

# PEOPIL

## *The Pan-European Organisation of Personal Injury Lawyers*

[www.peopil.com](http://www.peopil.com)

### **PEOPIL'S RESPONSE TO THE PRELIMINARY DRAFT PROPOSAL FOR A COUNCIL REGULATION ON THE LAW APPLICABLE TO NON- CONTRACTUAL OBLIGATIONS**

#### **1. PEOPIL**

The *Pan European Organisation of Personal Injury Lawyers* (PEOPIL) was founded in 1996 and formally established as a charitable entity in 1998 to improve and promote co-operation and communication between European jurisdictions in the field of personal injury law. The development and expansion of PEOPIL is recognition that the issues involved in personal injury litigation frequently extend beyond national boundaries and require an international perspective and knowledge.

Currently PEOPIL has 450 members from jurisdictions within the European Union, Non-European Union jurisdictions within Europe and 5 jurisdictions outside Europe.

The aims of PEOPIL are:

- ?? To develop co-operation and networking of personal injury lawyers within Europe;
- ?? To promote access to the legal system for consumers suffering personal injury;
- ?? To promote higher standards of care and safety for consumers;
- ?? To promote proper and fair compensation for all personal injury victims;
- ?? To support and encourage the exchange of information and knowledge.

PEOPIL is interested in the harmonisation process which is being carried out by The European Commission and European Parliament. In this respect PEOPIL has formulated written submissions in response to the European Commission's Green Papers on Liability for defective products, Compensation of Victims of Crime, Proposals for a Fifth Directive on Insurance against Civil Liability in respect of the use of motor vehicles, and on proposals for reform of Legal Aid.

PEOPIL has received grants from the European Commission to fund its continuing work including research in Comparative Law under the Grotius Project and under the Framework Programme for Judicial Co-operation in Civil Matters.

## **2. INTRODUCTION TO PEOPIL'S RESPONSE**

PEOPIL has carefully studied the proposal for a Council Regulation on the law applicable to non-contractual obligations and its response is premised upon consideration of issues relevant to cross-border personal injury and subsequent litigation.

PEOPIL understands the preliminary draft proposal is intended to establish choice of law rules which, together with the rules on determination of forum contained within Council Regulation (EC) NO. 44/2001, provide greater clarity and consistency in determining these issues which are so fundamental to the resolution of disputes relating to non-contractual obligations. PEOPIL welcomes this initiative, but does have a number of concerns about the content of the present proposal. The main areas of concern are as follows :-

1. The present proposal does not sufficiently protect the interests of victims of personal injury, particularly in relation to quantification of claims for compensation [Article 3, Articles 9(3), 9(4), 9(5)].
2. The wording of the general rule under Article 3 and in particular sub-section 3 thereof is imprecise and needs further clarification;
3. The proposal at Article 4 does not provide sufficient protection to victims of personal injury sustained in maritime accidents, providing as it does a general rule that the applicable law will be the country where a vessel is registered or the country whose flag it flies, despite the common practice of vessels registering or flying flags of convenience;

## **3. PROTECTION OF VULNERABLE MEMBERS OF SOCIETY**

The European Commission has introduced various measures to protect vulnerable members of society including those who have suffered personal injury. Those European Union citizens injured in countries other than their country of domicile often face significant difficulty in obtaining compensation, and some legislation has already been introduced to assist such victims to obtain adequate remedies. The Package Travel, Package Tours and Package Holidays Regulations 90/314/EC and the Fourth Motor Directive 200/26/EC are examples of legislation intended to simplify and accelerate resolution of claims arising from package

holidays and road traffic accidents where the victim has sustained injury in a country other than their country of domicile. The provision of enhanced Legal Aid Provision to assist with the funding of cross-border disputes is also welcomed and other initiatives are ongoing to improve the position of injured citizens. However, PEOPIIL consider that there is still much to be done to further assist the victims of personal injury in obtaining fair and reasonable compensation and that issues of applicable law are critically important particularly in relation to determining causation of injuries and quantification of compensation.

PEOPIL considers that a victim should be given the right to have issues relating to the extent of their injuries and assessment of compensation determined in accordance with the laws of their domicile. This allows for compensation in accordance with the legal and social frameworks of the victim's country of residence enabling, among other matters, proper consideration of the provision of Health and Social Security Benefits in that country. This ensures a victim is properly compensated for expenses such as the cost of any medical treatment or care which may have to be funded privately by the victim in their country of domicile but which may be provided by the state or which would otherwise not be recoverable by the victim if the law of a different country was applied. Clearly there are significant contrasts between the laws of European Union Member States in relation to the recoverability and calculation of compensation for matters including pain and suffering and loss of amenity, psychiatric injury, loss of earnings, provision of gratuitous care and assistance provided to the injured victim, and a wide variety of other matters. Enabling the victim to recover compensation in accordance with the laws of their domicile reduces the risk of injustice and provides the best opportunity for compensation to be tailored to the victim improving their quality of life in their domicile. Assessing compensation in this way also avoids inconsistencies, and the injustice caused where two victims domiciled in the same country and suffering the same injury and consequential losses in the same circumstances, recover very significantly different levels of compensation depending upon whether they sustained their injury in their country of domicile or elsewhere.

#### **4. ARTICLE 3 – THE GENERAL RULE**

Article 3 in its current form presently states that –

1. The law applicable to a non-contractual obligation arising out of a tort or delict shall be the law of the country in which the loss is sustained, irrespective of the country or countries in which the harmful event occurred and irrespective of the country in which the indirect consequences of the harmful event are sustained, subject to paragraph 2.

2. Where the author of a tort or delict and the injured party have their habitual residence in the same country when the tort or delict is committed, the applicable law shall be the law of that country.
3. However, if it appears from the circumstances as a whole that there is a substantially closer connection with another country and there is no significant connection between the non-contractual obligation and the country whose law would be the applicable law under paragraphs 1 and 2, the law of that other country shall be applicable.

A substantially closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is linked to the tort or delict in question.

### **Article 3(1)**

The wording of Article 3 and particularly Article 3(1) is unclear although, having sought to clarify this issue with the Commission <sup>1</sup>, PEOPIL understands that the expression “country in which the loss is sustained” in Article 3(1) refers to the place where any direct loss occurs. In the context of personal injuries this will normally be the country where an initial injury has occurred, typically the country where an accident occurred. Assuming this interpretation is correct, PEOPIL accept the desirability of the general rule insofar as it establishes the applicable law for the determination of liability and other related substantive law issues. However, PEOPIL is concerned that the current proposal makes no allowance for different legal issues arising from the same non-contractual obligations to be determined by different applicable laws. Thus under the present proposal Article 9 appears to specify that wide ranging issues including quantification of compensation will be in accordance with the applicable law specified under the general rule. Clearly this will mean that quantification of compensation will often not occur in accordance with the law of the country of domicile of the victim. For the reasons stated previously, PEOPIL consider this is highly desirable.

The relevant amendments can be achieved either by altering the proposed general rule at Article 3(1) or by amending Article 9 (see below).

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<sup>1</sup> Ms Claudia Hahn – e-mail 23 September 2002

### **Article 3(2)**

PEOPIL support the exception to the general rule proposed under Article 3(2).

### **Article 3(3)**

PEOPIL are concerned about the current wording of the proposed Article 3(3). PEOPIL consider that the present wording is confusing and the intention of the subsection is preserved if it is redrafted, omitting part of its present wording to read:-

“However, if it appears from the circumstances as a whole that there is a substantially closer connection with another country, the law of that other country shall be applicable. A substantially closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is linked to the tort or delict in question”.

### **Article 9**

For the reasons set out above, PEOPIL oppose the proposal that in relation to causation of injury and quantification of compensation, the applicable law should be determined solely by the general rule at Article 3, without allowing the victim of personal injury to have these issues determined in accordance with the law of their domicile. Redrafting of Article 9 or Article 3 is required to expressly recognise this alteration of the general rule. In particular, application of the laws of the victim’s domicile should be recognised in relation to the following subsections of Article 9:-

Article 9(3) – the existence and kinds of injury or damage for which compensation may be due.

Article 9(4) – the measures which a Court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation.

Article 9(5) – the measure of damages insofar as prescribed by law.

### **Article 4 – Areas not subject to territorial sovereignty**

At present Article 4 of the draft proposal states: -

Article 4(1) – the law applicable to a tort or delict occurring in areas not subject to the territorial sovereignty of the state shall be the law of the country

in which the means of transport or the installation connected with the tort or delict is registered or whose flag it flies or with which it has similar connections.

Article 4(2) - if there is no connection with a specific country or if there is a connection with several countries, the applicable law shall be that of the country with which the case is most closely connected.

PEOPIL are concerned that victims of personal injury sustained in maritime accidents may be deprived of appropriate remedies if the applicable law under the general rule at Article 4 is determined by the country of registration of a vessel or the country whose flag the vessel flies. PEOPIL is concerned about the widespread registration of vessels in countries with laws advantageous to their owners but not necessarily providing adequate protection to accident victims by European standards. By way of example, the present proposal would mean that where a ship registered in Panama is owned by a French company, with its crew and captain domiciled in France and is involved in an accident slightly outside French Territorial Waters, injured crew will have their non contractual rights determined in accordance with Panamanian Law, a country where the legal and social frameworks are significantly different to France. PEOPIL consider that the general rule under Article 3 (amended in the manner suggested) should apply equally for maritime accidents.

### **Pre-existing contractual relationships**

There also needs to be further consideration of the inter relationship between the commission's draft proposals for determining the applicable law for non contractual obligations and the determination of applicable law for contractual matters pursuant to the first Rome convention.

It is clearly undesirable to have contractual and non contractual disputes decided by reference to differing applicable laws. PEOPIL consider it desirable for any selection of applicable law by the parties to a contract to be binding. There are however, 2 proviso's to this. Firstly, this rule would apply only if the parties who entered into the contractual relationship were of equal bargaining strength, and if not then the applicable law for non contractual obligations may be applied at the request of the weaker party. In any event, the assessment of the extent of a victims personal injuries and compensation should be

determined in accordance with the law of the domicile of the victim for the reasons stated previously.

## **5. CONCLUSION**

PEOPIL are in favour of greater clarity and certainty in the determination of applicable law in relation to non-contractual obligations. However, further amendment to the proposals is required to ensure that vulnerable members of society receive adequate protection and opportunities for fair compensation.