

**THE 1980 ROME CONVENTION ON THE LAW APPLICABLE TO
CONTRACTUAL OBLIGATIONS**

CONSULTATION PAPER FROM THE EUROPEAN COMMISSION

RESPONSE OF THE GOVERNMENT OF THE UNITED KINGDOM

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 freely to 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?

1. The UK Government has received no evidence that there is any problem within the UK about a lack of adequate knowledge of the rules in the Convention. On the contrary, it seems likely that the majority of professionally drafted commercial contracts with an international element include a choice of law clause and that this indicates that the parties to such contracts and their advisers are in general terms aware of the rules in the Convention, and in particular its rules on party autonomy. There is no evidence that the current situation has a negative impact on the parties' conduct in their contractual relations or on court proceedings.

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

2. The UK Government believes that the Convention has generally operated in a satisfactory way. Although there are certain respects in which it could be improved (these will be discussed later in this submission), it is not considered that these are, in themselves, sufficiently important to justify the instrument's conversion into a Community instrument.
3. It is accepted that in principle it is desirable that the Convention should be subject to the jurisdiction of the Court of Justice and the uniformity of interpretation which its jurisprudence would establish. However the most appropriate means of achieving that would be for all the Member States to ratify as soon as possible both the Protocols which are attached to the Convention.
4. One significant problem with the Convention's conversion into a Community instrument concerns the proposed treaty base for any such instrument in accordance with Article 65 of the EC Treaty and the related possibility that such an instrument should, like the Convention (see Article 2), apply on a world-wide basis. In the view of the UK Government it is far from clear how choice of law rules as regards contractual disputes between parties neither of whom is domiciled or habitually resident in a Member State would be "necessary for the proper functioning of the internal market" as required by Article 65. An example might be a case where the London Commercial Court has jurisdiction pursuant to a

prorogation clause entered into by two South Korean nationals domiciled in South Korea and the claim relates to an alleged breach of contract committed by the defendant outside the European Union. A case of this kind is far from unusual, because that court is frequently chosen as a forum for the resolution of international commercial disputes. Accordingly the link between such a case and the Union, let alone its connection with the proper functioning of the internal market, would appear to be highly tenuous.

5. On this basis the UK Government considers that there would be legal uncertainty in connection with the use of Article 65 as the treaty base for any proposed Community instrument with a universal scope of application which would legislate in this area in respect of parties with no connection with the EU. Further, there would also be legal uncertainty as regards some cases involving only one party who is habitually resident there (ie where the other is habitually resident in a third State) and whether all such cases should be covered by that instrument. Thus, in the example given above, if one of the Koreans, the claimant, is domiciled in the UK, it is unclear what relevance the application of the choice of law rules in contract would have in relation to the proper functioning of the internal market. The same issue has already arisen in relation to the Commission's recently proposed Regulation on Choice of Law in Non-Contractual Obligations ("Rome II").

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?

6. The UK Government is not aware of any particularly significant problems arising out of the proliferation of conflict of law rules in sectoral Community law instruments, although it is the case that the adoption of such legislation has had the undesirable and inevitable consequence of increasing the complexity, and thereby reducing the transparency, of that law. Although this situation does not in itself justify the adoption of a Community instrument in this area to replace the Convention, one potential advantage of such an instrument would be the opportunity that it would offer to incorporate the various Community choice of law provisions in the field of contract within the scope of the new instrument and in some instances to rationalise them as appropriate. Such a codification of the choice of law rules in this area would, in principle, increase their accessibility.

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 in the consultation paper allow the objective pursued to be attained?

7. The UK Government would oppose the introduction of any general provision of Community law which would guarantee the application of a Community law standard in the kind of situation posited in the consultation paper. The case for such a wide-ranging provision has not been made out in the consultation paper by

reference to any identified general mischief and the UK Government is not aware of any such mischief in practice. Protection as regards choice of law is already available under the Convention and elsewhere in Community law for weaker groups, such as consumers and employees, and is not, in principle, desirable in commercial transactions. Problems with any of these existing provisions and any significant gap in the protection they provide for such groups, particularly as regards consumers, should be addressed specifically and, if it is considered desirable, rectified in any new Community instrument to replace the Convention (see paragraph 19 below, where it is proposed that consideration be given to a general provision to secure any minimal protection for consumers available under Community law). However a general provision of the sort suggested in the consultation paper and in principle applicable to both commercial and consumer transactions would undermine the important principle of party autonomy which underlies the Convention as a whole. It would also be likely to lead to increased uncertainty and cost and would, as a result, both be detrimental from a business perspective and also diminish the attractiveness of London as a forum of choice for the resolution of international disputes (any business lost as a result would be likely to leave the EU altogether by moving, for example, to New York or Geneva).

Question 5: How should relevant existing conventions be dealt with?

8. The UK Government agrees with the suggestion in the consultation paper that relevant international agreements in this area should continue to operate in relation to those Member States which are parties to them. It would be helpful for there to be a list of these agreements in an annex to any new Community instrument.

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

9. In the view of the UK Government the case for including either of these matters within the scope of any future Community instrument has not been made out. In general arbitration and choice of forum clauses in commercial contracts already clearly specify the competent arbitration tribunal or court. As regards the validity of choice of forum clauses, this issue, in so far as it concerns commercial agreements, falls within the scope of the draft convention on such clauses which is currently being negotiated at the Hague Conference on Private International Law. If those negotiations are successfully concluded in 2004, the case for further legislation on any such clauses at Community level is likely to be further weakened. Equivalent issues in relation to arbitration are more appropriately left to be dealt with under the New York Convention on that subject.

Question 7: How do you evaluate the current rules on insurance? Do you think that the current treatment of hypotheses (a)(where the risk is located outside the EU) and (c)(where the risk is located in the EU and is covered by an insurer not established in the EU) is satisfactory? How would you recommend resolving the difficulties that have been met (if any)?

10. The UK Government is particularly concerned about situations falling within hypothesis (b), namely where the risk is located in the EU and is covered by an insurer established in the EU. This type of situation is covered by various Community Insurance Directives which have turned out to be both confusing and unsatisfactory and they have proved difficult for courts in the UK to apply. Fundamentally the problem is that they have been drafted on the basis of the relatively straightforward insurance arrangements prevalent in many parts of the EU, and not in a way which is appropriate to the significantly more complex multinational risks assumed by insurers in the UK. For example, they do not adequately identify the location of the risk in international situations. As regards these risks the current Community rules are not adequate and a potential benefit of reform in this area would be the opportunity to address the problems with them, both in terms of rationalising their substance and improving their transparency, perhaps by including them in an annex to any new Community instrument.
11. As regards hypothesis (a) the UK Government has not been persuaded that there is a sufficient Community interest in further regulating at Community level (ie beyond the extent to which it is already provided for under the Convention) the law applicable to insurance where the risk is situated outside the EU. The UK Government is unpersuaded that any further Community legislation is required where the risk is situated within the EU but the insurer is not established there (hypothesis (c)).

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

12. In the view of the UK Government the parties should only be able to choose a national body of law. Permitting parties to choose an international convention to govern their contract would give rise to undesirable uncertainty and ambiguity. Such agreements do not generally contain the necessary supplementary rules covering matters such as the formal validity of the contract, the burden of proof, the consequences of breach, the heads of damage recoverable and limitation. There should not be uncertainty about which law should govern important matters of this kind. Allowing the parties to choose general principles of law would create even greater uncertainty. If the parties want to select such an option for the resolution of their dispute, then they should choose arbitration rather than seek a judicial decision.

Question 9: Do you think 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?

13. The UK Government considers that the present degree of freedom allowed to the parties to choose an applicable law in accordance with the terms of Article 3(1) of the Convention is important and should be retained. A tacit choice should be able to be implied from the terms of the contract and the surrounding circumstances and in such cases the choice identified will properly give effect to the objectively

presumed intention of the parties. Article 3(1) should not be amended in any way which would restrict that freedom. In particular the UK Government would be opposed to any restrictive change to the words in that provision that, in the absence of an express choice of law, the parties' choice need only be "demonstrated with reasonable certainty" (equivalent words also appear in the German text). It is proposed that the other language versions of that provision should be aligned with that wording. If there is no agreement on that, then it could be accepted that the issue should in due course be referred to the Court of Justice for its decision on the issue.

Question 10: Do you believe that Article 4 should be redrafted to compel the court to begin by applying the presumption in 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?

14. The UK Government accepts the suggestion in the consultation paper that the drafting of Article 4 could be improved; in particular the formulation in paragraph (2) of the terms of the presumption as to the country with which the contract is most closely connected should be carefully re-considered with a view to ensuring that it can be operated with greater certainty and so that it gives greater effect to the proper law identified in accordance with Article 4 (1) and (5). The UK Government is however supportive in principle of a presumption which can be operated with the necessary degree of certainty in order to facilitate the identification of the proper law.
15. Unfortunately, as presently drafted, the presumption in paragraph (2) fails to provide that degree of certainty. There is sometimes a lack of clarity as to what constitutes the "characteristic performance" of the contract and there can also be problems in determining the residence of the party who is alleged to provide the characteristic performance under the contract. Another problem is that the provision can produce artificial results which are not in accordance with the reasonable expectations of the parties as to the applicable law. In the light of the growth of international sales the identification under paragraph (2) of the country where the supplier of the goods resides will often have little connection with the contract and will not accord with what the parties would reasonably have expected. That country may in fact only be a tax haven or the place of residence of a parent company which is in reality performing the contractual services through a subsidiary with a local residence. Such artificial results are liable to encourage unscrupulous contractors to become established in jurisdictions which provide less redress for purchasers of goods and services.
16. The UK Government has at present no concluded view as to how Article 4(2) should be reformed. It would welcome a careful analysis of all those situations where the provision produces either uncertainty or artificial results in order to establish a proper basis for agreement on an improved version of the presumption in paragraph (2): this should better reflect the realities of the contractual situation in question.

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

17. The UK Government has no evidence that the absence of a special choice of law rule in relation to such short-term tenancies has created practical problems. The potential availability of the rule for exceptional cases in Article 4(5) is highlighted in the consultation paper and it may be that that provision would be sufficient in relation to any potential problems which may arise. However the UK Government would not oppose further discussion of this topic among the Member States and is not in principle opposed to a rule which would achieve consistency with the equivalent exclusive jurisdiction in EC Regulation 44/2001.

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 possible 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?**

18. The UK Government has no evidence of any significant difficulties in the practical operation of Article 5 and wishes in principle to preserve it in its present form. However there is one respect in which it should be changed, namely the amendment of Article 5 (2) to bring it into line with Article 15 (1) of the Brussels I Regulation. This would ensure that there is consistency in both provisions between the preconditions necessary for choice of law protection for consumers. It should make it more likely that, in cases where the court of the consumer's country has jurisdiction, that court would apply the laws of that country.

19. It is also proposed that consideration be given to some form of general provision which would guarantee the application of a minimum standard laid down for consumers under Community law (see Option (i) discussed in paragraph 3.2.7.3 of the consultation paper). This is desirable in view of the current risk that in certain situations Community law will not be applied even though all the elements of the case are located in the Community: the consultation paper (see paragraph 3.1.2.1) cites the example of the mobile consumer who may in some circumstances face the application of the law of a third country. Further, it may not always be possible to rely for the necessary protection on the scope provisions in particular Directives. In the light of these matters and the growth of cross-border sales since 1980 consideration should be given to a provision along the lines of Option (i), with the result that the fact that the parties have chosen the law of a non-Member State should not result in the disapplication of

Community law where all the other elements of the case at the time when the contract was made are connected with one or more Member States. A solution of this kind should not in principle disapply Article 5 and result in the automatic application of the law of the consumer's Member State: that issue should remain to be determined in accordance with the rules in that provision.

20. Finally, concerns have been expressed that the Convention may in some circumstances undermine the "country of origin" principle contained in the E-Commerce Directive. This could arise where under the law of a Member State a trader's failure to comply with a regulatory requirement might render a contract unenforceable under that law. The UK Government proposes that in any future negotiations there should be discussion of this and other issues relevant to e-commerce: online service providers are particularly likely to find themselves dealing across borders and therefore faced with a range of different approaches in national contract law within the EU. It is also important that any instrument which replaces the Convention properly respects the application of the Directive.

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?

21. The UK Government doubts the value of defining the different meanings of the term "mandatory rules" as it is used in relation to these provisions in the Convention. Although it would be possible to make it clear in any new instrument that the concept has a different meaning in the context of Article 7 from that which it has in the context of the other articles (as is suggested in the consultation paper), it is doubtful if many users of the Convention are in practice confused on the issue, in view of the assistance given by the Official Guiliiano/Lagarde Report and the numerous academic commentaries on the Convention. The UK Government is unpersuaded that any definition would be likely to be of much assistance to practitioners in identifying those rules of national law which should be regarded as mandatory.

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

22. The UK Government is not aware of any significant problems with the practical operation of this article. It may well be better to leave the undoubted, if perhaps somewhat theoretical, complexities inherent in the concept of "temporary employment" to future determination by the Court of Justice. In the preparation of any new instrument consideration could however be given to addressing issues of consistent terminology as between that instrument and the Posting of Workers Directive or alternatively the possibility of including the choice of law rule in that instrument within any replacement for the Convention.

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

23. The UK Government is unpersuaded by the examples given in the consultation paper that any further reform of this provision is necessary.

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?

24. The UK Government remains opposed to the incorporation of Article 7(1) into any future Community instrument. This provision was strongly opposed by the UK during the negotiations which led up to the Convention and, along with three other Member States, it has subsequently entered a reservation in respect of it. That view remains unchanged: the provision would be a source of considerable uncertainty, with the inevitable consequence in terms of the increased costs of litigation in resolving conflicts between inconsistent sets of mandatory rules. That uncertainty would be diametrically at odds with the Convention's commercially important objective of creating greater certainty by its general validation of the principle of party autonomy and the creation of harmonised choice of law rules. In the UK Government's view the application of Article 7(1) would be a disincentive to attracting international commercial litigation and would constitute an obstacle to international trade.
25. The consultation paper cites Regazzoni v Sethia in support of Article 7(1), but that case is not relevant in this context: it merely held that it was contrary to English public policy to give effect to a contract that involved the violation of sanctions legislation imposed by the Indian Government. It is a significant feature of this case that the English court did not, and under English PIL rules could not, have enforced the Indian legislation as it amounted to a foreign public law.

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

26. The UK Government considers that Article 9(1) and (2) adequately cover contracts concluded by e-mail and that there is therefore no need for reform in this area. As regards paragraph (1), where both parties to a contract are in the same country, it seems unlikely that, if their contract is concluded by e-mail, it would be held to be concluded in a third country because of the presence of an overseas server. Under paragraph (2), where the parties are in different countries, their contract is formally valid if it satisfies either the formal requirements of the law which governs it or the law of either of those countries. There is no reason to think that in this situation their contract, if concluded by e-mail, would not be formally valid provided it satisfies the formal requirements of one of these bodies of law.

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 propose?

27. It is clear from the discussion in the consultation paper and the response of our national experts that this is an area of very considerable complexity. It appears that all the options for reform put forward in that paper may have certain

disadvantages. In the light of these matters, and the likely difficulty in reaching agreement on a single satisfactory solution, the UK Government remains to be convinced that there are sufficiently important practical problems here to justify the reform of such a difficult area in any new Community instrument. Its present preference would be to leave any particular issues which may arise in the future to determination by the Court of Justice.

28. If it is nevertheless decided to embark on reform in this area, the UK Government would make two preliminary comments. The first reflects the fact that some of the issues at stake here should properly be categorised as proprietary rather than contractual in nature and should thus in principle fall outside the scope of the Convention and any new Community instrument which would replace it. Any revision of Article 12 may make it difficult to avoid the complex task of drawing an appropriate distinction between the two categories. Secondly, care should be taken to ensure that any revised version of Article 12 does not disturb the treatment of rights against an intermediary in respect of indirectly held securities.

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?

28. The UK Government remains to be persuaded that a convincing case for reform has been made out by reference to difficulties encountered in practice. Article 13 serves the limited, but useful, function of identifying the applicable law in those cases where subrogation arises as a matter of national law. There is a lack of a demonstrated need that the provision should either be expanded to cover contractual subrogations or amended for any other reason.

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?

29. The UK Government does not favour any new choice of law rule on “offsetting”. This should properly be regarded as a procedural matter which should continue to be determined in accordance with the *lex fori*.