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DOCUMENTS

DUTCH PRIVATE INTERNATIONAL LAW: THE 2001 ACT REGARDING CONFLICT OF LAWS ON TORTS

Introductory Note

On 1 June 2001 the Dutch Act regarding Conflict of Laws on Torts of 11 April 2001 (*Staatsblad* 2001, 190) entered into force. Before introducing a bill to Parliament with regard to this topic, the Minister for Justice asked the Dutch Standing Government Committee on Private International Law for an opinion on this matter. The Standing Government Committee delivered its Opinion on 23 December 1996 and prepared a draft bill. The bill proposed to Parliament (No. 26 608) and the Act of 11 April 2001, are, to a large extent, based on the draft bill presented by the Standing Committee. The Act deviates from the proposals laid down in the draft bill on minor points. Before 1 June 2001, Dutch rules on private international law regarding torts were unwritten and based on case law, with the exception of the rules regarding road traffic accidents, products liability and collision of ships (see Article 2 of the 2001 Act). For other torts, the rules laid down in the *COVA* decision of the Supreme Court (*Hoge Raad*) of 19 November 1993, *NJ* 1994 622 note Schultsz, *NILR* 1994 363 note Duintjer Tebbens, are important. The Supreme Court decided that according to Dutch private international law an action in tort is, except for choice of law by the parties, in principle governed by the law of the country where the tort has taken place (the *lex loci delicti*). However, if the perpetrator and the injured party reside in a country other than where the tort has been committed, and the legal consequences of the tort are entirely located in that other country, the law of that other country shall apply. The decision of the Supreme Court has been followed in Dutch case law ever since. The Dutch Standing Government Committee based its draft bill on this landmark decision (see para. 2 of the Committee's Opinion).

The 2001 Act also takes as a starting point the *lex loci delicti* (Article 3(1)). For torts with a multiple locus, e.g., cases of environmental pollution, Article 3(2) opts for the application of the law of the place of effect (what is well known – in German – as the '*Erfolgsort*'). This rule is based on the proposal made by the Standing Committee (see its Opinion, paras. 6 et seq.), where the law of the *Erfolgsort* is the law of the State on whose territory the harmful impact upon the person, property or natural environment occurs. The question whether the injured party should have a right of option to choose for the *lex loci delicti*, rather than for the law of the State in which the harmful event occurred, was answered negatively after careful consideration (see para. 10 of the Opinion). In Article 3(2) of the Act the injured party cannot choose the *lex loci delicti*, either. In accordance with the draft bill of the Standing Committee, Article 3(2) of the 2001 Act introduces a derogation of the law of the

Erfolgsort, if the perpetrator could not have reasonably foreseen the occurrence of the harmful impact in that particular State. According to Article 3(3) the law of the common residence of the perpetrator and the injured party is applicable, which is in conformity with the *COVA* decision of the Supreme Court and the draft bill by the Standing Committee. Parties also have a possibility to choose the law applicable – the choice having no other restrictions than that of being expressly made and demonstrated with reasonable certainty (Article 6). In certain cases where a tort is closely connected with an existing legal relationship, the Standing Committee advised applying to the matter relating to such a tort the law governing that other relationship. Article 5 of the 2001 Act provides for this accessory application of the tort (cf., Section 3 of the draft bill proposed by the Standing Committee). Finally, a special conflicts rule is laid down in Article 4 for matters relating to unfair competition, which are to be governed by the law of the State in whose territory the competitive action affects competitive relations.

In Brussels an EC-Regulation on Conflict of Laws regarding Torts ('Rome II') is going to be under negotiation. In 2002 a consultation was made on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations (see <http://europa.eu.int>). In September 2003 negotiations on this Draft Proposal will start. For other delegations of EC Member States, the Dutch Ministry of Justice made an English translation of the Opinion of the Dutch Standing Government Committee, including the annex containing the Committee's draft proposal.

In view of the importance of the subject, the Board of Editors thought it useful to give a wider publication to this Opinion (see B, *infra*). For the sake of good order the Board made an English translation of the 2001 Act, which – as stated before – deviates from the Committee's draft bill only on minor points (see A, *infra*).

P. Vlas
(Editor-in-Chief)

A. Act Regarding the Conflict of Laws on Torts of 11 april 2001, *Staatsblad* 2001, 190

Article 1

For the purposes of this Act, the following shall be treated as forming part of the territory of a State:

(a) installations and other facilities for natural resource prospection and exploitation, situated in, on or over that part of the seabed lying outside that State's territorial limits, provided that the State is entitled under international law to exercise sovereign rights there for the purposes of natural resource prospection and exploitation;

(b) a ship on the high seas, outside territorial limits, registered or issued a ship's passport or equivalent document by or on behalf of that State or, in the absence of any registration, ship's passport or equivalent document, belonging to a national of that State;

(c) an aircraft in flight, registered by or on behalf of that State or, in the absence of any registration, belonging to a national of that State.

Article 2

1. This Act shall not prejudice the Convention on the Law Applicable to Road Traffic Accidents, done at The Hague on 4 May 1971 (*Tractatenblad* 1971, 118) and the Convention on the Law Applicable to Products Liability, done at The Hague on 2 October 1973 (*Tractatenblad* 1974, 84).

2. The Act shall also not prejudice Article 7 of the Act of 18 March 1993 laying down certain rules of private international law with regard to maritime law and inland waterways law.

Article 3

1. Matters relating to tort, delict or quasi-delict shall be governed by the law of the State in whose territory the act occurred.

2. By way of derogation of the first section of this Article, where an act has a harmful impact upon a person, property or the natural environment other than in the State in whose territory that act occurred, the law applicable shall be that of the State in whose territory the impact occurred, unless the perpetrator could not reasonably have foreseen this.

3. Where the perpetrator and the injured party are habitually resident, or have their seat, in the same State, the law of that State shall apply by way of derogation from the preceding subsections.

Article 4

1. By way of derogation from Article 3, matters relating to unfair competition shall be governed by the law of the State in whose territory the competitive action affects competitive relations.

2. Subsection 1 shall not apply where the competitive action is directed solely against a specific competitor.

Article 5

Where a tort, delict or quasi-delict is closely connected with an existing legal relationship between parties, any matter relating to such tort, delict or quasi-delict may, by way of derogation from Articles 3 and 4, be subject to the law governing that other relationship.

Article 6

1. Where parties have chosen the law applicable to any matter relating to tort, delict or quasi-delict, that law shall apply between them notwithstanding the provisions of Articles 3 to 5.

2. The choice of law must be expressed or otherwise demonstrated with reasonable certainty.

Article 7

The law applicable pursuant to Articles 3 to 6 shall govern in particular:

- (a) grounds for and extent of liability;
- (b) grounds for exclusion, limitation and apportionment of liability;
- (c) existence and nature of damage eligible for compensation;
- (d) extent of damage and manner of compensation;
- (e) scope for transfer or transmission of entitlement to compensation;
- (f) persons entitled in their own right to compensation for damage suffered;
- (g) liability of a principal for acts of his agent;
- (h) the period of prescription or limitation of a claim for compensation and the time from which that period runs and at which it is interrupted or suspended.

Article 8

The provisions of Articles 3 to 7 shall not prevent the taking into account of traffic and safety regulations and other, comparable regulations for the protection of persons or property in force at the place of the tort, delict or quasi-delict.

Article 9

This Act can be cited as the Act regarding Conflict of Laws on Torts.

B. Opinion of the Standing Government Committee on Private International Law

By letter dated 25 February 1992 (reference: Executive Division for Private Law Legislation, No 191796/92/6) the then State Secretary for Justice asked the Standing Government Committee on Private International Law for an opinion on a draft bill, prepared by the Ministry of Justice, concerning conflict-of-law rules on non-contractual obligations (Non-Contractual Obligations Bill; hereafter 'draft bill'). The draft bill contains 14 Sections, of which Sections 1 to 12 have been reproduced in Sections 91 to 102 of the outline general bill on private international law (hereafter: 'outline'), as drafted in August 1992 by the Ministry of Justice's Executive Division for Private Law Legislation.

The Standing Committee's Subcommittee on the Law of Obligations¹ examined both the text of the draft bill and the matching provisions of the outline. It reported to the plenum of the Standing Committee in November 1995. The Standing Committee then spent three meetings extensively discussing both the report and the regulatory provisions on conflict-of-law rules on tort, delict and quasi-delict as drawn up by the Subcommittee, and herewith submits its opinion on the basis of the Subcommittee's abovementioned report. The opinion incorporates

1. The Subcommittee was composed as follows: Mr H.L.J. Roelvink, Chairman, Prof. P. Vlas, rapporteur, Mr T. Drion, Mr H. Duintjer Tebbens, Mr J.H.A. van Loon, Prof. L. Strikwerda, Mr F.J.A. van der Velden and Mr E. Hennis, deputy secretary.

the regulatory provisions drafted by the Standing Committee (hereafter: 'bill'); they will be found in the Annex hereto.

I. *Introduction*

1. The draft bill concerns non-contractual obligations: i.e. caretaking, undue payments, unjust enrichment and tort, delict or quasi-delict. This opinion deals solely with the most important component of the draft bill, namely matters relating to tort, delict or quasi-delict. The Standing Committee feels that the other categories of non-contractual obligations can be left to one side in the bill under consideration. The areas mentioned are still undergoing constant change, while disputes concerning PIL issues connected with them are comparatively rare.² In practice, nothing points to any urgent need for PIL legislation in those areas.

2. Some time after the draft bill and the outline had been drawn up, the Supreme Court handed down a fundamental judgment on tort, delict or quasi-delict (HR 19 November 1993, NJ 1994, 622 JCS, 'COVA').³ The conflict-of-laws rule formulated by the Supreme Court reads as follows:

'Under Netherlands private international law claims arising from tort, delict or quasi-delict shall in principle, unless a particular law is chosen, be governed by the law of the country where the tort, delict or quasi-delict occurred. (...)

The Court further rightly held that an exception may be made to the main rule providing for applicability of the *lex loci delicti* where both parties are established in a different country from that in which the tort, delict or quasi-delict was perpetrated and all its legal effects take place in that different country.'

The Standing Committee drew on that judgment for drafting legislation on conflict-of-laws rules on matters relating to tort, delict or quasi-delict. The bill reflects as closely as possible the Supreme Court's rule, because its judgment makes a clear choice with regard to a number of hitherto controversial issues and ties in with developments in neighbouring countries. Moreover, the legislation proposed by the Standing Committee is broadly similar to the provisions of the draft bill (and of the outline). The Standing Committee has furthermore

2. The following decisions from post-1983 case law are worthy of note. Undue payments: Rb Alkmaar, 13 May 1982, 1983 NIPR, 205; Rb Amsterdam, 18 June 1982, 1983 NIPR, 206 and Rb Assen, 15 November 1988, 1989 NIPR, 115. Unjust enrichment: Hof Amsterdam 23 October 1986, 1987 NIPR, 272; Rb Amsterdam 1 April 1992, 1992 NIPR, 377 and Rb Arnhem, 26 November 1992, 1993 NIPR, 275. Caretaking: HR 23 February 1996, RvdW 1996, 68 C, AAe 1996, p. 642 et seq. Regarding specialist literature, reference may be made to K. Boele-Woelki's article providing an overview, entitled 'Onge-rechtvaardigde verrijking en onverschuldigde betaling in het IPR (unjust enrichment and undue payment in PIL)' published in 'Europees Privaatrecht 1995', pp. 137 to 173, and to H.L.E. Verhagen, 'Onge-rechtvaardigde verrijking (Unjust enrichment)' published in 'Op Recht', a compilation of essays presented to Prof. A.V.M. Struycken on the occasion of his silver jubilee at the Catholic University of Nijmegen, 1996, pp. 367 et seq.

3. See also Th.M. de Boer, AAe 1994, pp 165 et seq.; H. Duintjer Tebbens, NILR 1994, pp. 363 et seq.

taken as much account as possible of the comments on the outline's provisions found in specialist literature.⁴

II. *Main rule (lex loci delicti): Section 1(1) of the bill*

3. The Supreme Court's judgment referred to in point 2 above adopts as a main rule linkage with the law of the country in which the tort, delict or quasi-delict occurred (i.e. the *lex loci delicti*). That rule is generally accepted as the 'natural' conflict-of-laws rule in matters relating to tort, delict or quasi-delict with the possibility of certain exceptions to it.⁵ Section 4 of the draft bill is based on the principle of the closest connection, whilst Section 5 presumes application of the *lex loci delicti*. That (presumptive) approach reflects the aim pursued in the draft bill, viz. to frame legislation valid for all types of non-contractual obligations, whilst the Standing Committee feels that the legislation ought to remain confined to conflict-of-laws rules in matters relating to tort, delict or quasi-delict. The Standing Committee has accordingly opted for regulatory provisions which are not based on legal presumption, but on a rule (reflecting the conflict-of-laws rule as formulated by the Supreme Court in its *COVA* judgment), to which exceptions are possible. That rule is enshrined in Section 1(1) of the bill proposed by the Standing Committee. Although the judgment refers to 'the law of the country where the tort, delict or quasi-delict occurred', the Standing Committee prefers the wording 'the law of the State where the act occurred'. The Standing Committee feels that questions of referral to States with several legal systems, and also the issue of inter-regional law in the context of the Kingdom of the Netherlands, should not be considered here. Legislation relating to the first matter should be included in the general section of the PIL consolidation, whilst legislation relating to the second matter falls outside the PIL consolidation context altogether.

4. The Supreme Court's judgment refers to the 'law of the country where the tort, delict or quasi-delict occurred', and Section 1(1) of the bill also uses the past tense. However, that provision could equally be applied to cases of *threatening* tort, delict or quasi-delict. Yet the form of words of the provision need not expressly allow for such a threat: in the case of Netherlands domestic law, Section 6:162 of the Civil Code does not do so either. This broad field of application should, however, be referred to in the explanatory memorandum.

5. As already stated above, the Standing Committee adopted the Supreme Court's *COVA* judgment as point of departure for the bill proposed by it. Consequently, it has not opted for

4. See inter alia D. Kokkini-Iatridou and K. Boele-Woelki, NIPR 1992, pp. 477 et seq. (in particular pp. 523 to 547); A.P.M. J. Vonken, WPNR (1993), 6113, pp. 831 to 834; H. Duinjer Tebbens, NIPR spec. 1994, pp. 44 to 51, as well as J. Erauw, NIPR spec. 1994, pp. 52 to 60.

5. The *lex loci delicti* is also generally accepted in foreign legislative consolidations as the conflict-of-laws rule in matters relating to tort, delict and quasi-delict, e.g. Section 133 of the Swiss PIL Act of 18 December 1987, Section 48 of the Austrian PIL Act of 15 June 1978 and Section 62 of the Italian PIL Act of 31 May 1995. The rule further appears in Section 40(1) of the German 'Referentenentwurf' (text to be found in J. Kropholler, *Internationales Privatrecht*, 2nd edition, 1994, p. 557, and IPRax 1995, pp. 132 and 133). Linkage with the *lex loci delicti* is accepted not only in States which have consolidated their PIL, but also in those with an unwritten PIL in this area, such as Belgium (see F. Rigaux and M. Fallon, *Droit International Privé*, Tome II, *Droit Positif Belge*, 1993, No 1528) and France (see H. Batiffol and P. Lagarde, *Droit international privé*, Tome II, 1983, No 557; Y. Loussouarn and P. Bourel, *Droit international privé*, 1993, No 401).

the principle of linkage with the law of the State with which the act in question has the closest connection. Although linkage to the 'closest connection' law may provide a solution for a range of events qualifying as tort, delict or quasi-delict which are difficult to locate geographically, the Standing Committee considers that this need not imply that the principle of linkage to the *lex loci delicti* should be abandoned. By basing the bill on application of the *lex loci delicti* whilst allowing for differentiation, linkage to the 'closest-connection' is ensured as far as possible. The Standing Committee does not favour encumbering the rules at issue here with detailed provisions concerning more specific instances of tort, delict or quasi-delict such as, for instance, those perpetrated via the Internet. It prefers, when framing the general part of the PIL consolidation, to consider in greater detail whether, (partly) in response to any problems which have arisen in legal practice in connection with the application of the framed conflict-of-laws rules to such specific cases, the 'closest-connection' principle should be included, whether or not in the form of a general exception.

III. *Multiple locus: Section 1(2) of the bill*

6. Where a tort, delict or quasi-delict causes harm in a different State other than that in which it was perpetrated, i.e. where the '*Handlungsort*' (place of action) is different from the '*Erfolgort*' (place of effect), the question arises as to where the act should be deemed to have taken place. The problem at issue here is that of the so-called 'multiple locus'.

That problem will arise mainly in the event of transboundary environmental pollution (as in the well-known case of the dumping of salt in the Rhine by French potash mines, which caused damage to market-gardeners' crops in the Westland area), but need not remain confined to such cases. A 'multiple locus' situation may also arise in cases of cross-border defamation where defamation occurs via the media in one State and harm is caused in another State in the form of injury to a person's reputation.⁶ In certain circumstances a 'multiple locus' situation may also arise in the event of unfair competition. The Standing Committee considers that the question of 'multiple locus' – particularly in the case of trans-boundary environmental pollution – requires separate rules departing from Section 1(1) of its bill.

7. Here the Standing Committee sought a form of words to the effect that departure from the rule in Section 1(1) does not concern cases where the tort, delict or quasi-delict causes harm in the State of action, but where it subsequently causes financial damage in another State. Cases of that kind cannot be qualified as 'multiple locus' situations.⁷ This is made clear by the provision in Section 1(2) of the bill proposed by the Standing Committee, which states that the rule in sub-section 1 does not apply where an act 'has a harmful impact upon a person, property or the natural environment other than in the State where it occurred'. The expression 'harmful impact' covers physical damage and injury, impairment of legal interests such as the natural environment, a person's reputation, customer patterns, etc. The form of words

6. See in connection with the EEC Enforcement Convention: judgment of the EC Court of Justice of 7 March 1995, Case C-68/93 (Fiona Shevill and others v. Presse Alliance S.A.), [1995] ECR, I-415, AAe 1995, pp. 880 to 887 (PV).

7. In connection with the interpretation of Article 5(3) of the EEC Enforcement Convention the EC Court of Justice ruled on 19 September 1995 in Case C-364/93 (Antonio Marinari v. Lloyds Bank plc) [1995] ECR I-2719, that the term 'place where the harmful event occurred' cannot be construed so extensively 'as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere' (ground No 14).

chosen by the Standing Committee ties in with the expression ‘place of injury’, as used in The Hague Products Liability Convention.

8. The proposed text of sub-section 2 describes clearly how the event can have a harmful impact upon a person (both natural and legal), property or the natural environment.

9. In the case of a cross-border tort, delict or quasi-delict involving more than one location, the Standing Committee has opted to apply the law of the ‘Erfolgsort’, i.e. the State in which the harmful impact upon the person, property or the natural environment occurs. The Standing Committee gives precedence to the application of this law – usually the law of the country in which the injured party has his place of residence or seat – over application of the law of the State in which the event occurred (the ‘Handlungsort’). The Standing Committee does, however, advocate the introduction of a derogation in the event of unforeseeability: if the perpetrator cannot reasonably foresee the occurrence of such harmful impact in another State, the second sub-section may not be applied and the rule enshrined in the first sub-section should be relied upon. The successful application of such derogation as invoked by the perpetrator depends on the circumstances of the case. Consequently, the concept of ‘unforeseeability’ is, conceivably, more likely to be accepted in the case of cross-border defamation (possibly expressed via a Dutch radio station received in another part of the world) than in that of transboundary environmental pollution (e.g. a nuclear reactor accident).

10. In addition to the introduction of such a derogation, which may be invoked by the perpetrator, the Standing Committee has also given thought to the question of whether the provision should prescribe a right of option for the injured party. Must the latter be able to opt for the application of the ‘lex loci delicti’, rather than for the law of the State in which the harmful impact occurs? The justification for such an option may be found in the fact that in certain instances the law of the ‘Handlungsort’ may offer greater protection to the victim than the law of the ‘Erfolgsort’ (in many cases, the injured party’s own law), whereas the perpetrator cannot object to the application of the law of the place in which his action occurred. The Standing Committee nevertheless takes the view that no provision should be made for such right of option for the injured party since the question of why, in the case of this type of tort, delict or quasi-delict involving more than one location, a right of option is not also granted to the injured party in other cases, such as in the case of application of Section 1(3), does not need to be considered. Furthermore, the possibility that the court will take into account the provisions for the protection of persons or property applicable in the State of the ‘Handlungsort’ is already opened up in the proposed Section 6.

IV. *Derogation in respect of legal effects – Section 1(3) of the bill*

11. Section 1(3) of the bill is taken from the Supreme Court’s judgment in the COVA case and derogates from both the first sub-section (application of the ‘lex loci delicti’) and the second sub-section (application of the law of the ‘Erfolgsort’ in the case of more than one location). Where the perpetrator and the injured party are habitually resident or have their seat in the same State, the law of that State shall apply. As opposed to the aforementioned judgment, the use of the term ‘legal effects’, as constituting a separate criterion, is avoided in sub-section 3. A connection with the perpetrator’s and with the injured party’s habitual place of residence or seat may suffice. This text is also in line with foreign legislation provisions, such as Article 133(1) of the Swiss PIL law.

12. The Standing Committee takes the view that it is not necessary to adopt a rule in Section 1(3) regarding the point in time at which perpetrator and injured party are required to have their habitual place of residence or seat in the same State. In the opinion of the Standing Committee, the time of issue of the summons is not in any case a determining factor. It is self-evident, in the Standing Committee's view, that the habitual place of residence or seat must be fixed at the time the tort, delict or quasi-delict is committed. However, there is no question of precluding the possibility that the court may, in special cases, have reason to depart from the rule that the time when the tort, delict or quasi-delict is committed is a determining factor, for example where the injury becomes apparent only after a lengthy period of time ('Spätschaden'). The explanatory memorandum should refer to both possibilities.

13. The term 'gewone verblijfplaats' means the 'habitual place of residence' of natural persons; the term 'seat' ('plaats van vestiging') refers to legal persons and companies – see reference to this concept in Article 4(2) EC Contracts Convention 1980.

V. *Unfair competition: Section 2 of the bill*

14. Section 2 of the bill includes a rule on unfair competition. This is also the subject of a rule in Section 7 of the draft bill (identical to Section 97 of the outline). The provision drafted by the Standing Committee marks something of a departure therefrom in terms of terminology. The Standing Committee takes the view that a rule on the subject of unfair competition is appropriate. The subject is also dealt with separately in foreign PIL rules and agreement exists regarding the conflicting rule – the law of the market – to be used (see Article 136 of the Swiss PIL Law and Section 48(2) of the Austrian PIL Law).

15. Although the 'market rule' is internationally accepted, the Standing Committee has searched for another description of the connection. The objection levelled at the connection with the law of 'the market' is that, with the advancing internationalization (globalization) of trade, it is hard to locate 'the market'. Thus national borders in the context of the European Union become blurred and there is increasingly less talk of a truly national market. It should, however, be noted in this regard that the Member States of the European Union continue to boast their own system of private law with its own competition rules. In order to counter the aforementioned objection, the Standing Committee has opted for the following terminology in the bill: 'by the law of the State in the territory of which the competitive action affects competitive relations'. Even with this description, however, fragmentation of the applicable law cannot be avoided when the competitive action affects competitive relations in several countries.

16. Section 2 refers to 'unfair competition', rather than to the term 'unlawful competition' used in Section 7 of the draft bill. The term used by the Standing Committee, which should be interpreted loosely, is in step with current practice in the field of conventions, case law and legal literature.⁸ Section 2 introduces a derogation from Section 1 (see beginning of Section 2). In its turn, Section 2 can be set aside by an option exercised by the parties (Section 4) since the view of the court is that the unfair competition is closely connected with another existing legal relationship between parties (Section 3).

8. See, for example, Asser-Hartkamp III, 1994, No 47; also D. Kokkini-Iatridou and K. Boele-Woelki, NIPR 1992, p. 540.

17. Section 2(2) expressly lays down that non-market-oriented action does not come under sub-section 1. Here we need to consider not only unfair advertising but also such acts as the enticement of personnel, infiltrating a particular competitor's organization, etc., which can be harmful to a specific competitor's interests. In the case of such actions, therefore, we should, in Section 2(2), fall back on the general rule laid down in Section 1. Article 136(2) of the Swiss PIL law establishes a connection in this instance with the law of the State 'in dem sich die betroffene Niederlassung (des Geschädigten) befindet' ('in which the establishment (of the injured party) concerned is situated'). There are no grounds for such a separate rule since the same result (harmful impact on a (legal) person) can be achieved in such cases on the basis of Section 1(2), insofar as, in cases where the competitor suffers injury, more than one location is involved.

VI. *Subsidiary connection: Section 3 of the bill*

18. Section 3 of the bill refers to subsidiary connections. A similar rule, albeit not restricted to tort, delict or quasi-delict, is also included in Section 3 of the draft bill (identical to Section 93 outline). The concept of subsidiary connection also has its place in foreign legislation (see Article 133(3) of the Swiss PIL Law and Section 41 of the German 'Referentenentwurf').

19. By way of derogation from the previous Sections, the obligation arising in connection with a tort, delict or quasi-delict may, in accordance with the bill, be subject to the law applicable to the other legal relationship where such tort, delict or quasi-delict is closely connected with an already existing legal relationship between parties. The provision relates to situations where legal relationships converge (in particular, tort, delict or quasi-delict with non-execution). Where such convergence occurs ('between parties'), the court may apply the law governing the other legal relationship to the obligation arising from a tort, delict or quasi-delict. The provision lacks the scope of a general exceptions clause, as contained in Article 15 of the Swiss PIL Law. In the view of the Standing Committee, any such general exception, if required, belongs in the general part of the PIL – consolidation (see also under 5 above). As is clear from the optional wording of Section 3, the court has jurisdiction to establish a subsidiary connection and is under absolutely no obligation to do so.

Furthermore, an existing legal relationship between parties (in most cases, a contractual relationship) must be involved. The explanatory memorandum should make it clear that in certain circumstances the court may establish a subsidiary connection with a quondam legal relationship between parties.

The extent to which a tort, delict or quasi-delict may be 'closely connected' to another legal relationship is not specified in further detail in Section 3. This is a matter for the discretion of the court.

VII. *Choice of law: Section 4 of the bill*

20. As in Section 2 of the draft bill in the case of all non-contractual obligations, Section 4 of the bill allows scope for parties to choose a law differing from the law that would be applicable to the tort, delict or quasi-delict, under Sections 1 to 3, in the absence of any choice of law. The possibility of a choice of law in the case of tort, delict or quasi-delict had already

been accepted in lower-level case law.⁹ Recently, the Supreme Court has also given a ruling on the matter in its COVA judgment of 19 November 1993. In that judgment the Supreme Court held the *lex loci delicti* to be applicable, *save in the event of a choice of law*. From the wording used by the Supreme Court it can be deduced that choice of law is not a prior consideration, but rather takes a secondary position to the general rule of the *lex loci delicti*. For tort, delict and quasi-delict, unlike contracts, it will thus usually be a choice of law after the event. In the Standing Committee's view, no provision should be made regarding procedures for the choice of law. Although the possibility cannot be ruled out of a more extensive contract also including a choice of law (in advance) which can apply to claims relating to tort, delict or quasi-delict between the parties, no separate provision is required for the purpose. The fact that the law chosen also governs matters relating to tort, delict and quasi-delict may emerge directly from the intention of the parties, but may also be determined by reference to ancillary factors. Nor does Section 42 of the German 'Referentenentwurf' (draft prepared by ministry officials) make the choice of law a prior consideration in the case of tort, delict and quasi-delict.¹⁰

The term 'parties' in Section 4 means the parties involved in legal proceedings. Where legal action is taken by insurers, Section 4 allows those parties to make a choice of law.

21. Under Section 4(2), drawing on Article 3 of the European Contractual Obligations Convention, the choice of law has to be expressed or otherwise demonstrated with reasonable certainty. For tort, delict and quasi-delict, a choice of law will in most cases be made after the event. The Standing Committee considers choice of law acceptable only where there is clearly a genuine meeting of minds between the parties to that effect. A presumed choice of law cannot therefore be accepted. The choice of law must be unequivocal ('expressed') or 'otherwise demonstrated with reasonable certainty', which might for instance mean a choice of law clearly emerging from the case papers or the circumstances of the case. In the Standing Committee's view, a choice of forum cannot automatically be regarded as indicative of the law applicable.

22. The question has been raised in the relevant literature of whether choice of law also applies in the case of international traffic accidents and international product liability matters.¹¹ Neither the Hague Traffic Accidents Convention nor the Hague Products Liability Convention makes any provision regarding choice of law. The Standing Committee regards the question of whether those Conventions nevertheless allow such a choice of law as a matter of interpretation of them; hence, in introducing a legal provision concerning (the validity of a) choice of law in those cases, the Netherlands legislature would risk having that provision

9. See, inter alia, Rotterdam Court, 8 January 1979, NJ 1979, 113.

10. Section 42 reads as follows: 'After the event giving rise to a non-contractual obligation, the parties may choose the law by which it is to be governed. This shall not affect the rights of third parties.'

11. For an answer in the affirmative, see D. Kokkini-Iatridou and K. Boele-Woelki, NIPR 1992, p. 527; A.P.M.J. Vonken, Verkeersongevallen, Praktijkreeks IPR, part 17, 1996, points 81 et seq.; H. Duintjer Tebbens, Speciale Aflevering NIPR 1994, p. 47; Th.M. de Boer, Alternatieven voor de *lex loci delicti*, Studiekring Prof. J. Offerhaus, No 13, 1982, p. 29. Also under the Traffic Accidents Convention: Arnhem Court, 11 July 1985, NIPR 1986, 292, and Amsterdam Court, 21 April 1993, NIPR 1994, 127, and under the Products Liability Convention: Rotterdam Court, 15 October 1993, S & S 1994, 80, NIPR 1995, 240.

ruled contrary to (a proper interpretation of) the Conventions in question. The Committee does not therefore think it advisable to include such a provision.

Insofar as such liability is governed by the Act of 18 March 1993 (Maritime and Inland Waterways Law (PIL) Act), the question of whether choice of law is allowed in cases of liability for collisions has to be answered by that Act. These points are made in Section 8 of the bill.

VIII. *Coverage of the law determined by the conflict-of-laws rule: Section 5 of the bill*

23. Section 5 of the bill establishes the coverage of the law determined by the conflict-of-laws rule, pursuant to the preceding sections. The provision is virtually identical with Section 10 of the draft bill (and Section 100 of the outline). The list in Section 5 is not strictly necessary, it being a question of classification, under the *lex fori*, of the subjects to be governed by the law determined by the conflict-of-laws rule. However, the Standing Committee takes the view that Section 5 may clarify matters for legal practitioners and is therefore worth including. A similar list is also included in other legislation (see Section 7(6) of the Maritime and Inland Waterways Law (PIL) Act).

24. The list of subjects in Section 5 is not exhaustive (note the phrase ‘in particular’ used in the lead-in to it). It is open to the courts also to deal with other legal issues arising in connection with a tort, delict or quasi-delict under the system of law governing the latter. Differences between the bill and the draft bill are considered below.

- Subsection (c) in the bill refers to the ‘nature of damage’, whereas the same subsection in Section 10 of the draft bill refers to the ‘nature of injury or damage’. The Standing Committee considers that the term ‘injury’ should be deleted, as damage is not so designated in the other provisions of its bill.
- Subsection (f) in the bill draws on Section 7(6)(e) of the Maritime and Inland Waterways Law (PIL) Act, which also refers to ‘persons entitled in their own right to compensation for damage suffered’.
- Subsection (g) in the bill refers to ‘liability of a principal for acts of his agent’. The term ‘principal’ is not here to be construed narrowly as relating only to a contract of agency, but rather covers all cases of liability in respect of servants (vicarious liability), as governed in this country by Sections 6:170, 171 and 172 of the Civil Code.
- Subsection (b) of Section 10 in the draft bill stipulates ‘the burden of proof insofar as the legislation applicable to it forms part of the law of liability’. The Standing Committee takes the view that this subsection should not be included, since it is not clear that the burden of proof will always be governed by the *lex causae*, with the *lex fori* thus being of no relevance here. It would be better to deal with the matter under the general aspect of consolidation of private international law.

The Standing Committee has also looked at the question of whether the power enjoyed by interest groups under Section 3:305a of the Netherlands Civil Code to take legal action in respect of a tort, delict or quasi-delict is also available to foreign interest groups and whether any provision needs to be made on this point. In the Committee’s view, neither the wording of that provision nor its purport, nor for that matter its genesis, gives any reason to suppose

that it relates only to legal persons established under Netherlands law.¹² The Standing Committee thus sees no need to make any provision on this point.

25. As is clear from Section 5(d), the extent of damage and manner of compensation come under the law applicable to the tort, delict or quasi-delict. The Standing Committee wondered here whether the Act should make any provision regarding punitive damages, as found in Anglo-American law, etc.¹³ The question of whether such damages are acceptable will arise mainly in enforcing foreign judgments. Enforcement of a foreign judgment awarding such damages could be refused by a court in the Netherlands as being contrary to public policy. As regards the scope of Section 5(d), the Standing Committee further considered whether there is sufficient reason to stipulate that the courts may disregard a rule of the applicable foreign law concerning the quantum of damages awardable, where the effect of that rule is, by way of punishment, to significantly over-compensate for the harm suffered by the injured party. The Standing Committee came to the conclusion that such a provision is not advisable, firstly, because a punitive element cannot be said from the outset to be unacceptable by the Netherlands' legal standards for any form of tort, delict or quasi-delict and, secondly, because the courts may disregard any such provision of foreign law, on grounds of public policy, if they deem its application incompatible with the Netherlands' legal system.

IX. *Traffic and safety regulations: Section 6 of the bill*

26. Section 6 of the bill is virtually the same as Section 8 of the draft bill (identical with Section 98 of the outline). The law applicable, as determined under this set of rules, does not prevent the taking into account of traffic and safety regulations and other, comparable regulations for the protection of persons and property in force at the place of the tort, delict or quasi-delict. Similar provisions are also to be found in Article 7 of the Hague Traffic Accidents Convention, Article 9 of the Hague Products Liability Convention and Section 7(5) of the Maritime and Inland Waterways Law (PIL) Act.

27. The form of words used in Section 6 ('shall not prevent') leaves it to the discretion of the courts to take the regulations referred to in Section 6 into consideration in their judgment.

28. The Standing Committee considered whether the scope of Section 6 of the bill should be extended so as to take account of 'regulations or rights applicable at the place of the tort, delict or quasi-delict'. That wording would allow account also to be taken of rules not in themselves to be regarded as mandatory rules, e.g. the mergers code and stock exchange rules. However, the Standing Committee takes the view that those rules can in general also be brought to bear by way of the duty of care required under the law found to be applicable pursuant to the conflict-of-laws rule. The Standing Committee therefore sees no reason to extend the scope of Section 6 of the bill.

12. See also P. Vlas, *Rechtspersonen, Praktijkreeks IPR*, part 9, 1993, point 189.

13. On this point see A. T. Bolt and J. A. W. Lensing, *Privaatrechtelijke boete*, preadvies Nederlandse Vereniging voor Rechtsvergelijking, No 48, 1993, and F. C. Schirmeister, *Amerikaanse toestanden in het Schadevergoedingsrecht?*, diss., Amsterdam, 1996.

X. *Treatment as territory of a State: Section 7 of the bill*

29. Where the bill refers to a 'State', this basically means the territory of that State. There may be some circumstances, however, requiring treatment as equivalent to the territory of a State for the purposes of the rules of reference laid down here. Section 7 of the bill covers those cases.

30. Firstly, Section 7(a) deals with such equivalent treatment for what is, in short, the continental shelf. The drafting of the provision drew on the Standing Committee's opinion of 10 December 1990 (IPR/206.6).¹⁴ Further to that opinion, this equivalent treatment clause has been drawn up as a multilateral aid in private international law. The general term 'international law' is used as the source of the sovereign rights referred to in the definition. The wording of the equivalent treatment clause departs from the above opinion in that it restricts coverage so as to treat as territory of the State in question not the seabed itself, but only installations and other facilities for natural resource prospection and exploitation situated in, on or over the continental shelf.¹⁵

Secondly, Section 7(b) treats as part of a State 'a ship on the high seas, outside territorial limits, registered or issued a ship's passport or equivalent document by or on behalf of that State or, in the absence of any registration, ship's passport or equivalent document, belonging to a national of that State'. It should be pointed out here that many installations for prospecting for and exploiting seabed natural resources now no longer stand on the seabed itself, but are sea-going vessels. In that event, such installations will be covered by Section 7(b) of the bill.

Thirdly, Section 7(c) deals with equivalent treatment for aircraft: 'an aircraft in flight, registered by or on behalf of that State or, in the absence of any registration, belonging to a national of that State'.

31. The subsections of Section 7 are concerned with 'loci sine lege'. The Standing Committee considers that this issue arises particularly for torts, delicts and quasi-delicts committed on drilling platforms and on board ships on the high seas (outside territorial waters) or aircraft in flight. The Standing Committee sees no reason to make any provision for other cases of 'loci sine lege' (e.g. torts, delicts or quasi-delicts committed on unoccupied land or on board spacecraft, satellites etc.).

It should be noted, however, that the equivalent treatment in Subsection (c) applies not only in the case of a 'locus sine lege', but to any tort, delict or quasi-delict committed on board an aircraft in flight. If one is committed at a time when the aircraft is in the airspace of any particular State, application of the *lex loci delicti* takes on a completely arbitrary complexion. Bearing in mind aircraft flying speeds, too, this may also give rise to problems of proof: how can it be proved where in the air an aircraft was positioned at the time of commission?¹⁶ In order to obviate any such problems, the Standing Committee has opted for the equivalent treatment outlined above.

14. See Standing Committee on PIL, selected opinions – Naar een afgewogen IPR – 1995, pp. 245-251.

15. See H.L.J. Roelvink, Het continentaal plat als IPR-aanknopingspunt, in: *Op Recht*, a collection of essays presented to Prof. A.V.M. Struycken to mark his silver jubilee at the Catholic University of Nijmegen, 1996, pp. 273 et seq.

16. See also Chr. von Bar, *Internationales Privatrecht*, II, 1991, p. 476.

XI. *Demarcation from other provisions: Section 8 of the bill*

32. Section 8 of the bill establishes a demarcation in relation to other provisions. Section 8 combines the provisions of Section 1 of the draft bill (identical with Section 91 of the outline) and Sections 11 and 12 of the draft bill (identical with Sections 101 and 102 of the outline). It stipulates that these rules are not applicable to, in short: (a) liability for collisions caused by ships to which the Maritime and Inland Waterways Law (PIL) Act is applicable, (b) liability for road traffic accidents to which the Hague Traffic Accidents Convention is applicable and (c) liability for products to which the Hague Products Liability Convention is applicable. This list is not meant to be exhaustive. Insofar as any conventions other than those listed in Section 8 deal with conflict-of-laws rules for tort, delict and quasi-delict, the general rule in Article 93 of the Constitution is also applicable to those other conventions.

As regards the question of whether a choice of law (under Section 4 of the bill) is allowed, see the comments in 22 above.

XII. *Not included: direct action*

32. Section 9 of the draft bill (identical with Section 99 of the outline) includes a provision concerning the law applicable to the question of whether a direct claim by the victim against the wrongdoer's insurer is possible. That section prompted the Insurance Association to raise some questions.¹⁷ The Standing Committee would point out that a provision on direct action is contained in Article 9 of the Hague Traffic Accidents Convention, on which Section 9 of the draft bill is broadly based. Given that direct action is mainly of relevance in the law on traffic accidents, with provision being made for the purpose in the Convention in question, the Standing Committee does consider any provision on the matter in other cases to be necessary.

The Hague, 23 December 1996

ANNEX

Bill regulating the conflict of laws with regard to matters relating to torts, delicts or quasi-delicts proposed by the Standing Government Committee on Private International Law

Section 1

1. Matters relating to tort, delict or quasi-delict shall be governed by the law of the State in which the act occurred.

2. However, where an act has a harmful impact upon a person, property or the natural environment other than in the State in which that act occurred, the law applicable shall be that of the State in which the impact occurred, unless the perpetrator could not reasonably have foreseen this.

17. In a letter of 4 February 1994, the Association put its objections to Section 9 to the then State Secretary for Justice.

3. Where the perpetrator and the injured party are habitually resident, or have their seat, in the same State, the law of that State shall apply by way of derogation from the preceding subsections.

Section 2

1. By way of derogation from the preceding Section, matters relating to unfair competition shall be governed by the law of the State in whose territory the competitive action affects competitive relations.

2. Subsection 1 shall not apply where the competitive action is directed solely against a specific competitor.

Section 3

Where a tort, delict or quasi-delict is closely connected with an existing legal relationship between parties, any matter relating to such tort, delict or quasi-delict may, by way of derogation from the preceding Sections, be subject to the law governing that other relationship.

Section 4

1. Where parties have chosen the law applicable to any matter relating to tort, delict or quasi-delict, that law shall apply between them notwithstanding the provisions of the preceding sections.

2. The choice of law must be expressed or otherwise demonstrated with reasonable certainty.

Section 5

The law applicable pursuant to the preceding sections shall govern in particular:

- (a) grounds for and extent of liability;
- (b) grounds for exclusion, limitation and apportionment of liability;
- (c) existence and nature of damage eligible for compensation;
- (d) extent of damage and manner of compensation;
- (e) scope for transfer or transmission of entitlement to compensation;
- (f) persons entitled in their own right to compensation for damage suffered;
- (g) liability of a principal for acts of his agent;
- (h) the period of prescription or limitation of a claim for compensation and the time from which that period runs and at which it is interrupted or suspended.

Section 6

The provisions of the preceding sections shall not prevent the taking into account of traffic and safety regulations and other, comparable regulations for the protection of persons or property in force at the place of the tort, delict or quasi-delict.

Section 7

For the purposes of this Act, the following shall be treated as forming part of the territory of a State:

(a) installations and other facilities for natural resource prospection and exploitation, situated in, on or over that part of the seabed lying outside that State's territorial limits, provided that the State is entitled under international law to exercise sovereign rights there for the purposes of natural resource prospection and exploitation;

(b) a ship on the high seas, outside territorial limits, registered or issued a ship's passport or equivalent document by or on behalf of that State or, in the absence of any registration, ship's passport or equivalent document, belonging to a national of that State;

(c) an aircraft in flight, registered by or on behalf of that State or, in the absence of any registration, belonging to a national of that State.

Section 8

This Act shall not be applicable to:

(a) liability in respect of collisions caused by ships insofar as the applicable law is determined by Section 7 of the Act of 18 March 1993 laying down certain rules of private international law with regard to maritime law and inland waterways law;

(b) liability in respect of road traffic accidents insofar as the applicable law is determined by the Convention on the Law Applicable to Road Traffic Accidents, done at The Hague on 4 May 1971, published in English and French and in Dutch translation in the *Tractatenblad* for 1971, No 118;

(c) liability in respect of products insofar as the applicable law is determined by the Convention on the Law Applicable to Products Liability, done at The Hague on 2 October 1973, published in English and French and in Dutch translation in the *Tractatenblad* for 1974, No 84.