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NOTE

from :	Irish delegation
to :	Committee on Civil Law Matters (Rome II)
No. Cion prop. :	11812/03 JUSTCIV 121 CODEC 1052
Subject :	Proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II")

General Comment

Since the launch of the most recent efforts in 2002, to bring about a Community instrument with regard to the law applicable to non-contractual obligations, a considerable effort has been expended in attempting to secure a broadly acceptable text that can meet wide approval. However, the outcome of the first reading of the Commission's proposal for a Rome II Regulation, as well as the different approach taken by the European Parliament's rapporteur in her draft Report, indicate the significant difficulties involved. In addition, we must be conscious of the advice of the Council Legal Service as to the nature of the choice or not of a universal scope of application for the Regulation.

Ireland is concerned that we can fulfill our ambition of agreeing a suitable Rome II instrument. However, we must be realistic in that ambition so as to prevent the previous stagnation of efforts to reach a suitable agreement from reoccurring. Our initial discussions have revealed certain fundamental differences of approach. In addition, we must remain mindful of the political context to which our efforts must have regard.

The draft Rome II Regulation, it is reasonable to conclude, does not yet seem to enjoy universal welcome as a critically required instrument. There have been claims that sufficient convincing evidence remains to be produced that points to the existence of problems, within the Internal Market, with regard to applicable law. Following recent seminars organised by the European Parliament in Brussels and the Academy of European Law in Venice, both of which featured many leading experts in this area, Ireland is somewhat perturbed by the lack of consensus amongst experts and academics across a range of applicable law issues concerned with Rome II. The recent extensive hearings by the House of Lords in the UK, and its report on Rome II, made a further valuable contribution in assisting our efforts to clarify the best approach to pursue with regard to the development of a Rome II instrument.

Ireland's approach remains one of seeking an added value outcome to our efforts in the context of non-contractual obligations. We must concentrate on what is achievable, realistic and desirable and which properly reflects the principles of subsidiarity and proportionality.

Specific Comments

To some degree, specific comments on the articles of the proposed Regulation must be understood in the context that a number of critical issues remain to be resolved and whose ultimate resolution may render invalid certain of the comments offered.

Article 1 - Material Scope

Ireland, while it can generally accept the proposed scope of the Regulation as set out in article 1, is conscious that the wider issue of the ultimate extent of application of the Regulation remains to be resolved.

Ireland offers the following specific comments:

- that article 1.2(d) be worded as follows:

(d) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of regulatory authorities, officers and members as such for the obligations of the company or body;

- that article 1.2(f) with regard to nuclear damages be deleted
- that matters covered by the Cross Border Insolvency Regulation (Council Regulation on Insolvency Proceedings (No 1346/2000)) be excluded from the scope of the Regulation

Article 2 - Universal application

Ireland will contribute to seeking to ensure the maximum possible application of the proposed Regulation, consistent with the advice of the Council Legal Service, the legitimate concerns of Community businesses, particularly where e-commerce is concerned and any consensus which might ultimately emerge on this issue. Given the nature of that advice, it is clear that we are faced with a critical choice with regard to the extent of the application of the proposed Regulation. Universal application would now appear to be a matter of practical and political choice, not of legal necessity. At this point, we are not in a position to offer specific suggestions as to possible “connecting factors”, lest it prejudice the ultimate nature of an agreement.

Article 3 - General rule

Ireland can accept, in principle, article 3. Ireland would prefer to use the term, where damage “occurs” or “is likely to occur”. We could support the incorporation of article 3.2 into 3.3.

Article 4 - Product liability

Ireland is not yet convinced that a sufficient case has been made for the inclusion of a special rule with regard to product liability. We would be concerned at the difficulties in ensuring sufficient definition and certainty of the concepts such as, “the person claimed liable can show that the product was marketed in that country without his consent” and the “applicable law shall be that of the country in which the person claimed liable is habitually resident”.

Article 5 - Unfair competition

No comment.

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

The issue of providing a suitable draft with regard to violations of privacy rights, rights relating to personality and to defamation remains a critical challenge to the Rome II Regulation. Competing fundamental principles - freedom of expression and the rights to reputation and privacy - are at stake and we must seek to ensure an equitable balance between them. The issue is further complicated by the need to effectively provide for electronic as well as traditional methods of distribution.

Ireland is not yet convinced that a special article is needed in this regard, apart from the general provisions of article 3. Indeed, there is some argument that article 22 can effectively cover the “forum” issue. It is also the case that effectively, a special article may only apply to a very small number of persons who could claim to enjoy multi-state reputation.

Ultimately, if a special article is to be included, Ireland is of the opinion that the most acceptable solution, to the issue of cross border defamation cases, may be found in provisions consistent with the existing jurisprudence in the Shevill case.

Article 7 - Violations of the environment

Ireland feels that there is a lack of clarity as to the exact purpose of article 7. The article appears to be in the nature of a substantive provision of public policy and motivated to deter and punish possible polluters of the environment. While this objective may be desirable, it is not clear that it is required in an applicable law Regulation. It may be preferable to delete this article and rely on the specific environmental legislation to achieve such aims.

Article 8 - Infringements of intellectual property rights

Ireland can accept this article. In paragraph 1, we suggest replacing the word 'sought', with 'claimed', so that the provision would read 'the law of the country for which protection is claimed'.

Article 9 - Determination of the Applicable Law

Ireland remains unconvinced of the need for article 9. It does appear, from discussions thus far, that we are asked to construct an article based on a remote possibility of usage. If there was a preexisting contractual relationship between two parties, then the law applied should be the law of the contract. It should be possible to deal with any other issue under article 3

Article 10 - Freedom of choice

Ireland can accept the objective behind article 10, but is of the opinion that further clarification is required. Regarding 10.1, Ireland believes that the law applicable to a non-contractual obligation, arising directly out of a preexisting contractual obligation, should be the law of the contract. It is unclear as to whether or not article 10.3 is required.

Article 11 - scope of the law applicable to non-contractual obligations

Ireland can generally accept article 11. In article 11(e) the phrase “in so far as prescribed by law” should be deleted.

Article 12 - Overriding mandatory rules

Ireland is unconvinced that there is a need for article 12. This is similar to article 7. 1 of the Rome Convention, in respect of which Ireland has entered a reserve.

Article 13 - Rules of safety and conduct

In principle, Ireland can accept article 13, though we are concerned that the reference to “account shall be taken of”, may be unnecessarily vague. We would support the use of the opening phrase “When determining the case under the applicable law” in preference to “Whatever may be the applicable law”. Ireland would also have a preference for the use of the word “may” rather than “shall”.

Article 14 - Direct action against the insurer of the person liable

No comment.

Article 15 - Subrogation and multiple liability

Ireland would wish that the text of article 15 reflect exactly the text of article 13 of the Rome Convention. Ireland could agree that the issue of multiple liability be dealt with in a separate article.

Article 16 - Formal validity

Ireland is not convinced that there is a requirement for article 16.

Article 17 - Burden of proof

If Article 16 were to be amended or deleted, Ireland suggests deletion of the linked article 17.2. We could support the transfer on article 17.1 to form part of article 11.

Article 18 - Assimilation to the territory of the State

Ireland is not yet in a position to offer a definitive comment on this article, as the explanation offered thus far is unclear as to how and when it would apply. As the article appears to be derived from Dutch legislation, Ireland awaits the promised paper from the Netherlands giving further background information.

Article 19 - Assimilation to habitual residence

Ireland wishes that the text of article 19 be brought in line with article 4 of the Rome Convention. We would support the use of the term “place of registration” in place of “principal establishment”. The inclusion or otherwise of article 19. (3) may be dependent on the ultimate fate of article 6.

Article 20 - Exclusion of renvoi

No comment.

Article 21 - States with more than one legal system

No comment.

Article 22 - Public policy of the forum

Ireland can support article 22.

Article 23 - Relationship with other provisions of Community Law

Ireland believes that there is a requirement for further consideration of the implications of article 23, especially with regard to e-commerce. Ireland can support retaining article 23.1, indent 1, and deleting all other indents of that paragraph and the whole of paragraph 2. The reference to the Treaties establishing the European Communities in paragraph 1 would be deleted.

Article 24 - Non-compensatory damages

Ireland recommends the deletion of this article.

Article 25 - Relationship with existing international conventions

While in principle, Ireland can support article 25, the nature of the initial debate with regard to the future application of Conventions, the precedence of their conflict rules over those of Rome II, the extent of current or future adherence by member States and the implications, in this regard, of the Council Legal Service advice on the issue of universal application, means that further consideration and discussion is required before arriving at a definitive position.

Article 26 - List of conventions referred to in Article 25

Ireland suggests that it is not necessary at this point to fix a date in regard to the provision of the information with regard to Conventions.

Article 27 - Entry into force and application

It is not appropriate at this point to specify an entry date.
