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Explanatory Report to the European Convention on the Place of Payment of Money Liabilities

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I. The European Convention on the Place of Payment of Money Liabilities, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation (CCJ), was opened to signature by the member States of the Council of Europe on 16 May 1972, at Basle, on the occasion of the VIIth Conference of European Ministers of justice.

II. The text of the explanatory report prepared by the committee of experts and submitted to the Committee of Ministers of the Council of Europe as amended by the CCJ does not constitute an instrument providing an authoritative interpretation of the text of the Convention, although it might be of such a nature as to facilitate the application of the provisions therein contained.

General considerations

1. In accordance with the decision of the Committee of Ministers of the Council of Europe, the Committee of Experts on the Place of Payment of Money Liabilities (hereafter called the "committee of experts") was set up in 1966. Its terms of reference were to prepare a convention on the place of payment of money liabilities. In six meetings, held between December 1966 and February 1969, the committee of experts drew up a draft Convention and a draft of Annex I thereto as well as a draft explanatory report.

2. On the instructions of the European Committee on Legal Co-operation, a sub-committee of this body, namely the Sub-Committee on the Place of Payment of Money Liabilities, held two meetings in November 1970 and in April 1971 respectively with a view to improving these draft texts and to making them acceptable to a greater number of member States. The sub-committee revised the texts of the Convention, of its Annex I and of the explanatory report and drew up Annex II.

3. The aim of this Convention is to unify the rules on the place of payment of money liabilities. The place of payment is an important element in the proper performance of the debtor's obligation. Accordingly the rules of Annex I will have a considerable impact on the law of obligations as a whole in the States concerned.

4. The choice of a place as the place of payment implies that the debtor shall make the means of payment available to the creditor at that place. Moreover, in cases where the creditor is not present at the place of payment or where he refuses to accept payment, the national law of some States provides that the money may be deposited at that place.

5. Uniform rules on the place of payment may facilitate economic relations. They may facilitate payment when the parties to a monetary liability, as is frequently the case, reside in different States, and particularly in cases where one of the parties has moved to another State after the obligation has arisen but before payment is made.

6. More specifically, the following reasons militate in favour of uniform rules on the place of payment of money liabilities :

(*a*) Although contracts of some importance will normally contain an express clause as to the place of payment, this point is often considered as so obvious that such a clause is omitted. It is however decisive for the proper discharge of the contract that the sum which is owed is available at the place of payment at the moment when it is due, otherwise the debtor may be considered to be in default *(en demeure).* If a uniform place of payment is established, the danger of payment being tendered at a place other than the proper place of payment will be diminished.

(*b*) In cases in which a contract is ambiguous because the money of account is referred to by a name capable of referring to the money of more than one State (e.g. *"franc"* which could be Swiss, French or Belgian), the existence of uniform rules on the place of payment at the time of the conclusion of the contract may contribute to uniform solutions.

(*c*) The place of payment may be material to the question whether the debtor has the option of paying in a currency other than the money of account. Moreover, where conversion takes place. it will generally be effected in accordance with the rate of exchange prevailing at the place of payment and also for this reason it would be useful that this place be uniformly decided upon.

(d) The European Convention on, Foreign Money Liabilities drawn up at an earlier date within the framework of the Council of Europe, will not introduce complete uniformity in its field without additional uniform rules on the place of payment. According to Article 1 of Annex I of the Convention, a liability is considered to be a foreign money liability if it consists of "a sum of money due in a currency which is not that of the place of payment". Hence, the basic question of what is a foreign money liability in the sense of that Convention can only be answered uniformly if there are uniform rules on the place of payment.

7. Within the legal systems of the member States of the Council of Europe three different solutions as to the place of payment prevail at present, in the absence of an agreement to the contrary and provided that no change of residence of a party intervenes :

(*a*) the residence of the creditor is decisive (Cyprus, Denmark, Italy, Norway, Sweden, Switzerland, Turkey, United Kingdom) ;

(b) the residence of the debtor is the place of payment (Belgium, France, Luxembourg)

or

(*c*) the residence of the debtor is legally considered to be the place of payment, but the money has to be sent, at the debtor's cost and risk, to the creditor's residence (Austria, Germany).

8. If a party changes his residence, it is at present uncertain in some States, which is the place of payment in this case. In other States the place of payment is changed if a party moves abroad. This confirms that a uniform regulation would be all the more desirable.

9. For the reasons set out below (see paragraph 33 of this report) the present Convention adopts the creditor's residence as the place of payment.

10. The following texts have been drawn up

(*a*) a Convention defining the scope of the rules set out in Annex I thereto and regulating the international obligations of the Contracting Parties ;

(b) Annex I containing the substantive rules on the place of payment of money liabilities ;

(*c*) Annex II setting out the permitted reservations.

11. Annex I does not contain a uniform law, but a series of rules to be reflected in the national legal systems in so far as such rules are not yet in force. The Contracting Parties may modify the wording to adapt it to their respective legal systems.

12. Although the Convention on the Place of Payment will be supplementary to the European Convention on Foreign Money Liabilities, it is firstly and basically an independent international instrument, Whereas the European Convention on Foreign Money Liabilities aims at harmonising certain rules relating to foreign money liabilities only, the present Convention seeks to unify the rules relating to the place of payment of all money liabilities.

13. In several member States the definition of the place of payment may have an effect upon such questions as jurisdiction and choice of law. The definition of these concepts falls, however, outside the scope of the committee of experts' terms of reference. These matters, and indeed any concept not defined in the present Convention, will be subject to the national law of the Contracting Parties.

14. The Committee of Experts on the Place of Payment of Money Liabilities was aware of the "Draft for a Uniform Law concerning the Place of Payment of Monetary Obligations" drawn up by the Committee on International Monetary Law of the International Law Association, which had been submitted at the Helsinki Conference (1966) of ILA, together with an explanatory memorandum by the Committee on International Monetary Law.

Moreover, the committee of experts had before it a draft of Annex I, drawn up at two short meetings, in Basle on 1 October 1966 and in Paris on 28 October 1966, by a group of consultant experts consisting of several members of the Monetary Committee of the International Law Association, who had contributed to the preparation of the ILA draft presented at Helsinki, namely Dr. Dach, Zurich, Special Rapporteur of the Committee on International Monetary Law for the "Draft for a Uniform Law concerning the Place of Payment of Monetary Obligations; Professor B. Goldman, Paris, President of the French branch of the International Law Association; Dr H. Guisan, Chairman of the Committee on Monetary Law of the International Law Association and Professor A.E. von Overbeck, Fribourg, member of this committee.

Valuable suggestions were drawn from both these texts.

Commentaries on the individual provisions of the Convention and of the Annexes thereto

I. CONVENTION

Article 1

Paragraph 1

15. Paragraph 1 imposes the duty upon Contracting Parties to ensure that their respective legal systems will conform with the rules set forth in Annex I to the Convention. This principle, indicated in paragraph 11 of the general considerations, means that the rules prevailing in the national laws of the Contracting Parties must lead to the result envisaged. Each State will

decide for itself the manner in which this result will be achieved, and is not bound by the wording of the rules. No formal steps are required if and in so far as the legal system of a Contracting Party is in conformity with the rules of Annex I.

16. The time limit of twelve months is usually employed in Council of Europe conventions in comparable cases. The term "date of entry into force" denotes the date of entry into force in respect of each particular Contracting Party.

Paragraph 2

17. As the term "all liabilities under which a sum of money is due" makes clear, the Convention and the Annexes are intended to cover money obligations of any kind (whatever their origin), i.e. contractual and non-contractual liabilities whether originally expressed in money or not. Subject to Article 3 of the Convention, obligations arising under public law are included.

Article 2

18. According to this provision the Contracting Parties shall transmit a report on the implementation of the present Convention.

The report shall contain, in particular, the official text of any legislation introduced in consequence of the entry into force of this Convention.

19. It was not thought possible to stipulate that States submit information on already existing legislation concerning matters governed by this Convention. Although such information would be highly desirable and should be given whenever available, the present Convention touches upon fields of law of such variety that it would seem extremely difficult to assemble all oases in which the place of payment is being dealt with in existing legislation.

20. "Official texts" are those adopted by States in pursuance of the present Convention. The case law, constituted by judgments, in the countries in which it has the force of law, is not to be considered as an official text. The texts must be transmitted in the national languages, which need not be translated.

Article 3

21. It seemed necessary to afford States the possibility of excluding the application of the rules of this Convention and of Annex I in specific matters. It should be borne in mind in this context that, according to Article 1 of Annex I, the Convention is only applicable if no different intention of the parties appears or no different usage prevails.

22. Specific matters may for example be cases of the payment of sailors' wages or servants' salaries, payment out of bank deposits, where the customer traditionally fetches his money, payment in cases of bankruptcy, the distribution of a fund insufficient for the discharge of the totality of liabilities, obligations arising under family law, obligations of parties to negotiable instruments, judgment debts and maintenance orders. Obligations arising under public law and payments made to or by public authorities may also be excluded.

23. It was not considered feasible to stipulate that the Contracting Parties declare beforehand and at a given moment (e.g. of signature or when depositing the instrument of ratification) in which matters they will not apply the Convention. The need for different rules may only appear in the future and the freedom of the Contracting Parties to adopt the necessary rules at such future moment should not be curtailed.

24. The Convention is without prejudice to legislation bearing upon the place of payment or its change, which applies as an overriding matter of public policy.

Article 4

25. This article makes it clear that the present Convention will not affect the obligations arising from other international instruments. It is, in particular, without prejudice to the Geneva Conventions of 1930 and 1931, providing Uniform Laws on Bills of Exchange and Promissory Notes and on Cheques or to the Hague Convention relating to a Uniform Law on the International Sale of Goods. Nor will the freedom of States to conclude any further treaties, conventions or bilateral or multilateral agreements governing in special fields matters covered by this Convention be prejudiced.

Article 5

26. Article 5 corresponds, in principle, to the model final clause in this respect approved by the Committee of Ministers. However, it is stipulated in paragraph 2 that the Convention shall enter into !force only after the fifth (and not ,the third, as provided for by the model final clause) instrument of ratification or acceptance has been deposited. As Annex I affects important questions of private law it seems advisable to make its entry into force subject to a greater number of ratifications than usual in order to ensure that it obtains force of law only at a moment when the Contracting Parties are certain that a considerable number of other States, possibly those with whom they have strong commercial links, adopt the same rules.

Article 6

27. This article corresponds to the model final clause on this subject approved by the Committee of Ministers.

Article 7

28. Paragraph 1 of this article makes it clear that no reservation with the exception of that set out in Annex II is permitted.

Articles 8-10

29. These articles are in conformity with the model final clauses approved by the Committee of Ministers.

II. ANNEX I

Article 1

30. This provision, which corresponds to the formula used in Article 1, paragraph 2, of the Annex to the European Convention on Foreign Money Liabilities, expresses the basic principle valid for all the provisions of Annex 1, namely that these provisions are not mandatory, but will only apply if no different intention of the parties appears or no different usage prevails.

31 The term "intention of the parties" was preferred to that of "agreement" as the former expression is of wider scope. It is intended to ensure that effect be given to the common intention of the parties even if no express agreement has been reached.

It is possible that in certain fields practices have developed, the results of which differ from the rules of Annex I. In order to enable account to be taken of such practices, Article 1 specifically refers to "a different usage".

32. In the French text of this article as elsewhere in the Convention and in Annex 1, the term *obligations monétaires* has been preferred to *sommes d'argent.* In the committee of experts' opinion, the term *obligations monétaires* is of as general a character as *sommes d'argent.*

Moreover it has the advantage that it corresponds more closely to the term used in the English text.

Article 2

Paragraph 1

33. It is the fundamental rule of Annex I that the place of payment shall be at the creditor's residence. No social or other reasons make it necessary to protect the debtor more than the creditor or vice versa. The majority of the member States of the Council of Europe have, in the past, followed the system that the creditor is entitled to have the money which is owed, brought to him, and it therefore seems appropriate to accept this principle as the starting point for the rules of this Convention. Especially in cases of non-contractual liabilities, the delivery of the sum is inherent in the idea of a *restitutio in integrum*. As this is believed to be an established rule in most of the member States, it seemed useful to extend its scope to all obligations.

34. The term "habitual residence" was preferred to that of "domicile", as it appears to be the expression which is usually employed in more recent international instruments. Thus the Hague Convention relating to a Uniform Law on the International Sale of Goods contains the term "habitual residence" in Article 59 of the Annex. It is also used in the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions (Article 1 (d)).

35. The large majority of the committee of experts was of the opinion that the term "habitual residence" should mean, in Annex I, the precise address, the house of the creditor. The debtor should know exactly where he is to pay the creditor. This might be of particular importance in large communities.

On the other hand some experts drew attention to the fact that according to their national law, the term habitual residence" of a person stands for the municipality or community in which this person resides.

On account of the fact that the term "habitual residence" is a general legal concept, about which rules can be found in every national legal system, it was not thought opportune to include an express definition of the meaning of this term in Annex I.

36. The residence of !the creditor at the time of actual payment was preferred by the majority of the members of the committee of experts to that at the time when the liability arose or to that at the time when the liability was due. In choosing the residence of the creditor at the time of actual payment one avoids defining as a place of payment a place where the creditor may no longer reside. The advantages of this solution outweigh, in the majority's opinion, the fact that the place of payment is not fixed nor even forseeable at the time when a liability arises.

37. Moreover, the principle of Article 2, paragraph 1, corresponds to the rule contained in the Hague Convention relating to a Uniform Law on the International Sale of Goods (Annex, Article 59), a Convention which various member States of the Council of Europe have signed.

38. The present rule applies both when the creditor ;changes his residence within one State, and when he moves abroad, as normally, through the use of modern facilities, payment abroad is not more difficult than payment within the same State. It is however undeniable that difficulties may arise in certain cases, and Articles 3 and 4 of Annex I introduce the rules which are intended to counterbalance them.

39. Article 2 as well as the following provisions are formulated so generally as to cover cases of assignment and succession and other cases of transfer of the claim. Once the principle is accepted that payment must be made at the creditor's habitual residence at the time of payment, it seems only logical that payment is to be made to the actual creditor and at his residence.

40. Questions such as the identity of the creditor and the validity of an assignment fall outside the scope of this Convention and will have to be determined according to general rules of the municipal laws.

Paragraph 2

41. This paragraph contains the option for the creditor to ask for payment at places other than the ordinary place of payment described in paragraph 1. This paragraph is intended to cover the following alternatives :

(*a*) in the case of the creditor not moving at all, but wishing to ask for payment at a place other than his habitual residence, he may require payment at any place within the State of his habitual residence ;

(*b*) in the case of the creditor's removal within one State he may ask for payment at any place within this State ;

(*c*) in the case of a removal from one State to another, the creditor may require payment

(i) at any place in the State where he had his residence when the liability arose ;

(ii) at any place in the State of his residence at the time of payment.

It was felt that these options would be of assistance to the creditor, while any prejudice to the debtor would be offset by Articles 3 and 4 of Annex 1.

42. The majority of ;the committee of experts considered that the phrase "the time when the liability arose" indicates the moment when the obligation is or becomes a liability to pay money.

43. The question how the creditor has to ask for payment at the above-mentioned places and whether he has to observe certain formalities is to be decided in the light of the general rules of law of each of the member States.

Likewise, the question whether the creditor who requires payment to be made at a place other than his actual address according to Article 2, paragraph 2, is bound by his request or whether he may at a later date withdraw or change it, has not been solved expressly in this Convention, and national rules apply

44. As stated above, Article 2, paragraph 2, like all provisions of Annex I, is intended to cover cases of assignment, succession and other cases of transfer of a claim. In the ease of an assignment to a person residing in another State, the new creditor could, accordingly, require payment at a place other than his habitual residence in this State or at any place in the State where the creditor had his habitual residence at the time when the liability arose.

45. No express rule to the effect that the creditor can require payment at a bank in the State in the currency of which the liability is expressed, has been included in Annex 1. An investigation undertaken by the International Chamber of Commerce seems to indicate that such a principle may well correspond to a usage in business circles as far as money transactions involving effective payment in a foreign currency are concerned. It was however thought neither necessary nor advisable to draw up an express provision to that effect, as Article 1 of Annex 1 will ensure that such usage is taken into consideration in any case.

Article 3

Paragraph 1

46. This provision aims at protecting the interests of the debtor. It appears necessary in order to counterbalance the extensive possibilities of choosing the place of payment which are given to the creditor by Article 2. The provision applies in all cases in which the application of the provisions of Article 2 would require payment to be made at a place other than the creditor's habitual residence at the time when the liability arose (i.e. as a result of the creditor's removal, or of his request, or of assignment, succession and other cases of transfer of a claim).

47. The concept of the discharge of a liability being rendered substantially more onerous" (in French : *aggravation notable*), which derives from the Swiss Code of Obligations, will enable judges to have regard to the particular circumstances in a given case.

It is, however, not the intention of this provision to treat all payments abroad as necessarily being substantially more onerous. Such interpretation would result in abolishing the principle of Article 2, that payment should normally be made at the creditor's residence at the time of payment, even if he has moved abroad.

It was also considered that a change of the place of payment within one town or community hardly ever leads to the fact that the discharge of the liability is rendered substantially more onerous.

48. The term "may refuse to pay" implies that the debtor must make his intention known to the creditor that he will not pay at the new residence. Only the knowledge of the debtor's intentions will enable the creditor to make provisions for collecting the money at a place other than his habitual residence. Annex I leaves open the question in which form or manner the debtor has to make known his refusal to pay at the new residence.

It was agreed that the refusal to pay would have to be made in due time. It is left to national law to determine which will be the consequences if the debtor fails to do so.

Paragraph 2

49. Paragraph 2 specifies which is the place of payment if the debtor refuses to pay at the new place. In the event of such a refusal, payment has, in principle, to be made at the place which was the creditor's place of residence at the time when the liability arose. As, at least in the case of a contract, the debtor has had to consider this residence as the probable place of payment when concluding it, he cannot reasonably object to being obliged to pay there. But paragraph 2 entitles 'the debtor to defer payment at that place until the creditor has arranged for the payment to be received there by him or on his behalf. In other words, if the inability of the debtor to pay is due to default of the creditor, because the creditor has failed to take the necessary steps, the debtor is not liable for having failed to pay in due time ; consequently he is not *en demeure*, even if the date of maturity has passed. Further, if the national law allows for the possibility, the debtor is entitled to deposit the sum due in court or elsewhere and thus discharge his liability.

50. The creditor may ask for payment to be made at any place in the State in which he had his habitual residence at the time when the liability arose, provided that payment at that place is not substantially more onerous for the debtor. In other words, the creditor has, in that respect, the same rights as if his habitual residence had not changed since the time when the obligation arose It did not seem necessary to allow him in addition to designate another place of payment in the State of his new residence, since payment at any place in that State would as a rule, in cases in which paragraph 2 of Article 3 of Annex 1 applies, be substantially more onerous to the debtor.

Article 4

51. According to this provision which is based on similar rules in the Austrian and German Civil Codes, the creditor must bear any increase in the expenses or any other financial loss resulting from the fact that, in accordance with Article 2 or Article 3, paragraph 2 of Annex I, payment has to be made at a place other than his original residence at the time when the liability arose.

Article 4 applies in the case of the creditor's removal, in the case of a request for payment at another place in accordance with Article 2, paragraph 2, in the case of an assignment, a succession or other instances of transfer of a claim and in the cases of Article 3, paragraph 2.

52. On the other hand, the application of this rule does not extend to the cases covered by Article 1 of Annex I. It did not seem justified that the creditor bear the increase in the expenses or any other financial loss even if a different place of payment is fixed by the common intention of the parties or according to the other alternatives of Article 1.

53. Only the increase in expenses or any other financial loss resulting from the fact that payment must be made at a place other than the original habitual residence of the creditor, has to be borne by the latter, i.e. there has to be a causal link between the change of the place of payment on one side and the increase in expenses or other financial loss on the other side.

Questions of proof, for example the question whether the debtor or the creditor has to prove that the causal link exists, or which are the facts constituting such a causal connection, are to be solved according to the national laws of the Contracting States.

54. It was considered that a change of the place of payment within one town or community would hardly ever result in an increase of expenses or any other financial loss.

55. The rule on expenses in Article 4 corresponds to that in Article 59, paragraph *2* (Annex) of the Hague Convention relating to a Uniform Law on the International Sale of Goods. As payments resulting 'from sales will constitute a considerable part of all payments, it would not have been advisable to introduce a provision which differs from the Hague Convention.

56. The rule contained in Article 4 does not affect the obligation of the debtor to ensure that the creditor receives the sum of money which the debtor owes him in due time, i.e. at the date of maturity. The debtor must make the necessary arrangements to this end. If the creditor has moved to a distant country or to a remote area, the debtor may either be obliged to transfer the money at an earlier date than in the case of the creditor residing in a nearby town, or he may have to employ speedier methods of transfer.

Any increase in the expenses or any financial loss resulting from these measure taken by the debtor is to be borne by the creditor in accordance with Article 4.

Article 5

57. This provision corresponds to rules already contained in certain national laws (see for instance Article 270 of the German Civil Code, and the concept of *domicile commercial* in French law). Moreover, it corresponds to a business custom which is generally observed in all the member States and which has found its expression in the Hague Convention relating to a Uniform Law on the International Sale of Goods (Annex, Articles 1, 23, 59).

58. Both business and professional activities are to be covered by this provision. The further definition of what is the place of business of a person or the seat of an enterprise, is beyond the scope of this Convention. It was stated however that the term "place of business" may include a branch. Nevertheless, the details of these questions are to be decided according to the municipal law of the Contracting Parties.

III. ANNEX II

59. As the European Convention on the Place of Payment of Money Liabilities concerns a rather narrow subject, it was considered desirable to limit as much as possible the number of reservations in order to reach a reasonable degree of uniformity between the Contracting Parties. The committee of experts' discussions have shown, however, that certain States may find difficulties in the application of Article 3 of Annex 1. In view of the fact that Articles 3 and 4 of Annex I provide for different methods of protecting the debtor when payment has to be made at a place other than the creditor's habitual residence at the time when the liability arose, it was held that the harmonisation of the provisions relating to the place of payment would not be substantially affected, if the Contracting Parties were allowed not to apply these two articles side by side, but to apply Article 4 only.

60. Italy and the Netherlands were not in a position to accept Article 3. Accordingly, Annex II provides for the possibility for these States to reserve the right not to apply it. The system of negotiated reservations was chosen in this context as the States which consider the rule contained in Article 3 of Annex I to be essential wished to ensure that no Contracting Parties other than those listed in Annex II could make a reservation.