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**GREEN PAPER**

**on the conversion of the Rome Convention of 1980  
on the law applicable to contractual obligations  
into a Community instrument and its modernisation**

(presented by the Commission)

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## **GREEN PAPER**

### **on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation**

The purpose of this Green Paper is to launch a wide-ranging consultation of interested parties on a number of legal questions on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations (“the Rome Convention” or “the Convention”) into a Community instrument and its modernisation.

It sets out the general context of the debate and presents a number of options.

The Commission invites interested parties to send reasoned replies to the questions raised in this Green Paper and listed on page 3. The questions are, obviously, not restrictive and more general comments will be appreciated. In addition, for each question interested parties are asked to provide the Commission with whatever information they can on the impact that the various options would have on:

- i. business life in general;
- ii. small business in particular;
- iii. relations between businesses and consumers/workers.

The Commission will take account of comments received in the case it prepares a proposal for a Community instrument.

It must be stressed that the Commission has neither taken a decision in respect of the necessity to modernise the Rome Convention nor in respect of its conversion into a Community instrument.

The present document does not intend to examine the relationship between a possible future instrument and the Internal Market rules. For the Commission it is clear, however, that such an instrument should leave intact the principles of the Internal Market laid down in the Treaty or in secondary legislation.

Interested parties are requested to send their answers and comments before 15 September 2003 to the following address:

European Commission  
Directorate-General for Justice and Home Affairs,  
Unit A3 - Cooperation in Civil Matters  
B-1049 Brussels  
Fax: + 32 (2) 299,64 57  
E-MAIL: [jai-coop-jud-civil@cec.eu.int](mailto:jai-coop-jud-civil@cec.eu.int)

Interested parties are requested to chose one single means of communication (electronic mail, fax or ordinary mail) to send their contributions. In the absence of formal instructions to the contrary, respondents’ answers and comments may be published on the Commission’s website.

The Commission plans to organise a public hearing on the subject in the last quarter of 2003.

## LIST OF THE QUESTIONS

- Question 1:** Do you have information concerning economic actors' and legal practitioners' actual knowledge of the Rome Convention of 1980 and of its rules, in particular the rule allowing parties to freely choose the law applicable to their contract? If you consider that such knowledge is sufficient, do you think that this situation has a negative impact on the parties' conduct in their contractual relations or on court proceedings?
- Question 2:** Do you believe the Rome Convention of 1980 should be converted into a Community instrument? What are your arguments for or against such a conversion?
- Question 3:** Are you aware of difficulties encountered because of the proliferation and dispersal of rules having an impact on the applicable law in several horizontal and sectoral instruments of secondary legislation? If so, what do you think is the best way of remedying them?
- Question 4:** Do you think a possible future instrument should contain a general clause guaranteeing the application of a Community minimum standard when all elements, or at least certain highly significant elements, of the contract are located within the Community? Does the wording proposed at 3.1.2.2 allow the objective pursued to be attained?
- Question 5:** Do you have comments on the guidelines with regard to the relationship between a possible Rome instrument and existing international conventions?
- Question 6:** Do you think one should envisage conflict rules applicable to arbitration and choice of forum clauses?
- Question 7:** How do you evaluate the current rules on insurance? Do you think that the current treatment of hypotheses (a) and (c) is satisfactory? How would you recommend resolving the difficulties that have been met (if any)?
- Question 8:** Should the parties be allowed to directly choose an international convention, or even general principles of law? What are the arguments for or against this solution?
- Question 9:** Do you think that a future Rome I instrument should contain more precise information regarding the definition of a tacit choice of applicable law or would conferring jurisdiction on the Court of Justice suffice to ensure certainty as to the law?
- Question 10:** Do you believe that Article 4 should be redrafted to compel the court to begin by applying the presumption of paragraph 2 and to rule out the law thus obtained only if it is obviously unsuited to the instant case? If so, how do you think it would be best drafted?

**Question 11: Do you believe one should create a specific rule on short-term holiday tenancy, along the lines of the second subparagraph of Article 22(1) of the Brussels I Regulation, or do you consider the present solution satisfactory?**

**Question 12: Evaluation of the consumer protection rules:**

- A. How do you evaluate the current rules on consumer protection? Are they still appropriate, in particular in the light of the development of electronic commerce?**
- B. Do you have information on the impact of the current rule on a) companies in general; b) small and medium-sized enterprises; c) consumers?**
- C. Among the proposed solutions, which do you prefer, and why? Are other solutions possible?**
- D. In your view, what would be the impact of the various possible solutions on a) companies in general; b) small and medium-sized enterprises; c) consumers?**

**Question 13: Should the future Rome I instrument specify the meaning of “mandatory provisions” in Articles 3, 5, 6 and 9 and in Article 7?**

**Question 14: Should Article 6 be clarified as regards the definition of “temporary employment”? If so, how?**

**Question 15: Do you think that Article 6 should be amended on other points?**

**Question 16: Do you believe there should be rules concerning foreign mandatory rules in the meaning of Article 7? Would it be desirable for the future instrument to be more precise on the conditions for applying such rules?**

**Question 17: Do you think that the conflict rule on form should be modernised?**

**Question 18: Do you believe that a future instrument should specify the law applicable to the conditions under which the assignment may be invoked against third parties? If so, what conflict rule do you recommend?**

**Question 19: Would it be useful to specify the respective scope of Articles 12 and 13? Do you believe that there should be a conflict rule for subrogation payments made in the absence of an obligation?**

**Question 20: In your view, would it be useful to specify the law applicable to legal compensation? If so, what conflict rule do you recommend?**

## Introduction

### **1.1. The creation of an area of freedom, security and justice**

One of the consequences of expanding trade and travel in the world in general and the European Union in particular is the increased risk that European citizens or companies established in a Member State may be involved in a dispute of which all the elements are not confined to the State where they have their habitual residence. An example might be a Greek consumer who bought an electronic instrument in Germany from a catalogue or via the Internet and now wants to sue the manufacturer because it has a serious defect that the manufacturer refuses to repair, or a German company which wants to sue its English trading partner for failure to perform its contract.

Parties are often discouraged from asserting their rights in a foreign country by the incompatibility or complexity of national legal and administrative systems. This applies particularly to private individuals or small businesses, who generally do not have the financial resources to secure the services of an international network of lawyers.

But in the European Union there cannot be a genuine internal market, envisaging free movement of goods, persons, services and capital, without a common law-enforcement area in which all citizens can assert their rights not only in their home country but also in other Member States.

The Tampere European Council on 15 and 16 October 1999<sup>1</sup> set three main lines of priority action for the creation of such an area, one of which is the strengthening of the mutual recognition of court orders and judgments.

Harmonisation of the rules of private international law is essential for attaining this objective.

### **1.2. The role of private international law in the creation of a European judicial area**

Private international law<sup>2</sup> is made up of mechanisms to facilitate the settlement of international disputes. It answers three questions:

- which country's courts have jurisdiction in a dispute; this question refers to the determination of "international jurisdiction" or "conflicts of jurisdiction";
- which country's substantive law is to be applied by the court hearing the case; the problem of applicable law goes by the name of "conflict of laws";
- can the decision given by the court which declared that it had jurisdiction be recognised and, if necessary, enforced in another Member State; this question, designated by the expressions "effect of foreign judgments" or "mutual recognition and enforcement of foreign judgments", is especially important if the losing party has no assets in the country where the judgment was given.

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<sup>1</sup> Presidency conclusions of 16.10.1999, points 28 to 39.

<sup>2</sup> Private international law does not have the same meaning in all Member States. In German or Portuguese law, for example, it only designates the rules concerning conflict of laws, whereas in other systems it also includes the rules concerning the international jurisdiction of the courts and the recognition of foreign judgments. In this document, the term is used in its broad sense.

Practically speaking, where a court action is to be brought in an international dispute, the first question is which country's courts have international jurisdiction. Once this has been determined, this court will decide which law is applicable to the dispute. It is only when this court has given judgment that the problem of enforcement abroad will arise.

Traditionally, each Member State has its own national rules of private international law. But this entails the major inconvenience of a lack of uniformity and legal certainty and also the risk that the parties or one of them might take advantage of the fact that their case has links with various legal systems to escape the law normally applicable to them. To return to the example of the Greek consumer and the German seller, just imagine that the sales contract between them contains a clause choosing the law of a third country that has no consumer protection provisions. This practice, if it were valid, would be repugnant as it would deprive the consumer of the protection provided for by both Greek and German law.

To combat such inconvenience and practices, the Member States have therefore chosen to harmonise their rules of private international law. So far they have concentrated on contractual and non-contractual obligations in civil and commercial matters.

### **1.3. The Rome Convention, the Brussels I Regulation and the future Rome II instrument - three complementary instruments**

No picture of the objectives of the Rome Convention is complete without a reminder of its predecessor, the Brussels Convention of 1968 (replaced since 1 March 2002, except for Denmark, by the Brussels I Regulation).<sup>3</sup> This was drawn up on the idea, already described in the EC Treaty, that a common market implies the possibility of having a judgment given in another Member State recognised and enforced with the minimum of difficulty. To facilitate this objective, the Brussels Convention begins with rules determining the Member State whose courts have jurisdiction.<sup>4</sup>

But merely having rules on jurisdiction does not fully exclude arbitrary factors in settling the dispute on the substance. The Brussels Convention and the Regulation which replaces it contain a number of options enabling the claimant to choose between this or that court. The risk is that parties will opt for the courts of one Member State rather than another simply because the applicable law in this state would be more favourable to them. This practice is known as "forum-shopping". By unifying the Member States' rules on conflict of laws, the Rome Convention ensures that the same solution will be applied as to the substance irrespective of the court hearing the case and thus reduces the risk of forum-shopping in the European Union.

But there is a great difference between the scope of the Brussels Convention and the scope of the Rome Convention: the first covers both contractual and non-contractual obligations, whereas the second covers only the former. Should the work on a future Rome II instrument on the law applicable to non-contractual relations<sup>5</sup> succeed, this instrument will therefore be

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<sup>3</sup> Council Regulation (EC) No 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, replacing the Brussels Convention of 1968, the consolidated version of which was published in the OJ C 27, 26.1.1998, p. 1. But the Brussels Convention of 1968 remains in force for relations between Denmark and the other Member States.

<sup>4</sup> The rules on jurisdiction in the 1968 Convention and the Brussels I Regulation are not basically what this Green Paper is about, but we refer to some of them when considering the various conflict rules (point 3).

<sup>5</sup> On 3 May 2002 the Commission launched a wide-ranging consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations in order to collect the

the natural extension of the work on unifying the private international law rules on contractual and non-contractual obligations of a civil and commercial nature in the Community.

Before looking in closer detail at the conflict rules of the Rome Convention, it is worth briefly describing their objectives.

#### **1.4. Objectives of the rules concerning conflict of laws as regards contracts**

For each conflict of laws rule, the legislature has a number of options. To explain why one or other option is preferred, we should begin by reviewing two principles – the principle of the proper law and the principle of freedom of choice.

The principle of the proper law is that a situation should be governed by the legal order which has the closest connection with it. This principle is particularly significant as regards international jurisdiction, for example when a dispute concerns a building or a traffic accident: the court for the place of where the building is situated or the place where the accident occurred is generally best placed to assess the facts and gather evidence. The principle of freedom of choice is that the parties may themselves choose the law which will govern relations between them, this solution being easily comprehensible in one of the example quoted above – the contract between two companies, German and English. This is the dominant principle in contract cases, enshrined in the positive law almost everywhere.

In the last twenty years or so, another principle has come to the fore, that of the protection of the weaker party. In the example of the Greek consumer and the German supplier quoted above, the two parties are not on equal footing. If there are no limits on the principle of free will, consumers may well have to accept a law which is unfavourable to them, thus depriving them of the protection which they are entitled to expect when they buy consumer goods, even abroad. The same reasoning applies to the relationship between employer and employee.

All these principles are present in the rules of the Rome Convention of 1980.

#### **1.5. Outline of the rules of the Rome Convention**

The uniform rules of the Rome Convention “*apply to contractual obligations in any situation involving a choice between the laws of different countries*”,<sup>6</sup> i.e. in situations in which all the elements are not connected to the legal order of one and the same State. For instance, the parties to the contract may be of different nationality or domiciled in different States, or the contract may be made or performed in different countries or in a country different from that of the court hearing the case.

The Rome Convention is what is known as a “universal” convention,<sup>7</sup> i.e. the conflict rules that it enacts can lead to the application of the law of a non-EU State.

The Convention also provides for the exclusion of the following: the status or legal capacity of natural persons; the law governing family economic matters (wills, successions, marriage settlements, contracts covering maintenance responsibility); obligations arising from negotiable instruments (bills of exchange, cheques, promissory notes); the law governing

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comments of the interested parties. The text is available at the following address:  
[http://europa.eu.int/comm/dgs/justice\\_home/index\\_en.htm](http://europa.eu.int/comm/dgs/justice_home/index_en.htm).

<sup>6</sup> Article 1.

<sup>7</sup> Article 2.

companies, associations and other legal entities; arbitration agreements and agreements on the choice of court; trusts; evidence and procedure.<sup>8</sup>

The keystone of the system is freedom of choice (Article 3), a principle which allows the parties to choose the law applicable to their contract. The freedom left to parties is not unlimited: they may choose any law, even if it has no objective connection with the contract; they may choose the law governing the contract after its conclusion and change their choice at any time during the life of the contract, in certain Member States even in the course of proceedings. Regarding the form of the choice, it “must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case”, which can be ascertained from an explicit clause in the contract or alternatively from other elements of the contractual environment, the court being left the task of checking whether there is a tacit or implicit choice of law.

In the absence of a choice of law by the parties, the Convention retains the principle of the proper law, the contract then being governed by the law of the country with which it is most closely connected (Article 4). The contract is presumed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence. The “characteristic performance” is what makes it possible to distinguish one contract from another (e.g. the obligation of the vendor to transfer the property, in a sales contract; the obligation of a carrier to transport a good or a person, in a contract of carriage; etc.); the obligation to pay an amount of money does not therefore constitute the characteristic performance for the purposes of Article 4, though there may be exceptions. The Convention then provides for other presumptions as regards property rights and the carriage of goods. But the court can disregard these presumptions “*if it appears from the circumstances as a whole that the contract is more closely connected with another country.*”

Under certain conditions the Rome Convention, like the so-called "Brussels I" Regulation, contains special rules for weaker parties (consumers and workers, Articles 5 and 6). The choice of a law by the parties to the contract may not deprive a consumer or an employee of the protection of the mandatory provisions of the law which would be normally applicable to them – as designated in accordance with the general rules of the Convention – in the absence of a choice of law. In the absence of a choice of law, a consumer contract is governed by the law of the country of the consumer’s habitual residence, and an employment contract is governed by the law of the place in which the employee habitually carries out his work in performance of the contract or in the absence of such a place, the law of the place in which he was engaged.

The Convention lays down special rules for certain matters (in particular assignment of claims and subrogation). It covers the law of contract in a very broad sense, since it governs the interpretation of the contract and its performance or non-performance as well as its extinction and nullity.

## **1.6. Connection with the “European contract law” project**

There are those who are already considering the link between Rome I and the European contract law project.<sup>9</sup>

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<sup>8</sup> Subject to Article 14 of the Convention.

The Commission communication of 2 July 2001 aimed at broadening the discussion on the future of European contract law at Community level and on the need for a change of approach regarding the substantive law.<sup>10</sup> In this paper the Commission in particular raised the issue of coherence of the EC *acquis* in the area of contract law and whether divergences in contract law between the Member States may hinder the proper functioning of the internal market. One of the options put forward, if a new approach turned out to be needed, was the adoption of a new Community instrument contributing to further approximation of the substantive law of contracts. Thus some commentators already called into question the value of working on rules prescribing the application of one or the other national rule.

There is, however, no reason for such questioning. In the Commission's opinion, the "European contract law" project does neither aim at the uniformisation of contract law nor at the adoption of a European civil law code. The Commission had already announced that a follow-up document would be published early in 2003. In addition, even assuming that one day there will be closer harmonisation of contract law in the Community, it is quite possible that this will concern only certain particularly important aspects and that the applicable law will still have to be determined for the non-harmonised aspects. Conflict of laws' rules will therefore lose none of their importance for Community cross-border transactions, today and in the future.

Accordingly, the European contract law project does not detract in any way from the arguments for considering a possible modernisation of the Rome Convention. On the contrary, both projects complement each other and will be conducted in parallel.

### **1.7. Initiatives already taken**

To prepare the discussions on modernising the Convention, the Commission provided finance under the GROTIUS CIVIL 2000 programme for a project submitted by the Academy of European Law in Trier for establishment of a database accessible on line relating to the implementation of the Convention by the courts of the Member States. This web site<sup>11</sup> already contains a number of references to case law.

In addition, on 4 and 5 November 1999, when preparing Regulation (EC) No 44/2000 (Brussels I), DG JAI organised a hearing covering the private international law and electronic commerce. It received 74 written contributions from professional bodies, consumers' associations, public institutions, companies and researchers. A major part of the comments covers the question of the law applicable to contracts concluded via Internet.

Lastly, the EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW (GEDIP) has been working on possible improvements to the Convention, culminating in specific proposals for amendment of the current text.<sup>12</sup>

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<sup>9</sup> Commission communication to the Council and Parliament concerning the European contract law (OJ C 255, 13.9.2001, p.1).

<sup>10</sup> The substantive law of contracts rules questions such as the validity, the conclusion and the performance of the contract, in contrast with private international law of contracts which only deals with the question of the law applicable to a contract.

<sup>11</sup> <http://www.rome-convention.org>.

<sup>12</sup> The results are accessible at <http://www.drt.ucl.ac.be/gedip>.

Before considering whether the conflict of laws rules in the Convention should be modernised (part 3), the reasons which could possibly justify its conversion into a Community instrument should be analysed (part 2).

But first of all, the Commission wishes to take the opportunity to gather precise information concerning what economic actors – companies, consumers and workers as well as legal practitioners – actually know about the existence of the Rome Convention and the rules it contains. The Commission also wonders how this knowledge or the lack of it influences the parties' practical conduct in their contractual relations or court proceedings.

**Question 1: Do you have information concerning economic actors' and legal practitioners' actual knowledge of the Rome Convention of 1980 and of its rules, in particular the rule allowing parties to freely choose the law applicable to their contract? If you consider that such knowledge is sufficient, do you think that this situation has a negative impact on the parties' conduct in their contractual relations or on court proceedings?**

## **2. CONVERTING THE ROME CONVENTION OF 1980 INTO A COMMUNITY INSTRUMENT**

At Community level, the Rome Convention is the only private international law instrument still in the form of an international Treaty. Therefore the question of its conversion into a Community instrument has been raised.

Converting the Convention into a Community instrument could have a number of advantages, the first of which would be greater consistency in Community legislation on private international law (point 2.2), based on Article 61(c) of the Treaty (point 2.1). It would, in addition, entail conferring on the Court of Justice the jurisdiction to interpret it in the best conditions (point 2.3) and would facilitate the application of the standardised conflict rules in the new Member States (point 2.4).

### **2.1. A new legal basis: Article 61 c) of the EC Treaty as amended at Amsterdam gave a new impetus to Community-based private international law**

While Community instruments on private international law were adopted on the basis of Article 293 (formerly Article 220) of the Treaty (Brussels Convention of 1968) or have the same status as instruments adopted on this basis (Rome Convention of 1980), since the entry into force of the Treaty of Amsterdam, this field is governed by the first pillar of the European Union.

In addition, on the basis of Article 61(c) of the Treaty, the Community has adopted several new Regulations for judicial cooperation in civil matters (Brussels II,<sup>13</sup> Bankruptcy,<sup>14</sup> Service of documents<sup>15</sup> and Evidence<sup>16</sup>) and converted the Brussels Convention of 1968 into a

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<sup>13</sup> Council Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility for children of both spouses, OJ L160, 30.6.2000, p. 19.

<sup>14</sup> Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L160, 30.6.2000, p. 1.

<sup>15</sup> Council Regulation (EC) 1348/2000 of on 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L160, 30.6.2000, p. 37.

Regulation. The Commission is currently preparing a Community instrument on the law applicable to non-contractual obligations (Rome II). The Vienna Action Plan<sup>17</sup> of the Council and the Commission, adopted by the Council in 1998, refers specifically to the compatibility of the conflict rules. Point 40(c) calls for “revision, where necessary, of certain provisions of the Convention on the Law applicable to contractual obligations, taking into account special provisions on conflict of law rules in other Community instruments”. The Mutual Recognition Programme<sup>18</sup> specifies that measures to harmonise conflict of laws rules constitute supporting measures, facilitating implementation of the principle of mutual recognition of judgments in civil and commercial matters.

Upon entry into force of the Nice Treaty, the "co-decision" procedure which provides for a stronger participation of the European Parliament to the legislative process will apply to cooperation in civil matters, except for family law.

## **2.2. Consistency of Community legislation as regards private international law**

Since the rules on jurisdiction and choice of law applying to contractual and non-contractual obligations of a civil or commercial nature form an entity, the fact that the Rome Convention takes a different form from the other Community instruments of private international law does not improve the consistency of this entity.

In addition, since the Rome Convention takes the form of an international Treaty, it contains a number of provisions that will have to be reviewed in the light of the concern for consistency in Community legislative policy, among them:

- the right of the Member States, under Article 22, to enter reservations (relating to Articles 7(1) and 10(1)(e);
- the right of the Member States, under Article 23, to adopt new choice of law rules in regard to any particular category of contract;
- the right of the Member States, under Article 24, to accede to multilateral Conventions on conflict of laws; and
- the limited (though renewable) duration of the Convention (Article 30).

It needs to be examined whether these provisions are compatible with the aim of establishing a genuine area of justice.

## **2.3. Interpretation of the Convention by the Court of Justice**

An analysis of the first judgments given by national courts that certain Articles of the Convention are not always being applied uniformly, in particular because the national courts tend to interpret the Convention in the light of previous solutions, either to fill in gaps in the Convention or to modify the interpretation of certain flexible provisions. Examples of these differences can be found in Article 1(1) (material scope: definition of contract, for example

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<sup>16</sup> Regulation (EC) No 1206/2001 of the Council of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1.

<sup>17</sup> OJ C 19, 23.1.1999, p. 1, point 51(c).

<sup>18</sup> OJ C 12, 15.1.2001, p. 8.

the question whether contract chains should be included) or Article 3(1) (definition of tacit choice: what about the reference to a legal concept specific to a given legal system).<sup>19</sup>

There is no doubt that uniform interpretation of the Rome Convention by the Court of Justice would improve the consistency of the interpretation of conflict of laws' rules at EC level.

In a Joint Declaration,<sup>20</sup> the Member States stated that they were ready to examine the possibility of conferring jurisdiction in certain matters on the Court of Justice, and the Convention has been supplemented by two Protocols conferring jurisdiction on the Court of Justice to interpret the Convention. But they are not yet in force.<sup>21</sup>

Converting the Convention into a Community instrument would ensure that the Court of Justice would have identical jurisdiction over all the Community private international law instruments. The Court of Justice could therefore ensure that the legal concepts common to the Rome Convention and the Brussels I Regulation<sup>22</sup> are interpreted in the same manner.

Here one should also bear in mind that the jurisdiction conferred on the Court of Justice under Title IV could well expand in the future. However, the ratification of the two protocols to the Rome Convention remains important for contracts concluded before the entry into force of a possible future "Rome I" instrument which would continue to be governed by the Rome Convention. The latter will therefore remain the relevant text for an important number of existing contracts.

#### **2.4. The application of the standardised conflict rules in the new Member States**

The Rome Convention of 1980 is part of the '*acquis communautaire*'. From the point of view of enlargement of the Union, the adoption of a Community instrument would prevent the entry into force of the uniform conflict rules from being delayed by ratification procedures in the applicant countries.

To illustrate this remark it is enough to recall that the Conventions of Funchal<sup>23</sup> and Rome,<sup>24</sup> concerning the accession of Spain and Portugal and Austria, Finland and Sweden, have still not been ratified by all the Member States. As the initial text was amended slightly on this occasion, two different versions of the Rome Convention therefore coexist today.<sup>25</sup>

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<sup>19</sup> Another source of divergent interpretations is that certain Member States have chosen to incorporate the provisions of the Convention in their national legislation by statute, sometimes amending the original text.

<sup>20</sup> The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.

<sup>21</sup> Ratification of the second protocol by Belgium is still needed for the first protocol conferring jurisdiction on the Court of Justice to enter into force in all the Member States which have ratified it (i.e. all Member States except Belgium and Ireland); for progress with ratifications, see: <http://ue.eu.int/Accords/default.asp?lang=en>.

<sup>22</sup> The concept of consumer, for example.

<sup>23</sup> OJ L 333, 18.11.1992, p. 1.

<sup>24</sup> OJ C 15, 15.1.1997, p. 10.

<sup>25</sup> The amendment made by the Funchal Convention mainly concerned the deletion of Article 27 on the geographical scope of the Convention.

## 2.5. The choice of instrument: regulation or directive?

For the choice of the type of measure to be adopted - a regulation or a directive - it must be borne in mind that, in accordance with the Mutual Recognition Programme, the harmonisation of the conflict rules contributes to the mutual recognition of court judgments in the Union.

One should also take into consideration that the point is not to regulate one or the other aspect of a matter – as is the case of sectoral Directives – but to harmonise an entire subject-matter – the private international law of obligations.

It seems that this objective can more easily be reached if a possible future Rome I instrument is in the form of a regulation, the instrument being directly applicable and its application avoiding the uncertainties of the transposal of a directive.

**Question 2: Do you believe the Rome Convention of 1980 should be converted into a Community instrument? What are your arguments for or against doing this?**

## 3. IS THERE A NEED FOR MODERNISING THE ROME CONVENTION OF 1980?

Since a good many of the substantive conflict rules entered into force barely eleven years ago, many will be surprised by the question. But there are several arguments for doing so.

First of all, the Member States undertook to consider the advisability of revising Article 5 concerning consumer protection at the time of Austrian accession to the Rome Convention: the explanatory report on the Convention of Accession specifies that this must be done in the near future and a declaration to this effect was annexed to the Final Act of the Conference of the Governments of the Member States.<sup>26</sup>

Then there is the close link between the Rome Convention and the related instrument in matters of conflicts of jurisdiction – the Brussels Convention. When this was converted into a Community Regulation, some of its articles were changed, too<sup>27</sup>. Some point out that the consistency of the Community private international law demands that these amendments be reflected in the instrument that deals with conflict of laws.

Moreover, there is a body of case law covering a period that is longer than the period during which the Convention has been in force. Several signatory States had already incorporated its provisions into their national legislation unilaterally before it actually entered into force.<sup>28</sup> In other Member States, the Convention inspired judges even before it entered into force.

It is manifest in this case law that certain essential rules of the Convention are criticised on grounds of insufficient precision. But it must be borne in mind that this is not one of those areas where strict precision is always possible, and a balance must be sought between rules that would give the judges complete freedom to determine the applicable law and, on the other hand, rigid rules that leave no opportunity for flexibility in the case in question.

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<sup>26</sup> OJ C 191, 23.6.1997, p. 11, 12.

<sup>27</sup> Namely Articles 5, 15 et 22 § 1.

<sup>28</sup> Denmark, Luxembourg, Germany and Belgium.

Consequently, the value of revising the substance cannot therefore lie in clarifying in minute detail all the points on which divergent interpretations are possible but in sorting out the most debatable points. Before considering these points Article by Article (at point 3.2), there are broader questions concerning the general balance of the Convention (point 3.1).

### 3.1. The general balance of the Convention

#### 3.1.1. *Link between the general conflict rules of the Rome Convention and the rules in sectoral instruments that have an impact on the applicable law*

##### 3.1.1.1. The proliferation of rules in sectoral instruments that have an impact on the applicable law

The proliferation of sectoral instruments of Community secondary legislation containing isolated conflict rules<sup>29</sup> or of rules that determine the scope of territorial application of community law and therefore having an impact on the applicable law<sup>30</sup> has aroused extensive comment. The effect of Article 20 of the Convention and the general principles of law<sup>31</sup> is that these special rules governing specific matters derogate from Convention rules of general scope. In most cases, the sectoral rules meet the aim to strengthen the protection of weaker parties (cf. point 3.2.6, *infra*).<sup>32</sup>

But their proliferation is a source of concern. According to some, this is likely to harm the consistency of the body of conflict rules applicable in the Union. An example often cited is the rules have an impact on the applicable law in the consumer protection Directives, which use a mechanism differing from that of the conflict rules as such<sup>33</sup> and also contain formulas that vary slightly from one instrument to another. In addition, transposal by the Member States does not always reflect the spirit of the Directives, in particular when a bilateral rule becomes unilateral.<sup>34</sup>

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<sup>29</sup> In particular: Directive on the return of cultural objects unlawfully removed from the territory of a Member State (1993/7, 15.3.1993); Directive concerning the posting of workers in the framework of the provision of services (1996/71, 16.12.1996); Directive 1944/44 of 25 May 1999 on certain aspects of sale and of the guarantees of the consumer goods. There is also a coherent set of conflict rules applicable to insurance in the following Directives: second non-life insurance Directive (1988/357 of 22 June 1988), as supplemented and amended by Directives 1992/49 and 2002/13; second life assurance Directive (1990/619 of 8 November 1990), as supplemented and amended by Directives 1992/96 and 2002/12.

<sup>30</sup> A certain number of directives contain a provision that, although not being a conflict of laws' rule, have an impact on the applicable law to a contract. If the contract has a direct link to the territory of one or more Member States, these provisions provide for the application of Community law even if the parties chose the law of a third country. The following instruments contain such a clause: Unfair terms Directive (1993/13, 5.4.1993); Timeshare Directive (1994/47, 26.10.1994); Directive 97/7 of 20 May 1997 on the protection of consumers in respect of distance contracts; Directive on the sale and guarantees of consumption goods (1999/44, 25.5.1999); Directive on distance sales of financial services (2002/65, 23.9.2002)

<sup>31</sup> “*Generalia specialibus derogant*” – special laws derogate from general laws.

<sup>32</sup> The provisions concerning the territorial scope of the consumer directives find their reason in the fact that the protection given by Article 5 of the Convention is not always considered as being sufficient; cf. pint 3.2.7, *infra*

<sup>33</sup> Cf. note 34, *supra*.

<sup>34</sup> Most of the rules of conflict of laws are bilateral, i.e. they can designate either a foreign law or the law of the forum. For example, there is a French rule according to which the court must determine a child's affiliation on the basis of the law of the mother's nationality. If the mother is French, the French court will apply French law; if she is Italian, it will apply Italian law. According to the unilateralist method, each state is satisfied with determining the cases where its own law is applicable in order not to give

Other commentators argue that this dispersal of the conflict rules make it very difficult for the reader, and in particular for the expert, to determine what text is applicable, in the context of the broader debate in progress in the European Union on codification of the '*acquis communautaire*' to improve transparency.<sup>35</sup>

### 3.1.1.2. Possible solutions

Several solutions are currently under discussion, ranging from measures enabling experts to find their way more easily around the mass of existing legislation to genuine codification of the Community conflict rules:

- i. existing legislation might be more reader-friendly if there were an annex to the future instrument, listing the references of sectoral instruments of secondary legislation containing conflict rules and updated each time an instrument is adopted;
- ii. special rules could be incorporated in the future Community instrument. The real question would then be whether the aim is to move towards a general instrument covering all the Community conflict rules in contractual matters. This *de facto* raises the question of codification of the '*acquis communautaire*';
- iii. the rules in the sectoral instruments that have an impact on the applicable law aim in general at better protection for weaker parties. However, the present Green paper precisely takes up some reflections currently under discussion among academic writers in order to, on the one hand, introduce a general clause that guarantees the application of a Community minimum standard (cf. point 3.1.2., *infra*) and, on the other hand, to modernise Article 5 of the Convention on consumer contracts (cf. point 3.2.7, *infra*). If these amendments were made, some have already suggested to repeal the rules in sectoral instruments.

**Question 3: Are you aware of difficulties encountered because of the proliferation and dispersal of rules having an impact on the applicable law in several horizontal and sectoral instruments of secondary legislation? If so, what do you think is the best way of remedying them?**

3.1.2. *Envisage a clause to guarantee the use of the Community minimum standard when all the elements or some of the elements of the contract are located in the Community*

3.1.2.1. The risk that Community law is not applied although all the elements of the case are located in the Union

There are and always will be situations in which a weaker party does not enjoy the benefit of the protective rules of the Convention owing to the specific circumstances of the case. The parties' autonomy can thus lead to the application of the law of a third State. If all parties involved are Community nationals, such a result goes against the spirit of the Convention and of Community law in general.

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jurisdiction to the law of another State in a case where that state does not want it to be applied. Based on the idea that private international law serves to resolve conflicts of sovereignty, such rules are the exception nowadays. An example is Article 3 subparagraph 3 of the French Civil Code: "*the laws on the status and capacity of persons govern French persons, even those residing abroad*".

<sup>35</sup> Cf. Commission communication to Parliament and the Council on Codification of the *Acquis communautaire*, COM (2001) 645 final, 21.11.2001.

As will be seen (point 3.2.7, *infra*), it may happen that a “mobile” consumer is unprotected against the application of the law of a third country. For example, where a Portuguese consumer goes to Belgium to make a purchase, no provision of the Rome Convention forbids the seller from submitting the contract to the law of a non-European country which has no consumer protection rules.<sup>36</sup>

Admittedly, one could point to the fact that the protection of weaker parties is also and in particular contained in a number of Directives that comprise rules on the scope of application in order to avoid that a choice of law of a third state leads to their non-application. (point 3.1.1, *supra*). However, some argue that such a mechanism is not sufficient: apart from making it more difficult to identify the applicable rule, the sectoral Directives, as their title indicates, do not apply across the full range of civil law but only in certain areas of it. Lastly, the sectoral Directive technique is also unsatisfactory in that the consumer cannot rely on the provisions of a Directive that has not been transposed or has been incorrectly transposed.<sup>37</sup>

### 3.1.2.2. Possible solutions

The modernisation of articles 5 and 6, as discussed under point 3.2.7 *infra*, would admittedly allow to correct some shortcomings of their current wording. But consideration should be given to another solution— a clause to guarantee the Community minimum standard where all elements, or the very characteristic elements, of the contract are located in the Community.

Such a clause could be based on Article 3(3) of the present Convention, which specifies that “*where all the other elements relevant to the situation at the time of the choice are connected with one country only*”, the fact that the parties have chosen a foreign law may not prejudice the application of that country’s mandatory rules of law.

Likewise, the future Rome I instrument could specify that, if a directive imposes the respect for minimum standards, the parties cannot circumvent this by virtue of the rules on conflict of laws by choosing the law of a third country for contracts that are purely internal to the Community. A provision along the following lines has been suggested: “The fact that the parties have chosen the law of a non-member country shall not prejudice the application of the mandatory rules of Community law where all the other elements relevant to the situation at the time when the contract is signed are connected with one or more Member States.”<sup>38</sup>

This proposal has to be seen also in the light of the *Ingmar* decision of the European Court of Justice. Despite the fact that not all elements of this case were situated within the Community – the principal was established in the US – the Court of Justice held that certain articles of the Directive 86/653 on commercial agents apply because the commercial agent had exercised his activity in a Member State<sup>39</sup>.

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<sup>36</sup> There remain obviously the safety-nets in the form of public-order legislation – the rules that the court can apply whatever the law applicable to the contract (cf. point 3.2.8, *infra*). This device, however, is burdensome: there are only few rules that can be clearly identified as such – the foreseeability of the judicial solution is thus far from being guaranteed.

<sup>37</sup> Because directives do not have horizontal direct effect. Thus the German *Gran Canaria* jurisprudence has its origins in the non-transposition of the Directive 85/577 of 20.12.1985 by Spain (cf. note 61, *infra*).

<sup>38</sup> As to the notion “mandatory rules”, cf. point 3.2.8., *infra*

<sup>39</sup> Case 381/98 *Ingmar GB Ltd c/ Eato Lonard Technologies Inc* [2000] ECR 263 (judgment given 9.11.2000).

**Question 4: Do you think a possible future instrument should contain a general clause guaranteeing the application of a Community minimum standard when all elements, or at least certain highly significant elements, of the contract are located within the Community? Does the wording proposed at 3.1.2.2 allow the objective pursued to be attained?**

*3.1.3. Relationship with existing international conventions*

Even a Community instrument could make it possible for Member States to continue implementing conflict rules contained in international conventions to which they are currently Parties. The point of this would be to avoid conflicts between the rules in those Conventions and the rules in the Community instrument. And Member States which are already Parties to such Conventions would not have to denounce them.

This solution has the disadvantage of enabling these States to apply rules diverging from those provided for by the Community instrument, which would detract from the creation of a genuine common law-enforcement area. But this is only a slight risk, as the content of these rules is already perfectly known and the Member States would no longer be able to accede individually to other Conventions once the proposed Community instrument is adopted. Under the rule in AETR,<sup>40</sup> the adoption of a Community instrument standardising the rules of conflict of laws relating to civil and commercial contracts would confer exclusive power on the Community to negotiate and adopt international instruments on such matters.

This possibility could be accompanied by an obligation for the Member States to notify the relevant international conventions so as to guarantee transparency and certainty as to the law. The list could be reproduced in an annex to a Rome I instrument.

**Question 5: Do you have comments on the guidelines identified above?**

**3.2. Problems met in the implementation of various Articles**

*3.2.1. Scope of the Convention - exclusion of arbitration and choice of forum clauses (Article 1(2)(d))*

Arbitration clauses – which provide for the designation of an arbitrator or an arbitration board rather than a court in the event of a dispute – and choice of forum clauses – i.e. clauses designating the court having jurisdiction in the event of a dispute – are excluded from the scope of the Convention.

The exclusion of arbitration agreements is not a problem, as there are a number of treaties on the matter. But they more often concern the recognition and enforcement of arbitral awards than the law applicable to the arbitration agreement itself.

Regarding choice of forum clauses, Article 23 of the Brussels I Regulation does contain material rules, directly laying down certain conditions for the validity of such clauses, but the Article does not settle all aspects of the matter.

**Question 6: Do you think one should envisage conflict rules applicable to arbitration and choice of forum clauses?**

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<sup>40</sup> Case 22/70 *Commission v Council* [1971] ECR 263 (judgment given on 31.3.1971).

### 3.2.2. *Rules applicable to insurance contracts (Article 1(3))*

#### 3.2.2.1. The current situation

Insurance contracts covering risks located on the territory of the Union are excluded from the scope of the Convention. The reason for this exclusion is that, in parallel with the negotiations for the Rome Convention, another group of experts was working on private international law and freedom to provide services as regards insurance. Several sectoral Directives<sup>41</sup> govern the conflict of laws specifically for insurance.

Accordingly, three hypothetical situations need to be distinguished depending, whether on the risk is or is not located in a Member State and whether the insurer is or is not established in the Community:

- a) the risk is located outside the territory of the Union: the applicable law is determined according to the rules of the Convention, whether the insurer is established in the Community or not; under the general rules of the Convention (Article 4), in the absence of a choice of law, the contract is presumed to be most closely connected with the country in which the insurer is established;
- b) the risk is located in the Union and is covered by an insurer established in the Community: the applicable law is determined in accordance with the rules of the insurance directives, which differ appreciably from the general solutions of the Convention. Directive 90/619 on life insurance lays down the general rule that the law of the state where the policy-holder habitually resides apply if the policy-holder is a private individual. This solution, which treats the policy-holder effectively as a consumer, corresponds to the one applied in most non-member countries;
- c) the risk is located in the Union and is covered by an insurer not established in the Community: the applicable law is determined in accordance with the national conflict rules of each Member State; there is no harmonised solution for the Union.

#### 3.2.2.2. Questions regarding the current situation

The current situation has been criticised by specialists in private international law, in particular because it is not strictly compatible with the concern for transparency in Community law; insurance law specialists can identify the applicable rules, but the more general public cannot always do so.

Then there is the question whether situation (a), in which the insurer's law is applied, is in line with the general aim, also described in the Brussels I Regulation,<sup>42</sup> of ensuring a high level of protection where the policy-holder is a private individual.

Lastly, it may seem surprising that there are no harmonised conflict rules for situation (c) (risk located in the European Union covered by an insurer established outside the Community). But insurance specialists stress that in practice there is no need to worry about hypothesis (c), as

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<sup>41</sup> The Directives mentioned in footnote 29 above. It should be noted that on 27 May 2002 the Council adopted a joint position for the adoption of a consolidated version of the life assurance Directives (OJ C 170 E, 16.7.2002, p. 45). Work is also in hand to consolidate the Directives on non-life insurance, to be completed in 2003.

<sup>42</sup> Section 3 of the Brussels Convention of 1968 already contained special rules on jurisdiction.

the rules concerning freedom to provide services require the non-Community service provider to declare an address for service in the Union, which brings them under Community law.

### 3.2.2.3. Possible solutions

The following avenues could be explored:

- i. Do the Convention's general rules, applying in situation (a), adequately reflect the specific nature of insurance contracts. Would it not be preferable to envisage a special conflict rule, like the Brussels I Regulation? Or should the Community, like most other countries, ignore risks which are not located on its territory?
- ii. To improve the transparency of Community legislation, the special rules on insurance might conceivably be incorporated in a future Rome I instrument. But if the instrument was a Regulation, this is not necessarily the appropriate legislative technique for rules concerning insurance: when the insurance directives were prepared, the Community legislature wished to leave the Member States some room for manoeuvre regarding connecting factors to allow the law of the policy-holder to apply, and such freedom is not compatible with a regulation. Most Member States, responding to the Commission's work on insurance and electronic commerce, expressed their wish not to incorporate the conflict rules in the Rome Convention or the instrument which will replace it.
- iii. The annex giving a regular update of the conflict rules in sectoral instruments (point 3.1.1.2., *supra*) would make it possible to improve the legibility and transparency of the applicable rules.

**Question 7: How do you evaluate the current rules on insurance? Do you think that the current treatment of hypotheses (a) and (c) is satisfactory? How would you recommend resolving the difficulties that have been met (if any)?**

### 3.2.3. Freedom of choice (Article 3(1)) - Questions regarding the choice of non-state rules

It is common practice in international trade for the parties to refer not to the law of one or other state but direct to the rules of an international convention such as the Vienna Convention of 11 April 1980 on contracts for the international sale of goods, to the customs of international trade, to the general principles of law, to the *lex mercatoria* or to recent private codifications such as the UNIDROIT Principles of International Commercial Contracts.

In the minds of the authors of the Convention, such a choice does not constitute a choice of law within the meaning of Article 3, which can only be choice of a body of state law: a contract containing such a choice would be governed by the law applicable in the absence of a choice (Article 4), and it would fall to this law to determine the role to be played by the non-state rules chosen by the parties.<sup>43</sup> Traditionally, most academic writers have ruled out the possibility of choosing non-state rules, particularly because there is not yet a full and consistent body of such rules.

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<sup>43</sup> Cf. P. Lagarde, *Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980*, RCDIP, 1980.287.

Others would prefer the choice of non-state law to constitute a choice of law for the purposes of Article 3 of the Rome Convention.<sup>44</sup> One of the reasons brought forward to this is that one should not refuse a practice before the court that is already admitted (in many countries) before arbitrators.

Concerning more specifically the parties' choice of the rules of the Vienna Convention of 11 April 1980, the Dutch courts have twice ruled on situations in which the Convention did not apply directly pursuant to its Article 1(1).<sup>45</sup> According to the Hoge Raad, the Dutch Supreme Court, the parties were free to designate this Convention as the law applicable to their contract. There is still the question of the effects of such a designation: if the contract had been purely internal, the rules of the Convention could not have derogated from the mandatory rules of the law applicable in the absence of a choice. But since the contract was an international contract, the Court acknowledged that the choice of the Convention ruled out the mandatory rules of the law applicable in the absence of a choice.<sup>46</sup> It did not refer to the law which would have been applicable in the absence of a choice to ascertain the role that it would confer on the Vienna Convention. In other words the parties themselves had genuinely chosen this Convention.

**Question 8: Should the parties be allowed to directly choose an international convention, or even the general principles of law? What are the arguments for or against this solution?**

#### 3.2.4. Freedom of choice – tacit choice (Article 3(1))

##### 3.2.4.1. The legislature's intention

Once the principle of freedom of choice is accepted, it must be ensured that the parties actually exercise this right to choose the law applicable to their contract. According to the second sentence of Article 3(2), “the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case”. However, some translations of the Convention seem to be more flexible than others<sup>47</sup>, and it is not impossible that this difference is at the root of divergent interpretations in the countries concerned.

The legislature's intention was to admit a clear choice, even if it was tacit. In addition to the frequent case of a deliberate clause inserted in the contract, the choice of law can therefore be ascertained either from other provisions of the contract or from aspects of the contractual environment: the first situation would include, for example, acceptance of a standard-form contract governed by a specific legal system, even in the absence of any deliberate clarification as to the applicable law, the text leaving it to the court to check that the choice, though tacit, is real, or a reference to provisions of a given law without this law being designated in the aggregate. Regarding the “circumstances of the case”, a contract might be

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<sup>44</sup> Cf. K. Boele-Woelki, *Principles and Private International Law - The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts*, *Uniform Law Review*, 1996.652.

<sup>45</sup> Article 1(1) of the Convention specifies that it applies “*to contracts of sale of goods between parties whose places of business are in different States: a) when the States are Contracting States; or b) when the rules of private international law lead to the application of the law of a Contracting State.*”

<sup>46</sup> Hoge Raad, 26.5.1989, NJ 1992.105 and 5.1.2001, NJ 2001.391.

<sup>47</sup> Instead of “with reasonable certainty” and “mit hinreichender Sicherheit” in the English and German version, the French version asks for “de façon certaine”.

closely connected with an earlier contract in which there had been a deliberate choice of law, or it might be part of a series of operations, the law having been chosen only for the basic contract underlying the general operation.<sup>48</sup>

Article 3(2) on the other hand excludes the purely hypothetical choice deduced from excessively ambiguous contractual clauses. This boils down to the hypothesis of the absence of a choice by the parties, and the court will apply the presumptions of Article 4.

#### 3.2.4.2. Difficulties encountered in applying this Article

The borderline between the tacit choice and the purely hypothetical choice is rather vague. Analysis of the case-law reveals a major difference of the solutions regarding this point: the German and English courts, perhaps under the influence of a slightly more flexible form of words, and under the influence of their previous solutions, are less strict about discerning a tacit choice than their European counterparts.

One of the recurring questions is how far an arbitration or choice of court clause can constitute an implicit choice of the law of the country whose courts or arbitrators are designated. The question arises in particular when the court is confronted with such a clause without further argument in favour of this choice. Divergences have also emerged regarding the role to be given to the parties' reference to technical standards or legal concepts belonging to the law of a given country.

#### 3.2.4.3. Possible solutions

The legislature's intention having been to leave the court with considerable room for manoeuvre in interpreting the parties' choice, Article 3, which is a key provision of the Convention, is voluntarily written in general terms. This means that the question of revision must be approached very cautiously:

- i. If the Convention is converted into a Community instrument, the Court of Justice would automatically have jurisdiction to interpret it. Admittedly, since Decisions would then be taken on a case-by-case basis, the fact that jurisdiction is conferred on the Court of Justice, which decides points of law and not of fact, would not mean that the concrete solution can be predicted in advance. But the court can reasonably be expected to define at least the general framework for the interpretation of Article 3(1), thus reducing the most glaring uncertainties;<sup>49</sup>
- ii. The future instrument could itself give more precise information regarding the definition and the minimum requirements for there to be a tacit choice;
- iii. To strengthen the uniform implementation of the Convention, it seems preferable to align the various language versions of the text.

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<sup>48</sup> Cf. examples given by the explanatory report on the Convention by Mr Guiliano and Mr Lagarde, OJ C 282, 31.10.1980.

<sup>49</sup> The Court of Justice might also, for example, hold that the mere fact of designating the courts of a country does not constitute a choice of law if this choice is not corroborated by other factors.

**Question 9: Do you think that a future Rome I instrument should contain more precise information regarding the definition of a tacit choice of applicable law or would conferring jurisdiction on the Court of Justice suffice to ensure certainty as to the law?**

3.2.5. *What is the strength of the general presumption laid down by Article 4(2)*

3.2.5.1. Current situation

Which law should be applied when the parties have made no explicit or tacit choice of the law applicable to their contract? The Convention follows the principle of the proper law: according to Article 4(1) the contract is governed by the law of the country with which it is most closely connected. The formula is deliberately vague: the court has to weigh up the factors that help to reveal the “centre of gravity” of the contract. That is sometimes a difficult task, and there is a risk of uncertainty as to the solution selected.

To strengthen certainty as to the law and help the court to determine the applicable law, Article 4(2) then establishes a general presumption that “*the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence*”.<sup>50</sup> The “*characteristic*” performance is what constitutes the centre of gravity of the contract, basically that which must be paid for depending on the type of contract – the obligation to transfer property in a sales contract, to provide a service in a service contract, to transport in a contract of carriage, to insure in an insurance contract, and so on. Art. 4 thus leads, in principle, to the application of the law of the seller or the service provider.

But the court can disregard this presumption “*if it appears from the circumstances as a whole that the contract is more closely connected with another country*” (Article 4(5)). It then applies the general rule of identifying the law with which the contract is most closely connected. This mechanism making it possible to return to the general rule is known as the “exception clause”.

3.2.5.2. Difficulties encountered

In the spirit of many comments on the Convention, the exception clause of Article 4(5) must be used carefully and rarely since its frequent application leads to unforeseeability as to the applicable law – an unforeseeability that the presumptions of Art. 4 are precisely intended to reduce.

Thus, an analysis of the case-law reveals that in several cases the courts have applied the exception clause *ab initio*, seeking immediately the law that is most closely connected, without beginning with the presumption of Article 4(2).

3.2.5.3. Possible solution

The solution is closely bound up with the objective that one wishes to pursue with the conflict rule: is it to ensure the closest possible connection, which would encourage a flexible clause

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<sup>50</sup> For certain types of contract (immovable property, contract for carriage of goods), the Convention establishes special presumptions (Article 4(3) and (4)).

such as Article 4(5), or the highest degree of certainty as to the law, which would encourage the strict application of the presumption provided for in Article 4(2)?

Given the letter and spirit of the Convention, the courts might reasonably be expected to begin with the presumption of Article 4(2). Only if it emerged that the law designated is not appropriate because other circumstances clearly militate in favour of another law would the court then use the “exception clause”. This is precisely the rule laid down in a Decision of the Dutch Hoge Raad, whereby the court must first apply the presumption of Article 4(2) and rule out the law thus obtained only if it is obviously unsuited to the instant case.<sup>51</sup>

To clarify the text on this point, it would be possible to review the drafting of Article 4. One possibility would be purely and simply to delete paragraph 1 so as to emphasise the exceptional character of paragraph 5. Another solution would be to amend paragraph 5 itself. Thus the future Rome I instrument could take as a starting point the preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations (Rome II), the exception clause in Article 3(3) of which introduces two new conditions in relation to the Rome Convention: it is required that there be “a substantially closer connection [between the tortious/delictual act and] another country” and also that “*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.*”

**Question 10: Do you believe that Article 4 should be redrafted to compel the court to begin by applying the presumption of paragraph 2 and to rule out the law thus obtained only if it is obviously unsuited to the instant case? If so, how do you think it would be best drafted?**

### 3.2.6. *Application of the special presumption in property matters to holiday leasing agreements (Article 4(3))*

#### 3.2.6.1. Current solution

When the subject matter of the contract is a right in immovable property or a right to use immovable property (sale contract, deed or lease of an apartment, for example), it is presumed be most closely connected with the law of the place where the property is situated (Article 4(3)). The reason for this rule is that States traditionally want buildings located in their territory to be governed by their own law, in particular owing to the importance of property for the social and economic organisation of the country.

#### 3.2.6.2. Difficulties encountered in the application of this Article

The special presumption in property matters also covers contracts for very short-term holiday accommodation. For instance, a German landlord, being a private individual or a travel agency, owns a house in the South of Spain and rents it to German private individuals. The tenants are not satisfied with the state of the house and wish to recover part of the rent. As this

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<sup>51</sup> *Nouvelles des Papeteries de l' Aa v. BV Machinenfabriek BOA*, Hoge Raad, 25 September 1992: when the characteristic performance could be ascertained, § 2 contained the main rule and the exception to that rule contained in § 5 should therefore be interpreted restrictively. In other words, § 2 should be disapplied only if, in the light of special factors, the country of habitual residence of the party carrying out the characteristic performance had “no real value as a connecting factor”.

contract concluded between two Germans concerns immovable property, it would be governed by the Spanish law under Article 4(3).<sup>52</sup>

It was already suggested in the explanatory report on the Convention that in such circumstances the courts could apply the exception clause in Article 4(5). Some courts have already done so.<sup>53</sup>

Some authors do however not approve the frequent use of the exception clause in article 4 (5) because it leads to uncertainty with respect to the outcome of a procedure.

In addition, this solution may be incompatible with the Brussels I Regulation, Article 22 of which contains - unlike the Brussels Convention of 1968 - a specific rule on “tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months”. Under certain circumstances the parties are then allowed to derogate from the exclusive jurisdiction of the courts of the place where the immovable property is situated and to bring proceedings in the courts of the Member state of the landlord's and tenant's common domicile.

### 3.2.6.3. Possible solution

The EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW suggested Article 4 (3) should contain a specific rule on short-term holiday tenancy, along the lines of the second subparagraph of Article 22 of the Brussels I Regulation. The wording could be the following: "However, contracts which have as their object tenancies of immovable property concluded for a temporary private use for a maximum period of six consecutive months will be governed by the laws of the country in which the lessor is domiciled, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same country."<sup>54</sup> Should such a clause be inserted to article 4 (3), the judge would still be allowed to apply the exception clause of article 4 (5) to compensate for the rigidity of such a rule.

**Question 11: Do you believe on should create a specific rule on short-term holiday tenancy, along the lines of the second subparagraph of Article 22(1) of the Brussels I Regulation, or the present solution is it satisfactory?**

### 3.2.7. *The protection of consumers (Article 5)*

#### 3.2.7.1. Summary of the contents and scope of the protective rules of Article 5

Since the 1970s a new special body of law – consumer law – has emerged to reflect the imbalance between consumers and professionals. Special rules, such as the nullity of unfair terms or the right to withdraw from a contract unilaterally within a certain time, now protect the consumer against rash commitments.

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<sup>52</sup> Article 5 does not apply if the lessor himself is a private individual. If the lessor is a professional, Article 5 (4) provides that the consumer protecting rules do not apply in a contract for the supply of services "where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence".

<sup>53</sup> BGH, 12 October 1998, IPRAX 1990,318: application of the German law to a contract in which a German travel agency supplied its German customers with holiday houses in France.

<sup>54</sup> Care will have to be taken with the consistency of legal terminology in the future instrument, as Article 22 of the Brussels I Regulation introduces the concept of “natural person”, which might appear less restrictive than “consumer”.

But the protective rules in force in the country of the consumer's habitual residence, i.e. those on which the consumer basically relies for protection, would be rendered ineffective in international or intra-Community trade if they could be excluded merely by choosing a foreign law. To reassure consumers, who have a vital role to play in an internal market which has no hope of success without their active participation, the Rome Convention envisages special conflict rules.

But Article 5 also aims to preserve a degree of balance between the parties. That is why it states the conditions for its application precisely.

Article 5 lays down a double rule: on the one hand, in the absence of choice, the contract is governed by the law of the country in which the consumer has his habitual residence (Article 5(3)). Moreover, "*a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence*" (Article 5(2)). The application of this provision leads to a situation described as "dépeçage", i.e. different parts of a same contract are ruled by the laws of two or even more countries. Thus a contract between a consumer residing in country A and a business established in country B will contain very often a clause for making the law of country B applicable; when the conditions of Article 5 are met, the court must nevertheless give effect to certain provisions of the law of country A, those which relate to public policy and protect the consumer.<sup>55</sup> The court must accordingly apply two distinct laws to the same contract.

Regarding the conditions for application of Article 5, the scope of the protective rules is confined to certain types of contracts,<sup>56</sup> concluded with consumers, this concept being strictly defined, in quite precise circumstances. There are three of these circumstances, and they can be summarised by saying that, as a general rule and apart from the case of cross-border excursions organised by the vendor, there is no protection for the "mobile consumer", i.e. a consumer who travels to a country other than that of habitual residence to make a purchase or receive a service.<sup>57</sup> For the mobile consumer, the general conflict rules of Articles 3 and 4 apply, and they generally make the law of the seller's or service provider's residence applicable.

### 3.2.7.2. Difficulties encountered

The solution in Article 5, which was written at a time when consumer law and distance selling techniques were in their infancy, has come in for some criticism. Austria, for instance, made its accession to the Rome Convention conditional on consideration being given to revision of this Article.<sup>58</sup>

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<sup>55</sup> This involves in particular the right of the consumer to withdraw from the contract and to be protected against unfair terms, such as those releasing the professional from liability in the event of damage.

<sup>56</sup> The contracts to which Article 5 applies are contracts for the supply of tangible goods or services and contracts to finance such supplies.

<sup>57</sup> More precisely, the following three hypotheses are concerned. First, where the signing of the contract was preceded in the country of the consumer's habitual residence by a specific proposal (for example the sending of a catalogue or of an offer of contract) or advertising (via radio, television, newspaper, mail, whatever) if the consumer performed in this country the measures needed to conclude the contract. Second, where the professional received the order in the country of the consumer's habitual residence. Third, more specific, where the tradesman organised a "cross-border excursion" with the aim of prompting the consumer to conclude sale.

<sup>58</sup> Cf. footnote 26, *supra*.

Article 5 is regarded by several academic writers as not giving the mobile consumer proper protection. It is clear from an analysis of the case law that, since the contract is not within the situations envisaged by this Article, a consumer contract can be governed by a foreign law which has no consumer protection provisions. His situation is still worsened when, as in an important German case, he finds himself also deprived of the benefit of the mandatory rules of article 7.<sup>59</sup>

Admittedly, thanks to a large number of EC directives, all consumers residing in the European Union now enjoy the benefit of a Community minimum protection standard.<sup>60</sup> But it must be borne in mind that these directives cover only certain aspects of legal rules which protect the consumer. In addition, there can still be differences from one country to another, in particular where a Member State fails to transpose a directive: since directives do not have horizontal direct effect, the consumer cannot rely on a provision not transposed into national law in his relations with his contracting partners.<sup>61</sup> Lastly, a certain number of EC directives introduce only a minimum standard of protection which falls short of the consumer protection given in certain Member States.

Article 5 is also criticised for the criteria on the basis of which it distinguishes consumers eligible for specific protection from those subject to the general system. These are the conditions for application of Article 5.<sup>62</sup> The criteria selected no longer seem adapted to the development of new distance selling techniques. To determine whether or not a contract is within the scope of Article 5, it is always necessary to locate it in space by reference to an aspect such as advertising, the signing of a contract or the receipt of an order (Article 5(2)). In addition, this solution is no longer in harmony with Article 15 of the Brussels I Regulation, under which consumer protection provisions apply where a company directs its business activities towards the Member State of the consumer's residence and a contract is concluded within the framework of these activities, whatever distance selling technique is used.<sup>63</sup>

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<sup>59</sup> Cf. judgment of the German BGH of 19.3.1997, quoted in footnote 61, *infra*. On the contrary, the French Cour de cassation recently decided that some of the rules on overindebtedness contained in the French Code de Consommation are mandatory within the meaning of Article 7 (Civ I, 10.7.2001, Bull. n° 210, N° 000-04-104).

<sup>60</sup> Cf. point 3.1.2, *supra*.

<sup>58</sup> Such a failure to transpose a Community Directive was at the source of two sets of cases (*Gran Canaria*) in the German courts, which culminated in a judgment of the Bundesgerichtshof. In the first set of cases, German tourists on holiday on the Spanish island of Gran Canaria were the victims of a German company manufacturing bed linen. It had an agreement with a local Spanish company which organised free bus excursions to a bird reserve. During the trip it advertised the products of the German company and gave the tourists a "sales contract" form, which they signed without paying anything immediately. It was stated that on returning to Germany the customers would receive confirmation of their orders from the German company. Disputes arose when, on their return to Germany, some of these tourists refused to pay the price invoiced by the German company and claimed to exert their right of withdrawal under German law, enacted under Directive 85/577. The legal question was whether the law applicable to these disputes was the German law, favourable to the customers, or Spanish law, specified as the applicable law by the contract, which, as Spain had not transposed part of the Directive at the material time, did not acknowledge the right to withdraw. In the second set of cases, German consumers travelling in the Canary Islands were subjected to hard-sell sessions and induced to sign contracts for the purchase of a timeshare in a holiday apartment. The contracts - some subject to the law of the Isle of Man, others to Spanish law - contained a non-withdrawal clause although withdrawal was possible in German law and Community law. The question was whether the consumers could rely on German law against the law chosen in the contract. The BGH ruled out any attempt to justify the application of the protective German law, even as mandatory rule of the forum within the meaning of Article 7.

<sup>62</sup> Cf. note 57, *supra*.

<sup>63</sup> Cf. joint declaration by the Commission and the Council concerning Articles 15 and 73 of the Brussels I Regulation, accessible at [http://europa.eu.int/comm/justice\\_home/unit/civil\\_en.htm](http://europa.eu.int/comm/justice_home/unit/civil_en.htm).

Lastly, some wonder about the use of the *dépeçage* mechanism. It raises theoretical questions,<sup>64</sup> and it will also be necessary to ascertain whether practical difficulties arise with its use in the courts.

### 3.2.7.3. Possible solutions

When consideration is given to the revision of Article 5, the general concerns for the protection for the consumer, in particular when all the facts of the case are located in the Union, and the need to preserve balance in the interests of the parties must be borne in mind. Future rules should be clear, general and as broad as possible, so that the parties can know clearly in advance what law will apply to their contractual relationship.

Consideration will extend to the nature of the protection given to the consumer (application of one or other law) and to the criteria for identifying the consumers actually eligible for the protective provisions, i.e. the conditions for application of them.

The following are some possible guidelines for the debate:

- i. Maintenance of the current solution, with a general clause guaranteeing the use of the Community minimum protection standard (point 3.1.2, *supra*): This solution would make it possible to remedy situations in which the lack of Community consumer protection is the most blatant. But while such a clause would state that certain provisions of Community law must be adhered to, it would not itself determine the applicable law. This solution would therefore involve a mechanism very different from that of the other conflict rules and it might remain exceptional. In particular, EC directives do not yet cover all the aspects of consumer law, so protection via national law remains important;
- ii. Maintenance of the current solution, but changing the conditions for application to include the mobile consumer and possibly the types of contracts currently excluded, on the grounds that the current solution is basically satisfactory, and that all that is needed is to enlarge its scope (point vi, *infra*);
- iii. Generalisation of Articles 3 and 4 of the Convention, the law of the place of the business being applied in exchange for generalised application of the mandatory rules of the state of the consumer's residence: The EUROPEAN GROUPING OF PRIVATE INTERNATIONAL LAW proposes applying Articles 3 and 4 of the Convention to consumer contracts, in combination with an extension of the rule currently provided for in Article 5(2). In practice this would mean that the consumer contract would be governed by the law of the place where the business is established, whether or not the parties choose it, but that the court would in either event apply the mandatory rules of protection of the law of the consumer's place of residence. This solution would have the advantage of making it easier for the supplier to foresee the applicable law. To further increase this foreseeability, the solution could be supplemented by a provision that the mandatory rules of law of the consumer's place of residence are applied provided the supplier is actually in a position to know where that is (point vii, *infra*). But this would increase the

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<sup>64</sup> One of the questions raised by the *dépeçage* mechanism is what happens when the consumer's protective provisions are more favourable in country B than in country A. The answer to this question depends on the view taken of consumer protection: does it consist of applying a law that is known to the consumer and therefore matches his legitimate expectations or a law which is actually more favourable to him?

number of cases of dépeçage and the potential practical difficulties will have to be weighed up;

- iv. Options ii and iii require the identification of the "mandatory rules" of the consumer's habitual place of residence. For legal matters already harmonised at Community level, it was suggested that the consumer protection rules of the law chosen by the parties should apply (in general, the law of the place where the business is established). Only in matters not harmonised at EC level, the consumer should not be deprived of the protection through the "mandatory rules" of the law of the country of his habitual residence;
- v. Systematic application of the law of the consumer's place of residence: This would be a neat and clear solution and would make it unnecessary to split the contract. This in turn would enhance certainty as to the law and would enable proceedings to be handled more quickly and more cheaply; both parties stand to gain. But here again, there is the question of the conditions for application of the rule (point vi, *infra*);
- vi. With respect to solutions ii, iii or v, there will always be a need to examine the conditions of their application to make a distinction between consumers who are eligible for specific protection in cross-border transactions and those who are not.<sup>65</sup> The traditional approach, adopted in the Brussels Convention of 1968 and the Rome Convention, was to look at the question from the consumer's angle, withholding protection from those who had knowingly taken the "risk of foreign trade". But, as has already been seen, this criterion, requiring locating measures taken by the parties, is not well adapted to the era of the new distance selling techniques (Pay-TV, Internet). Another solution might be to analyse the conduct by the business to determine the conditions for application of the protective provisions of Article 5. Thus the future Rome I instrument could take as a starting point Article 15 of the Brussels I Regulation, which combines two conditions to decide whether a consumer is eligible for the protective rules<sup>66</sup>: firstly, that the business directs its activities towards the State of the consumer's residence and, secondly, that a contract is concluded at a distance within the framework of these activities. This Green Paper could also be the occasion to reflect on the need to introduce a Community definition of the expression to "direct an activity towards another State"; for instance, such definition could be composed of a range of facts.
- vii. The introduction of elements involving the theory of appearance provides a variant on solution (vi), still with the objective of specifying the conditions for application of the consumer protection provisions. Thus a future instrument could provide that the place of

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<sup>65</sup> There are hypotheses in which the application of the consumer's law is not reasonably possible, for example when a Belgian tourist travelling in Portugal enters a local shop there and buys a video cassette that turns out to be defective.

<sup>66</sup> Cf. statement by the Commission and the Council on Article 15 of the Brussels I Regulation (available at [http://europa.eu.int/comm/justice\\_home/unit/civil/justciv\\_conseil/justciv\\_en.pdf](http://europa.eu.int/comm/justice_home/unit/civil/justciv_conseil/justciv_en.pdf)), specifies that for the consumer protection provisions to be applicable, it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence; a contract must also be concluded within the framework of its activities. "... the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor." The statement does not necessarily refer only to interactive sites: the aim of a site asking the visitor to send an order by fax is to conclude a distance contract. But a site does not aim to conclude a distance contract if, while addressing the consumers of the whole world with in the intention of providing information on a product, it then refers them to a local distributor for the purpose of signing a contract.

the consumer's residence would be a relevant factor only if the supplier was aware of it or should have been aware of it on the ground of the consumer's conduct. The supplier would be protected from the application of a foreign law if the consumer did not provide him with any means of knowing at least the country – but not necessarily the exact address – of his residence, on the understanding that it is for the supplier to give the consumer the opportunity to do so.<sup>67</sup>

- viii. A completely different approach would be not to distinguish any more between consumers which are eligible for specific protection and those who are not, but to introduce one single rule applicable to all consumers. For instance, a future instrument might permit, for all consumer contracts, the choice of a law which is not that of the consumer's habitual residence, but it would be a very limited choice, since the parties could only chose the law of the country where the business is established. For this choice being valid, it would be for the business to prove that the consumer made an informed choice and that he had advance information on all the rights and obligations conferred on him by that law (right of withdrawal, exchange of product, duration and terms of the guarantee, etc. If the business failed to do so, the court would apply either the consumer's law or the mandatory provisions of that law. Such a solution, being justified by the existence of a Community minimum standard of consumer protection, would obviously be applicable only if the business was domiciled in a Member State. Non-Community businesses, in exchange for the choice of a law other than that of the consumer, would remain subject to its mandatory provisions and must accept the dépeçage of the contract;

Whatever the solution selected, it must be remembered that consumer disputes only seldom come before the courts, as they tend to be small claims. The question of the law applicable to a consumer contract should accordingly be seen in the context of current efforts both in the Member States and at the European Commission to encourage alternative, including electronic, dispute resolution procedures.<sup>68</sup>

**Question 12: Evaluation of the consumer protection rules:**

- A. How do you evaluate the current rules on consumer protection? Are they still appropriate, in particular in the light of the development of electronic commerce?**
- B. Do you have information on the impact of the current rule on a) companies in general; b) small and medium-sized enterprises; c) consumers?**
- C. Among the proposed solutions, which do you prefer, and why? Are other solutions possible?**
- D. In your view, what would be the impact of the various possible solutions on a) companies in general; b) small and medium-sized enterprises; c) consumers?**

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<sup>67</sup> For a contract concluded via the Internet, for example, it is up to the business to make sure that its standard form enables it to identify the place of the consumer's residence.

<sup>68</sup> Cf. Green Paper on alternative dispute resolution in civil and commercial matters, COM(2002)196 (01).

### 3.2.8. Questions regarding the definition of the term “mandatory provisions”

#### 3.2.8.1. The concept of mandatory provision covers a multiform reality

The Convention refers to the applicability of mandatory provisions in Articles 3(3), 5, 6, 7 and 9. What does this mean? In national law, there are numerous mandatory provisions designed to guarantee a country’s social and economic order, also called “public policy” rules. The reference here is to rules from which the parties cannot derogate by contract, in particular those aiming to protect weaker parties (consumers, workers, authors in publishing contracts, minors, commercial agents).<sup>69</sup> However, in a contract subject to a foreign law, a weak party cannot automatically expect his own country’s public policy provisions to apply unless the special rules of the Convention (Articles 5 and 6) so provide.

The mandatory provisions within the meaning of Article 7, also designated by the term “overriding rules” by English writers, are a different matter, and they are involved only in an international context: this involves provisions to which a state attaches such importance that it requires them to be applied whenever there is a connection between the legal situation and its territory, whatever law is otherwise applicable to the contract. What is special about the mandatory rules within the meaning of Article 7 is that the court does not even apply its conflict rules to see what law would be applicable and assess whether its content might be repugnant to the values of the forum<sup>70</sup> but automatically applies its own law. Article 7 does not enumerate overriding mandatory rules, each court must decide on the basis of its own legal system whether this or that provision is a mandatory rule within the meaning of Article 7, and the answer is not always obvious.

This difference can be illustrated by the French law on redundancy. This is indisputably an internal public policy law, which means that any contract between a French employer and a French employee whereby the employee waived his rights to redundancy pay or agreed to shorter than normal periods of notice without compensation would be null and void. On the other hand, the French courts have held that it is not an “overriding mandatory rule” within the meaning of Article 7, applicable whatever the law applicable to the contract.<sup>71</sup> Accordingly, a French employee whose employment contract is validly subject to a foreign law (point 3.2.9, *infra*) cannot expect French redundancy legislation to apply automatically.

#### 3.2.8.2. Difficulties encountered

There are those<sup>72</sup> who express doubts about the combination between the mandatory provisions of Article 5 and those of Article 7: they argue that Article 5 is a special application of Article 7 as the two aim to displace the normally applicable law. Accordingly, when the conditions of Article 5 are not met, Article 7 would also be inoperative. This interpretation would deprive a mobile consumer, who already does not enjoy the protection of Article 5, of the safety valve offered by the public order acts. The German case law has followed the same line,<sup>73</sup> but most academic writers are sharply critical.

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<sup>69</sup> For example, in employment law, the rules concerning safety and health at work, minimum wages, paid leave or sick leave.

<sup>70</sup> This is the public-policy exception, provided for by Article 16 of the Convention.

<sup>71</sup> Paris Court of Appeal, 22.3.1990, D. 1990, Somm., p. 176.

<sup>72</sup> P. Lagarde, Cf. P. Lagarde, *Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980*, RCDIP, 1991, 316.

<sup>73</sup> Bundesgerichtshof, 19 March 1997 (Case VIII ZR 316/96): German consumers travelling in the Canary Islands were induced by dubious practices to sign contracts for the purchase of a timeshare in a holiday

Generally, the use of the same expression for very different concepts generates confusion in the interpretation of the Convention.

### 3.2.8.3. Possible solutions

A future instrument could specify that the scope of the two Articles is not identical. Article 5 designates an objectively applicable law (in the circumstances that it defines) whose mandatory protective provisions (as defined by national law) must be complied with. But it does not interfere with the possible application of overriding mandatory rules, provided for by Article 7 as regards laws which regard their provisions as internationally mandatory and which can thus provide complementary protection when their conditions for application in geographical terms are satisfied.

The future Rome I instrument could therefore propose a definition of the concept of mandatory rules within the meaning of Article 7, based on the decision of the Court of Justice in *Arblade*,<sup>74</sup> according to which this term means “*national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.*”

In response to the Court’s decision in *Ingmar GB Ltd v Eaton Loenard Technologies Inc.*,<sup>75</sup> some have also suggested specifying in the future instrument that there cannot be mandatory provision within the meaning of Article 7 when a rule aims only to protect purely private interests, as opposed to legislation protecting the state’s political, economic or social order.

According to the *Ingmar* decision, not only national provisions but also provisions of Community legislation may be mandatory within the meaning of Article 7. This idea could be incorporated into a future "Rome I" instrument, along the lines of Article 11 (3) of the draft proposal for a Council Regulation on the law applicable to non-contractual obligations ("Rome II").<sup>76</sup>

**Question 13: Should a future Rome I instrument specify the meaning of "mandatory provisions" in Articles 3, 5, 6 and 9 and in Article 7?**

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apartment. The contracts - some subject to the law of the Isle of Man, others to Spanish law - contained a non-withdrawal clause although withdrawal was possible in German law and Community law. When they returned to Germany, certain tourists wished nevertheless to exercise the right of withdrawal provided for by German law. Being eligible as “mobile” consumers for the consumer protection measures of Article 5, the lower courts argued that the right of withdrawal under German law was conferred by public-order legislation within the meaning of Article 7(2) of the Convention. This argument was rejected by the Supreme Court on the ground that German law could be applied under Article 7 only if the conditions as to connection with the territory provided for by Article 5(2) for contracts governed by this Article were met. Consumer protection in such a case is now given by Community sectoral Directives.

<sup>74</sup> Cases C-369/96 and C-374/96 (judgment given on 23.11.1999).

<sup>75</sup> Case C-381/98 (judgment given on 9.11.2000).

<sup>76</sup> Cf. note 5, *supra*.

### 3.2.9. *Uncertainties relating to the interpretation of “temporary employment” of employees in Article 6*

#### 3.2.9.1. The law applicable to employment contract

Out of the same concern for workers’ protection as for consumers, the authors of the Convention derogated from the general rules of Articles 3 and 4. Article 6(1) is built on the same model as the first subparagraph of Article 5(2): freedom of choice is not abolished, which is not negligible for contracts negotiated by managers. This freedom is limited, however, in that the choice of another law than that which would be objectively applicable in the absence of a choice cannot have the effect of depriving the worker of the protection enjoyed under the mandatory provisions of the objectively applicable law.

But the spirit behind the determination of the objectively applicable law in Article 6(2) is different from Article 5: while for Article 5, the applicable law is that of the consumer’s residence, which is the law that the consumer generally knows and on the protection of which he relies, Article 6(2) tries to determine the law with which the contract is most closely connected. It distinguishes according to whether the worker habitually carries out his work under the contract in the same country or not.

In the first case, the law of the country in which the worker habitually carries out his work is applicable. The Article specifies that this is also the case when the worker “*is temporarily employed in another country*”: the law applicable to the contract of a worker sent abroad for a given duration or for the needs of a specific job does not change, whereas expatriation entails the application of the law of the new country as that is now the country in which the worker habitually carries out his work.

When, on the other hand, the worker does not habitually carry out his work in the same country,<sup>77</sup> the applicable law is that of “*the country in which the place of business through which he was engaged is situated*”.

In both cases, whether or not the worker habitually carries out his work in the same country, the objective connection defined by the Convention can be overridden by an exception clause (end of Article (2)), which for the worker avoids the harmful consequences of rigid connection of the contract to the law of the place of performance.<sup>78</sup>

#### 3.2.9.2. Difficulties encountered

Practitioners and academic writers generally consider that the rules of Article 6 are relatively well drafted. Consequently, the decided cases tend to focus on the circumstances of the case, often complex and open to interpretation. But there are a few difficulties that should be pointed out. First there are those already referred to in relation to Articles 3, 4 and 5, pertaining in particular to determination of the tacit choice, to frequent use of the exception clause and the interaction between the mandatory provisions provided for in Article 6 and the public-order legislation referred to in Article 7, to which we will not return here.

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<sup>77</sup> Examples would include a worker in a mobile construction crew and a sales agent active in several States.

<sup>78</sup> For example, a contract concluded in France between a French employer and a French employee for a two-year work in an African country, possibly with the promise of further employment in France on the expiry of the contract, can be assumed to be governed by the law not of the African country of the place of performance but by French law, with which it is most closely connected.

Close attention must be paid, on the other hand, to the “temporary employment” concept. For one thing, an analysis of the decided cases reveals that the definition of “temporary” raises problems in private international law, and for another, account must be taken of the definition of “posting” in Directive 1996/71 of 16 December 1996.

To begin with the private international law angle, the Convention leaves it to the court to determine the duration beyond which employment ceases to be temporary. Solutions are thus not easily foreseeable and can vary from country to country. However, this absence of rigidity regarding the applicable law also enables the court to take full regard to the facts of the case, as “temporary employment” can refer to a great variety of situations. Temporary employment within a group of companies raises questions. What happens when the worker is sent to a company in the same group, with which he concludes a local employment contract? Sometimes, the companies of a group enjoy genuine autonomy and it may be that the transfer really corresponds to a new contract. In other situations, the worker is engaged by the management of the group before being transferred by decision of the same management; the new contract then corresponds merely to administrative requirements (need to obtain a work permit, for example).

To continue with the link with the directive on “posting of workers”,<sup>79</sup> Article 6 brings our attention back to the question of the interaction between the general conflict rule of the Rome Convention and the rule affecting the applicable law in the sectoral Directive. Apart from being difficult for practitioners wishing to identify the applicable law, the two instruments do not use the same terminology.

The purpose of Directive 96/71 is to guarantee that certain mandatory provisions of the host Member State are applied in the event of an employee being sent to work there temporarily. This particularly concerns minimum wage regulations but also health and safety requirements. A superficial reading might suggest that the Directive does not follow the same logic as the Convention, Article 6 of which stipulates that the employee’s status does not have to be changed because of a temporary assignment. But it is clear from a more detailed analysis that the two instruments sit well together. In the event of a temporary assignment, the Directive by no means aims to amend the law applicable to the employment contract but determines a “focal point” of mandatory rules to be complied with throughout the period of assignment to the host Member State, “*whatever the law applicable to the working relationship*”. The Directive must therefore be regarded as an implementation of Article 7 of the Rome Convention, concerning overriding mandatory rules". The instrument thus aims to guarantee fair competition and the respect for employees' rights on the labour market in the Union.<sup>80</sup>

There is a risk of confusion in that the two instruments do not use the same terminology.

Article 1(3) of the Directive 96/71 specifies that its rules apply provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting. From the moment the employee concludes a new employment contract, there is no posting in the sense of the Directive. But it has been seen that for the purposes of

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<sup>79</sup> Directive 1996/71 of 16 December 1996, OJ L 18, 21.1.1997, p. 1.

<sup>80</sup> It must be remembered that the rules of the Directive also apply to the non-Community workers and employers, so that there is no differentiated treatment according to whether the sending company is established in a Member State or not. The text specifies that companies established in a non-member state may not be treated more favourably than companies established in a Member State. Accordingly the legislation of Member States transposing the Directive applies without discrimination to workers seconded to their territory whatever the country of origin of the worker or of the employer.

the Convention, on the contrary, there can be a temporary assignment even if the employee concludes a new employment contract in the host country, for example within a group of companies. For the purpose of the Convention it is the criterion of duration which decides whether the employee finds himself in the situation of "temporary assignment" in the sense of Article 6, whereas the criterion of duration is not relevant for the purposes of the Directive.

The Rome Convention and the Directive not having the same objectives, there is no inconsistency between these instruments. However, the present situation does not add to the transparency of Community legislation.

### 3.2.9.3. Possible solutions

To ensure that the duration of the temporary assignment for the purposes of Article 6 of the Rome Convention is not assessed on a purely case by case basis, thus creating an unforeseeable solution, several solutions can be envisaged:

- i. appraisal of the assignment's temporary nature in the light of the intention of the parties, in that an assignment planned for a given duration or a given project would be temporary. This solution, which would mean that the duration of the assignment was assessed *ex ante*, has been proposed by the EUROPEAN GROUPING OF PRIVATE INTERNATIONAL LAW;
- ii. another solution would be for the court to assess the duration *ex post*, on the basis of the actual duration, on a case by case basis, possibly on the basis of a period set by a future instrument. The EUROPEAN GROUPING OF PRIVATE INTERNATIONAL LAW stresses, however, that this step, though having the advantage of foreseeability, would inevitably be arbitrary and probably too rigid in view of the diversity of situations;
- iii. the Convention could further specify that a new contract concluded with an employer of the same group does not exclude this being considered as a temporary assignment.

**Question 14: Should Article 6 be clarified as regards the definition of "temporary employment" ? If so, how?**

### 3.2.10. Other questions concerning Article 6

The Convention does not specify the position of employees carrying out their work at a place not subject to national sovereignty (sailors, pilots). The courts tend to prefer the law of the place where the employee was engaged rather than locating somewhat artificially the place where work is carried out in one country or another.

Certain Member States have special rules, sometimes unilateral, that are detrimental to uniformity of solutions (for example, a conflict rule designating the law of the flag for sailors on board ship).

One could also question the relevance of the connection of the contract to the law of the place of performance of the work in the case of cross-border home-working. Its connection to the place where the interests of the employing business are located or to the place where the work

is delivered might, under certain circumstances, be more protective<sup>81</sup> of the employee's interests. It seems that the last paragraph of Article 6 permits the connection of the contract to these latter laws, but some academic writers suggest this Article should contain more precise indications with respect of the country with which "the contract is most closely connected" to expressly mention the situation of home-working.

**Question 15: Do you think that Article 6 should be amended on other points?**

*3.2.11. Application of foreign mandatory rules (Article 7(1))*

In addition to applying the overriding mandatory rules of the forum (point 3.2.8, *supra*), the Convention sometimes allows the court to give effect to mandatory rules of other countries with which the situation is closely connected, including states which are not members of the European Union. This is a highly innovatory provision, expressing the concern of the Member States to respect the legislative policy of other states, including non-member countries. Foreign overriding mandatory rules can be applicable in a variety of situations. By way of example, there is a Decision of the House of Lords of 1958 which had regard to Indian legislation prohibiting jute exports to South Africa in a case concerning a contract governed by English law.<sup>82</sup>

There have so far been very few court decisions on Article 7(1).

Article 22(1) of the Convention stipulates that Member States not wishing to adopt Article 7(1) relating to foreign overriding mandatory rules may reserve the right not to apply it, and the United Kingdom, Luxembourg and Germany have actually done so. This does not preclude the courts there from taking foreign mandatory rules into account, but they would then be acting outside the Convention and the additional details that it contains.

Should the Rome Convention be converted into a Community instrument, and if so may be even into a regulation which would not be compatible with reservations, the question of the future of this Article will have to be addressed

**Question 16: Do you believe there should be rules concerning foreign mandatory rules in the meaning of Article 7? Would it be desirable for the future instrument to be more precise on the conditions for applying such rules?**

*3.2.12. Law applicable to formal validity of contracts (Article 9)*

*3.2.12.1. Current solution*

The form of the contract means any external behaviour imposed by law on the author of a legal transaction, such as the requirement of a written document, a hand-written endorsement or a deed. To encourage the validity of the contract as to form, the Convention lays down an alternative rule: it is enough for the measure to be valid according to one of two laws – the law applicable as to substance, determined in accordance with the general rules of the

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<sup>81</sup> For instance, in case of application of the rules of the country where the business is established regarding collective dismissal, the protection of employees' rights in case of business transfer or bankruptcy of the business.

<sup>82</sup> *Regazzoni v Sethia* 1958 [AC] 301. The court does not seem to have referred specifically to the concept of foreign public-order legislation, as the case substantially predated the Rome Convention, but the situation was precisely the kind of situation to which Article 7(1) applies.

Convention, and the law of the place where the contract was concluded. As regards contracts concluded at a distance (by fax, mail or e-mail, for example), there is a place of conclusion for each party in the contract, which further multiplies the chances that the contract is valid as to form. This solution has made it unnecessary to take a more or less artificial decision on the location of a contract between distant parties.

### 3.2.12.2. Difficulties encountered

Article 9 was thought up before contracts concluded by e-mail had become common practice. But how is the place of conclusion to be determined for each party, this being one of the branches of the alternative proposed when offer and acceptance are done by a simple exchange of e-mails?

### 3.2.12.3. Possible solutions

It might be possible to provide a subsidiary rule where it is not possible to determine the place where the contractual intention was expressed. The alternative rule in Article 9 could contain an additional branch by adding the law of the habitual residence of the author of the statement of intention to contract to the law governing it as to substance and the law of the place of conclusion. It will be enough, therefore, for the statement to satisfy the formal requirements of one of the three laws to be valid as to form. This rule will apply without discrimination to contracts concluded by electronic means and to other contracts concluded at a distance.

<b>Question 17: Do you think that the conflict rule on form should be modernised?</b>
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### 3.2.13. *Law applicable to the voluntary assignment of legal rights (Article 12)*

#### 3.2.13.1. Current solution

Assignment is a mechanism widely used, in particular in banking practice, for carrying out various credit or factoring operations. There is an agreement whereby a creditor, called the assignor, transfers his claim against his debtor, called the assigned debtor, to a contractor, called the assignee. An example might be a parts supplier (the “assignor”) who has claims on his own customers, the car manufacturers (the “assigned debtors”). Instead of waiting for manufacturers to pay him, the supplier assigns these claims to his bank (the “assignee”) to obtain the amounts on his invoices immediately.

Like any triangular operation, assignment raises many questions in private international law since there are three distinct legal relations, each of which can be subject to its own law. In the above example, the first contractual link chronologically is between the parts supplier and the car manufacturers. It is this claim, called the “original claim” that will subsequently be assigned. It is subject to its own law, determined in accordance with Articles 3 (freedom of choice) and 4 (closest connection) of the Convention.

The “assignment contract” or “transfer contract” is then made between the assignor, in our example the parts supplier, and the assignee, here the bank. According to Article 12(1) of the Convention, the applicable law is again determined in accordance with the general rules of the Convention (Articles 3 and 4). In the absence of a choice,<sup>83</sup> the applicable law is often

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<sup>83</sup> Some writers argue that an assignment contract contains a tacit choice for the law of the claim assigned. This solution has the advantage of submitting the claim and the assignment to the same law. On the

therefore that of the assignee, who provides the characteristic performance.<sup>84</sup> The third legal relationship is between the assigned debtor, in our example the car manufacturer, and the assignee bank. According to the Convention, this contract is governed by the same law as the original claim. Thus the Convention aims to protect the assigned debtor by ensuring that his obligations remain governed by the same law, the only one which can reasonably be expected, and that he does not owe the bank more than he owed the supplier.

### 3.2.13.2 Difficulties encountered

The Rome Convention does not deal explicitly with the question under which conditions the assignment can be invoked against third parties. The question is important because it determines the effectiveness of the assignment of the claim and the transfer of the property. It may happen, in the example aforementioned, that the parts supplier did not pay his own creditor, who then wishes to seize his assets and claims, including the claims which were assigned to the bank. The question then arises who – the new creditor or the bank – owns the relevant claims. The supplier may also have assigned his claims to two different banks to obtain credit fraudulently. The question is then which of the two banks owns the claims.<sup>85</sup> Since the Member States do not all answer these questions in the same way, it would be preferable for them to apply the same law to discourage forum-shopping.

But as neither the Convention nor the Bankruptcy Regulation<sup>86</sup> enacts conflict rules explicitly covering the question of the conditions under which the assignments can be invoked against third parties, each Member State applies its own rules here, and the solution varies widely from one court to another. The disparities are all the more marked as the courts of certain Member States consider that, while the question is not treated explicitly by the Convention, it nevertheless contains implicit rules.

### 3.2.13.3 Possible solutions

The future instrument could specify the law applicable to the question of assignments being invoked against third parties. Several options are possible:

- i. application of Article 12(1) (application of the same law as to the transfer contract): this solution has been adopted by the Dutch courts.<sup>87</sup> It has unquestionable advantages in legal systems which do not usually distinguish between the validity of the transfer contract and the effectiveness of the transfer of ownership of the claim;

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other hand, in the event of a multiple assignment, this solution is likely to submit the assignments between assignor and assignee to different laws even though they are a single business operation.

<sup>84</sup> In certain complex operations, for example a large-scale credit operation, the characteristic performance could also be that of the assignee. The Convention therefore leaves certain room for manoeuvre so that the courts can take account of specific situations.

<sup>85</sup> In more technical terms, what this question boils down to is whether the Convention covers only the contract law aspects or whether it also includes the property law aspects (what law determines the question whether the measures of information for the debtor serve only to protect him or also to make the transfer of property effective).

<sup>86</sup> Regulation (EC) No 1346/2000 of 29 May 2000 relating to insolvency proceedings, which came into force on 31 May 2002. This Regulation does not contain conflict rules, but Article 5 establishes that a insolvency proceeding initiated in a Member State does not affect rights in rem in assets located in other Member States. These rights in rem include “the exclusive right to have a claim met” (Article 5(2)(b)). It must be specified that according to Article 2(g) of the Regulation, a claim is located “in the Member State within the territory of which the third party required to meet them has the centre of his main interests”.

<sup>87</sup> Hoge Raad, 16 May 1997, *Nederlands International Privatrecht* 1997, No 209.

- ii. application of Article 12(1) (application of the same law as to the original claim): this was the solution in the preliminary draft Convention but not in the final text. It is also the solution applied by the German courts.<sup>88</sup> The position here is that the fate of third parties in general, such as a creditor of the transferor or a second assignee of the same claim, should not be dissociated from that of the assigned debtor; the law applicable to the question whether the contract can be pleaded would be the same in both cases, ensuring a degree of consistency in the treatment of the assignment operation as a whole;
- iii. application of the law of the place of residence of the assignment debtor: since the assignor's creditors are not always familiar with the law applicable to the original claim, some propose that the question whether the contract can be pleaded should be governed by the law of the place of residence of the assignment debtor. This solution has the advantage that third parties will be familiar with this law, but it would further complicate the multiple business credit assignments when debtors are resident abroad, a single business operation being subject to several laws;
- iv. application of the law of the assignor's residence: this is the solution best capable of satisfying the criterion of foreseeability for third parties. Thus was this solution adopted by the United Nations Convention on the assignment of claims in international trade,<sup>89</sup>
- v. all the solutions except point (ii) have the disadvantage of making the question whether the assignment can be invoked against the assigned debtor and against other third parties subject to different laws, which could in certain circumstances lead to deadlock. It has therefore been suggested that there might be a material rule giving priority to whoever brings the first action while taking into account the good or bad faith of the competing creditors.

**Question 18: Do you believe that a future instrument should specify the law applicable to the conditions under which the assignment may be invoked against third parties ? If so, what conflict rule do you recommend?**

### 3.2.14. *Respective scope of Articles 12 and 13 relating to the assignment of claims and subrogation*

#### 3.2.14.1. Subrogation in the Rome Convention

This is a mechanism which is not known in all the Member States. As in the case of assignment, it involves a triangular operation transferring an obligation. There is subrogation where a person paying a creditor acquires his rights and becomes the debtor's creditor in his place. There can be either a contract between the parties or a legal provision which automatically activates it in relation to certain measures. The Rome Convention does not cover liberalities, but only subrogation payments made by a third party under the terms of an obligation. The question whether this third party is then subrogated to the creditor's rights is theoretically governed by the same law as this obligation (Article 13).<sup>90</sup>

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<sup>88</sup> Bundesgerichtshof, 8 December 1998, XI ZR 302/97, IPRAX, 2000, p. 124.

<sup>89</sup> Adopted by the General Assembly on 31 January 2002. This Convention has not yet been signed or ratified by any of the Member States. It does not provide for an "opt-out" mechanism for Article 22 concerning the possibility of relying on the assignment against third parties, contrary to the other conflict rules.

<sup>90</sup> A payment made by a guarantor is a typical case of subrogation and it is therefore the law of the contract of guarantee which governs subrogation.

### 3.2.14.2. Difficulties encountered

There is an important business law mechanism, factoring, called contractual subrogation in certain countries and credit transfer in others. Since there are conflicts of terminology, it has not been possible to apply the Convention uniformly. In addition, some writers argue that Article 13 applies only to the subrogation by operation of law, contractual subrogation being covered by Article 12.

Since the rules of Articles 12 and 13 are very similar, it is not clear whether the conflict of terminology has any real practical effect. But the question remains whether there is a clear rule that is easy for the practitioner to apply.

Lastly, some would like subrogation payments made in the absence of an obligation to be within the scope of the Convention.

### 3.2.14.3. Possible solutions

The future Rome I instrument could specify the respective scope of Articles 12 and 13. Another solution would be to merge Articles 12 and 13. In the absence of a clear provision, the question will be settled by the Court of Justice.

**Question 19: Would it be useful to specify the respective scope of Articles 12 and 13? Do you believe that there should be a conflict rule for subrogation payments made in the absence of an obligation?**

### 3.2.15. *Absence of conflict rule relating to offsetting of claims*

#### 3.2.15.1. The offsetting mechanism

The offsetting mechanism means that when two parties are each other's creditor and debtor, their respective debts are reduced to the amount of the smallest one. For example, if Paul owes Peter €20 and Peter owes Paul €10, the offsetting mechanism operates automatically so that Peter is released from his debt and Paul owes Peter €10. This is a mechanism for extinguishing obligations and is of great importance in daily business life.

Offsetting may be either by operation of law (legal offsetting), when certain conditions are met, or by the desire for the parties (contractual offsetting).<sup>91</sup>

#### 3.2.15.2. Difficulties encountered

Under Article 10(d) of the Convention, the various methods of extinguishing obligations, of which offsetting is one, are governed by the same law as the relevant obligation. But this provision does not reflect the difficulties inherent in the legal offsetting mechanism applied to two obligations subject to different laws. Here each Member State would apply its own conflict rule. As these rules differ, there is uncertainty as to the law in this matter.

#### 3.2.15.3. Possible solutions

The Convention could specify the law applicable to legal offsetting:

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<sup>91</sup> For contractual offsetting, the applicable law is determined in accordance with the general rules of the Convention (Article 3 and 4).

- i. cumulative application of the two laws involved: this rule protects the interests of the parties but is very restrictive;
- ii. application of the law which governs the credit to be offset.

The Bankruptcy Regulation,<sup>92</sup> which entered into force on 31 May 2002, contains no conflict rules concerning offsetting as such, but even so it has an impact on this question. Article 6 treats offsetting in the same way as Article 5 treats assignments: when, under the normally applicable conflict rules, the right to offset is subject to a different national law from the insolvency procedure, Article 6 enables the creditor to preserve this possibility as an acquired right in the insolvency procedure. But the Convention gives it only if offsetting is allowed by the law applicable to the claim by the insolvent debtor (passive credit) and thus opts for the solution (ii) above.

These rules apply, obviously, only where offsetting is invoked in an insolvency proceeding and leave open the question of the applicable law in other circumstances.

**Question 20: In your view, would it be useful to specify the law applicable to legal compensation? If so, what conflict rule do you recommend?**

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<sup>92</sup> Council Regulation (EC) No 1346/2000 of 29 May relating to insolvency proceedings.

## Annex 1

### Private international law: a glossary

<b>Applicable law/lex causae:</b>	When a legal relationship between private individuals has an international character (for example, because they are of different nationality, do not reside in the same country, are parties to an international commercial transaction, etc), it is necessary to determine which of the laws involved govern the situation. The applicable law is determined according to the conflict rules.
<b>Bilateral conflict rule:</b>	Most of the rules of conflict of laws are bilateral, i.e. they can designate either a foreign law or the law of the forum. For example, there is a French rule according to which the court must determine a child's affiliation on the basis of the law of the mother's nationality. If the mother is French, the French court will apply French law; if she is Italian, it will apply Italian law. The bilateral conflict rules are opposed to unilateral rules.
<b>Dépeçage:</b>	Situation in which different parts of an international contract are governed by the laws of several states (for example, a sales contract may be governed by German law except for the guarantee clause, which is governed by English law).
<b>Domestic public policy:</b>	A set of mandatory national rules the objective of which is to guarantee the social and economic order of a state. This concerns rules from which parties cannot derogate by contract, for example those aiming to protect weaker parties (consumers, workers, minors, etc).
<b>Forum:</b>	The court to which an international dispute was referred.
<b>Forum-shopping:</b>	The attitude of a person involved in an international dispute who takes his case to the court of a particular country not because it is best placed to hear the dispute but only because, under its rules on conflict of laws, it would apply the law giving the most advantageous result for this person.
<b>Freedom of choice:</b>	The right of private individuals to choose the law applicable to their legal situation.
<b>International jurisdiction:</b>	When a dispute is international (for example, because the parties are of different nationalities or do not reside in the same country), several courts may have jurisdiction in the same case. The rules of international jurisdiction determine the country whose courts have jurisdiction in a given dispute.

<b>International public policy:</b>	After having determined the law applicable to a given legal situation in accordance with its conflict rules, the court may consider that the application of this law entails a result not compatible with the values of the forum. Accordingly, it rules out the normally applicable foreign law and applies its own law.
<b>Mandatory provision:</b>	In the Rome Convention, the expression “mandatory provision” covers multiple realities: it designates at the same time overriding mandatory rules in the meaning of Article 7, a concept specific to private international law, and public-policy rules of national law.
<b>Overriding mandatory rule:</b>	Cf. Article 7 of the Convention. Concept of private international law which designates the provisions to which a state attaches such importance that it requires them to be applied wherever the legal situation is connected with its territory, whatever law is otherwise applicable to the situation. Unlike the mechanism of the international public-policy exception, the court does not look to its conflict rules to ascertain the applicable law and evaluate whether its content may be incompatible with the system of values of the forum but automatically applies its own rules.
<b>Rule of conflict of laws:</b>	When a legal relation one between private individuals has an international element, the laws of several countries can compete with each other to govern the situation. To decide which of the laws involved applies to this situation, the courts apply the conflict rules.
<b>Substantial law:</b>	Substantial law is opposed to the private international law of a state. It means the national rules determining the rights and obligations of a person in a given legal situation (for example, the rule that there cannot be a contract if the assent of one of the parties was vitiated).
<b>Unilateral conflict rule:</b>	According to the unilateralist method, each state is satisfied with determining the cases where its own law is applicable. Such rules are the exception nowadays. An example is Article 3 subparagraph 3 of the French Civil Code: “ <i>the laws on the status and capacity of persons govern French persons, even those residing abroad</i> ” (but this rule is “bilateralised” by the case law).

## Annex 2

### List of Rules of conflict of laws

#### and rules affecting the applicable law<sup>93</sup> in contractual matters

##### in sectoral instruments of secondary legislation

- Directive on the return of cultural objects unlawfully removed from the territory of a Member State (1993/7, 15.3.1993)
- Directive on unfair terms (1993/13, 5.4.1993)
- Directive on time-sharing (1994/47, 26.10.1994)
- Directive concerning the posting of workers in the framework of the provision of services (1996/71, 16.12.1996)
- Directive 97/7, 20.5.1997 on the protection of consumers in respect of distance contracts
- Directive 1999/44, 25.5.1999 on certain aspects of the sale of consumer goods and associated guarantees
- Second non-life insurance Directive (1988/357, 22.6.1988) as supplemented and amended by Directive 1992/49 and 2002/13
- Second life assurance Directive (1990/619, 8.11.1990) as supplemented and amended by Directives 1992/96 and 2002/12

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<sup>93</sup> I.e. conflict of laws' rules, on the one hand, and rules specifying the territorial scope of Community legislation on the other hand. Cf. notes 31 and 32.