not fall within the choice of law rule established by Article 14 (1).

B. Admissibility of modes of proving acts intended to have legal effect

Paragraph 2 of Article 14 deals with the admissibility of modes of proving acts intended to have legal effect (in the sense of *voluntas negotium*).

The text provides for the application in the alternative of the law of the forum or of the law which determines the formal validity of the act. This liberal solution favouring proof of the act is already recognized in France and in the Benelux countries([51]). It seems to be the only solution capable of reconciling the requirements of the law of the forum with the desire to respect the legitimate expectations of the parties at the time of concluding their act.

The law of the forum is normally employed to determine the means which may be used for proving an act intended to have legal effect, which in this context includes a contract. If, for example, that law allows a contract to be proved by witnesses, it should be followed, irrespective of any more stringent provisions on the point contained in the law

governing the substance or formal validity of the act.

On the other hand, in the opposite case, if the law governing the formal validity of the act only requires oral agreement and allows such an agreement to be proved by witnesses, the expectations of parties who had relied on that law would be disappointed if such proof were to be held inadmissible solely on the ground that the law of the trial court required written evidence of all acts intended to have legal effect. The parties must therefore be allowed to employ the modes of proof recognized by the law governing formal validity.

Nevertheless this liberalism should not lead to imposing on the trial court modes of proof which its procedural law does not enable it to administer. Article 14 does not deal with the administration of modes of proof, which the legal system of each Contracting State makes subject to the law of the trial court. Admitting the application of a law other than that of the forum to modes of proof ought not to lead to the rules of the law of the forum, as regards the administration of the modes of proof, being rendered nugatory.

This is the explanation of the proviso which in substance enables a court, without reference to public policy, to disregard modes of proof which the law of procedure cannot generally allow, such as an affidavit, the testimony of a party or common knowledge. Consideration was also given to the case of rights subject to registration in a public register, holding that the authority charged with keeping that register could, owing to that provision, only recognize the modes of proof provided for by its own law.

Such being the general system adopted, a proviso had to be added regarding the law determining formal validity applicable as an alternative to the law of the forum.

The text refers to 'any of the laws referred to in Article 9 under which that contract or act is formally valid'. This expression means that if, for example, the act is formally valid under the law governing the substance of the contract but is not formally valid under the law of the place where it was done, the parties may employ only the modes of proof provided for by the first of these two laws, even if the latter is more liberal as regards proof. The reference in Article 14 (2) to the law governing formal validity is clearly based on the assumption that the law governing formal validity has been observed. On the other hand, if the act is formally valid according to both laws (*lex causae* and *lex loci actus*) mentioned in Article 9, the parties will be able to employ the modes of proof provided for by either of those laws.

C. There is no provision dealing with the evidential value of acts intended to have legal effect. The preliminary draft of 1972 contained a provision covering two questions derived, in Roman law countries, from the concept of evidential value; the question how far a written document affords sufficient evidence of the obligations contained in it and the question of the modes of proof to add to or contradict the contents of the document — 'outside and against the content' of such a document, according to the old phraseology of the Code Napoléon (Article 1341). Despite long discussion, no agreement could be reached between the delegations and it was therefore decided to leave the question of evidential value outside the scope of the Convention.

Article 15

Exclusion of renvoi

This Article excludes renvoi.

It is clear that there is no place for renvoi in the law of contract if the parties have chosen the law to be applied to their contract. If they have made such a choice, it is clearly with the intention that the provisions of substance in the chosen law shall be applicable; their choice accordingly excludes any possibility of renvoi to another law(52).

Renvoi is also excluded where the parties have not chosen the law to be applied. In this case the contract is governed, in accordance with Article 4 (1), by the law of the country with which it is most closely connected. Paragraph 2 introduces a presumption that that country is the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence. It would not be reasonable for a court, despite this express localization, to subject the contract to the law of another country by introducing renvoi, solely because the rule of conflict of laws in the country where the contract was localized contained other connecting factors. This is equally so where the last paragraph of Article 4 applies and the court has decided the place of the contract with the aid of indications which seem to it decisive.

More generally, the exclusion of renvoi is justified in international conventions regarding conflict of laws. If the Convention attempts as far as possible to localize the legal situation and to determine the country with which it is most closely connected, the law specified by the conflicts rule in the Convention should not be allowed to question this determination of place. Such, moreover, has been the solution adopted since 1951 in the conventions concluded at The Hague.

Article 16

'Ordre public'

Article 16 contains a precise and restrictively worded reservation in favour of public policy ('ordre public').

First it is expressly stated that, in the abstract and taken as a whole, public policy is not to affect the law specified by the Convention. Public policy is only to be taken into account where a certain provision of the specified law, if applied in an actual case, would lead to consequences contrary to the public policy ('ordre public') of the forum. It may therefore happen that a foreign law, which might in the abstract be held to be contrary to the public policy of the forum, could nevertheless be applied, if the actual result of its being applied does not in itself offend the public policy of the forum.

Secondly, the result must be 'manifestly' incompatible with the public policy of the forum. This condition, which is to be found in all the Hague Conventions since 1956, requires the court to find special grounds for upholding an objection([53]).

Article 16 provides that it is the public policy of the forum which must be offended by the application of the specified law. It goes without saying that this expression includes Community public policy, which has become an integral part of the public policy ('ordre public') of the Member States of the European Community.

Article 17

No retrospective effect

Article 17 means that the Convention has no retrospective effect on contracts already in existence. It applies only to contracts concluded after it enters into force, but the entry into force must be considered separately for each State since the Convention will not enter into force simultaneously in all the contracting States (see Article 29). Of course, there is no provision preventing a court of a contracting State with respect to which the Convention has not yet entered into force from applying it in advance unter the concept of *ratio scripta*.

Article 18

Uniform interpretation

This Article is based on a formula developed by the United Nations Commission on International Trade Law.

The draft revision of the uniform law on international sales and the preliminary draft of the Convention on prescription and limitation of actions in international sales contained the following provision: 'In the interpretation and application of this Convention, regard shall be had to its international character and to the necessity of promoting uniformity'. This provision, whose wording was slightly amended, has been incorporated in the United Nations Convention on contracts for the international sale of goods (Article 7) signed in Vienna on 11 April 1980.

Article 18 operates as a reminder that in interpreting an international convention regard must be had to its international character and that, consequently, a court will not be free to assimilate the provisions of the Convention, in so far as concerns their interpretation, to provisions of law which are purely domestic. It seemed that one of the advantages of this Article might be to enable parties to rely in their actions on decisions given in other countries.

It is within the spirit of this Article that a solution must be found to the problem of classification, for which, following the example of the Benelux uniform law, the French draft and numerous conventions of The Hague, the Convention has refrained from formulating a special rule.

Article 18 will retain its importance even if a protocol subjecting the interpretation of the Convention to the Court of Justice of the European Communities is drawn up pursuant to the Joint Declaration of the Representatives of the Governments made when the Convention was opened for signature on 19 June 1980.

Article 19

States with more than one legal system

This Article is based on similar provisions contained in some of the Hague Conventions (see, for example, the Convention on the law applicable to matrimonial property regimes, Articles 17 and 18 and the Convention on the law applicable to agency, Articles 19 and 20).

According to the first paragraph, where a State has several territorial units each with its own rules of law in respect of contractual obligations, each of those units will be considered as a country for the purposes of the Convention. If, for example, in the case of Article 4, the party who is to effect the performance which is characteristic of the contract has his habitual residence in Scotland, it is with Scottish law that the contract will be deemed to be most closely connected.

Paragraph 2, which is of special concern to the United Kingdom, covers the case where the situation is connected with several territorial units in a single country but not with another State. In such a case there is a conflict of laws, but it is a purely domestic matter for the State concerned which consequently is under no obligation to resolve it by applying the rules of the Convention.

Article 20

Precedence of Community law

This Article is intended to avoid the possibility of conflict between this Convention and acts of the Community institutions, by according precedence to the latter. The text is based on that of Article 52 (2) of the Convention of 27 September 1968 as revised by the Accession Convention of 9 October 1978.

The Community provisions which will have precedence over the Convention are, as regards their object, those which, in relation to particular matters, lay down rules of private international law with regard to contractual obligations. For example, the Regulation on conflict of laws with respect to employment contracts will, when it has been finally adopted, take precedence over the Convention.

The Governments of the Member States have, nevertheless, in a joint declaration, expressed the wish that these Community instruments will be consistent with the provisions of the Convention.

As regards the form which these instruments are to take, the Community provisions contemplated by Article 20 are not only acts of the institutions of the European Communities, that is to say principally the Regulations and the Directives as well as the Conventions concluded by those Communities, but also national laws harmonized in implementation of such acts. A law or regulation adopted by a State in order to make its legislation comply with a Directive borrows, as it were, from the Directive its Community force, thus justifying the precedence accorded to it over this Convention.

Finally, the precedence which Article 20 accords to Community law applies not only to Community law in force at the date when this Convention enters into force, but also to that adopted after the Convention has entered into force.

Article 21

Relationship with other Conventions

This Article, which has its equivalent in the Hague Conventions on the law applicable to matrimonial property regimes (Article 20) and on the law applicable to agency (Article 22) means that this Convention will not prejudice the application of any other international agreement, present or future, to which a Contracting State is or becomes party, for example, to Conventions relating to carriage. This leaves open the possibility of a more far-reaching international unificatin with regard to all or part of the ground covered by this Convention.

This provision does not of course eliminate all possibility of difficulty arising from the combined application of this Convention and another concurrent Convention, especially if the latter contains a provision similar to that in Article 21. But the States which are parties to several Conventions must seek a solution to these difficulties of application without jeopardizing the observance of their international obligations.

Moreover, Article 21 must be read in conjunction with Articles 24 and 25. The former specifies the conditions under which a contracting State may become a party to a multilateral Convention after the date on which this Convention enters into force with respect thereto. The latter deals with the case where the conclusion of other Conventions would prejudice the unification achieved by this Convention.

Article 22

Reservations

This Article indicates the reservations which may be made to the Convention, the reasons for which have been set out in this report as regards Articles 7 (1) and 10 (1) (e). Following the practice generally applied, in particular in the Hague Conventions, it lays down the procedure by means of which these reservations can be made or withdrawn.

TITLE III

FINAL PROVISIONS

Article 23

Unilateral adoption by a contracting State of a new choice of law rule

Article 23 is an unusual text since it allows the contracting States to make unilateral derogations from the rules of the Convention. This weakening of its mandatory force was thought desirable because of the very wide scope of the Convention and the very general character of most of its rules. The case was envisaged where a State found it necessary for political, economic or social reasons to amend a choice of law rule and it was thought desirable to find a solution sufficiently flexible to enable States to ratify the Convention without having to denounce it as soon as they were forced to disregard its rules on a particular point.

The possibility of making unilateral derogations from the Convention is, however, subject to certain conditions and restrictions.

First, derogation is only possible if it consists in adopting a new choice of law rule in regard to a particular category of contract. For example, Article 23 would not authorize a State to abandon the general principle of the Convention. But it would enable it to adopt, under the conditions specified, a particular choice of law rule different from that of the Convention with respect, for example, to contracts made by travel agencies or to contracts for correspondence courses where the specialist nature of the contract could justify this derogation from the common rule. It is of course understood that the derogation procedure shall only be imposed on States if the contract for which they wish to adopt a new choice of law rule falls within the scope of the Convention.

Secondly, such a derogation is subject to procedural conditions. The State which wishes to derogate from the Convention must inform the other signatory States through the Secretary-General of the Council of the European Communities. The latter shall, if a State so requests, arrange for consultation between the signatory States in order to reach unanimous agreement. If, within a period of two years, no State has requested consultation or no agreement has been able to be reached, the State may then amend its law in the manner indicated.

The Group considered whether this procedure should apply to situations where the contracting States would wish to adopt a rule of the kind referred to in Article 7 of the Convention, i.e. a mandatory rule which must be applied whatever the law applicable to the contract. It was considered that the States should not be bound to submit themselves to the Article 23 procedure before adopting such a rule. But to escape the application of Article 23 the rule in question must meet the criteria of Article 7 and be explicable by the strong mandatory character of the rule of substantive law which it lays down. It is not the intention that the contracting States should be able to avoid the conditions of Article 23 by disguising under the form of a mandatory rule of the Article 7 kind a rule of conflict dealing with matters whose absolute mandatory nature is not established.

Articles 24 and 25

New Conventions

The procedure for consultation imposed under Article 23 on a State intending to derogate from the Convention by amending its national law is also imposed on a State which wishes to derogate from the Convention on becoming a party to another Convention.

This system of 'freedom under supervision' imposed on contracting States applies only to conventions whose main object or whose principal aim or one of whose principal aims is to lay down rules of private international law concerning any of the matters governed by this Convention. Consequently the States are free to accede to a Convention which consolidates the material law of such and such a contract, with regard, for example, to transport and which contains, as an ancillary provision, a rule of private international law. But, within the area thus defined, the consultation procedure applies even to

Conventions which were open for signature before the entry into force of the present Convention.

Article 24 (2) further restricts the scope of the obligation imposed on the States by specifying that the procedure in the first paragraph need not apply:

1. if the object of the new Convention is to revise a former Convention. The opposite solution would have had the unfortunate effect of obstructing the modernization of existing Conventions;

2. if one or more contracting States or the European Communities are already parties to the new Convention;

3. if the new Convention is concluded within the framework of the European Treaties particularly in the case of a multilateral Convention to which one of the Communities is already party. These rules are in harmony with the precedence of Community law provided for under Article 20.

Article 24 therefore establishes a clear distinction between Conventions to which contracting States may freely become parties and those to which they may become parties only upon condition that they submit to consultation procedure.

For Conventions of the former class, Article 25 provides for the case where the conclusion of such agreements prejudiced the unification achieved by this Convention. If a contracting State considers that such is the case, it may request the Secretary-General of the Council of the European Communities to open consultation procedure. The text of the Article implies that the Secretary-General of the Council possesses a certain discretionary power. The Joint Declaration annexed to this Convention in fact provides that, even before the entry into force of this Convention, the States will confer together if one of them wishes to become a party to such a Convention.

For Conventions of the latter class, the consultation procedure is the same as that of Article 23 except that the period of two years is here reduced to one year.

Article 26

Revision

This Article provides for a possible revision of the Convention. It is identical with Article 67 of the Convention of 27 September 1968.

Articles 27 to 33

Usual protocol clauses

Article 27 defines the territories of the Member States to which the Convention is to apply (cf. Article 60 of the revised Convention of 27 September 1968). Articles 28 and 29 deal with the opening for signature of the Convention and its ratification. Article 28 does not make any statement on the methods by which each contracting State will incorporate the provisions of the Convention into its national law. This is a matter which by international custom is left to the sovereign discretion of States. Each contracting State may therefore give effect to the Convention either by giving it force of law directly or by including its provisions into its own national legislation in a form appropriate to that legislation. The most noteworthy provision is that of Article 29 (1) which provides for entry into force after seven ratifications. It appeared that to require ratification by all nine contracting States might result in delaying entry into force for too long a period.

Article 30 lays down a duration of 10 years, automatically renewable for five-year periods. For States which ratify the Convention after its entry into force, the period of 10 years or five years to be taken into consideration is that which is running for the first States in respect of which the Convention entered into force (Article 29 (1)). Article 30 (3) makes provision for denunciation in manner similar to the Hague Conventions (see for example Article 28 Agency Convention). Such a denunciation will take effect on expiry of the period of 10 years or five years as the case may be (cf. Article 30 (3)). This Article has no equivalent in the Convention of 27 September 1968. The difference is explained by the fact that this Convention, unlike that of 1968, is not directly based on Article 220 of the Treaty of Rome. It is a Convention freely concluded between the States of the Community and not imposed by the Treaty.

Articles 31 and 33 entrust the management of the Convention (deposit of the Convention and notification to the signatory States) to the Secretary-General of the Council of the European Communities.

No provision is made for third States to accede to the Convention. The question was discussed by the Group but it was unable to reach agreement. In these circumstances, if a third State asked to accede to the Convention, there would have to be consultation among the Member States.

On the other hand a solution was found to the position, *vis-á-vis* the Convention, of States which might subsequently become members of the European Community.

The Group considered that the Convention itself could not deal with this question as it is a matter which falls within the scope of the Accession Convention with new members. Accordingly it simply drew up a joint declaration by the contracting States expressing the view that new Member States should be under an obligation also to accede to this Convention.

Protocol relating to the Danish Statute on Maritime Law — Article 169

The Danish Statute on Maritime Law is a uniform law common to the Scandinavian countries. Due to the method applied in Scandinavian legal cooperation it is not based upon a Convention but a result of the simultaneous introduction in the Parliaments of identical bills.

Article 169 of the Statute embodies a number of choice of law rules. These rules are partly based upon the bills of lading Convention 1924 as amended by the 1968 Protocol (The Hague — Visby rules). To the extent that that is the case, they are upheld as a result of Article 21 of the present Convention, even after its ratification by Denmark.

The rule in Article 169, however, provides certain additional choice of law rules with respect to the applicable law in matters of contracts of carriage by sea. These could have been retained by Denmark under Article 21 if the Scandinavian countries had cooperated by means of Conventions. It has been accepted that the fact that another method of cooperation has been followed should not prevent Denmark from retaining this result of Scandinavian cooperation in the field of uniform legislation. The rule in the Protocol permitting revision of Article 169 without following the procedure prescribed in Article 23 corresponds to the rule in Article 24 (2) of the Convention with respect to revision of other Conventions to which the States party to this Convention are also party.

NOTES

relating to the report on the Convention on the law applicable to contractual obligations

(1) Minutes of the meeting of 26 to 28 February 1969.

(2) Minutes of the meeting of 26 to 28 February 1969, pages 3, 4 and 9.

(3) Commission document 12.665/XIV/68.

(4) Minutes of the meeting of 26 to 28 February 1969.

(5) Minutes of the meeting of 20 to 22 October 1969.

(6) Minutes of the meeting of 2 and 3 February 1970.

(7) See the following Commission documents: 12.153.XIV.70 (questionnaire prepared by Professor Giuliano and replies of the rapporteurs); 6.975/XIV/70 (questionnaire prepared by Mr Van Sasse van Ysselt and replies of the rapporteurs); 15.393/XIV/70 (questionnaire prepared by Professor Lagarde and replies of the rapporteurs).

(8) The meetings were held on the following dates: 28 September to 2 October 1970; 16 to 20 November 1970; 15 to 19 February 1971; 15 to 19 March 1971; 28 June to 2 July 1971; 4 to 8 October 1971; 29 November to 3 December 1971; 31 January to 3 February 1972; 20 to 24 March 1972; 29 to 31 May 1972; 21 to 23 June 1972.

(9) Minutes of the meeting of 21 to 23 June 1972, page 29 *et seq.*

(10) The meetings were held on the following dates: 22 to 23 September 1975; 17 to 19 December 1975; 1 to 5 March 1976; 23 to 30 June 1976; 16 to 17 December 1976; 21 to 23 February 1977; 3 to 6 May 1977; 27 to 28 June 1977; 19 to 23 September 1977; 12 to 15 December 1977; 6 to 10 March 1978; 5 to 9 June 1978; 25 to 28 September 1978; 6 to 10 November 1978; 15 to 16 January 1979; 19 to 23 February 1979.

(11) The list of government experts who took part in the work of this *ad hoc* working party or in the work of the working party chaired by Mr Jenard is attached to this report.

(12) The work done on company law by the European Communities falls into three categories. The first category consists of the Directives provided for by Article 54 (3) (g) of the EEC Treaty. Four of these Directives are already in force. The first, issued on 9 March 1968 (OJ No L 65, 14. 3. 1968), concerns disclosure, the extent to which the company is bound by acts done on its behalf, and nullity, in relation to public limited companies. The second, issued on 13 December 1976 (OJ No L 26, 31. 1. 1977), concerns the formation of public limited companies and the maintenance and alteration of their capital. The third, issued on 9 October 1978 (OJ No L 295, 20. 10. 1978), deals with company mergers, and the fourth, issued on 25 July 1978 (OJ No L 222, 14. 8. 1978), relates to annual accounts. Four other proposals for Directives made by the Commission are currently before the Council. They concern the structure of 'sociétés anonymes' (OJ No C 131, 13. 12. 1972), the admission of securities to quotation (OJ No C 131, 13. 12. 1972), consolidated accounts (OJ No C 121, 2. 6. 1976) and the minimum qualifications of persons who carry out legal audits of company accounts (OJ No C 112, 13. 5. 1978). The second category comprises the Conventions provided for by Article 220 of the EEC Treaty. One of these concerns the mutual recognition of companies and legal persons. It was signed at Brussels on 29 February 1968 (the text was published in Supplement No 2 of 1969 to the Bulletin of the European Communities). The draft of a second Convention will shortly be submitted to the

Council; it concerns international mergers. Finally, work has progressed with a view to creating a Statute for European companies. This culminated in the proposal for a Regulation on the Statute for European companies, dated 30 June 1970 (OJ No C 124, 10. 10. 1970).

(13) For the text of the judgment, see: *Rev. crit.*, 1911, p. 395; Journal *dr. int. privé*, 1912, p. 1156. For comments, cf. Batiffol and Lagarde, *Droit international privé* (2 vol.), sixth edition, Paris, 1974–1976, II, No 567–573, pp. 229–241.

(14) Kegel, *Internationales Privatrecht: Ein Studienbuch*, third edition, München–Berlin, 1971, § 18, pp. 253–257; Kegel, *Das IPR im Einführungsgesetz zum BGB*, in Soergel/Siebert, *Kommentar zum BGB* (Band 7), 10th edition, 1970, Margin Notes 220–225; Reithmann, *Internationales Vertragsrecht. Das internationale Privatrecht der Schuldverträge*, third edition, Köln, 1980, margin notes 5 and 6 Drobnig, *American-German Private International Law*, second edition, New York, 1972, pp. 225–232.

(15) Morelli, *Elementi di diritto internazionale privato italiano*, 10th edition, Napoli, 1971, Nos 97–98, pp. 154–157; Vitta, Op. cit., III, pp. 229–290.

(16) *Rev. crit.*, 1938, p. 661.

(17) Frederic, *La vente en droit international privé*, in *Recueil des Cours de l'Ac. de La Haye*, Tome 93 (1958–I), pp. 30–48; Rigaux, *Droit international privé*, Bruxelles, 1968, Nos 348–349; Vander Elst, *Droit international privé. Règles générales des conflits de lois dans les différentes matières de droit privé*, Bruxelles, 1977, No 56, p. 100 *et seq.*

(18) The text of the judgement in the *Alnati* case (Nederlandse Jurisprudentie 1967, p. 3) is published in the French in *Rev. crit.*, 1967, p. 522. (Struycken note on the Alnati decision). For the views of legal writers: cf.: J.E.J. Th. Deelen, Rechtskeuze in het Nederlands internationaal contractenrecht, Amsterdam, 1965; W.L.G. Lemaire, Nederlands internationaal privaatrecht, 1968, p. 242 *et ss.;* Jessurun d'Oliveira, Kotting, Bervoets en De Boer, Partij-invloed in het Internationaal Privaatrecht, Amsterdam 1974.

(19) The principle of freedom of choice has been recognized in England since at least 1796: *Gienar v. Mieyer* (1796), 2 Hy. Bl. 603.

(20) [1939] A.C. 277, p. 290.

(20a) See, e.g., the Employment Protection (Consolidation Act 1978, s. 153 (5) and the Trade Union and Labour Relations Act 1974, s. 30 (6)).

(20b) Unfair Contract Terms Act 1977, s. 27 (2).

(20c) Anton, *Private International Law*, pp. 187–192.

(20d) This includes cases where the parties have attempted to make an express choice but have not done so with sufficient clarity.

(20e) *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA* [1971] A.C. 572, at pp. 584, 587 to 591, 596 to 600, 604 to 607.

(21) Lando, *Contracts*, in *International Encyclopedia of Comparative Law*, vol. III, *Private International Law* (Lipstein, Chief editor), sections 51 and 54, pp. 28 to 29; Philip, *Dansk International Privat-og Procesret*, second edition, Copenhagen, 1972, p. 291.

(22) C.P.J.I., *Publications*, Série A, Nos 20 to 21, p. 122.

(23) *International Law Reports*, vol. 27, pp. 117 to 233, p. 165; *Riv. dir. int.*, 1963, pp. 230 to 249, p. 244.

(24) For a summary of this award, including extensive quotations, see: Lalive, *Un récent arbitrage suisse entre un organisme d'Etat et une société privée étrangère*, in *Annuaire suisse de dr. int.*, 1963, pp. 273 to 302, especially pp. 284 to 288.

(25) *Int. Legal Mat.*, 1979, pp. 3 to 37, at p. 11; *Riv. dir. int.*, 1978, pp. 514 to 517, at p. 518.

(26) The first Convention, dated 1 October 1976, was in force between the following eight European countries: Belgium, Denmark, Finland, France, Italy, Norway, Sweden, Switzerland. The Republic of Niger also acceded to the convention. For the text of the second and third conventions, see: *Associazione Italiana per l'Arbitrato, Conventions multilaterales et autres instruments en matière d'arbitrage*, Roma, 1974, pp. 86 to 114. For the text of the fourth convention see: *Conf. de La Haye de droit international privé, Recueil des conventions (1951–1977)*, p. 252. For the state of ratifications and accessions to these Conventions at 1 February 1976, see: Giuliano, Pocar and Treves, *Codice delle convenzioni di diritto internazionale privato e processuale*, Milano, 1977, pp. 1404, 1466 *et seq.*, 1497 *et seq.*

(27) Kegel, *Das IPR cit.*, margin notes 269 to 273 and notes 1 and 3; Batiffol and Lagarde, *Droit international privé* cit. II, No 592, p. 243; judgment of the French Cour de Cassation of 18 November 1959 in *Soc. Deckardt* c. *Etabl. Moatti*, in *Rev. crit.*, 1960, p. 83.

(28) Cf. Trib. Rotterdam, 2 April 1963, S § S 1963, 53; Kollewijn, De rechtskeuse achteraf, *Neth. Int. Law Rev.* 1964 225; Lemaire Nederlands Internationaal Privaatrecht, 1968, 265.

(29) *Riv. dir. int. priv. proc.*, 1967, pp. 126 *et seq.*

(30) V. Treves T., *Sulla volontà delle parti di cui all'art. 25 delle preleggi e sul momento del suo sorgere*, in *Riv. dir. int. priv. proc.*, 1967, pp. 315 *et seq.*

(31) For a comparative survey cf. Rabel, *The Conflict of Laws. A comparative study*, II, second edition, Ann Arbor, 1960, Chapter 30, pp. 432 to 486.

(32) Batiffol and Lagarde. *Droit international privé*, cit., II, Nos 572 *et seq.*, pp. 236 *et seq.*, and the essay of Batiffol, *Subjectivisme et objectivisme dans le droit international privé des contrats*, reproduit dans choix d'articles rassemblés par ses amis, Paris 1976, pp. 249 to 263.

(33) *Rev. crit.*, 1955, p. 330.

(34) According to German case law, 'hypothetischer-Parteiwille' does not involve seeking the supposed intentions of the parties, but evaluating the interests involved reasonably and equitably, on an objective basis, with a view to determing the law applicable (BGH, 14 April 1953, in IPRspr., 1952–53, No 40, pp. 151 *et seq.*). According to another case, 'in making this evaluation of the interests involved, the essential question is where the centre of gravity of the contractual relationship is situated' (BGH, 14 July 1955, in IPRspr., 1954–1955, No 67, pp. 206 *et seq.*). The following may be consulted on this concept: Kegel, Internationales Privatrecht ct. § 18, pp. 257 *et seq.*; Kegel, *Das IPR* cit., Nos 240 to 268, and the numerous references to judicial decisions given in the notes; Reithmann, *Internationales Vertragsrecht*, cit., pp. 42 *et seq.*

(35) See *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201 at p. 219; *Tomkinson* v. *First Pennsylvania Banking and Trust Co.* [1961] A.C. 1007 at pp. 1068, 1081 and 1082; *James Miller and Partners Ltd.* v. *Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583 at pp. 603, 605 and 606, 601 to 611; *Compagnie d'Armement Maritime SA* v. *Compagnie Tunisienne de Navigation SA* [1971] A.C. 572 at pp. 583, 587, 603; *Coast Lines Ltd* v. *Hudig and Veder Chartering NV*, [1972] 2 Q.B. 34 at pp. 44, 46, 50.

(36) *Mount Albert Borough Council* v. *Australian Temperance and General Mutual Life Assurance Society* [1938] A.C. 224 at p. 240 *per* Lord Wright; *The Assunzione* [1974] P. 150 at pp. 175 and 179 *per* Singleton L.J.

(36a) Anton, *Private International Law*, pp. 192 to 197.

(37) See to this effect: Cour de Cassation, judgment of 28 March 1953 (n. 827), *supra;* Cour de Cassation (full court), judgment of 28 June 1966 (n. 1680), *supra*; Cour de Cassation, judgment of 30 April 1969 (n. 1403), in *Officina Musso* c. *Société Sevplant (Riv. dir. int. priv. proc.*, 1970, pp. 332 *et seq.* For comments: Morelli,

Elementi di diritto internazionale privato, cit. n. 97, p. 155; Vitta. *Dir. intern. privato* (3 V) Torino 1972–1975 III, pp. 229 to 290.

(38) See especially Vischer, *Internationales Vertragsrecht*, Bern, 1962, especially pp. 89 to 144. This work also contains a table of the decisions in which this connection has been upheld. See also the judgment of 1 April 1970 of the Court of Appeal of Amsterdam, in *NAP NV* v. *Christophery*.

(39) This is the solution adopted by the Court of Limoges in its judgment of 10 November 1970, and by the Tribunal de commerce of Paris in its judgment of 4 December 1970 (*Rev. crit.*, 1971, pp. 703 *et seq.*). The same principle underlies the judgment of the Supreme Court of the Netherlands of 6 April 1973 (N.I. 1973 N. 371). See also Article 6 of the Hague Convention of 14 March 1978 on the law applicable to agency.

(40) For the judgments mentioned in the text see: *Rev. crit.* 1967 pp. 521 to 523; [1920] 2 K.B. 287; [1958] A.C. 301; [1963] 2 Q.B. 352 and more recently: R. Van Rooij, *De positie van publiekrechtelijke regels op het terrein van het internationaal privaatrecht*, 1976, 236 *et seq.*; L. Strikwerda, *Semipubliekrecht in het conflictenrecht*, 1978, 76 *et seq.*

(40a) On this Article, see the reflections of Vischer, *The antagonism between legal security and search of justice in the field of contract*, in Recueil de l'Académie de La Haye, Tome 142 (1974 II) pp. 21 to 30; Lando *op. cit.* n. 200 to 203 pp. 106 to 110; Segre (T), *Il diritto comunitario della concorrenza come legge d'applicazione necessaria*, in *Riv. dir. int. priv. et proc.* 1979 pp. 75 to 79; Drobnig, comments on Article 7 of the draft convention in *European Private International Law of obligations* edited by Lando — Von Hoffman-Siehr, Tübingen 1975, pp. 88 *et seq.*

(41) V. Delaporte, *Recherches sur la forme des actes juridiques en droit international privé*. Thesis Paris I, 1974, duplicated, No 123 *et seq.*

(42) V. Delaporte, *op. cit.*, No III.

(43) The possibility of applying a common national law is expressly provided for by Article 26 of the preliminary provisions to the Italian Civil Code. See also Article 2315 of the French draft of 1967.

(44) The solution adopted has been influenced by that approved, though in a wider setting, by the Corte di Cassazione italiana, 30 April 1969, *Riv. dir. int. priv. e pro.* 1970, 332 *et seq.* It is contrary to that given by the Cour de Cassation of France, 10 December 1974, Rev. crit. dr. inter. pr. 1975, 474, note A.P. The alternative solution also prevails in the United Kingdom, *Van Grutten v. Digby* (1862), 31 Beav. 561; cf. Cheshire and North, *P.I.L.* 10th edition, p. 220.

(45) Solution adopted in German (principal law), Article 11 E.G.B.G.B.; in Italy (subsidiary) Article 26 prel. pro. and in France (Cour de Cassation 26 May 1963, *Rev. crit. dr. int. pr.* 1964, 513, note Loussouarn; 10 December 1974 see note 44 above), and implicitly allowed by the Benelux Treaty (Article 19).

(46) Se references cited in the previous note.

(47) See, for example, Article 13 (4) of the Benelux Treaty 1969 which has not entered into force.

(48) For a comparative outline on this subject, see: Toubiana: *Le domaine de la loi du contrat en droit international privé* (contrats internationaux et dirigisme économique) Paris 1972, spec. pp. 1 to 146; Lando: *Contracts in International Encyclopedia of Comparative Law,* vol. III, *Private international law* (Lipstein, chief editor) sections 199 to 231 pp. 106 to 125.

(49) See on this subject Article 4 of the Hague Convention of 1955 on the law applicable to international sales of corporeal movables.

(50) See the Benelux Treaty 1969 (Article 2) not entered into force, the preliminary provisions of the Italian Civil Code (Article 1), the law introducing the German

Civil Code (Article 7) and French judicial decisions. Rec. 16 January 1861, Lizardi, D.P. 1861.1.193, S. 1861.1.305.

(51) See Article 20 (3) of the Benelux Treaty 1969 not entered into force and, in France, Cass. 24 February 1959 (Isaac), D. 1959 J. 485; 12 February 1963 (*Ruffini v. Sylvestre*), *Rev. crit. d.i.p.*, 1964, p. 121.

(52) Cf. Kegel, *IPR*, fourth edition, p. 173; Batiffol and Lagarde, sixth edition, p. 394; Article 2 of the Convention of 15 June 1955 on the law applicable to international sales of corporeal movables; Article 5 of the Convention of 14 March 1978 on the law applicable to agency. Dicey and Morris, ninth edition pp. 723 to 724.

(53) See *Acts and Documents of the Hague Conference*, IXth Session vol. III, *Wills* (1961) explanatory report, p. 170.

LIST OF PARTICIPANTS (1)

Work under the auspices of the Commission

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Work under the auspices of the Council

Chairman

Mr A. Brancaccio	Ministero di Grazia e Giustizia, Rome.
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Mr M. Hanotiau	Chef de service, Ministère de la Justice, Brussels.
Mr P. Gothot	Professeur à la Faculté de droit à l'Université de Liège.
Mr R. Vander Elst	Professeur, Université libre de Bruxelles.
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Mr A. Philip	Professor, Justitsministeriet, Copenhagen.
Mr P. Blok	Professor, Justitsministeriet, Copenhagen.
Mr H. C. Abildtrup	Attaché (Justitsministeriet), Danmarks faste Repræsentation, Brussels.
Mr N. Waage	Attaché (Justitsministeriet), Danmarks faste Repræsentation, Brussels.
Mr H. Wendler-Pedersen	Fuldmægtig, Justitsministeriet, Copenhagen.
GERMANY	
Prof. Dr. Arndt	OLG Präsident i. R., Sachverständiger, Bremen.
Dr. B. Klingsporn	Ministerialrat, Bundesministerium der Justiz, Bonn.
Mr E. Rebmann	Regierungsdirektor, Bundesministerium der Justiz, Bonn.
Mr W. Hantke	Regierungsrat, Bundesministerium für Wirtschaft, Bonn.
Mr H. König	Richter AG, Bundesministerium der Justiz, Bonn.
FRANCE	
Mr H. Batiffol	Doyen honoraire, Prof. à la Faculté de Droit à Paris.
Mr P. Lagarde	Professeur à l'Université de Paris I.
Mr T. Cathala	Conseiller à la Cour d'Appel, Paris.
IRELAND	
The Hon. J. B. Walsh	Senior Ordinary Judge of the Supreme Court of Ireland Law Reform Commission.

(1) Other specialist experts who do not appear on this list, have been consulted on the examination of certain specific questions, and in particular concerning insurance, labour law, interpretation of the Convention by the Court of Justice of the European Communities.

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