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Section I

INTERNATIONAL PRIVATE AND PROCEDURAL LAW

Rome II and traffic accidents*

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I. Proposal of the European Commission[1]

1. Article 3(1)

First of all, I would like to address the proposal of the European Commission. Following the rule on connecting factors stated in Article 3(1), the law which is applicable to a non-contractual obligation is the law of the country in which the damage arises or is likely to arise. As a result, it is the law of the place where the consequences of that tort arise which is applicable. Similar to the exceptions I will talk about in a moment, Article 3(1) no doubt refers to liability based on fault. In particular, however, obligations arising from a traffic accident which are based on the strict liability of the owner of a vehicle are of great practical relevance. It can be assumed that the conflict of law rules contained in the Rome II Regulation also include obligations based on strict liability. For reasons of clarity, the Community legislature should include a statement to this effect in the Recitals.

In addition, the Commission should further clarify whether the capacity for tort liability is also subject to the harmonised rules on connecting factors. Although the capacity for tort liability could be viewed as a particular form of legal capacity, it appears to be consistent with the Regulation that the capacity for tort liability (as part of the liability arising under non-contractual obligations) is governed by Article 3.

2. Article 3(2)

In Article 3(2), the European Commission provides for an exemption for cases where the person inflicting the damage and the person sustaining the damage have their habitual residence in the same country. Therefore, if two German tourists are involved in a traffic accident in Paris, the applicable law is not the law of the place where the consequences of the tort arise, and therefore, French tort law, which would normally be applicable in accordance with Article 3(1), but the law of the common place of residence, and thus, German substantive law. It seems appropriate that the European legislator does not allow judges to exercise any discretion in this respect, but that the general connecting factor provided for by Article 3(1) has to be disregarded where the facts of the case give rise to Article 3(2). However, in individual cases, this exception may cause difficulties if applied in practice. Article 3(2) does not require that the common habitual residence be combined with other factors, for example, that both or one of the motor vehicles involved are registered and insured in the common country of residence. In cases where the car causing the damage, for example a hired car, is registered and insured in the (third) country where the harmful event occurs, there is the risk that the obligation to pay damages which arises under the law of the common habitual residence will exceed the insurance cover. Nevertheless, Article 3(2) should be retained in its present form for the reason that Article 3(3) Sentence 1 offers a solution for the case scenario I mentioned above. Accordingly, taking into account the country where the car causing the damage is registered and insured, it is assumed that there exists a manifestly closer connection with the law of the country in which the harmful event occurred.

3. Article 3(3)

There is no doubt that particularly the exemption stated in Article 3(3) Sentence 1 is to be welcomed. It reflects the principle of the closest connection and provides for the presumption in Article 3(3) Sentence 2 that a manifestly closer connection with another country may result from an existing legal

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1 Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations („Rome II") [COM(2003) 427 final].

relationship of the parties such as a contract. As the case may be, the contractual tie may also affect the legal relationship between the parties in respect of tort liability where the contract is closely connected with the respective tort. It may become important to apply this rule in the case of traffic accidents, for example, where a consumer suffers loss or damage in the context of a contractual obligation to be transported by a bus. The exemption may also apply, for example, in cases where someone is transported by a taxi (across national boundaries). In cases like this, it is appropriate for the Community legislator to provide those applying conflict of law rules with some discretion. This becomes clear from the word "may" in Article 3(3) Sentence 2 as well as from the required elements which need to be fulfilled for this provision to apply.

However, it may be criticised that the only example the European Commission provides in its proposal is a contract. From the wording of the provision it becomes very clear that this list is not intended to be exhaustive. Nevertheless, there remains the risk that those applying the law will not take into account that there is an "accessory connection", for example, where there exists a different legal relationship or even only a *de facto* relationship between the parties. For instance, it is also conceivable that a special relationship arising under family law justifies an exemption for the purpose of Article 3(3) Sentence 1. Therefore, it seems appropriate to connect obligations that arise from a tort between spouses or parents and children to the conflict of law regime governing the effects of marriage, or respectively, the legal relationship between parents and children. Where this is the case, the tort must, of course, be closely connected with such a special relationship.

One may express doubts as to whether participating in general road traffic is affected by the relationship between the parties involved which arise under family law. Concerning Article 41(1), (2)(1) of the Introductory Law of the German Civil Code (the EGBGB, which stands for "*Einführungsgesetz zum Bürgerlichen Gesetzbuch*"), this has so far been rejected by the majority view in the legal literature as well as by the judiciary.[2] For this reason, in the case of a traffic accident any connecting factor with the regime governing the effects of marriage, or respectively, the legal relationship between parents and children will not be considered under German international tort law. I am not able to say whether other Member States take a different view on this particular subject matter.

However, it seems important to me to generally point out to those applying conflict of law rules that Article 3(3) Sentence 1 does allow for a connecting factor to be taken into account, for example, on the basis of a special relationship arising under family law. This is even more the case as this provision, in addition to being relevant to different kinds of traffic accidents, also concerns the obligation to pay compensation that arises from a tort in general.

It is also conceivable, that in Article 3(3) Sentence 2 a further example is added to that of a contract, namely that of a "special legal relationship", which would also include a legal relationship between family members or parents and children. Alternatively, such a relationship could be included in the Recitals.

It also appears that one further aspect should have been included in Article 3(3) Sentence 2, namely the so-called *de facto* relationships, which are of particular practical relevance in cases of traffic accidents. Imagine, for example, a case where a hitchhiker is given a ride across national boundaries without paying any money. Based on the assumption that in this case the parties did not conclude a contract of transport, the question arises whether Article 3(3) Sentence 1 allows for an exemption. The equivalent provision in German international tort law, which is Article 41(2)(1) of the Introductory Law of the German Civil Code, expressly states that a connecting factor may arise in cases where a *de facto* relationship exists between the parties involved. In accordance with the majority view, this provision allows for a lift in a car, which is done as a favour, to become subject to the law of the country where the journey started. This means that the law of the country where the harmful event occurred does not apply. Therefore, the European legislator should consider extending Article 3(3) Sentence 2 to include the criterion of a *de facto* special relationship. Article 3(3) Sentence 1 may, no doubt, also be applied to this case. However, the fact that the Commission only expressly refers to a contract as an example in Article 3(3) Sentence 2 may cause someone not to take into account that, as the case may be, a merely *de facto* special relationship may also give rise to an "accessory connection". In the event that one does not wish to amend the actual provisions of the proposal, it would always be possible to clarify this point in the respective Recitals.

4. "Mass accidents"

In cases where several individuals are involved as the tortfeasor and the party sustaining the damage, the following scenario may occur: where several of the parties involved have their habitual residence in the same country, the obligations that arise between them are governed by the legal regime of their habitual residence in accordance with Article 3(2). For any other obligations that arise, the law at the place where the harmful event occurred applies in accordance with Article 3(1). In cases involving road traffic accidents this may result in a situation where the obligations of the driver have to be assessed in accordance with a different legal system than the obligations of the owner of the vehicle. In order to avoid any such divergence, it seems necessary to provide for a special rule that results in the application of one single legal system. Nevertheless, I am of the opinion that the European legislator should refrain from introducing such a special rule. One of the reasons why uniform connecting factors should not be applied in cases of mass accidents is that the arguments in favour of the law of the place of the common habitual residence are not invalidated by the fact that the claims for compensation of other parties involved are subject to the law of the place in which the harmful event occurred. Therefore, the different treatment of the parties involved does not occur at random, but may be justified because the facts give rise to different foreign connecting factors. In brief, it is not necessary

[2] *Looschelders*, Internationales Privatrecht, 2003, Article 41 EGBGB para. 15.

to introduce a special rule for mass accidents. Similarly, it does not seem to be in the interests of the different parties to subject mass accidents to a uniform substantive law by resorting to Article 3(3) Sentence 1.

5. Article 10

This brings me to the principle of freedom of choice contained in Article 10. In its proposal, the Commission only allows for the freedom of will to be exercised retrospectively. Solving the problem this way seems in any case appropriate for international traffic accidents since it is unlikely that the parties involved will exercise their freedom of choice in respect of their liability arising from non-contractual obligations before the event giving rise to the damage.

6. Article 13

Now I would like to proceed to Article 13. In accordance with this provision, the rules of safety and conduct at the place and time of the event giving rise to the damage have to be taken into account, independent of the applicable law. From this, it follows that such rules have to be observed, for example, when assessing questions of illegality and fault, even in cases where the accident is not subject to the law of the place where the harmful event occurred. However, the question arises whether such rules of safety and conduct are applied as proper rules. In the former case, the rules on conduct are merely applied as facts, as "local data", but not as legal rules. This question may become relevant in cases where a judge, of his own motion, identifies and applies foreign rules in accordance with the procedural law of his country, but the facts have to be presented and proved by the respective parties. In the explanatory memorandum of its proposed Regulation, the Commission not only rightly points out that Article 13 is based on the corresponding Article 7 of the Hague Convention on the Law Applicable to Traffic Accidents (4 May 1971), it in fact states that the foreign law for the purpose of Article 13 is merely to be taken into account as a point of fact. It remains to be seen whether a uniform application of legal rules can be achieved, if this principle is not also included in the actual wording of the Regulation. In any case, in Recital 18 it is not made sufficiently clear that safety and conduct rules for the purpose of Article 13 are merely to be taken into account as a point of fact.

7. Article 14

I would now like to go on to discuss Article 14 which deals with the subject of a direct action of the injured party against the insurer of the person liable. The solution offered in this provision is convincing in that it gives the person sustaining damage the option between the law applicable to the non-contractual obligation and the law applicable to the insurance contract. However, the question on what the European legislator exactly means when stating in the first option that the right of the party sustaining damage to take direct action against the insurer is subject to the law applicable to the non-contractual obligation arises. Unfortunately, the explanatory memorandum of the Commission does not contain any further details on this particular point. However, considering the structure of the Regulation, it will not only be possible to apply Article 3(1) and therefore the law of the place where the consequences of a tort arise, but Article 14 also refers to Article 3(2) and therefore to the law that is applicable in the country where both parties involved are habitually resident. However, it is doubtful whether this is also valid for Article 3(3). It should be clarified in the Recitals whether this is the case or not.

No doubt Article 14 needs to be interpreted in a way that the law also applicable to the non-contractual obligation is the substantive law stipulated in Article 10(1) Sentence 1, 2 which may also be opted for retrospectively. In any case, the interests of the insurer are protected in that pursuant to Article 10(1) Sentence 3 the choice of law may not affect the rights of third parties.

However, the explanatory memorandum contains a Sentence which gives rise to concern. It says that the scope of the insurer's liability is always determined by the law governing the insurance policy. Even if the person sustaining damage, for example, opts for the law of the country where the harmful event occurred, the scope of the liability of the non-contractual obligation is always to be governed by the law applicable to the insurance contract. Firstly, it seems unclear whether this statement only relates to the amount of cover or, for example, also applies to other statutory provisions. Such statutory provisions could concern, for example, the question of whether the insurer is prohibited from claiming in relation to the third party sustaining the damage that it was released from its obligation to make any payments on behalf of the insured party liable to pay compensation. Even if one only considers the sums insured that are expressly stated, the solution favoured by the Commission may lead to results that are inconsistent. The question whether the person sustaining the damage will receive the full amount would be coincidental to the (third) country where the person causing the damage is insured. Such arbitrary results may be avoided by always subjecting the question of the maximum amount covered to the law applicable to the non-contractual obligations. It also seems to be consistent with the Regulation, not only to give the person sustaining damage an option for a direct claim in Article 14, but also to infer from this provision a principle of awarding the more favourable amount in terms of scope and content of such a claim. Regardless of which approach the European legislator will take – the law applicable to the insurance contract, the law applicable to the non-contractual obligation or the principle of awarding the more favourable amount – it has in any case to be clarified in the Recitals whether, for example, the law applicable to the insurance contract is to state the maximum amounts covered as well as deal with the statutory provisions I mentioned above.

8. Relationship with the Hague Convention on traffic accidents

However, the proposal of the Commission may be criticised in particular with respect to the ambivalent treatment of the

Hague Convention I mentioned above. It is Article 25 that determines the relationship of the Rome II Regulation with existing conventions. This Article gives Member States the possibility of continuing to apply the choice of law rules laid down in international conventions to which they are already a party when the Regulation is adopted. As stated in the explanatory memorandum, this includes the Hague Convention on the Law Applicable to Road Accidents. However, due to a number of reasons it has so far only been applied to a limited extent within the Internal Market. The Convention has mainly been criticised on the basis that it is limited to non-contractual liability. A further weakness of the Convention is its complicated casuistics. But regardless of this weakness, due to Article 25 of the Rome II Regulation States such as Belgium, France, Austria, the Netherlands, Luxembourg, Spain and Poland are exempt from the rules on connecting factors applicable in the Internal Market. These countries will continue to apply the Hague Convention in future. This means, however, that the Commission has failed to achieve its goal in respect of road-traffic accidents, which constitute a core area of international tort law. Its goal was to reduce the incentives for "forum shopping" by harmonising international private law rules and to increase legal certainty.

On the other hand, it does not appear to be particularly consistent that Article 20 excludes renvoi. This means that in contrast to current international private law rules in Germany, a German court will continue to directly apply the substantive law of a country in accordance with Article 20, even if that country has ratified the Hague Convention. Somehow all this does not fit together very well. There is no doubt that it is appropriate to exclude renvoi. However, this means that the goal of the Commission to achieve a uniform set of rules and legal certainty needs to be realised either by replacing the Hague Convention altogether in the European solution or by making it binding on all Member States by way of incorporating it into the Regulation. In view of my critical comments made above in respect of the Convention, the second solution needs to be rejected. In this context, it should be kept in mind that the Convention on the law applicable to contractual obligations, the Rome Convention,[3] should also be incorporated in a regulation.[4] Such harmonisation of conflict of law rules for contractual obligation, however, would partly be undermined by the Hague Convention since it does not allow for an "accessory connection" to be taken in to account like in Article 3(3). Further discrepancies result in respect of a direct claim against the insurer of the person liable.

My intention is not to make obligation under international conventions seem less important, but it is necessary to look at the situation that will arise in the Internal Market in future: in some Member States it will be the Rome II Regulation that is applied to traffic accidents, whereas in other States it will be the Hague Convention and if Denmark fails to opt-in, it may be possible that purely national rules are applied. The question is whether it should really be possible to apply three different sets of rules within the EU? When looking at the full picture, it therefore seems desirable to introduce a uniform system of connecting factors in accordance with the Rome II Regulation. Maybe by keeping an open dialogue between the Commission and the European Convention States it will be possible to find an acceptable solution to this dilemma.

II. Proposal of the European Parliament[5]

1. Article 3(2) presumption b)

At this point I would like to continue by looking at the draft proposed by the European Parliament. My comments relate to the draft report of 11 November 2004. In the draft of the European Parliament, Article 3(1) is based on a general clause whereby the connecting factor is that of the closest connection. Article 3(2) then provides a number of presumptions. In my comments I shall focus on Article 3(2) presumption b).[6]

The proposal of the European Parliament results in a situation where a person sustaining damage while travelling "carries" the level of protection of the country where he is resident "in his luggage". This raises the question whether such a conflict of law rule is suitable to reasonably balance the legal interest of the parties involved. The tort-feasor has no way of knowing whether the pedestrian struck by him has his habitual residence in the country where the accident takes place or abroad. This means that the law of the place of residence may not be predicted by the tort-feasor, but is merely incidental. Where the car is insured in the (third) country in which the harmful event occurs there is the additional risk that the claim to damages that arises in accordance with the law of the place of residence exceeds the scope of the insurance cover. Therefore, from the point of view of the tort-feasor, it is in his interest to apply the law which would be the law of the country in which the harmful event occurred.

However, for the person sustaining damage it always seems *prima facie* preferable that the law of the country in which he is resident is applied. It is the law which he is familiar with and which may be ascertained at less cost. It would be jumping to conclusions to presume that the law at the place of residence is always more favourable for the person sustaining damage. This is the impression given in the justification of the European Parliament, which is the wrong conclusion, however. It could also be the case that the person sustaining damage is put in a better position by the law of the place where the consequences of the tort arise. Such law may, for example, provide for more extensive damages for personal injury. Similarly, the presumption in Article 3(2)(b) may not be justified by claiming that it always results in the harmonisation of international jurisdiction and applicable law. In any case, re-

[3] The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ 1998, C 27, at 34.

[4] Green Paper of the European Commission on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation [COM(2002), 654 final].

[5] Draft Report of 11 November 2004 on the Proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations („Rome II") [Provisional 2003/0168(COD)].

[6] "(...) subject to Article 13, where the harmful event results in a claim for damages for personal injuries, the non-contractual obligations shall be governed by the law of the victim's country of residence; (...)"

garding the action brought by the person sustaining damage against the tort-feasor, Article 5(3) Brussels I Regulation[7] provides that the court for the place where the harmful event occurred has international[8] and local jurisdiction. In the case that the action is conducted in the court of that country, the court has to decide on foreign law of damages, although the accident occurred in the country where it is situated. This does not seem very practical.

Assuming now that the litigation takes place in the country in which the person sustaining damage is resident: in this respect, the court will apply the familiar *lex fori*, but in view of Article 13 it faces the difficulty that it has to combine this provision with safety and conduct rules it is not familiar with. Again this seems to make little practical sense. In addition, the following has to be pointed out: in Article 3(2) presumption (b) the European Parliament expressly refers to Article 13, which is not only unnecessary, but may also lead to the wrong conclusion that Article 13 does not apply to the other presumptions included in Article 3(2).

Article 3(2) presumption (b) merely provides that a claim for damages for so-called personal injuries is governed by the law of the country of residence. According to this, claims for compensation of damage to property would be excluded. As a result, the single set of facts associated with a traffic accident is split up and is subjected to two different legal systems. Again this approach does not seem very convincing.

The difficulties I mentioned above which are caused by the draft advocated by European Parliament are reinforced in the following case scenario: a Belgian motorist causes injuries to several passengers on a bus used for public transport whereby some of the passengers are either resident in Brussels or come from different countries and spent their holidays in Brussels. In accordance with the draft of the European Parliament, when settling the claims for damage arising from the traffic accident they would be split up in claims for damage to property and personal injury. They also would, on one hand, be subject to the law of the place where the consequences of the tort arise and, on the other hand, a large number of different laws applicable in the respective countries of residence, which again would have to be combined with the safety rules of the place where the harmful event occurred.

Other cases which also seem almost impossible to solve are those that involve motorists with a different habitual residence where each party brings a claim on the basis of contributory negligence, or as the case may be, where each party is liable for an operational risk. This scenario, however, often occurs in practice since it is rarely the case that when two cars collide it is only one motorist which is solely at fault, or as the case may be, is solely liable for the operational risk.

In addition, it is unclear which ranking order applies in respect of the presumptions contained in Article 3(2). This is particularly relevant to the question whether a connecting factor in accordance with Article 3(2)(d) or Article 3(3) may be taken into account where there is a pre-existing contractual relationship between the tort-feasor and the person sustaining damage. This question could in particular be relevant to a taxi or bus ride (across national boundaries). Which law would apply if a person is injured during a taxi ride in Brussels to his hotel because of a careless taxi driver? However, one has to assume that an "accessory connection" also has to be taken into account in the case of a contract of transport or travel (for a package holiday) and therefore the law applicable to the contract has priority over the law applicable in the country of residence. However, in view of the wording of Article 3 this is not necessarily apparent to those applying the provision.

From my comments it is easily gathered that it seems to me that the rule in Article 3(2) presumption b) is not particularly well balanced and that I have my doubts as to how it ties in with the other presumptions.

This is particularly due to the fact that the need for protection of the person sustaining damage is considered the overriding goal of the Regulation. Such a view, however, may result in tilting the balance too much in favour of the victim in that the legitimate interests of the tort-feasor are disregarded. Similar to children, for example, they also require increased protection from suffering a disadvantage caused by the application of conflict of law rules. To illustrate my point, I would like to give you the following example: recently, the German legislator has introduced a rule which grants children a special status when participating in road traffic. In accordance with Section 828(2) sentence 1 German Civil Code (the "*Bürgerliche Gesetzbuch*"), children at the age between seven and ten are not responsible for damage they cause to somebody else in an accident with a motor vehicle.[9] In the opinion of the German legislator, children below this age are not able to properly judge speed and distance. Accordingly, it was decided that it was fair in terms of legal policy and economic terms to place the burden on motorists as well as on insurers in that they have to share the risk involved. Thus, if a child of the age of nine is negligent when stepping onto a road and the motorist suffers personal injury or damage to property when trying to avoid the child, it is not liable to pay compensation. The child does not yet have any capacity for tort liability. However, the goal of protecting the child fails if the settlement of the damage claim is subjected to foreign law on the basis that the motorist is a tourist from another Member State. In accordance with the draft of the European Parliament, it would be the law of the country in which the motorist who suffered damage is resident that would apply. This *lex causae* also determines whether a child in cases where it is the tort-feasor has capacity for tort liability and therefore is liable to pay compensation. If the foreign legal system does not have a similar concept of excluding under age road users from tort liability, the child has to pay for the damage.[10] This does not seem to be doing justice to the different interests involved.

However, I would not like to be misunderstood to be saying that the person suffering damage did not require increased protection. By including Article 3(2) presumption (b), how-

[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, at 1).

[8] See also Article 2(1) Brussels I Regulation.

[9] This does not apply if the injury was caused on purpose.

[10] It seems unclear whether Article 12 or 22 will lead to another result.

ever, the European Parliament far exceeds that which is required to achieve the desired goal. By this I mean that the European Parliament does not sufficiently take into consideration that in the proposal of the European Commission the interests of the person suffering damage are also adequately taken into account.

Let me make the following interim conclusion: the presumption in Article 3(2)(b) seems to me to be misguided. As outlined above, there is already the danger of conflicting results when assessing the various claims arising from a traffic accident as well as the risk that the combination of the law of the country of residence and the rules of safety of the place where the harmful event occurred produces results that are not suitable for practical purposes. The same problem occurs when, in the context of claims arising from personal injury or damage to property, the law of the place where the consequences of the tort arises as well as the law or even several laws of the country of residence are applied to a set of facts associated with a real life situation.

In this context, it is important to realise that this conflict of law rule is not only limited to traffic accidents. Although the European Parliament emphasises in its justification that Article 3(2) presumption (b) is especially drafted to cater for traffic accidents, it also includes, in its provision, all non-contractual obligations that arise from a tort. This means that the difficulties outlined above are multiplied.

No doubt, it is true to say that a uniform system of connecting factors is required when applying conflict of law rules and one should not create special provisions for traffic accidents. It is probably also true to say that in respect to the Internal Market we still have a long way to go before achieving a uniform substantive tort law and law of damages. However, I would suggest a compromise which is already being considered by the European legislator. In the case that the proposal of the Commission on the application of conflict of law rules is adopted, it is still possible with respect to traffic accidents to partly harmonise, for example, the substantive law and the jurisdiction of the courts. From the point of view of the person sustaining damage, one of the most important questions is whether he can sue the insurer of the tort-feasor in the courts of his country of residence. In my opinion, a person sustaining damage can already today bring an action against the insurer in his country of residence in accordance with Article 11(2) in combination with Article 9(1)(b) of the Brussels I Regulation. However, in the legal literature an action based on these provisions is viewed differently – even after the implementation of the Fourth motor insurance Directive.[11] It remains to be seen whether the Fifth motor insurance Directive[12] will shed more light on the matter. In any case, there is the possibility in the form of a directive to address the individual concerns a person suffering damage may have in terms of protecting his interests, for example, with respect to the jurisdiction of the courts or the reimbursement of legal fees.

2. Relationship with the Hague Convention on traffic accidents

To put it in a nutshell, the disadvantages of the proposal of the European Parliament on connecting factors seem to me to be too substantial. However, in case it is the European Parliament that wins the "competition for ideas", I would like to point out one further aspect. In accordance with Article 25(1), those Member States which have signed and ratified the Hague Convention are allowed to continue applying the conflict of law rules contained in the Convention instead of those contained in the Rome II Regulation. This means that not only the European Commission but also the European Parliament may be blamed for being somewhat inconsistent in their approach. On one hand, the European Parliament argues to exclude renvoi and, on the other, provides that the Hague Convention is to prevail over the Rome II Regulation. The European Parliament, however, limits the territorial scope of the Hague Convention. Article 25(1)(a) of the draft of the European Parliament states that "However, where all the elements relevant to the situation at the time when the damage occurs are located in one ore more Member States of the European Community, the rules of this Regulation shall prevail over the rules of the Hague Convention of 4 May 1971 on the law applicable to traffic accidents (...)". First of all, one has to ask which elements the European Parliament is actually talking about. A relevant connecting factor is in any case the habitual residence of the person sustaining damage. Not to take this connecting factor into account may be contrary to Article 3(2) presumption (b). In this context, I would like to look at the case where an injured person has his habitual residence in a third country: in accordance with Article 25(1)(a) a Convention State would be allowed to apply the Hague Convention since the elements involved in the situation do not purely relate to the Internal Market. This means, however, it is not the law of the country of residence of the injured person that is always applied. As a result, the application of Article 25(1)(a) leads to the injured person being treated unfairly, which is contrary to the proclaimed goals of legal certainty and legal uniformity. As already mentioned in the context of the proposal of the Commission, the goal should be to try and find a coherent solution for the whole of the Internal Market by keeping an open dialogue with the Convention States.

III. Conclusion

For this reason I have reached the following conclusion: regarding the subject of international traffic accidents, the proposal of the Commission has shown a more balanced approach than the draft of the European Parliament. However, in view of a number of questions which still have to be resolved and a few technical problems, the proposal of the Commission still needs to be more detailed and requires further clarification on various aspects.

[11] OJ 2000, L 181, at 65.

[12] COM(2005) 57 final.