

Overview of the *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*

Introduction

Traffic accidents constitute one of the most – if not *the* most – voluminous sources of non-contractual obligations worldwide. Increasing cross-border traffic and transport leads to growing numbers of traffic accidents that include international elements. Traffic accidents present two noteworthy characteristics: they are dealt with, for probably more than 99 percent of cases, (1) outside the court system, and (2) mainly through the activity of insurers, often through agreed international arrangements¹. In order to determine questions of liability, of existence, kinds and extent of damages, and of applicability of rules of prescription and limitation, it is crucial to be able to determine *ex ante* and with certainty what law applies to these questions.

Purpose of the Convention

The *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents* (the “Traffic Accidents Convention”) was drawn up with full awareness of this reality. One of its primary aims is, therefore, to provide clear, precise and easily applicable rules to determine what law applies to the traffic accident. This serves the interests of all parties involved, those of the victim in particular. The victim has a critical interest in knowing with certainty, immediately after the accident, what law applies to the issues of liability and damage, so that these do not need to be made subject to (protracted) litigation. This is also in the interest of insurers, who are thus able to avoid judicial costs. This, in turn, results in lower insurance premiums, which is in the general interest of everyone.

The Convention goes back to a proposal of the United Kingdom made at the Tenth Session of the Hague Conference (1964) to put the topic of the law applicable to torts and delicts on the Agenda of the Conference².

The concern of the Convention is to connect the accident to the appropriate legal environment, to achieve a fair result to *all* parties involved. In this context, the protection of the victim remains, however, a major overall as well as specific concern of the Convention.

¹ Insurance plays a critically important role in (international) traffic accidents. Insurance in *international* traffic accidents now operates within frameworks such as the Uniform Agreement (1989), which made the green card possible, and in the European Union within the Directives on traffic accidents and the 1991 Multilateral Guarantee Agreement, which together abolished the control of the green card at the borders.

² In his Memorandum on Torts in Private International Law, Professor Dutoit on behalf of the Conference's Permanent Bureau concluded that while it would be difficult for the Conference to draw up a *general* Convention on the law applicable to torts, in the light of the enormous varieties among legal systems, it might be feasible to draw up specific instruments on traffic accidents and on products liability. This analysis was accepted by the experts and the Governments, and ultimately resulted in two Conventions; one on traffic accidents that was signed in 1971, and one on product liability, the *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability* which was signed in 1973. The Conference also has on its Agenda for future work a global convention dealing with civil liability for environmental damage.

What traffic accidents are covered by the Convention?

Although the Convention deals only with traffic accidents – and not, for example, with questions of product liability, or the liability of parents for their children, or contractual liability – the varieties and numbers of issues it covers are still enormous. The term vehicles – as means of transport – may include, in addition to the usual suspects, cars and trucks, trains and trams, horses, and skis. The place of the accident may be a public road, an industrial site or a campsite. The persons involved may, in addition to the driver and the passengers, include the lessee of the car and persons outside the vehicle.

Connecting factors to establish the applicable law in the event of a traffic accident

The Convention provides in addition to its main rule – the law of *the place of the accident* – subcategories of rules, based on the *registration of the vehicle* and the *habitual residence of the persons involved*, for a certain number of specific groups of situations where these are more connected with a different legal environment than that of the place of the accident. For all these different groups of situations the Convention guarantees a predictable outcome of the question of the applicable law to practically any relevant question. Moreover, the Convention ensures that in all cases, as a principle, the victim has a right of *direct action against the insurer* of the liable person.

When does the Traffic Accidents Convention apply? Main rule: Article 3

The rules of the Convention apply universally; they are independent of whether the law is that of a Contracting State or not. This makes it possible to deal with traffic accidents wherever they occur. The main rule of the Convention is set out in Article 3: the applicable law is the internal law of the State where the accident occurred. This place is generally easy to determine. Should under the law of the place of the accident the victim not have a direct right of action against the insurer of the person liable, then the victim nevertheless has such a right if it exists under the law governing the contract of insurance.

In certain situations, the law of the place of the accident presents fewer connections with the case than another legal system. Articles 4 and 5 deal with several categories of such situations: Article 4 is concerned with damage to persons and to vehicles; Article 5 with other kinds of material damage. The provisions are rather detailed, but since the reality of cross-border traffic accidents is so complex, a certain level of detail is necessary to make *ex ante* legal certainty possible.

Special Rule: Article 4 (Damage to Persons and Vehicles)

Article 4 may have the effect of setting aside the law of the place of the accident according to two criteria: (1) whether one or more vehicles are involved, and (2) whether the persons involved are (a) the owner, person in control of the vehicle or the driver, (b) a passenger, or (c) a person outside the vehicle. So, for example, if a car registered in Belgium crashes against a tree in France, the liability of the driver against the passenger will, in principle, be determined according to Belgian law. The law of the place of the accident (France) is less helpful in such a case, in particular to the passenger, than the law of the State of registration of the car (Belgium). This State is likely also to be the State where both the driver and the victim lived, the place where the insurance contract was made and the insurer has his place of business, and, if it was a rented or a lease car, the place where the car was hired. Only where the victim had his or her habitual residence in the place of the accident (France), does the Convention prescribe the application of law of that place, which again serves the victim's interest. On the other hand, if the same car would cause damage to a person *outside* the car, then since that person normally has no connection with the car and those inside it, the law of the place of the accident – French law – will apply to the claim of that person, unless he or she happened to live in Belgium.

When two, or more, cars registered in Germany crash in Belgium, the Convention prescribes the application of German law to determine the liability towards the passengers – except where the passenger lived in Belgium: then in respect of that passenger Belgian law will apply. This rule has been helpful in particular in situations where, for example,

workers move in columns by car to or from their homelands during the holidays. The use of the law of the place of *registration of the vehicle* as connecting factor will usually result in the coincidence of the laws applicable – to the claim and the insurance contract – which guarantees full insurance coverage.

Special Rule: Article 5 (Damage to Goods)

Article 5 deals with damage to goods. Goods belonging to the passenger follow the regime that applies to the passenger under Articles 3 and 4. Those Articles also determine the liability for other goods carried in the vehicle. Liability for goods outside the vehicle is, in principle, determined by the law of the place of the accident (see for an exception paragraph 4).

Protection of the victim

It is important to note, that where more victims are involved, the liability towards each of them is determined separately. This has the advantage that a victim need not be concerned with the question if other persons have also suffered damage. On the other hand, one and the same law will govern the liability of all liable persons, if there is more than one, towards one victim. This also simplifies the determination of the applicable law. And again, if the law of the place of registration does not provide for a direct action against the insurer of the person liable then the victim nevertheless has such a right if the law of the place of the accident provides it, or, if that law does not, ultimately, the law governing the contract of insurance.

Explanatory Report; and more than 30 years of doctrine and case law

In addition to the Explanatory Report by the Swedish judge Essén, over the past thirty years, doctrine and case law have helped to settle many – inevitably – outstanding issues, including the question – not expressly dealt with by the Convention - whether the parties may choose a law different from that designated by the Convention: the general view is that they *may* indeed *do so*.

High degree of predictability attracts States

The Convention has proven its utility during the thirty years since it came into force on the international plane. It has continued to attract new State Parties. Within the European Union, twelve States, Austria, Belgium, the Czech Republic, France, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Slovenia and Spain are at this point Parties to the Convention, while Portugal has signed but not ratified the instrument. In addition, the following countries are Parties to the Convention: Belarus, Bosnia and Herzegovina, Croatia, The Former Yugoslav Republic of Macedonia, Serbia, Montenegro and Switzerland. The uniformity of regime is important in light of transit movements, including those from Western and Central Europe to the Eastern and Southern Mediterranean regions and vice versa.

The Convention is open for signature by all States that were Members of the Hague Conference at the time of its XIth Session (1968), and for accession by all other States. The high degree of *ex ante* predictability of the Convention's rules assists in avoiding litigation, facilitating out of court settlements, reducing individual as well as social costs enormously, and contributing to fairness and justice in a great many cases.