CONVENTION ON THE LAW APPLICABLE TO TRAFFIC ACCIDENTS

Explanatory Report by Mr Eric W. Essén

(Translation of the Permanent Bureau)

A Introduction

1 Adopting the proposal of the United Kingdom delegation, the Tenth Session of the Hague Conference requested the Netherlands Commission on Private International Law and the Permanent Bureau to examine whether it was suitable to put the question of the assumption of jurisdiction and the applicable law in torts (delicts and quasi-delicts) on the agenda of the Eleventh Session (1968) or of a following Session (Final Act, Part B, IV, 1 a).

2 The Permanent Bureau, carrying out this decision, undertook preparatory studies and sent to the Governments two documents in January 1967: -

a A Preliminary Document No 1, entitled Mémorandum relatif aux actes illicites en droit international privé, by Bernard M. Dutoit, then Secretary at the Permanent Bureau;

b A Preliminary Document No 2, which contained a Questionnaire for the attention of the Governments.

The Permanent Bureau asked the Governments to reply and add their observations, and these formed Preliminary Document No 3 which was forwarded to the members of the Special Commission convened to discuss the replies.

3 The Special Commission met at the Permanent Bureau of the Hague Conference from the 16th until the 21st of October 1967 and from the 22nd of April until the 4th of May 1968. Mr Y. Loussouarn, Professor at the Faculté de droit et des sciences économiques de Paris was elected Chairman and Mr K.M.H. Newman, Assistant Solicitor, Lord Chancellor's Office, House of Lords, was elected Vice-Chairman for the first session; Mr W.L.M. Reese, Director of the Parker School of Foreign and Comparative Law, Columbia Law School, was elected Vice-Chairman for the second session which Mr Newman was unable to attend. During the second session, Mr Eric W. Essén was asked to draft the report of the Special Commission.

4 Discussion in the Special Commission revealed that the field of torts was too wide and heterogeneous to be dealt with in one single convention. It was decided to study traffic accidents in the first place and then afterwards products liability. The work of the Special Commission relating to the first-mentioned matter led to the drawing up of a draft Convention on the Law Applicable to Traffic Accidents.[1]

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1 See the draft Convention adopted by the Special Commission and the Report of Mr E.W. Essén, Preliminary Document No 4 of June 1968.

It should be noted, in this context, that the Eleventh Session requested the Netherlands Commission on Private International Law and the Permanent Bureau to examine the desirability of putting the question of products liability on the agenda of the Twelfth, or a following Session.[2]

5 Basing its work on the draft of the Special Commission and the observations of Governments on this draft[3], the Second Commission of the Eleventh Session of the Conference was charged with the task of drafting a definitive text. Mr Y. Loussouarn was Chairman of the Commission, while Messrs. W.L.M. Reese and E.W. Essén continued in their respective offices of Vice-Chairman and Rapporteur.

Although the main structure of the draft was conserved, the Commission made a number of changes; it submitted, to the plenary meeting, a draft Convention on the law applicable to traffic accidents, which was approved.

B General Outline

1 The Convention deals solely with the law applicable to civil, non-contractual liability, arising from traffic accidents. Problems of jurisdiction, or of recognition and enforcement of decisions, in this field, remain outside the scope of the Convention.

2 The Convention contains 21 articles, the first two delimiting its scope. Article 3 enunciates the main rule and articles 4 to 6 state exceptions thereto. Article 7 deals with the importance to be accorded to local rules relating to the control and safety of traffic, whilst article 8 lays down the scope of the applicable law and article 9 takes up the question of the direct action. Article 10 contains the traditional provision relating to "ordre public". By virtue of article 11, the Convention is to be regarded as a uniform law of private international law, without any restriction acting thereon. Articles 12 to 14 deal with problems arising in the context of countries having non-unified legal systems. Article 15 settles the relationship between the Convention and other conventions and articles 16 to 21 contain the final clauses.

3 The scope of the Convention, according to article 1, is to determine the law applicable to civil, non-contractual liability arising from traffic accidents, in whatever kind of proceeding it is sought to enforce this liability. The term "traffic accident" in the Convention means an accident which involves one or more vehicles, whether motorized or not, and is connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access.

It was, however, thought wise to exclude from the scope of the Convention all matters of liability of manufacturers, sellers and repairers of vehicles, the responsibility of the owner, or that of any other person for the maintenance of a way open to traffic or for the safety of its users, and vicarious liability, with the exception of the liability of an owner of a vehicle, or of a principal, or of a master (article 2). Furthermore, the Convention does not apply to recourse actions among persons liable, to recourse actions and to subrogations insofar as insurance companies are concerned, nor does it apply to actions and recourse actions by or against social insurance institutions, other similar institutions and public automobile funds, or to any exemption from liability laid down by the law which governs these institutions.

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2 See Final Act, Part C, a.

3 Preliminary Document No 5, Actes et Tome III, p. 81

4 Article 3 lays down the main rule of the Convention, the application of the law of the place of the accident, a rule which is in line with the practice of the majority of Member States of the Hague Conference. The determination of the place of the act does not give rise to serious difficulty in the case of road accidents, as the place where the wrong was perpetrated nearly always corresponds to the place where damage was suffered. To deal with the exceptional case when these two places are different, the Conference chose the place of the accident as the determining criterion, that is to say the place of the tortious act, it being easier to ascertain. Indeed, the guiding principle followed in the work of the Conference was to create a convention addressed not only to judges, but above all to the subjects of the law and their legal advisers, as it was realized that almost all disputes arising from accidents are settled without the intervention of the judge. Consequently, the solution must be simple, precise and easy to apply.

5 The Conference did not think it could adopt a rule sanctioning the application the application of the law of the place of the accident without exceptions. In certain cases, converging factors point to the application of a law other than that of the place of the tort. Special provisions were thought necessary to sanction the application of that law. These exceptions, which represent a new contribution to the solution of the conflict of laws arising from non-contractual liability, are set out in articles 4, 5 and 6.

5.1 In the draft Convention of the Special Commission, the exceptions were essentially founded on the existence of a common residence of the parties involved in a country other than that in which the accident occurred. The final text, whilst retaining the criterion of habitual residence as a subsidiary link, gave preference to the place of registration of the vehicle or vehicles. The advantage of this criterion is that it is easy to ascertain and it unites a number of connecting factors. Indeed, usually, the country of registration will coincide with that of the habitual residence of the driver and the owner and with the seat of the insurance company.

It was, however, thought necessary to retain habitual residence as a supplementary criterion. On the one hand, the place of registration is only taken into account if it coincides with the habitual residence either of the owner or of the driver of the vehicle. If there is no such concordance, the place of registration would really be void of any significance as a connecting factor. On the other hand, habitual residence has some relevance with respect to passengers and persons present at the scene of the accident outside the vehicle or vehicles. As regards the last-mentioned persons, their habitual residence must coincide with the place of registration for an exception to be made to the application of the lex loci. As to the passenger who is the victim of an accident, the law of the country of registration will not replace the law of the place of the accident if the passenger had his habitual residence in that country.

5.2 The Convention further differs from the draft Convention of the Special Commission in that it does not deal separately with the transport of persons. The draft Convention contained an article on gratuitous transport and another on non-gratuitous transport, thus drawing a distinction between the internal relationship, that is the relationship between the transporter and the transported person, and the external

relationship, that is the relationship for example between the person inside the vehicle and the person outside. By these rules, the draft Convention prescribed the application of different laws, for example to regulate the case between a passenger and his driver on the one hand, and that of the passenger and the driver of another vehicle on the other hand, even if all these persons were involved in the same accident. This plurality has not been maintained in the definitive text of the Convention which is more marked by a reinforcement of the principle of unity. The same conflicts rule regulates internal and external relationships and all co-authors are governed by the same law as regards their liability towards each separate victim. Any other solution would have made division of liability impracticable. On the other hand, if there are several victims, the applicable law is determined separately for each of them. Indeed, the law governing each victim may be determined separately from that governing the other victims, even if the other victims appear before the same court. This solution[4] has the advantage that it facilitates foreseeability, for each victim is able to concentrate on his own claim without having to enquire whether other victims intend to claim or not and without having to investigate their respective habitual residences.

The discontinuance of the special treatment of transport of persons has, in comparison with the draft Convention, brought about the increased importance of the lex loci.

5.3 In laying down the exceptions to the application of the lex loci, the Convention distinguishes between damage to persons and vehicles, which is dealt with in article 4, and damage to goods, dealt with in article 5.

5.4 In view of the complexity of the subject-matter, it was necessary in article 4 to separate different hypotheses, starting with the simplest so as to lead up to the most complex.

Article 4 a envisages the case where a single vehicle is involved in an accident and is registered in a State other than that in which the accident occurred. In that case the internal law of the State of registration applies to the issue of liability

- towards the driver, owner or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,
- towards a victim who is a passenger whose habitual residence is in a State other than that where the accident occurred, and
- towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.

Article 4 b deals with the situation where several vehicles are involved in the accident. In this case the rules of article 4 a only apply if all the vehicles are registered in the same State. Thus there must be unity of registration to avoid the application of the lex loci.

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4 See Batiffol, "La Onzième session de la Conférence de La Haye de droit international privé", Revue critique de droit international privé, 1969, p. 233, and Loussouarn, "La Convention de La Haye sur la loi applicable en matière d'accidents de la circulation routière", Clunet, 1969, p. 17.

Article 4 c applies when one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable. In this case exception is only made to the lex loci in favour of the law of the State of registration if all these persons had (official text: have) their habitual residence in the State of registration of the vehicle or vehicles involved in the accident.

5.5 As regards damage to goods, article 5 distinghuishes between goods carried in the vehicle and goods outside the vehicle. Carried goods are divided into two categories depending on whether the goods belong to the passenger - in which case the issue of liability is governed by the same law as that determining the liability towards the passenger - or on the other hand belong to another person. In the latter case, the same rules will apply as those which govern the liability towards the owner of the vehicle. As for the liability for damage to goods outside the vehicle or vehicles, the local law will in the main apply, except as regards the personal belongings of the victim, which are governed by the law which determines the liability towards the victim for physical damage.

5.6 In the case of vehicles which have no registration or whose registration is meaningless, the internal law of the State in which they are habitually stationed replaces by virtue of article 6 that of the State of registration.

6 According to article 7, if the applicable law is a law other than that of the place of the accident, one must all the same take into account the laws relating to the control and safety of traffic which were in force at the place and time of the accident.

7 Article 8 specifies the scope of the applicable law. The Conference decided to accord the widest possible field of application to the applicable law. All matters which civil law assigns to the realm of tortious liability fall within this field. Thus the applicable law determines for example the basis and extent of liability, the grounds for exemption from liability, any limitation of liability, any division of liability, the existence and kinds of injury or damage which may have to be compensated, the kinds and extent of damages, the question whether a right to damages may be assigned or inherited, the persons who have suffered damage and who may claim damages in their own right, the liability of a principal for the acts of his agent or of a master for the acts of his servant, the rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

8 A special article, article 9, deals with the direct action of a victim against the insurer of the person liable, so as to allow the victim to take advantage of such an action in the greatest possible number of cases. Such an action is permitted not only when it is sanctioned by the law applicable to liability, but also when it is sanctioned by the law of the country in which the accident occurred, even if this law is not the law applicable to the issue of liability. In this case, thus, a return to the principle of the application of the law of the place of the accident is admitted in favour of the direct action. Finally, if neither of these laws provides any such right, it may still exist if it is provided by the law governing the contract of insurance.

9 Following the practice of the Hague Conference, the "ordre public" provision, retained in article 10, is very limited, and the application of any of the laws declared applicable may be refused only when it is manifestly contrary to public policy ("ordre public").

10 The "ordre public" provision was, together with others, adopted as a safety valve, due regard being paid to the requirements of article 11, which states that the Convention is a uniform law of private international law without restriction. Therefore, the application of articles 1 to 10 of the Convention is independent of any requirement of reciprocity. The Convention applies even if the applicable law is not that of a Contracting State.

11 Articles 12 to 14 aim to solve the various problems presented by States with non-unified legal systems.

11.1 Article 12 lays down the rule that any territorial entity forming part of a State having a non-unified legal system shall be considered as a State for the purposes of articles 2 to 11 when it has its own legal system, in respect of civil non-contractual liability arising from traffic accidents.

11.2 So as to avoid States with non-unified legal systems having to apply the Convention even to internal accidents, article 13 specifies that such a State is not bound to apply the Convention to accidents occurring in that State which involve only vehicles registered in territorial units of that State.

11.3 Article 14 contains a federal clause whereby a State having a non-unified legal system may declare that the Convention shall extend to all its legal systems or only to one or more of them and may at any time modify its declaration.

12 Finally it was thought necessary to solve as far as could be done the problem of conflicting conventions. Article 15 thus states that the Convention shall not prevail over other conventions in special fields to which the Contracting States are or may become Parties and which contain provisions concerning civil non-contractual liability arising out of a traffic accident.

C Commentary article by article

Preamble

1 Following the practice of the Hague Conference, the preamble is very short. It has two main objects. The first is to make it clear that the Convention only covers part of the field of torts. Indeed, this field is too vast and heterogeneous to be usefully dealt with in a single Convention. The Convention only contains rules to solve problems of the conflict of laws relating to civil non-contractual liability arising from traffic accidents. The Conference, in adopting this limitation, was influenced by the consideration that these are the most frequent torts and that the practical necessity of finding a solution to the problems of conflict of laws has been made all the more pressing

by the rapid growth of inter-State traffic. The subject-matter of finding the law applicable to traffic accidents has the further advantage that it is easy to delimit and lends itself readily to unification.

2 Secondly, the preamble shows that the Convention only deals with the determination of the applicable law. All problems of jurisdiction, and of the recognition and enforcement of judgments in cases of traffic accidents are left outside the Convention. These two questions are regulated by the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. A first draft of a convention dealing with these questions, which was drawn up by the Permanent Bureau following directives of a sub-committee during the meeting of the Special Commission of April to May 1968 on torts, was not discussed at the Eleventh Session.

Article 1

1 This article defines the scope of the Convention.

2 Taking up the terms of the preamble, article 1 states that the Convention shall determine the law applicable to civil, non-contractual liability arising from traffic accidents.

2.1 The Convention only deals with the law applicable to civil liability as opposed to criminal liability.

When the question arose as to whether the law designated by the Convention should still be applied to claims brought in a criminal court for compensation for tortious acts, the Conference considered that the applicable law should in no way be replaced by another, when the victim or persons deriving their rights from him (ayants droit) appear civilly in a criminal case. Indeed, the link which allies the civil action to the criminal action is essentially procedural by nature and does not take away from the civil action its own character. Consequently, the law which governs that action by virtue of the Convention should continue to apply even in criminal courts. This solution is implied in the part of the article which reads: "in whatever kind of proceeding it is sought to enforce this liability". The wording is very wide and will even cover the case in which an action falls to be adjudged in administrative proceedings.

2.2 In the field of civil liability, matters arising are customarily divided into two very distinct groups: on the one hand those which relate to contractual liability, on the other hand those which pertain to non-contractual liability. This separation has also been effected in this Convention, which applies only non-contractual liability.

The term employed means that the Convention does not cover only the civil liability which a person incurs for any harm due to his fault, negligence or lack of care caused to another, but also liability founded on risk (absolute liability).

2.3 As the Convention is limited to non-contractual liability, the problem of characterization arises. The Conference did not think it wise to include a rule on characterization in the Convention; consequently, the general conflicts rules in each of the Contracting States will apply to this matter and in the majority of cases the characterization will be effected by the law of the forum.

2.4 The disadvantage of this solution is that it opens the door by way of different characterizations to a varying application of the Convention in different countries, particularly so in the case of transport of persons. The traditional distinctions is that between gratuitous and non-gratuitous transport. Firstly as regards gratuitous transport, which presupposes the lack of a contract between a transporter and the person transported, and which thus falls within the Convention, the risk of a varying application of the Convention does not seem to be very great, seeing that the notion of gratuitous transport does not seem to differ much in one country from another. For there to be gratuitous transport, the transported person must as a rule have been taken into the vehicle "out of kindness and gratuitously" ("par complaisance et gratuitement", article 59 of the Swiss Federal Law on Road Traffic). In some countries this criterion is very strictly adhered to, while in others certain transport which is not entirely free is considered to be gratuitous, for example the transport of a person who shares the expenses of the transport.

When one considers non-gratuitous transport, views tend to differ to a greater extent. This notion is the opposite of the notion of gratuitous transport. For there to be non-gratuitous transport, a contract must have been concluded between the person liable and the victim.

The typical case of non-gratuitous transport is a bus journey. As a rule, a contract of carriage exists when neither of the parties intends to perform a service gratuitously. If there is an express clause relating to liability, it seems to be generally admitted that such liability is contractual and consequently falls outside the Convention. In other cases, there may be less uniform interpretation. For example, in France, as the liability of the non-gratuitous transporter is considered to be contractual, even in the absence of an express clause, a French judge would not apply the Convention to this point. In other countries, the Convention will be applied, as the liability will be considered to be tortious. Yet other legal systems would give a choice between tortious and contractual liability and would allow the victim to rely either on the law of the contract, if he chooses to invoke contractual liability, or the law designated as applicable by the Convention, if he invokes the tortious liability of the defendant. Finally, other legal systems allow the victim to rely simultaneously on the two laws (for example Swiss law).

This divergence may, in a limited sphere, bring about a limping application of the Convention which would to a limited extent give rein to "forum shopping" by the victim. However, it must be emphasized that these drawbacks seem to be more theoretical than practical. Furthermore they are inevitable, as long as one is not ready to impose characterizations on national judges. The Convention would, moreover, lose a great deal of its practical effect, if the carriage of persons or goods were excluded from its scope.

2.5 The question as to whether parties may choose the applicable law is not settled by the Convention. It thus depends on the law of the forum to determine whether a contract designating the applicable law will have the effect that all the relationships between the parties become contractual or in any case governed by the law of the contract, or whether on the other hand some part of their relationship may be non-contractual and thus governed by the rules of the Convention, notwithstanding the choice of the parties. The law of the forum must also

stipulate whether litigating parties in a non-contractual claim may, after the accident, agree on the law to be applied, and whether such an agreement must be made expressly or whether it may be made impliedly.

2.6 The Convention is not incompatible with the system of the international card of insurance, the so-called "green card". This system only creates an undertaking on the part of the insurer to cover the liability of the insured person towards third parties, insofar as such liability is determined by the law which is deemed applicable in the particular case.

2.7 The Convention does not take any position on the so-called problem of accumulation of contractual and tortious liability. Consequently, if according to the law of the forum, the victim has the choice between a contractual action and a tortious action, he may make his choice between these two types of liability. Thus, if the law of the contract adequately compensates the victim, he will choose to sue in contract; on the other hand, if the contract includes a limitation of liability, the Convention will apply to determine the applicable law in a tortious action.

3 The second paragraph defines the term traffic "accident".

3.1 The concept of accident has not been defined. The word should be taken to bear its usual meaning, that is to say an occurrence occasioning damage.

If the baggage of a passenger is lost during carriage", this will not be considered to be a traffic accident. This case falls outside the scope of the Convention.

3.2 The Convention only deals with road traffic, thus excluding air, rail, river and maritime traffic. Such traffic is already dealt with by a number of conventions which almost totally exclude the possibility of conflicts of law arising out of torts in these fields. Furthermore, following past practice, the Hague Conference refrains from interfering with the work of more specialized organizations.

It should be noted at this stage that the relationship between this Convention and other conventions which deal with civil non-contractual liability arising from traffic accidents, but in particular fields, is governed by article 15. That article states that the Convention shall not prevail over other conventions in special fields.

3.3 The word "involves" ("an accident which involves one or more vehicles") was chosen so as not to restrict the application of this Convention to the case in which a vehicle is the active cause of the accident. The Convention therefore covers damage sustained or caused by a passive vehicle; thus it will also apply to damage inflicted upon a passive vehicle by a pedestrian, an animal or an object or, conversely, by a passive vehicle on a road-user. It will be seen that the definition is wide.

3.4 The concept of "vehicle" is also wide, and it includes any means of locomotion, whether motorized or not. Damage may therefore be done by a motorized vehicle, a bicycle, a sledge, a perambulator, a trailer, even if it is not attached to a vehicle, etc. The same applies to a horse-drawn carriage or to an animal, as long as it can be considered as a means of locomotion, that is to say as long as it is used for the

carriage of a person or thing. The Convention also extends to accidents involving a vehicle pertaining to a railway, if it affects road traffic, as in the case of damage caused by a tram or train on a level crossing. A fortiori trolley buses, which do not proceed on rails, but follow overhead wires, fall within the scope of the Convention. The terms used would also in the future cover hovercrafts moving over the ground.

3.5 The accident must be connected with traffic. This concept has not been defined. It means as a rule that one of the vehicles or one of the persons involved in the accident should be in motion. However, it was realized that the concept could also cover a vehicle parked on a public highway. The Convention also applies to the case in which damage occurs beyond the public highway, for example when a vehicle leaves the road and causes damage to a house. The term "traffic accident" also includes damage caused by stones thrown up by a vehicle against an adjoining house. On the other hand, the Convention will not apply to damage caused by rioters stoning parked cars or by an explosion in a stationary booby-trapped car.

The term "connected with traffic" therefore has a wide meaning, and the Conference expected that it would be given a generous interpretation. The term does not imply the requirement of a chain of causation.

3.6 When defining the place of the accident, the Conference took note of article 2, paragraph 1 of the first Annex to the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles. The text of the Hague Conference, following this provision, refers to traffic "on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access". This enumeration covers practically everywhere that a vehicle may be, for example, in ports, railway stations, courtyards, inside factories or shops, on camping-grounds and other places which people are permitted to frequent. This definition also appears to cover an accident occurring in a street, to which vehicles have no right of entry.

Article 2

1 This article, in its six sub-paragraphs excludes certain matters from the scope of the Convention.

2 In sub-paragraph 1, the Convention is said not to apply to the liability of manufacturers, sellers or repairers of vehicles. It was thought that the particularity of this type of liability, which calls to mind the American concept of products liability, militates against the Convention on Traffic Accidents applying also to the liability of manufacturers of motor vehicles for damage caused by faults in their products, etc. Moreover, it should be pointed out that the Eleventh Session requested the Netherlands Commission and the Permanent Bureau to examine the desirability of placing the liability of manufacturers for their products in priority on the agenda of the Twelfth Session or of a following Session.

This exclusion applies not only to the liability of the manufacturer of the car itself, but also to the liability of the manufacturer or seller of a part of the vehicle, for example the tyre manufacturer.

3 Sub-paragraph 2 of this article provides that the Convention does not apply to the responsibility of the owner, or of any other person, for the maintenance of a way open to traffic or for the safety of its users. Seeing that in the majority of cases the responsibility falls on a State public service, or a public body or a public concessionary, in which case one cannot conceive any other law applying than that of the State where the accident occurred, it was thought preferable to leave this question outside the Convention.

The second part of this sentence was added so as to cover the case in which the person liable to maintain the way is not the owner, for example a tenant, or a usufructory etc.

The part of the sentence which refers to "the safety of its users" takes note of the situation in some countries, such as the Federal Republic of Germany, where legislation makes the distinction between responsibility for the maintenance of the road and the responsibility for its safety.

4 By virtue of sub-paragraph 3, the Convention does not apply to vicarious liability, with the exception of the liability of the owner of a vehicle or of the principal or of a master. The Conference considered it inopportune to deal with this matter in the Convention, especially as the question of the liability of parents for the acts of their children or of the husband for his wife, etc. is closely related to family law.

4.1 The notion of vicarious liability is not defined in the Convention. The term used has been borrowed from the classification of article 1384 of the French Civil Code, which refers in particular to the liability of a father or mother for the acts of their children, the liability of professors, instructors and directors of holiday camps for children confided into their care, to liability of craftsmen for the acts of their apprentices and the liability of masters and principals for the acts of their servants. The characterization of this concept will be effected according to the general conflict rules, that is to say, usually by the law of the forum, on the basis of the examples given.

4.2 Dealing with the particular matter of the liability of parents for damage caused by their children, the Conference considered that such liability should remain outside the scope of the Convention, even in the case of those countries where such liability was not considered to be vicarious liability. For example, according to German law, parents are personally liable for the lack of supervision of their children. However, according to French law, parents are presumed to have been negligent in the supervision of their children, but this presumption can be rebutted. However, both in German and in French law, parents are liable for damage caused by their children, as their liability cannot be made out unless damage has been caused by the children.

All questions of status as parent or child remain outside the Convention. The law designated by the rules of the forum to govern matters of personal status will, for example, determine the age of majority.

It should be pointed out that all matters pertaining to liability for damage caused by things are within the scope of the Convention, the most practical example in this context being the liability of an owner of an animal for damage caused by it.

4.3 The exclusion from the Convention of the liability of parents for the acts of their children does not mean that the Convention will never apply to accidents caused by children. Such accidents are covered by the Convention; but the habitual residence of the parents is not to be taken into account, for example, in the cases enumerated in article 4 c, for the purpose of determining the law applicable to liability. Furthermore, the law deemed applicable by virtue of the Convention will not regulate the question as to whether and to what extent parents are liable for the acts of their children (nothing however prevents the common law from referring these questions to the same law). Moreover, if the parents are the owners of the vehicle, their liability could well be covered under this heading. And also if a father is the principal of his infant son, the provisions of article 8, No 7, can be applied.

4.4 Seeing that in some countries the liability of an owner of a vehicle falls within the category of vicarious liability, it was thought necessary to state expressly that the liability of an owner - a fundamental part of our subject - is totally covered by the Convention.

4.5 The Convention also applies, by way of a derogation to the exception of sub-paragraph 3, to the liability of a principal or master for the acts of his agent or servant, the tortfeasor. The application of the Convention to the principal or master is further confirmed by sub-paragraph 7 of article 8. As to the meaning of principal and master, see below under article 8, paragraph 10, page 31.

5 Sub-paragraph 4 of article 2 provides that the Convention shall not apply to recourse actions among persons liable.

5.1 Notwithstanding the fact that the Convention is based on the principle of the unity of the applicable law with respect to the liability of co-authors of the accident, cases may arise in which the liability of different co-authors may be determined by different laws. Such will be the case for example if as a result of an accident involving many authors and many victims, the victims bring an action against different co-authors. In this case, the problem of the law applicable to recourse actions between the co-authors takes on such a degree of complexity that it was considered wise to leave it aside. The Conference, in adopting this solution also took into consideration the fact that the problem of recourse actions between persons liable is characterized as quasi-contractual in Common Law countries. Thus the Convention excludes from its field of application all problems of recourse actions between persons liable, even when the liability of the co-authors is determined by one single law.

6 A particular problem of recourse actions arises in the realm of insurance. For example there is the case of subrogation of the insurer to the rights of the victim whom he has indemnified, against the author, and the case of the recourse action that the insured person, the author of the accident, has against his own insurer, when the victim has been compensated. As all these questions are of a contractual nature, the Commission decided to exclude them expressly from the Convention. This exclusion is set out in sub-paragraph 5 of article 2.

6.1 Sub-paragraph 6 provides that the Convention shall not apply either to actions and recourse actions by or against social insurance institutions, other similar institutions and public automobile guarantee funds or to any exemption from liability laid down by the law which governs these institutions; as it is, these cases in general belong to the realm of public law.

6.2 As regards public automobile guarantee funds, it should be noted that the establishment of such funds is provided for in article 9 of the European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles, in order to compensate injured parties for damage caused in circumstances giving rise to a civil liability, where the obligation to be insured has not been complied with or the person liable has not been identified or where ordinary insurance is excluded, viz. when a person has taken control of the vehicle either by theft or violence or merely without the consent of the owner or person in charge. However, merely the actions and recourse actions against public automobile guarantee funds fall outside the scope of the Convention. Private funds, such as exist for example in the Federal Republic of Germany and in Sweden are thus covered by the Convention.

Article 3

1 This article lays down the main rule of the Convention, the application of the internal law of the State where the accident occurred.

2 By adopting the classical solution of the application of the lex loci commissi in tortious matters, the Convention conforms with the present practice in the majority of Member States of the Hague Conference. This rule has been confirmed either by legislation or by case law in the following countries: Austria, Belgium, Czechoslovakia, Denmark, France, Greece, Italy, Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Yugoslavia and probably also Finland. In the United States, the application of the local law had long been the general rule; however, the case of Babcock v Jackson 12 N.Y. 2d 473, 191 N.E. 2d 279, 240 N.Y.S. 2d 743 (1963) may have changed the position.

3 In adopting this rule, the Conference did not motivate its decision by theoretical considerations. No reference was made to the theory that a traffic accident gives rise to a non-contractual obligation which can only be localised at its source, that is to say the juridical fact which gives birth to it; furthermore, the Conference did not countenance the idea that a person in a country should be protected against injury occurring to him by the law in force in that country and that the person liable should be subject to the same duty of compensation as all others. The Conference was rather guided by the desire to create clarity in this field by adopting a rule which would be simple, clear and easy to apply. According to the Conference, its work was to prepare a convention, not only for the attention of judges, but above all for the attention of the subjects of the law and their advisers so that they could determine their rights with ease after the occurrence of an accident. We could cite as an example a study recently undertaken by Swiss insurers, which was made known to the Commission by the Swiss Delegate, Mr Panchaud, and which shows that in Switzerland 995 cases out of a thousand of all accidents causing damage are settled without court intervention. Consequently, the solution chosen had to be precise and practical.

In article 3, the Conference adopted a standpoint contrary to the tendency, noticeable mainly in legal writing, to depart from the application of the lex loci. In particular, the Conference proved itself not to be receptive to proposals to introduce the principle of the proper law of the tort, even in very restricted fields. The adopted rule, however, is also contrary to the system established in certain countries, for example Canada, the Federal Republic of Germany, Israel, Japan and the United Kingdom which in varying degrees combine the lex loci with the lex fori.

4 One of the advantages of a convention which is limited to traffic accidents is that the determination of the place which must be taken into consideration rarely leads to any difficulty. The place of the tortious act is almost always the same as the place where the damage occurred The exceptional case where the two places differ did not in the opinion of the Conference call for any special provision. In view of this consideration and seeing that the place of the tortious act is easier to determine in the case of traffic accidents, the Conference chose it as the main criterion for the determination of the applicable law, even in those rare cases where the damage makes itself felt elsewhere. Putting this idea into words, the Convention refers to the internal law of the State where the accident occurred. Let us suppose that a person is knocked down by a car, no apparent harm is done, the victim returns home, and later, the consequences of the accident make themselves felt: the applicable law will be that of the place of the accident and not that of the domicile of the victim. Similarly, if an Austrian is knocked down by a vehicle in France, the evaluation of the "dommage moral" suffered by his family resident in Austria in hearing the news of the accident, will be carried out according to French law. Another somewhat restricted example is that of the accident occurring in Martelange, in Belgium, where a French lorry carrying gas exploded an hundred metres from the Luxemburg frontier causing damage in Luxemburg. It was accepted that according to the Convention, Luxemburg law would not be applied although damage occurred in Luxemburg: the tortious act took place in Belgium.

5 Article 3 specifies that the applicable law is the internal law of the State where the accident occurred, thus the conflict rules of the law deemed applicable by this article will not be taken into consideration and there will be no possible renvoi to the law of another State. This solution corresponds to the general practice of the Hague Conference, which tends to exclude any possibility of renvoi in conventions which aim to eliminate all conflicts between legal systems.

6 The Conference confined itself to resolving the problem of conflicts in the territorial sphere of application. The problem of temporal conflicts of law was not solved in the Convention; according to the generally followed system, this problem will be governed by transitory provisions in the law deemed applicable by the Convention.

7 It should be noted that the draft Convention contained a special rule to deal with the case where the accident did not occur entirely within the territory of a single State. This was not the case in which the tortious act took place at one side of the frontier and its effects were felt on the other side (the accident in Martelange referred to under No 4 above); this provision dealt rather with an accident occurring in a

place where two laws were applied at the same time, and it was not possible to know which to prefer, or even in the case of an accident which would not be connected with any one country, because its localisation was undetermined. Such a case may arise with an accident on horseback at the frontier or, as exampled by the Luxemburg expert, with an accident in an international locality, for example a locality divided between Belgium, Luxemburg and France, or in a Condominium, for example a road belonging both to Belgium and to Luxemburg. To deal with these cases, the draft Convention provided for the application of the legal system which was most appropriate in view of all the circumstances of the accident (and its consequences). It was however decided not to retain this provision, seeing that on the one hand these cases were exceptional, and on the other hand that the provision which was motivated by the concept of the proper law of the tort was obscure and did not help in the determination of the applicable law.

Article 4

1 The Conference did not think it possible to adopt the rule sanctioning the application of the lex loci delicti commissi without providing any exception thereto. For those cases in which converging factors point to the application of a law other than that of the place of the tort, the Conference deemed it wise to set up special provisions to sanction the application of that law. These exceptions, making a new contribution to the solution of the conflict of laws in the realm of non-contractual liability, appear in articles 4, 5 and 6.

2 In the draft Convention, the exceptions were essentially based on the existence of a common residence between the persons involved in a country other than that in which the accident occurred. This solution however proved to be too complicated. Indeed it would be difficult to determine the applicable law according to the habitual residence of so many different persons, such as the driver, the owner, the hirer, the passenger, etc.

3 To clarify and limit the exceptions, it was decided to adopt the place of registration of the vehicles involved in the accident as the fundamental criterion of the exceptions. The advantage of the place of registration is that as a criterion for determining the applicable law it is easier to use than habitual residence. Moreover, the State of registration of the vehicle will as a rule coincide with that of the habitual residence of the driver and owner and also with the seat of the insurance company. The criterion of registration therefore has the advantage of representing the place on which a number of connecting factors converge.

Yet as registration is a purely formal criterion, it was thought necessary to require in certain cases the addition of the real criterion of habitual residence. Thus as appears from the last part of article 6, the aim of which is to put aside all registrations which are meaningless, the criterion of registration is only relevant if it coincides with the habitual residence of either the owner, or the person in possession or control, or the driver, of the vehicle.

It was further considered necessary to retain habitual residence as a connecting factor to a certain extent as regards persons whose connection with the vehicle are fortuitous or non-existent, as for example passengers and persons outside the vehicle at the scene of the accident. In respect to these latter persons, their habitual residence must coincide with that

of the State of registration of the vehicle for an exception to be made to the application of the lex loci. The habitual residence of a passenger who is a victim of the accident is only taken into account in the determination of the applicable law if it is that of the country in which the accident occurred. In that case, the habitual residence counterbalances the fact of registration in another country and the case is brought back to the sphere of application of the lex loci.

On the other hand, the driver, the person in control, an owner of the vehicle and any other person having a right to the vehicle, are, without prejudice to article 6, as a rule identified with the vehicle.

4 The draft Convention drawn up by the Special Commission proposed special provisions to be made for non-contractual liability in the realm of transport of persons. These provisions which appeared in article 4 (gratuitous transport) and 5 (non-gratuitous transport) - (see also article 1 No 2.4 above, page 8) - drew a distinction between the internal relationship, that is to say the relationship between the transporter and the transported person, and the external relationship, that is to say the relationship between several vehicles involved in the accident or between a driver and the passenger of another vehicle or between the driver and a pedestrian. By reason of these provisions, the draft Convention would apply a different law, for example to a case between a passenger and his driver on the one hand, and to the passenger and the driver of another vehicle on the other hand, even if all the persons were involved in the same accident.

This plurality of applicable laws did not find its way into the final text of the Convention, which is more pervaded by the principle of unity. Special provisions on transport have been left out and the same conflict rules govern both external and internal relationships. So the liability of all persons involved in one and the same accident towards the victim is governed by the same law. However, for practical purposes, the principle of unity has been limited to the relationship between the co-authors of the tort and each particular victim. If there are several victims, the applicable law is determined separately for each of them.

5 In this way article 4 provides for the exceptions to the general principle of the application of the law of the State in which the accident occurred. Together with article 5, it makes the most original contribution of the Convention, in providing a solution to the disadvantages encountered in applying the local law when all parties in an accident are connected with a country other than that in which the accident occurred. The idea is simple but its operation proved to be more difficult due to the complexity of the subject-matter. Various hypotheses had to be separated starting with the simplest and working through to the most complicated. The article therefore deals separately with the cases firstly where one single vehicle is involved, then where several vehicles are involved, and lastly where persons present at the scene of the accident but outside the vehicle or vehicles are involved in the accident.

6 Article 4 deals only with liability for damage done to persons or vehicles, while article 5, as we shall see, deals with liability for material damage.

7 Article 4 refers to vehicles or persons involved in the accident.

7.1 The word "impliqué" can have two meanings in French[5]. One meaning of the word would introduce the concept of culpability. According to this meaning of the word, a vehicle would be involved (impliqué) in an accident when the liability to which it may give rise is put into question. But in modern usage, this word may also have a more neutral and more objective meaning. When the word has this meaning, a vehicle "impliqué" in the accident is a vehicle which is directly concerned in the accident or has taken part in the accident, or has played a role in the accident. The Swiss Federal Law on Road Traffic of the 19th of December 1958 uses the word both as regards persons liable ("responsables") or who may be liable ("à mettre en cause"), and towards persons who are certainly not[6].

7.2 Both meanings of the word are used in article 4 of the Convention. In paragraphs a and b the word "impliqué" bears its neutral objective meaning, brought out in the English text by the use of the word "involved", the meaning of which is quite clear. In paragraph c on the other hand, the word "impliqué" takes on its subjective meaning of culpability, which explains why in the English text the expression "involved and may be liable" is used.

7.3 Without a doubt, one could maintain that the word "impliqué" bears a meaning involving culpability in all cases. To maintain this would be to admit that very difficult differences existed between the English and the French texts which would pose an awkward problem of choice, the practical consequences of which would be most acute.

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5 See P. Robert, Dictionnaire alphabétique et analogique de la langue française, which says: Impliquer - engager (quelqu'un) dans une affaire fâcheuse; mettre en cause une accusation (impliquer une personne dans une affaire; être impliqué dans un procès); but the same dictionary also refers to "contenir" and "inclure".

6 See for example article 51, paragraph 2, second and third sentences: "Ceux qui sont impliqués dans l'accident, mais en premier lieu les conducteurs de véhicules, avertiront la police. Toutes les personnes impliquées, y compris les passagers, doivent prêter leur concours à la reconstitution des faits".

It is certain that all those "impliqués" in the accident are not likely to be liable, for example the passenger. Furthermore, article 60, paragraph 2 of the same law refers to "responsables (those liable) impliqués".

One example may be taken: a vehicle registered in State A, either regularly parked or stopped at traffic lights in State C is hit by a vehicle registered in State B. According to the objective meaning of the term, there are two vehicles which are involved in the accident, and which take part in the accident (one actively, the other passively), and the law of C will be applied as the law of the occurrence of the tort, by virtue of the different places of registration of the vehicles. On the other hand, if one took the other meaning of "impliqué" (culpability), only one vehicle (the vehicle that ran into the other) is involved in the accident. In this case the law of A would be applied, being the law of the State in which that vehicle is registered.

7.4 We are of the opinion that the Convention did not intend to put this meaning on the term in all cases. Paragraph a of article 4 envisages the case in which according to facts established by a police report, one vehicle has played a part in the accident. This is the straightforward case in which a vehicle collides into a tree or knocks down a pedestrian.

Paragraph b covers the case in which two or more vehicles play a part in the accident, the more obvious case being that of a collision between two vehicles even if one of them is legally parked. The notion of "impliqué" will only be clothed with an element of culpability in the case provided for in paragraph c which does not refer to vehicles but to persons, to pedestrians, in respect of whom a subjective enquiry is justified, if only to distinguish pedestrians who have "played a role" in the accident from mere witnesses of the accident.

7.5 Besides arguments derived from the English text ("involved" in paragraphs a and b, "involved and may be liable" in paragraph c) there is a logical argument which may be called on to support this interpretation. The "liability of a vehicle" is an objective liability in some legal systems. For example, when a collision takes place, it will not be possible to know whether the liability of the vehicle can be invoked without consulting the applicable law which creates such objective liability. Yet this objective liability must first be invoked in the determination of the applicable law. It is precisely to avoid such a vicious circle that the Commission at the Eleventh Session preferred to use the objective term "impliqué"-involved rather than having recourse to the notion "author of the accident" which figured in article 3 of the draft Convention drawn up by the Special Commission. As regards paragraph c which indeed introduces the notion of culpability, it will be noted that this paragraph deals with persons and not with vehicles and that in this case liability is really objective and presupposes, whatever may be the applicable law, some evaluation of the role played by the person concerned. So as we have said, we must distinguish from the start between persons who may be liable and mere witnesses whose residence should not play a role in the search for the applicable law.

8 Article 4 deals only with the case in which the vehicle or vehicles involved in the accident are registered. Accidents involving unregistered vehicles as well as certain cases of multiple registration or registration which is meaningless are dealt with in article 6. It should be observed that the vehicles falling under article 6 should also be taken into consideration in the determination of the applicable law. Thus an accident involving a car and a bicycle will fall within the scope of article 4 paragraph b by virtue of the combined effect of articles 4 and 6.

9 Paragraph a of article 4 envisages the case in which one single vehicle is involved in the accident.

If this vehicle is registered in a State other than that in which the accident occurred, the internal law of the State of registration will apply to determine liability depending on certain conditions which vary according to particular situations. Paragraph a is divided into several sub-paragraphs dealing separately with the liability first towards the driver, owner or any other person having control of or an interest in the vehicle, then towards a victim who is a passenger and lastly towards a victim who is outside the vehicle at the place of the accident. Finally there is a provision to deal with the case where there are several victims.

9.1 The first sub-paragraph of paragraph a deals with the liability towards the driver, owner or any other person having control of or an interest in the vehicle.

9.1.1 When these persons are victims, their claims are determined by the internal law of the State of registration, their habitual residence not being taken into account. If for example a vehicle registered in Sweden, driven in Denmark by a person other than the owner, crashes against a tree, questions of liability between the driver and the owner are governed by Swedish law. Thus, one of the advantages of using registration as a criterion for determining the applicable law is that thereby any split of the legal relationship between the driver, the owner and the person having control of the vehicle is avoided. From the point of view of the applicable law, these persons are totally assimilated with the vehicle. In fact, the claims which the driver could bring against the owner or the owner against the driver, have no connexion with the local law. The links with the State of registration are usually much closer seeing that these persons normally have their residence in that country. But even if such were not the case, for example if the vehicle has been rented during a visit to a foreign country, the connexion with the law of the State of registration would even then be quite normal as this law usually also governs the contract of hire. Furthermore, the insurance cover is usually taken out in the country of registration.

9.1.2 The person having control of the vehicle ("détenteur") has the material use of the vehicle without claiming to be the owner of it. He may have the use of the vehicle by virtue of a hire-purchase agreement, a contract of hire or a pledge, etc.

9.1.3 The first sub-paragraph refers to the case where the driver, owner or person having control of the vehicle is a victim. Here it should be pointed out that it follows indirectly from the provisions of the second and third sub-paragraphs that these persons are also assimilated with the vehicle if they are persons who may be liable.

More particularly with regard to the owner, what has been said above is only applicable to his special position as an owner. If he is injured as a passenger, the rule which is applied to passenger-victims is followed, and if he is injured at the scene of the accident, but outside the vehicle, his case will fall within the provisions of the third sub-paragraph.

9.2 The second sub-paragraph of paragraph a deals with liability towards a victim who is a passenger in the vehicle.

9.2.1 This liability is governed by the law of the State of registration if the passenger has his habitual residence in a country other than that in which the accident occurred. By using the imperfect tense in the French text ("qui était passager"), reference is made to the time of the accident for the purposes of determining whether the victim had his habitual residence in the State of registration or in a third State.

As it is relatively infrequent that the passenger has his residence in the State in which the accident occurred, the rule means de facto that the internal relationship (see under No 4 above) is governed as a general rule by the law of the State of registration when one vehicle alone is involved in the accident. In respect of the passenger, the place of the accident is no longer in itself a connecting factor. This factor must correspond with the habitual residence of the passenger for the local law to be applicable. In other cases, when the passenger is resident in a country other than that where the accident occurred, the law of the State of registration is more relevant, as the passenger and the person responsible for the vehicle usually have their habitual residence in that country, the place where the insurance contract has also been normally been taken out. Furthermore, the passenger can foresee and accept the fact that the law of the State of registration will be applied. The application of this law can only appear arbitrary in connexion with tours or other collective forms of transport. Yet in this case, parties may always agree on the applicable law by making provisions in the contract of carriage. As for hitch-hikers, it was considered that when they get into a car, they accept in advance the possible application of the law governing the vehicle. The hitch-hiker is furthermore protected by the fact that the lex loci will be applied when the passenger is habitually resident in the State where the accident occurred.

9.2.2 The fairly rare case of the passenger being co-author of the accident was not considered sufficiently important to be dealt with explicitly in the Convention. Silence of the Convention on this point implies that the habitual residence of the passenger-co-author of the accident is not to be taken into consideration in the determination of the applicable law. Thus the negligent passenger is totally assimilated with the vehicle, in the same fashion as the driver. He has indeed intermeddled with the driving of the vehicle.

9.2.3 "Habitual residence" is a fundamentally factual concept. It involves a certain stability with respect to both duration and intention.

9.3 The first sub-paragraph of paragraph a deals with liability towards a victim who is outside the vehicle at the place of the accident. This really is the case of the pedestrian.

The application of the lex loci appears to be the natural choice of law for this case. An exception in favour of the law of the country of registration was deemed justifiable in the case in which the victim at the time of the accident had his habitual residence in the State of registration. In this case any claims will usually be dealt with in the State of registration.

The rule only deals with victims who are at the place of the accident at the time at which the accident occurred, that is to say "direct victims". All other persons who have a right to damages for any harm they have suffered on the rebound as a consequence of the injury done to the direct victim, for example by reason of rules on compensation for "tort moral" or for damage arising from the death or incapacity to work of another person, are totally assimilated with the direct victim for the purpose of the determination of the applicable law. Their claims are therefore governed by the law which determines or would have determined questions of liability towards the direct victim. However, the text makes it clear that the habitual residence of the victim on the rebound must be taken into consideration if that victim was present at the scene of the accident. The law which is deemed applicable by virtue of the habitual residence of the direct victim will by article 8 No 6 determine those persons who have a claim for damages.

9.4 The last sub-paragraph of paragraph a covers the case of several victims.

In this case, the applicable law is determined separately for each of them. It is therefore possible that the law of the State of registration is applied to questions of liability for damage caused to the driver or the vehicle, whilst the lex loci is applied to questions of liability, arising from the same accident, towards the hitch-hiker and the pedestrian, both of whom had their habitual residence in the State where the accident occurred.

Thus in the case of several victims, it was deemed advisable - in contrast to the case involving a plurality of authors, where there is a unity of the applicable law among them - to adopt a rule providing for a possible plurality of laws to be applicable to each of their claims. Indeed, from the point of view of the plaintiff-victims, their different legal actions are by nature more severable than the cases of the defendant-co-authors, where unity of the applicable law is essential for practical and procedural reasons; the liability of each co-author must be evaluated in the light of the liability of the others.

From what has been said above, it follows that paragraph a may be applied, even if several persons are liable, so long as all these parties are linked with the vehicle involved by being drivers, owners or persons in control of the vehicle or passengers. They are all for the purposes of the applicable law assimilated with the vehicle and are governed by the law of the State of registration, no account being taken of their habitual residence.

If one of the co-authors is a pedestrian, the reader is referred to the commentary on paragraph c (see No 11 below).

It remains for us to consider the case in which one or several co-authors are at the same time victims of the accident. Firstly, it must be pointed out that a victim who has contributed towards his own injury is not to be considered as co-author in the sense of article 4. Really this is a question only of the contributory negligence of the victim. Co-author must be understood to mean a person who is responsible for injury caused to a third person. When one of the co-authors is at the same time a victim of the accident, only his role as an author is taken into account in the determination of the applicable law and the principle of unity comes into play. Therefore, there can be no plurality of applicable laws, unless there are at least two victims who are not at the same time co-authors.

10 Paragraph b of article 4 deals with the case where several vehicles, whether registered or not (see No 8 above) are involved in the accident.

In this case, the provisions of paragraph a which provide for an exception to the lex loci are only applicable if all the vehicles involved in the accident are registered or, in particular cases, stationed in one and the same country other than that in which the accident occurred.

Paragraph b creates a complete unity of the law applicable to all the vehicles. If just one of the vehicles involved in the accident is registered in a third country or in a country where the accident occurred, the lex loci must be applied to all vehicles and persons concerned in the accident.

If other persons present at the scene of the accident but outside the vehicles are involved, paragraph b is only applicable if they are only victims and are not at the same time responsible for the accident.

The application of paragraph b should not lead to any difficulty. The provision means that if all vehicles which took part in the accident are registered in the same country, the law of the State of registration applies to questions of liability towards drivers, owners, persons having control of or an interest in the vehicle, without any further conditions being added. As regards liability towards the passenger-victim, he must also have his habitual residence in a country other than that in which the accident occurred. As regards questions of liability towards a pedestrian-victim, the law of the State of registration is only to be applied if the pedestrian had his habitual residence in the State of registration.

Paragraph b provides for unity only as regards the vehicles. When there are several victims, it is possible that the law of the State of registration will be applied for example to questions of liability towards a passenger resident in the State of registration whilst the lex loci will be applied to questions of liability towards another passenger who had his habitual residence in the State where the accident occurred.

11 Paragraph c of article 4 covers the case where one or more persons outside the vehicle or vehicles at the place of the accident bring about the accident. These third parties may be solely liable for the accident, or may be co-authors of it.

In this situation, the provisions of paragraphs a and b are applicable only if all the third parties had their habitual residence in the State of registration at the time of the accident. If such is not the case, the lex loci will be applied to all persons involved in the accident.

11.1 As is mentioned in No 7.5 above, the reference in paragraph c to persons "impliquées" in the accident, means persons who may be liable for it (cf. No 7.1 above). This interpretation comes out clearly in the English text which says "are involved in the accident and may be liable". It will suffice if a person involved in the accident as author or victim brings up the liability of this third person, for paragraph c to be applicable.

11.2 The reference to persons outside the vehicle or vehicles at the place of the accident envisages in the first place pedestrians, but can also cover for example a cattle-driver or a dog-owner. As for this latter case, it should be noted that if a cow or dog causes an accident in the absence of its owner or person controlling it, paragraph c is

not taken into consideration in the determination of the law applicable to questions of liability towards victims of the accident; only the criteria set out in paragraphs a and b should be relied on. Any damage caused by an unattended animal to a vehicle therefore usually falls within the scope of application of the law of the State of registration.

11.3 It appears from the last sentence of paragraph c that it will apply even if persons outside the vehicles are also victims of the accident. This sentence may appear superfluous in view of the third subparagraph of paragraph a. But it was added for reasons of clarity and it also reaffirms the general principle whereby the liability of an author of an accident who is at the same time a victim of it is evaluated from the standpoint of his position as author of the accident. The sentence thus is indicative of a return to the principle of unity. The applicable law is usually determined separately in respect of each victim in accordance with the rule of plurality, but when a victim is at the same time a co-author of the accident, there is a return to the principle of unity of laws applicable to the co-authors. Let us suppose that a Belgian vehicle knocks down three pedestrians in the Netherlands, one of whom is resident in the Netherlands and the other two in Belgium. The law applicable to the Netherlands pedestrian will be the local law, and Belgian law will apply to the Belgian pedestrian. But if the Netherlands pedestrian is a co-author of the damage suffered by one of the Belgian pedestrians, the lex loci will be applied to the legal relationship existing between the driver, the Netherlands citizen and the Belgian. The last part of paragraph c emphasizes this rule of unity. Only questions of liability of the driver towards the other Belgian pedestrian remain governed by Belgian law.

12 Article 4 thus sanctions the rule of unity of applicable laws to co-authors of one and the same accident in different ways. For an exception to be made to the application of the lex loci it requires that all vehicles are registered in the same country, drivers, owners, persons having control of the vehicle and passengers being assimilated with the vehicle as persons who may be liable, and that co-authors outside the vehicle or vehicles present at the scene of the accident have their habitual residence in the State of registration.

13 The rule set out in paragraph a, providing for the application of the law of the State of registration when only one vehicle is involved in the accident constitutes an important exception to the principle of the application of the lex loci. On the other hand, in the cases covered by paragraphs b and c, where several vehicles are involved in the accident or where persons outside the vehicle are involved and may be liable, the exceptions to the lex loci will be fairly rare in practice.

Article 5

1 This article deals with damage caused to goods other than vehicles.

2 The first paragraph of article 5 relates to goods carried in a vehicle and which either belong to a passenger or have been entrusted to his care. If these goods are damaged in a traffic accident, the law deemed applicable under articles 3 and 4 to questions of liability towards the passenger will also govern liability for damage done to these

goods. Whether the goods actually belong to the passenger or to another person, for example by reason of a hire-purchase contract or some kind of bailment, is totally irrelevant. It is patently clear that a passenger's goods also include his clothes and other personal effects which he has on him.

Passengers' goods defined in this way are therefore totally assimilated to the passenger from the point of view of the determination of the applicable law.

2.1 From the text one sees that the first paragraph applies only to goods carried in the same vehicle as the passenger. Consequently, if goods of a passenger are carried in a vehicle other than that in which the passenger travels, the second paragraph of article 5 governs questions of liability for damage caused to goods, even if both vehicles are involved in the same accident.

2.2 It might be well to repeat at this juncture that the Convention applies only to traffic accidents. If there is no accident but baggage of a passenger is lost during carriage, the Convention is not applicable.

3 The second paragraph of article 5 deals with goods carried in the vehicle which do not belong, or have not been entrusted, to a passenger. These are then goods belonging to a third person outside the vehicle and which have been entrusted to a carrier, a driver or an owner of the vehicle or to any person other than a passenger. As the driver is not a passenger, goods which belong to him and which are in the vehicle are also covered by the second paragraph. The same is true for the goods of the owner of the vehicle unless he is a passenger in which case the first paragraph is to be applied.

Liability for damage to these goods is governed by the law which is applicable under articles 3 and 4 to determine liability towards the owner of the vehicle. These goods are therefore assimilated to the vehicle. One can presume that a person entrusting his goods to the driver of the vehicle accepts to have liability governed by the law of the vehicle.

4 In this context one should remember that under article 15, this Convention gives way to conventions in special fields, such as for example the "Convention relative au contrat de transport international de marchandises par route (CMR)".

5 The third paragraph of article 5 governs liability for damage to goods outside the vehicle or vehicles, such as for example damage to trees, animals and buildings. Here the lex loci is applied as a general rule; this seems to be inevitable in the case of damage to real property.

5.1 Yet it proved necessary to provide a special rule for damage caused to clothing and other personal effects of a victim outside the vehicle. If clothing is damaged, the victim himself usually suffers some bodily injury. Now, under the third sub-paragraph of paragraph a of article 4, the law of the State of registration is to be applied to questions of liability for bodily damage caused to a victim outside the vehicle who was present at the scene of the accident, if the victim had his habitual residence in the State of registration. So as to avoid the inconsequent situation of applying the law of the State of registration to bodily damage and the lex loci to material damage, it has been provided that

liability for damage caused to personal effects of such victim is governed by the internal law of the State of registration, when that law would be applicable to the liability towards the victim according to article 4.

5.2 The concept of "personal belongings" should be interpreted widely. It covers not only clothes, cameras, briefcases etc., but also articles entrusted to the care of the victim, even if they are very valuable, for example diamonds in his care.

6 The following example may illustrate the meaning of article 5. An accident occurs in Holland involving two Belgian cars. In one of the cars is a Netherlands passenger. The cars damage a roadside house, and injury is done to the passenger and to a Belgian who has temporarily rented the house. The first paragraph of article 5 points to the law applicable to the baggage of the passenger: Netherlands law, as the passenger resides in the country where the accident occurred. In respect of the baggage entrusted to the driver, Belgian law would be applied under the second paragraph, as the two cars were both registered in Belgium. An evaluation of the damage caused to the house will be made according to the lex loci, by virtue of the third paragraph, whilst questions of liability for injury sustained by the Belgian tenant, who was habitually resident in Belgium, will be governed by Belgian law. Liability for damage to his clothes and his camera will also be governed by the same law.

Article 6

1 This article covers the case of vehicles which do not have any registration or whose registration is meaningless.

2 If a vehicle is not registered - either because there is no duty to register the vehicle, as for example bicycles and horse-drawn vehicles etc., or because the vehicle should have been registered but is not - registration can obviously not be used as a point of contact. The same is true if the vehicle is registered in several countries as is the case in Canada, a country in which lorries must be registered in every province which they cross.

In these cases, the internal law of the country in which the vehicle is habitually stationed replaces that of the country of registration. Indeed it was thought preferable that the criterion chosen to govern the determination of the applicable law for these vehicles should be objective, such as the place where they are habitually stationed, rather than personal, such as the habitual residence of the owner, driver or person having control of the vehicle. The objective criterion is closer to that of registration. It is also the criterion adopted in the European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles. The place where the vehicle is habtually stationed will most often coincide with the habitual residence of the owner.

3 The criterion of the place where the vehicle is habitually stationed is also applied if registration is meaningless or of a purely formal nature, i.e. when neither owner nor driver nor the person having control of the vehicle had their habitual residence in the State of registration at the time of the accident.

This is the case, for example, with military personnel stationed abroad, whose vehicles bear local number plates, but whose habitual residence is in their country of origin. The same is true in respect of customs number plates, which are for example allotted to foreign tourists at the Swiss border. Another example is that of a tourist who buys a car in a country with the intention of selling it on his departure. The owner in this case does not have his habitual residence in the State in which the vehicle is registered either. The same case arises when the vehicle bears a provisional international registration.

4 In all these examples, reference is made to the law of the State in which the vehicle is habitually stationed. Yet it may be difficult to determine this place in the case of a vehicle which has just been purchased. Suppose that a person, habitually resident in Sweden, buys a car whilst on visit to Germany and an accident occurs in Denmark when he is on his return journey home. The German registration of the car may not be considered, as the owner, who is at the same time both the driver and the person having control of the car does not reside in Germany. One should therefore return to the criterion of the place where the vehicle is habitually stationed. Now this criterion fails as well, as the vehicle has definitely left Germany and has not yet arrived in Sweden. All the same the points of contact seem to converge on Sweden, the State in which the vehicle could be said to have been habitually stationed in anticipation, taking into consideration the habitual residence of the owner; one could also return to the basic principle of the application of the lex loci.

Article 7

1 This article determines the influence that the local law may have on questions of liability.

2 It sets out the rule that whatever may be the applicable law, in determining liability, account shall be taken of rules relating to the control and safety of traffic which were in force at the place and time of the accident.

3 Article 7 is therefore only of importance when, by the operation of articles 4 to 6, the applicable law is a law other than that of the place of the accident. In such a case it seems normal that these rules governing traffic should be taken into account when determining liability, although they derive from a law other than that which determines liability.

4 The term "rules" has been used in its widest sense and covers the law, regulations, and even municipal ordinances.

5 The rules relating to safety do not include only technical requirements applying to the vehicle but also for example specifications limiting the working hours of a professional driver and the percentage of alcohol permitted for drivers.

6 Local rules relating to control and safety of traffic are only data which a judge will all the same have to take into account. Yet the reference to "rules relating to the control and safety of traffic" covers different concepts, in respect of which the lex loci does not

always assert itself equally strongly. There are very many degrees of these rules and the local law is not exclusive. It is for this reason that a flexible wording has been adopted, conferring on judges wide discretionary powers of evaluation.

6.1 For example, it would be inconceivable to refer to a law other than that of the place of the accident in respect of rules governing one-way streets or priority or those laying down whether one should drive on the left or on the right.

6.2 Similarly, if there is a speed limit according to local law, a judgment must take into account any violation of this rule, even if the applicable law does not have any such restriction.

6.3 If, on the other hand, there is no speed limit fixed by the local law, a judge may nevertheless consider that the driver was at fault in driving too fast taking into account all the circumstances. It should therefore be noted that in such a case the local law may not be invoked to excuse the driver for an act which is negligent in the eyes of the applicable law.

6.4 Then again, there is the case where the law applicable to questions of liability is more exacting than the law of the place of the accident. If for example foglamps are not required by the latter law, but are required by the law applicable to questions of liability, it was considered that a judge may consider the lack of these lamps to be negligent, for example if he is of the opinion that the driver should have reduced his speed as his car was not equipped with foglamps. The following example of a coach travelling in a foreign country where an accident occurs illustrates the same situation: - according to local law, there is no need to change the driver at regular intervals. On the other hand, according to the law deemed applicable to liability, the driver of the coach must be replaced every six hours. Although the local law does not contain any such restriction, a judge may take into account the requirements of the law of the State of registration in determining liability.

6.5 The evaluation of the tortious nature of the act committed by the author of the accident therefore depends on the combined effect of the local law and the law applicable to liability. The rules of the local highway code are data which play a part in the evaluation of the whole situation. This evaluation is carried out according to the applicable law, but on the basis of factual elements drawn inter alia from the local law. This law is therefore only of relevance in providing certain factual elements to the judge and so to enable him to apply the law governing liability.

Article 8

1 This article determines the scope of the applicable law.

2 The Conference decided to give as wide a scope as possible to the applicable law. Indeed it would have been pointless to extract a law governing as a general rule civil non-contractual liability, if subsequently a host of questions relating to liability were to be withdrawn from its field of application. All matters, with the exception of those expressly excluded in article 2, which civil law assigns to the realm

of tortious liability, will therefore fall within this field. It was deemed particularly useful, contrary to the practice of some legal systems, to avoid a scission of applicable laws, as there is often a link between the requirement of fault and the extent of reparation. For example, a law requiring proof of negligence will award total redress, whilst another law which dispenses with the necessity of proving negligence will limit the amount of compensation payable. If one were to carve up the applicable law and separate liability from reparation, this could only lead to a very approximate solution. By not carving up the applicable law, article 8 rejects certain tendencies which are manifesting themselves at the present time.

3 The Conference did not deem it useful to make an exhaustive list of all matters to be covered by the law applicable to liability. In its view, it sufficed to make en enunciative enumeration (demonstrated by the use of the adverbial phrase "in particular"), so as not to exclude involuntarily any important matter. Article 8 therefore mentions only as examples certain matters which are governed by the applicable law.

4 Sub-paragraph 1 of article 8 mentions the basis and extent of liability. These are the intrinsic elements which make up liability, in other words the positive conditions of such liability.

4.1 "Basis of liability" should be taken to mean for example whether liability is based on fault or is ascertained objectively, the definition of fault, including the problem of ascertaining whether an omission in the same way as an act may constitute fault, the existence of an act germinating liability, presumptions of liability and the burden of proof as substantive issues, the link of causation between the tortious act and the damage caused, the persons liable, etc.

4.2 It should be noted that under article 2, sub-paragraph 3, the Convention does not apply to vicarious liability with the exception of the liability of an owner of a vehicle or of a principal, or of a master. (See the commentary to article 2, Nos 4.1 to 4.3).

4.3 The reference made to the extent of liability covers inter alia any legal limitation set on such liability, and shows that if there is a maximum fixed by law, this is determined by the law deemed applicable to liability by virtue of the Convention. Questions of compensatory damages and division of liability between the tortfeasors similarly fall under this heading. But it should be remembered that the Convention does not apply to recourse actions among persons liable (article 2, sub-paragraph 4).

4.4 It is essential to point out that preliminary questions do not fall within the scope of the applicable law by virtue of this Convention. For example the definition of an owner is not a question of liability but is a question of property law. The rules of private international law relating to property law will be applied. The same is true in respect of capacity; the national law or the law of the domicile depending on the case, not the law governing liability, will decide who is capable and who is incapable. The Convention only contemplates liability, not questions of personal status or realty.

5 According to the second sub-paragraph of article 8, the law deemed applicable shall also determine the grounds for exemption from liability, any limitation of liability and any division of liability. This provision refers to the extrinsic elements of liability, i.e. the conditions of exemption.

5.1 Among the grounds for exemption would fall for example force majeure, including necessity and act of a third party, and also the fact that the accident was due totally to the negligence of the victim.

It seems that the application of the "guest statutes" as known in America, which exempt a gratuitous carrier from liability towards his passenger, and the problem of the admissibility of actions between spouses, denied as a rule in some Common Law countries, should also fall within the scope of this provision.

It should be noted that rules of exemption set in social security law remain outside the Convention under article 2, sub-paragraph 6.

As regards the problem of the validity of clauses which exempt a person from fault or limit his liability, the drafting committee had proposed to use the phrase "legal grounds for exemption", so as to exclude from this provision contractual clauses exempting or limiting liability. Afterwards it was decided to strike out the word "legal" from the text. Consequently it seems that the text as it has been adopted would admit that the problem of ascertaining whether such exemption clauses are valid also falls within the scope of the law applicable to liability.

5.2 As to the concept of division of liability, this may refer to cases where there is contributory negligence on the part of the victim; in such cases liability for damage is divided between the author of the accident and the victim, possibly varying in proportion to the respective gravity of the negligence of each party.

6 Under sub-paragraph 3 of article 8, the law deemed applicable shall determine the existence and the kinds of injury or damage which may have to be compensated.

6.1 This will thus determine whether there is damage which gives rise to any civil liability and also the order in which damage, physical, material or "moral", is to be redressed. The applicable law will also determine the various elements of damage for which the victim may claim compensation, such as losses suffered and profits missed (damnum emergens, lucrum cessans), as well as evaluation of these elements (article 8, sub-paragraph 4).

6.2 As regards the problem of the law applicable to the burden of proof, one must distinguish proof of liability and the proof of damage. The burden of proving liability as an element of substance depends on the law governing the substance of the case, that is to say the law applicable to liability. If there is a presumption of liability, this falls under article 8, sub-paragraph 1, which deals with the basis of liability (see No 4.1 above). On the other hand, proof of damage, including various methods of proof, is proof of a fact and thus falls within the ambit of the lex fori.

7 Sub-paragraph 4 of article 8 refers to the kinds and extent of damages (the English word "damages" corresponds to the French phrase "dommages et intérêts" and thus covers compensation for damage). Indeed, it proved necessary to mention this point expressly, seeing that the question of the extent of damages is governed at the present time by the lex fori in some countries, such as the United Kingdom.

7.1 The applicable law thus determines the mode of redress, that is to say whether the damage should be compensated in kind or equivalently by the payment of damages. It will also determine the amount of redress due.

7.2 More particularly as regards the question of measure of damages, it was emphasized during the discussions of the Special Commission, that if the lex fori fixes a maximum of damages payable while the foreign law applicable to liability does not have such a limit, the judge ought to follow the foreign law. There will therefore be no maximum amount payable; but this will not prevent the judge from fixing the amount of damages according to his own personal convictions. If some countries evaluate "dommage moral" according to scales established by practice, a judge should, as far as possible, take these scales into account. A further example of the application of the rules of the lex causae in respect of the measure of damages arises when a judge who would have to apply Swiss law, might notwithstanding any provisions of the law of the forum, make use of the provision in Swiss law allowing for reduction of damages if the tortfeasor would find himself in financial difficulties or if the victim were well-to-do.

8 Sub-paragraph 5 of article 8 relates to the question whether a right to damages may be assigned or inherited. As appears clearly from the English text, this provision covers transfer of the right both by assignment and by way of succession.

In the latter case it must be ascertained whether an action may be brought by a person inheriting the rights (ayants droit) of the victim - not in his personal capacity to obtain redress for the damage which he has suffered on the rebound due to the death of the victim, a matter which is dealt with under sub-paragraph 6 of article 8 - but in his capacity as heir with a view to obtaining redress for the original damage suffered by the victim whether to his person or to his goods.

8.1 Firstly, it seems that the law governing the devolution of the estate of the victim should be that which determines whether a person can be an heir or not. This a preliminary question to the main action.

8.2 As regards the question whether a right to damages may be assigned or inherited, the situation was less clear. Two tendencies made themselves felt in the Special Commission, one which favoured the application of the law applicable to the inheritance and the other which considered that questions of the transfer of rights fall within the scope of the law applicable to liability. This latter opinion prevailed at the Conference.

This solution is particularly interesting in view of the differences which exist between Common Law countries and Continental countries on the question as to whether a right to damages may be assigned or inherited. Although the opposition of the Common Law countries to the admissibility of an action by an heir lessened to some degree, differences still remain as regards the conditions in which this action may be brought.

8.3 Finally, it should be noted that the question of the survival of an action against the heirs for compensation for a tort committed by the deceased can only be determined by the law governing questions of succession.

9 Sub-paragraph 6 of article 8 states that the applicable law shall also determine the persons who have suffered damage and who may claim damages in their own right.

This provision deals in particular with the problem of ascertaining whether a person other than the "direct victim" (see commentary to article 4, No 9.3) can obtain redress for damage suffered by him on the rebound, as a consequence of the damage caused to the victim. Very often "dommage moral" may be suffered as a consequence of initial damage felt by someone else; for example, the accidental death of one person causing tribulation to another. This situation also occurs in the field of material damage. We think of the case of children whose maintenance depended on the work of their father who was killed in a traffic accident. These children are directly injured. If they sue the motorist who killed their father, they will sue in their personal capacity for compensation for the damage done to them.

The text of this provision reads that the damage should have been suffered personally by the victim who is asking for redress. This does not mean to say that a body corporate, comprised of a group of individuals may not claim damages for an injury affecting the totality of interests that it represents. The problem of ascertaining whether such an action will be admissible therefore also depends on the law deemed applicable to liability. Yet article 2, sub-paragraph 6 states that the law deemed applicable shall not apply to actions and recourse actions by or against social insurance institutions.

10 Under sub-paragraph 7 of article 8, the law deemed applicable shall determine the liability of a principal for the acts of his agent or of a master for the acts of his servant.

10.1 This reference which seems merely to repeat the content of article 2, sub-paragraph 3, was added with a view to clarifying the text and to avoid any lacuna appearing. It also covers the liability of any body corporate for its agents.

The rule whereby the law applicable to the liability of an agent-author of an accident will also determine the liability of his principal, conforms to the guiding principle of the Convention, the need to ensure that there is a unity of applicable laws in respect of the different co-authors.

10.2 The concept of "commettant", referred to in the Convention, is not known to all legal systems represented at the Hague Conference. To explain the meaning of this term in the Convention, it may be useful to illustrate its meaning in French domestic law, where the concept seems to be more developed. In a very general way, "commettant" relates to a person who directs someone else to carry out certain acts on his behalf and according to his instructions. Article 1384 of the French Civil Code indeed directs that masters and "commettants" are liable for damage caused by their servants and agents acting within the scope of their employment. The term "master" (maître) picks out only a particular

kind of "commettant", whose underlings are servants or domestics, that is to say all those hired to look after the person or house of the master. To establish the existence of this link, it would seem that both legal commentators and case-law in France are in agreement that the essential, and in reality sole, condition is the requirement of a link of subordination between the "commettant" and the "preposé". On the other hand, whether the "commettant" pays a salary or not to the "préposé", is of little importance; moreover, the "commettant" need not be bound to his "préposé" by contract. The standard requirement insisting that the "commettant" has chosen his "préposé" does not seem to be retained by case-law. Thus a person hiring a car with driver may be liable for the acts of that driver in spite of his lack of free choice as regards the identity of the driver.

To illustrate the principle of subordination, we may cite other cases particularly relevant to traffic: the fact that an occupant of a car does not know how to drive does not prevent him from being the "commettant" of the driver, when the latter is subject to his direction; it has also been decided that subordination exists when a father is sued for the acts of his child driving his car: on the other hand, a person entrusting his car to another with a direction to sell it has been deemed not to be a "commettant" and consequently cannot be held liable for damage resulting from an accident occurring during test-drives; similarly, the owner of a car who instructs a garage-keeper to carry out repairs, does not become the "commettant" either of the garage-keeper or of his employees who drive the car.

The meaning of the concept "commettant" is also clarified by the English text which speaks of "principal" and "master".

11 Sub-paragraph 8 of article 8 states that the applicable law shall determine rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

By the term "prescription", the Convention means extinctive prescription as opposed to acquisitive prescription. This may in a general way be described as a method of extinguishing a right due to the non-exercise of it within a period of time fixed by law. The term must be understood in its widest sense and will thus include short prescriptions.

To emphasize this wide interpretation, the Convention also refers to "déchéances"; in the English text the Convention speaks both of prescription and limitation. The idea of "déchéances" known to legal systems based on the Civil Code, refers to the loss of a right or of an action by reason of a failure to exercise it within the period and on the conditions determined by the judge, the law or conventions. In the realm of procedure, the "déchéances" are usually known as "forclusions". The text of the Convention only refers to "déchéances" based on the expiration of a period of time. Cases where one may be deprived of a right other than by expiration of a time-period are thus not covered.

The rule of course applies also to rules of prescription and limitation in the field of direct actions, dealt with in the following article.

The principle of having rules of prescription and limitation (in their widest sense) governed by the law applicable to liability has great value: it lends certainty by settling the old controversy between those

supporting the application of the law of the forum, as to them this was a question of procedure, and those favouring the application of the law governing liability, for whom this matter was one relating to the substance of liability.

Article 9

1 This article regulates the direct action of those injured against the insurer of the person liable.

2 The right of the direct victim and other persons suffering damage to bring an action directly against the insurer of the person liable for the damage is in some countries regulated as a totally separate matter, independent of the relationship between the victim and the tortfeasor. In other countries, the rights of the person suffering damage and of the tortfeasor against the insurer are identical. It was thought appropriate to submit the question of the existence of this right expressly to the law governing liability. The first paragraph of article 9 therefore states that persons who have suffered injury or damage shall have a right of direct action against the insurer of the person liable if they have such a right under the law applicable according to articles 3, 4 or 5.

The insurer in this context is of course not the insurer of the victim but the insurer of the author of the accident or person otherwise liable for the damage caused by the accident. The qualifying phrase "of the person liable" added to the word "insurer" demonstrates further that the Convention is concerned with liability insurance and not with object insurance.

3 The Conference wished to allow those suffering damage to bring an action directly against an insurer to the greatest extent possible and to avoid such rights being abolished due to the effect of the Convention. Let us suppose that the applicable law is the law of the State of registration and that this law does not know of the right of direct action, whilst the law of the State where the accident occurred sanctions this right. It follows that the application alone of the law of the State of registration would deprive the victim of the right that he would have possessed if the Convention did not exist. It was in order to avoid such a displeasing result that the Conference added the second paragraph of the article by virtue of which the right of direct action shall nevertheless exist if it is provided by the internal law of the State where the accident occurred. The return to the principle of the application of the law of the State where the accident occurred is therefore justified by the interests of the victim.

4 Lastly, if neither of these laws provides any such right, a direct action remains possible under the third paragraph of article 9 if it is provided by the law governing the contract of insurance.

5 The way in which article 9 is drafted makes it clear that if all three laws permit a direct action against the insurer, the victim will not be able to choose the law which is most favourable to him. The laws apply in the order in which they are set out in the text.

6 As has been mentioned under article 8, No 11, p. 32, the rule set out there concerning prescription applies also to prescription and limitation of a direct action.

In this context it should be noted that the substantive rule of article 8 of Annex 1 to the European Convention on Compulsory Insurance against Civil Liability in Respect of Motor Vehicles states that any action by the injured party against the insurer based on the former's direct claim against him shall be barred after two years have elapsed since the time of the accident.

Article 10

1 This article deals with "ordre public" (public policy).

2 In accordance with the practice of the Hague Conference, this article has been drawn up in a very restrictive way and states that the application of any of the laws declared applicable by the present Convention may be refused only when it is manifestly contrary to public policy ("ordre public").

3 The Conference wished to encourage prudence on the part of judges and wanted the use of the public policy clause to be restricted to the greatest possible extent. The form of words used demonstrates that courts of Contracting States may only have recourse to the concept of public policy in serious cases, that is to say in those cases where application of a foreign law would derogate without a shadow of doubt from the fundamental principles of law or morals of the State of the forum. In such a case, the foreign law should only be set aside on very limited points.

4 It was emphasized that a foreign legal provision which, whilst according compensation to a victim for damage caused by an accident, does not give the same scope of compensation as the law of the forum, is not to be considered as contrary to public policy.

Article 11

1 This article accords to the Convention the status of a uniform law of private international law.

2 It was not thought useful to restrict the field of application of the Convention either rationae loci or rationae personae or as to the laws which may become applicable. Once the Convention has entered into force for a Contracting State, the Convention will apply in that country even if the accident occurred in a non-Contracting State, or if it involved persons other than nationals or habitual residents of Contracting States. The Convention will apply even if the applicable law is not that of a Contracting State. Therefore the application of the substantive provisions of the Convention, articles 1 to 10, is independent of any condition of reciprocity.

3 The countries in which the Convention enters into force will substitute it for their existing private international law in respect of all countries, and there will not be any overlap of treaty law and common law.

4 This technique is not new. The Conference has already drawn up two Conventions unifying conflicts rules intended to have a universal effect. One Convention is that on the Law Applicable to the International Sales

of Goods of the 15th of June 1955, and the other is that on the Conflict of Laws relating to the Form of Testamentary Dispositions of the 5th of October 1961. These two Conventions are in force and have replaced the existing private international law in Contracting States[7].

5 The way in which national conflicts rules will be replaced by the Convention will depend on the constitutional law of Contracting States. In certain countries, such as France, the new conflicts rules will enter into force as from the time of promulgation of the treaty[8]. In other countries, on the other hand, enabling statutes will introduce these rules into internal law[9].

6 As we have mentioned, a judge in a Contracting State may be required to apply the law of a non-Contracting State by virtue of the Convention: for example if an accident occurs in Ruritania involving a French vehicle and a Swedish vehicle, French or Swedish judges will have to apply the law of Ruritania. The same will also apply if the accident takes place in France or in Sweden and it involves only one vehicle which is registered in Ruritania.

This obligation under the Convention to apply any particular law in the world to questions of civil liability gives added importance to the provision on public policy in article 10 which has just been dealt with.

The Member States of the Conference are known to each other and are aware that their domestic laws contain nothing which could be disagreeable. But the world is large and the number of national legislations is rapidly growing. To take an extreme example, a foreign law deemed applicable by the Convention might fix limits on liability depending on race, religion or colour of a victim. It is probable that such discriminatory legislation would offend the public policy of Contracting States and article 10 could be invoked.

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7 As regards the Sales Convention see Ph. Malaurie, Unification du droit et conflits de lois, travaux du Comité français de droit international privé, 1964-1966, p. 83 et seq.; Ph. Kahn, Journal du droit international 1966, p. 304 et seq.; Droz, Revue critique de droit international privé, 1964, p. 669; Y. Loussouarn and J.-D. Bredin, Droit du commerce international, 1969, p. 663 et seq.

As regards the Wills Convention see G. Droz, "Les nouvelles règles de conflit françaises en matière de forme des testaments, Revue critique de d.i.p. 1968, particulièrement, p. 20 et seq.

8 See Droz, Revue critique 1964 ibid., p. 21.

9 See for example in respect of the Sales Convention the Swedish law of the 4th of June 1964 (S.F.S. 1964: 528-529) which repeats articles 1 to 6 of the Convention and as regards the Wills Convention, see in England the Wills Act 1963 and in Ireland the Succession Act 1965 which appear in the form of national provisions of private international law whilst sanctioning the principles of the Convention.

Article 12

1 Articles 12 to 14 form a trilogy dealing with countries with non-unified legal systems.

2 The initial problem created by such countries is the question of ascertaining which law is the internal law in respect of civil non-contractual liability. For example the United States of America does not have one single legal system; each single territorial unit making up this country has its own private law.

Article 12 solves this problem by declaring that every territorial entity forming part of a State having a non-unified legal system shall be considered as a State for the purposes of articles 2 to 11 when it has its own legal system, in respect of civil non-contractual liability arising from traffic accidents.

3 This article is mainly directed to countries such as Canada, the United States of America, the United Kingdom and Yugoslavia. Seeing that the Convention determines only the law applicable to civil non-contractual liability arising from traffic accidents, it follows that a reference to States with non-unified legal systems applies only to countries whose rules on non-contractual liability in this field are not unified. For example, Switzerland is to be considered as a unified legal system, even though the rules in other fields such as the law of procedure vary from Canton to Canton. In the same way any slight differences in administrative rules between two municipalities or two provinces of one State whose law is in all other respects unified, are unimportant. The difference must be apparent in the substantive rules governing liability.

4 As an example of the effect of article 12, it should be noted that it designates as the applicable law for the cases falling within article 3 the internal law of the territorial entity where the accident occurred, and for cases falling within article 4 the internal law of the territorial entity in which the vehicle was registered. If the vehicles are not registered by region, but following recent trends, centrally for the whole country, the principle laid down in article 6 dealing with registration in several countries will be applied, and the law of the territorial entity where the vehicle was habitually stationed at the time of the accident will be applied.

A further complication arises from the system of registration in force in the United Kingdom. There registration is effected locally by county councils which accord to all motor vehicles a registration certificate bearing inter alia the name of the local authority granting registration. This certificate as well as the number plates assigned to it are never changed throughout the life of the vehicle. If a vehicle registered in London is sold to a person residing in Glasgow, the second sentence of article 6 must be referred to. Supposing that neither owner nor driver nor the person having control of the vehicle had his habitual residence at the time of the accident in the territorial entity in which the vehicle was registered, that is England (London), reference must be made to the internal law of the territorial entity in which the vehicle was habitually stationed, that is to say Scots law.

Article 13

1 This article aims to remove an ambiguity present in the previous article.

2 The text of article 12 is indeed ambiguous as it could be interpreted as imposing an obligation on a State with a non-unified legal system to apply the Convention even to internal accidents, for example, to an accident occurring in the United Kingdom between two persons resident there.

In order to avoid such a situation, the Conference, at the request of the United Kingdom delegation, introduced article 13 whereby a State having a non-unified legal system is not bound to apply this Convention to accidents occurring in that State which involve only vehicles registered in territorial units of that State.

Therefore such a State is not required to modify its inter-regional conflict rules in respect of such accidents.

3 In rare and theoretical cases, this could have unexpected consequences. Let us suppose two Dutch families agreed to travel together in the United Kingdom. They hire two cars in Edinburgh and on arrival in London these two cars collide. If this case were brought before an English judge, he would apply English law by virtue of article 13 and, subsequently, it is possible that he would consider the proper law of the tort to be Dutch law. If, on the other hand, the case is brought before a Dutch judge, he would be bound to apply articles 4 b and 12 of the Convention and consequently Scots law.

Article 14

1 This article contains a Federal Clause.

2 Some Federal States for constitutional reasons are not free to bind each of the Member States within it to an international convention. These individual States are to be considered as independent from each other as regards such conventions. It was therefore necessary to provide a special clause allowing individual States to ratify this Convention.

3 The clause provides that a State having a non-unified legal system may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or only to one or more of them, and may modify its declaration at any time thereafter, by making a new declaration.

These declarations are to be notified to the Ministry of Foreign Affairs of the Netherlands and shall state expressly the legal systems to which the Convention applies.

4 The article does not contain any provision as to the time at which such declarations will take effect.

A declaration made at the time of signature, ratification or accession will obviously only take effect from the date at which the Convention enters into force for the declaring State.

As regards later declarations, which may either contain an extension or a limitation of the field of territorial application of the Convention, they would seem to take effect, in the absence of any special provision, as from the notification of the declaration to the Ministry of Foreign Affairs of the Netherlands. One could also invoke article 19, paragraph 3, by analogy as regards extensions.

Article 15

1 This article deals with the problem of conflicting conventions.

2 It declares that this Convention shall not prevail over other conventions in special fields to which the Contracting States are or may become Parties and which contain provisions concerning civil non-contractual liability arising out of a traffic accident.

3 This provision has two purposes: to safeguard the validity of conventions which have already been adopted and to permit Contracting States to conclude both multilateral and bilateral conventions in the future notwithstanding this Convention.

However, it should be noted that article 15 does not refer to other conventions in general but only to conventions which, in special fields, contain provisions concerning the questions of liability dealt with in this Convention. Thus the Gevena Convention of the 19th of May 1956 "relative au contrat de transport international de marchandise par route"(CMR) will prevail over this Convention in so far as it governs inter alia questions of non-contractual liability. The same is true for the proposed convention "relative au contrat de transport international de voyageurs et de bagages par route"(CVR), as well as, for example, the Paris Convention "concernant la responsabilité envers les tiers en matière d'énergie nucléaire" of the 29th of July 1960, the Supplementary Convention of the 31st of January 1963 and the Vienna Convention "relative à la responsabilité civile en matière de dommages nucléaires, etc." of the 21st of May 1963. If, on the other hand, two Contracting States to this Convention decide to conclude a bilateral convention on traffic accidents in general, that convention would not prevail over this Convention as it would have exactly the same scope.

Article 16

1 Articles 16 to 21 contain the Final Clauses.

2 Article 16 deals with signatures and ratifications.

3 The procedure whereby a country may become a Party to the Convention is dealt with in two articles, articles 16 and 18. Article 16 is relevant for States represented at the Eleventh Session of the Conference; article 18 deals with States not represented at that Session.

4 The main reasons for two articles being drawn up to deal with two different categories of States are the following: (i) only States represented at the Eleventh Session may sign the Convention; (ii) these States may then ratify the Convention whilst States not represented at that Session may only accede to it; (iii) only ratifications of the States represented at the Session are taken into consideration when

calculating the minimum number of ratifications necessary to cause the Convention to enter into force; (iv) the division of this question into two articles makes it more easy to determine the group of States which are allowed to accede to the Convention.

5 Article 16 therefore states that the Convention shall be open for signature by the States represented at the Eleventh Session of the Conference and shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 17

1 This article regulates the date of entry into force of the Convention.

2 The first paragraph deals with the first entry into force of the Convention. This will take place on the sixtieth day after the deposit of the third instrument of ratification.

3 The second paragraph relating to the entry into force for each subsequent ratification, states that the Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 18

1 This article deals with accessions to the Convention by States not represented at the Eleventh Session of the Conference (see also under article 16).

2 In order to achieve conformity with the practice of other recent international instruments, in particular those drawn up by the United Nations Organization, the system of accession has been slightly changed from previous Conventions of the Conference. Under the new system, spelt out in the first paragraph, the Convention is not totally open to accession by all States not represented at the Eleventh Session of the Conference, but is only open to a State which is a Member of the Conference or of the United Nations Organization or of a specialized agency of that Organization, or is a Party to the Statute of the International Court of Justice. An accession may not be effected until after the Convention has entered into force in accordance with the first paragraph of article 17.

3 Under the second paragraph of article 18, the instrument of accession is to be deposited with the Ministry of Foreign Affairs of the Netherlands.

Under the third paragraph, the Convention shall enter into force for States acceding to it on the sixtieth day after the deposit of its instrument of accession. As from that date, consequently, the rules of the Convention will replace national conflicts rules.

4 However, according to paragraph 4 the accession will have effect only as regards the relations between the acceding States and such Contracting States as will have declared their acceptance of the accession.

This rule, which makes it necessary that States consent explicitly to a particular accession was preferred over the old system which obliged them to make known their opposition if they wished to exclude the effects of such accession. This system could in effect give rise to negative declarations of a political character, which the Conference wished to avoid.

The term "Contracting States" also includes States acceding to the Convention. The condition of acceptance therefore applies equally for there to be any treaty relations between an acceding State and a State which has already acceded to the Convention.

5 Paragraph 5 of this article states that the Convention will enter into force as between the acceding State and the State having declared to accept the accession on the sixtieth day after the deposit of the declaration of acceptance.

It will be seen that for the determination of the date of entry into force, the phrase "soixante jours après le dépôt" is used in the French text of paragraph 5, whilst in paragraph 3 and in articles 17 and 19, the Convention speaks of the "soixantième jour" after deposit. Since the latter phrase has been used throughout previous Conventions of the Conference and that it corresponds with the English text of paragraph 5 ("on the sixtieth day after the deposit"), it is to be presumed that the French text of paragraph 5 should be understood in this way.

Article 19

1 This article deals with the application of the Convention to territories which do not manage their international affairs themselves.

2 The Convention applies automatically to the home territories of Contracting States. If a Contracting State wishes the Convention to apply to territories for the international relations of which it is responsible, it must make an express declaration to this effect.

3 Article 19 therefore provides that any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extension shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in the extension on the sixtieth day after such notification.

4 It will be seen that this territorial extension is not subject to the condition of acceptance by other Contracting States provided for in article 29 of the Convention on the Recognition of Divorces and Legal Separations for example.

Article 20

1 This article deals with the duration of the Convention and its denunciation.

2 The Convention will remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 17, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, the Convention shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least 6 months before the end of the five-year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall, however, have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 21

This article deals with the notification which the Ministry of Foreign Affairs of the Netherlands as the depositary of the Convention must give to the States represented at the Eleventh Session as well as to States acceding to the Convention. The article does not call for comment.

Stockholm, October 1969. Eric W. Essén

ANNEX I

The draft Convention has already been studied in several articles. In particular the following may be mentioned:

Amram, Ph.W. - Report on the Eleventh Session of the Hague Conference; American Journal of International Law 1969, p. 521.

Batiffol, H. - Détermination de la loi applicable en matière d'accidents de la circulation routière; Revue critique de droit international privé 1969, p. 226.

Beitzke, G. - Die 11. Haager Konferenz und das Kollisionsrecht der Strassenverkehrsunfälle; Rabelszeitschrift 1969, p. 204.

Dutoit, B. et Mercier, P. - Convention sur la loi applicable en matière d'accidents de la circulation routière; Rivista di diritto internazionale privato e processuale 1969, p.404 and Nederlands Tijdschrift voor Internationaal Recht 1969, p. 236.

Essén, E.W. - Tilläpig lag vid internationella trafikolyckor; Nordisk Försäkrings Tidskrift 1969, p. 217.

Loussouarn, Y. - La Convention sur la loi applicable en matière d'accidents de la circulation routière; Journal du droit international 1969, p.5.

Mochi Onory, A.G. - L'Undecesiona Sessione della Conferenze dell'Aja di diritto internazionale privato; Rivista di diritto internazionale Vol. LII 1969, p. 18.

Newman, K.M.H. - The Convention on the Law Applicable to Traffic Accidents; The International and Comparative Law Quarterly 1969, p. 643.

De Nova, R. - La Convenzione dell'Aja sulle legge applicabile agli incidenti stradali; Diritto internazionale vol. XXIII 1969, p. 104.

- Etude parue dans Jus Privatum Gentium - Festschrift Max Rheinstein, Tübingen 1968, vol. 1, p. 399.

ANNEX II

It was thought useful to reproduce below the Resolution concerning delictual obligations in private international law adopted on the 11th of September 1969 by the INSTITUTE OF INTERNATIONAL LAW in its 53rd Session (Edinburgh 1969).

It will be noticed that the general guidelines laid down in the Resolution do not depart from the rules adopted at The Hague in the particular realm of traffic accidents:

The Institute of International Law,

Being of the opinion that as a result of technical developments the principles governing delictual liability in private international law have greatly gained in practical importance and that they continue to do so.

Observing that largely as a result of these developments the traditional application of the law of the place of delict has been and is being questioned in many countries by courts and by academic writers,

Being convinced that the application of the law of the place of delict should be subject to exceptions where that place is merely fortuitous and where the social environment of the parties differs from the geographical environment of the delict, but that nevertheless the rule by which the law of the place of the delict governs liability should be maintained,

Being further of the opinion that the extent to which and the way in which the law of the place of delict is to be replaced by some other legal system must be worked out separately for each type of delict (traffic accidents, accidents at work, defamation and infringement of privacy through mass media of communication, unfair competition and other economic delicts, delicts committed on the high seas, in the air, or in space, etc.) and transcends the limits of a general resolution on delictual liability.

And being also of the opinion that the time has not yet arrived for the Institute to express any view in favour or against the expediency of applying different laws to different issues arising from delictual liability.

Considering that the difference between liability for fault and liability for risk and between the purposes of deterrence and of risk distribution are differences of degree and not differences in kind, that it is impossible to establish different principles of private international law for the two types of liability or for the two types of purposes, and that the same rules of private international law should apply to fault liability and to risk liability as well as to rules serving the primary purpose of deterrence and serving the primary purpose of social risk distribution,

Considering further that it is inexpedient to establish abstract rules for the definition of the place of delict, the determination of which must in each case depend on the degree to which the issue involved is connected with one of the places at which the conduct alleged to be delictual occurred or the effect of that conduct was produced,

Being of the opinion that it is inexpedient in a Resolution devoted to delictual liability to establish any rules of law governing the characterzisation (qualification) of a claim, a matter which can only be discussed within the framework of the general principles of private international law.

But considering that the scope of the following rules on delictual liability should not include either contractual liability or liability for unjust enrichment, or any questions of the immunity inter se of members of a family from delictual claims, or the transmission of delictual claims to the estate, the heir or other successor in title of the victim of a delict or the transmission of delictual liability to the estate, the heir or other successor in title of the person responsible,

And considering further that the rights of an insurer of a victim to be subrogated to the claim of the victim against the person responsible for the accident, and the right of the victim to raise a direct claim against the insurer of the person responsible, are so closely connected with the sphere of the contract of insurance as to render it inadvisable for the Institute in this Resolution on delictual liability to express any views as to the law applicable to these rights,

And considering that in view of the rapid and often conflicting development of the law in many countries the time has not arrived to formulate a precise draft of legislation, but that general principles are required which can give guidance to courts and academic writers,

Has passed the following Resolution:

Article 1

In principle delictual liabilities are governed by the law of the place at which the delict is committed.

Article 2

For the purpose of article 1 a delict is regarded as having been committed at the place with which, in the light of all the facts connecting a delict with a given place (from the beginning of the delictual conduct to the infliction of the loss), the situation is most closely connected.

Article 3

In the absence of any substantial connection between the issue to be determined and the place or places at which the delict has been committed, and by way of exception to the rules in articles 1 and 2, that law is to be applied which is indicated by a special relation between the parties or between the parties and the occurrence:

a thus the law of the common habitual residence may be applied between members of the same family, the law of the seat of an enterprise to liabilities arising between employers and employees and between fellow employees of the same enterprise;

(Annexe II, continued)

b thus the law of the registration of a vehicle may be applied to liabilities arising between its driver or owner and its passengers, whether for hire and reward or gratuitous, and between those passengers, the law of the place at which an expedition has been organised to delicts committed in the course of the expedition.

With the same intent the law of the flag may be applied to delicts on board a ship in foreign territorial waters, and the law of the place of registration to delicts committed on board an aircraft.

Article 4

The principles expressed in articles 1, 2 and 3 apply to all issues arising from delictual liability, and notably:

a to the standard of liability, including the question whether a person made responsible is liable for the creation of a risk or for fault, for gross negligence or simple negligence, and to all presumptions relating to this liability;

b to the question how far contributory fault of the victim is relevant to the liability of the person responsible;

c to the question of delictual capacity, including that of infants and mentally disordered persons, and of corporate bodies;

d to immunities from delictual liability of charitable organisations and trade unions;

e to questions of vicarious liability, including those of employers for their employees and of corporate persons for their organs, but not necessarily to that of husbands for their wives, parents for their children, or teachers and masters for their pupils and apprentices;

f to the determination of the person or persons entitled to compensation, to the determination of the loss for which compensation can be claimed (including the question of dommage moral) and to the assessment of the damage (including financial limitations).

Article 5

The application of the law which is applicable in accordance with the preceding rules can be only excluded in so far as such application to the issue to be determined would be manifestly incompatible with the public policy of the forum.