II

(Preparatory Acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

405TH PLENARY SESSION, 28 AND 29 JANUARY 2004

Opinion of the European Economic and Social Committee on the ‘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’

(COM(2002) 654 final)

On 14 January 2003 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned Green Paper.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 12 November 2003. The rapporteur was Mr Pegado Liz.

At its 405th plenary session of 28 and 29 January 2004 (meeting of 29 January), the Economic and Social Committee adopted the following opinion by 65 votes with one abstention.

I. INTRODUCTION

A. Objectives, reasons and appropriateness of the Commission’s initiative

1.1 The Commission’s main purpose in presenting the 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 [COM(2002) 654 final of 14 January 2003], henceforth referred to as the ‘green paper’, was ‘to launch a wide-ranging consultation of interested parties on a number of legal questions’ concerning conversion and modernisation, formally declaring that it ‘has neither taken a decision in respect of the necessary to modernise the Rome Convention nor in respect of its conversion into a Community instrument’.

1.2 In contrast the Committee, acting within the scope of its consultative powers, wishes at this stage to express its approval of the principle of converting the Rome Convention into a Community instrument, and of the modernisation of its provisions. In so doing, it is aware that it is fulfilling its consultative role in an area which is vital not only to the regulation of key aspects of the completion of the internal market, but also to the creation of a European civil society with regard to an essential aspect of an area of freedom, security and justice (1).

(1) See question 2 of the Green Paper.
1.3 In a number of earlier opinions, the Committee called for a debate on the relevance of the provisions of the Rome Convention and on the various difficulties encountered in its implementation concerning several general or sectoral aspects (2).

1.4 By the same token, with regard to conversion into a Community instrument by virtue of the new possibilities provided by the Treaty of Amsterdam for the creation of an area of freedom, security and justice, which were set out in the Vienna action plan, adopted by the Council in 1998 (3) and fleshed out at the Tampere European Council in October 1999, the Committee can only repeat the views it expressed in its earlier opinions on conversion into a Community instrument, on the current Regulation 44/2001 of 22 January 2000 (4), and on the Communication from the Commission on European contract law (5).

1.4.1 In the first of these opinions, the Committee welcomed the Commission’s decision to convert the Convention into a draft regulation, as ‘a regulation with direct application’ representing ‘significant progress, in particular insofar as it will create greater legal certainty’ and since ‘the Court of Justice will be able to ensure uniform application of the provisions set out in the regulation in all Member States’.

1.4.2 In the second opinion, the Committee argued that ‘it is undeniable that international traders feel the need for a universal, workable, stable, predictable framework to promote secure and fair transactions and compliance with the relevant provisions and principles of international public law contained in major international conventions and common law’.

1.4.3 With regard to the present initiative, therefore, the Committee would repeat the support it expressed for converting the Brussels Convention into a Community regulation. It would also draw attention to the need for legal consistency, which in turn suggests that a similar approach would be appropriate.

1.5 The Committee also considers that the Commission already has sufficient data compiled from a number of sources (6), including the above-mentioned EESC opinions, to enable it to press ahead with a fully-justified initiative which should not be delayed in view of the forthcoming accession of ten more Member States.


(3) OJ C 19 of 23.1.1999.


(7) Including the work of the European Group for Private International Law (http://www.drt.ucl.ac.be/gedip).
1.6 In view of the advances in substantive and procedural areas already made or in the pipeline, such as, amongst others (1), the Communication from the Commission on European contract law (2) and the Rome II instrument on the law applicable to non-contractual obligations (3), it would be advisable, as a minimum, for all aspects of private international law contained in the various above instruments and documents mentioned to be systematically linked in a single instrument, directly applicable in all Member States, as a means of ensuring uniform application of standardised rules of conflict of laws in all the Member States.

B. The socio-economic impact of the initiative

1.7 In addition to the highly technical and legal aspects relating to the modernisation and conversion of the Rome Convention into a Community instrument, the Commission is quite rightly concerned about the socio-economic impact of the initiative and a number of questions are raised in relation to the application of various provisions of the instrument.

1.8 The Committee shares the Commission’s concern and, in assessing the proposals to modernise the Convention’s content, takes account of available data on the impact of the measures, particularly concerning sectors and areas such as insurance, leasing arrangements, labour law, businesses – especially SMEs – and consumers.

1.9 The Committee wishes, from the outset, to express its general belief that modernisation of private international law arrangements, by consolidation into a single Community instrument, will have a highly beneficial effect on economic and social relations within the EC area, since it will help to standardise conflict rules and thereby generate certainty and confidence.

1.10 If the internal market is to function properly, and particularly freedom of movement and of establishment for natural or legal persons, legal certainty must be increased. Since this involves stability of legal relations, such relations must receive equal treatment in all the EU Member States (although, of course, subject to the constraints of public policy in each country).

1.10.1 This aim will be reflected in the protection of the legitimate expectations of parties to contractual relations involving multiple locations, which will also entail ensuring that there is certainty as to which law is applicable to such relations. Such stability will always be valuable when uniformity is achieved in evaluating legal situations and contractual relations in the various EU Member States. Progress towards such uniformity is without question facilitated by unifying the conflict rules, rules which prevent or resolve territorial conflicts of law.


1.10.2 This provides a single vision of such relations, increasing legal certainty regarding the way in which they should be governed, with clear benefits for the planning of commercial life and its geographical extension, freed from concern about shifts in the rules governing contractual relations (10). This also avoids ‘forum shopping’ (11).

1.10.3 Moreover, unification of the conflict rules will provide greater predictability as to which system governs contractual relations between natural persons, in turn facilitating and boosting commercial life, since the players involved will be more ambitious if less concerned about the future of their relations (12).

C. Methodological issues: the questions

1.11 The Green Paper is intended primarily for legal specialists, especially universities and judges, companies and associations protecting and upholding the interests of citizens, especially consumers. The questions were drawn up with this in mind, covering almost exhaustively the issues raised by the application of the Rome Convention.

1.12 The Committee, for its part, plans to group the issues raised into major themes, making a distinction between general and specific questions, and to organise the present opinion accordingly.

1.13 In view of the ample academic and case-law information provided by the Green Paper in support of the questions the Rome Convention may raise and the alternative solutions put forward, in the interests of brevity the Committee does not reproduce all the possible arguments, sometimes simply listing the advantages of the solutions proposed.

1.14 However, in a concluding synthesis, the Committee attempts to provide a specific answer to each of the questions asked by the Commission and also raising further questions and making recommendations concerning the future work of the Commission, with the aim of contributing to the formulation and adoption of an instrument meeting current needs in this area.

(10) The formal approach of private international law is propitious to unification, since effective rules to govern it are often independent of the specific circumstances of each national community. This applies even more in the field of contracts, where the views of those involved tend to converge, regardless of their geographical location. This may be to the detriment of certain legal-substantive objectives, but there is widespread agreement in the Community as to these objectives. The question remains whether existing laws match the desired substantive results, as will be the case of protection of the party considered to be weaker. Recent comments on the Brussels I Regulation could, mutatis mutandis, be brought to bear on this question.

(11) Furthermore, unification in the field of conflicts of laws would, by reducing forum shopping on the basis of the law deemed competent by each country’s system of private international law, enable further steps to be taken towards uniform rules on international jurisdiction: there is nothing to choose between different forums available for an action, at least from the point of view of the law that is to be applied in a given forum, thereby increasing market unity and boosting commercial activity in the single market. This is a further reason for proposing complementarity between the two branches of conflict in private international law, even if the diversity of values and objectives which they seek to pursue is confirmed, and they address problems which are also distinct and raise a number of legal issues. Irrelevance of the location in which an action takes place will always have the effect of facilitating the movement and establishment of persons and interests in different places, fostering real mobility within the common market on the basis of real needs and uninfluenced by the consideration that a law may be more favourable in one country than in another.

(12) Cf. M. Giuliano and P. Lagarde, Report on the Convention on the law applicable to contractual obligations, 19 June 1980, OJ C 282 of 31.10.1980, p.4 et seq.; and M. Giuliano, op.cit., loc.cit., where the author suggests that the Rome Convention should be seen as a kind of ‘membership card’ for a common legal area, designed to ensure that natural and legal persons operating within the Community enjoy a high level of legal certainty in their contractual relations, both internally and externally, thereby facilitating the operation of the common market.
II. LEGAL BASIS AND THE LEGAL INSTRUMENT TO BE USED

2.1 The Committee agrees with the Commission’s suggestion that the legal basis for the present initiative should be Articles 61(c) and 65(b) of the Treaty, and with its reasons for doing so, since the initiative is not in conflict, but rather in full keeping, with the principles of subsidiarity and proportionality.

2.2 The Committee’s preference for the Community instrument to be used is, unambiguously, for a regulation, since this more closely matches the nature of the rules in question and the objective of ensuring certainty of interpretation and implementation by both the different national courts and businesses and private individuals in their transactions.

III. PRINCIPLES UNDERPINNING THE CONVENTION AND THEIR REAFFIRMATION

3.1 The Rome Convention is based on a number of fundamental principles and values which form the historical foundation and shared heritage of the legal systems embodying the rule of law. These include:

— the principle of freedom of private individuals under private international law, meaning recognition of the choice of the parties as the main connecting element;

— the importance of certain mandatory rules designed to safeguard public policy interests;

— the value of stability in international legal affairs: the aim of unification (with effects on uniform interpretation) and the principle of favor negotii or favor validitatis, in the area of form of contracts and capacity; the value of protection of appearance/trust;

— protection of expectations and of legal certainty: the trend to consider the applicable law to be that most closely connected with the contract (an approach of universal scope facilitating harmony of judgments; the importance of the law of the economic and social environment of the parties (Umweltrecht), with the ensuing additional or alternative choice (relating to the existence and validity of the contract) of the law of the place of residence of one or both of the parties.

3.2 Since at substantive level national legal systems lay down rules to protect consumers or the party considered to be weaker (workers, insured persons or policy-holders) – not so much in order to favour them with increased benefits beyond what would in fairness be due to them, but rather to restore the balance and proportion inherent in the obligation-related aim of all contractual relations – the objective of the approach to protection of the weaker party may, also in the field of private international law, has been strictly limited to ensuring real adherence to the purpose of the conflict rules in this area, thereby preventing the distortion of conflict law which could arise from choice of the applicable law where such choice, under the guise of freedom of choice in the area, serves to conceal what is actually a unilateral choice of lex contractus made by the stronger partner (e.g. business operator, employer, etc.).

3.3 By invoking the rules of necessary and immediate implementation, it is intended to ensure not only the implementation of the commutative justice inherent to contracts, but also that certain substantive public objectives, which may conflict with European countries’ economic and social organisation, are not put aside; aims deriving from distributive justice may also be achieved.
3.4 These approaches, which are more or less deeply rooted in private international law, reflect a desire for legal certainty, and in general do not stand in the way of harmony of judgments, even in relation to third countries, as well as the desire for a general trend toward the universality of the connections chosen. In spite of the reservation consisting of the need to ensure compliance with certain public policy interests, or to apply certain protective rules whether or not arising from the incorporation of Community law (13), the Committee considers that the new Community regulation on this matter should still be essentially based on these principles and values.

IV. MAIN COMMENTS AND PROPOSALS

4.1 The questions raised with regard to the application of the Rome Convention and its future may be divided into those generated internally and those of external origin. The former result from the Rome Convention's own rules and their underlying value-based choices, and from the methodologies followed; the latter from, for example, the Convention's relation with Community law and other public international law instruments, particularly those intended to unify the conflict rules or substantive law in the field of contracts (whether already concluded or in preparation) (14), and the future relation between the Convention of Rome and the Brussels I Regulation (15).

4.2 Structure

4.2.1 The structure of the Rome Convention fits within the traditional mould of conventions for the unification of conflict rules. Following a definition of its scope and a declaration of its application to non-contracting states – continuing to apply when its rules indicate that the law of a non-contracting state has jurisdiction – the conflict rules are set out. However, the systematic inclusion of certain provisions raises some reservations.

4.2.2 Thus firstly, after Article 3, the general rule set out in Article 4 already contains a number of special rules concerning contracts for immovable property and for carriage of goods. Since certain contracts merit treatment in separate articles, this dual criterion for distribution of special rules, at least regarding carriage of goods (in deciding to maintain this rule – cf. below), should be reviewed in recognition of the different level of specialisation involved.

4.2.3 Secondly, general rules on transitory law and uniform interpretation appear among rules closer to questions more narrowly related to private international law. The systematic inclusion of these rules should be reconsidered.

4.3 Scope (Article 1(2))

4.3.1 The Convention did not seek to extend unification to all conflict-related areas in the field of contracts. Thus contractual obligations arising from family relations and succession, from credit instruments, company matters, activities of representatives or agents, trusts and insurance contracts covering risks situated in Community territory are excluded from its scope.

(13) Possibly to the benefit of the underlying aims of the conflict rules, as in the case of the protection of certain categories of person, since even while assuring a substantive minimum level of protection by implementing domestic or Community legislative policies the aim is, as has been seen, not to render meaningless the concept of choice in conflicts which flows from the freedom of choice of both parties.

(14) In some fields, there is already a well-established history of successful substantive unification, but its partial nature continues to point to the need for unification in the area of conflict of laws. On unification and harmonisation of substantive contract law, see the Commission's action plan referred to in footnote 8, and the Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council and the European Parliament on European contract law, OJ C 241 of 7.10.2002.

(15) In analysing this question, careful account is taken of the judicious proposals for amendments made during the protracted debate within GEDIP, and its suggestions are frequently taken on board.
4.3.1.1 Some of these exclusions resulted from the existence of other regulatory instruments already providing international unification, or from current preparations for specific measures to bring about unification.

4.3.1.2 Work in progress should therefore be outlined and a new assessment made of the regulation’s scope.

4.3.2 In view of the unifying purpose and the general character of the rules contained in the future regulation, it is recommended that the scope is extended as far as possible, for example to all insurance contracts, and consequently deleting Article 1(3) and (4), leaving it to Community law and national systems to match these rules with any mandatory provisions regarding transposition, in the field of insurance (16).

4.4 Application of law of non-contracting states (Article 2)

4.4.1 The regulation sees fit to adopt the universal character of the Rome Convention, providing that its conflict rules are applicable, even when specifying a law of a third country. A different choice could entail altering the scope of the regulation, for example by limiting it to the resolution of conflicts of laws in certain contracts, which would make it difficult to determine what constitutes a Community contract or a contract influencing or possibly having an effect on the legal and economic life of the Community or on Community territory.

4.4.2 Neither would it suffice, from the point of view of the objectives of Community legislative policy, to apply only the unified conflict rules if these should specify the applicable law as being that of a Member State, and refraining in other cases, even if the contract may have strong effects on the territory or in the life of the Community, leaving the task of ensuring the pursuit of certain Community objectives regarding protection to the internal laws of the Member States and to other Community rules.

4.5 Freedom of choice (Article 3) (17)

4.5.1 Regarding the possibility of choosing a non-state set of rules, whether the general principles of law or, in the field of lex mercatoria, customary commercial practices or usages, whether or not written down and whether or not systematically arranged by international collective entities, and given the complexity involved in studying such sets of rules, the reluctance to accept a description of this type, as well as practice as established in case-law together with the general sense of national laws and the current state of development of such sets of rules and their fragmentary nature, it would be advisable to retain the approach adopted by the Rome Convention to the effect that freedom of choice must relate to a set of laws of state origin (18).

(16) See question 7 of the Green Paper.
(17) Discussed, inter alia, in questions 8 and 9 of the Green Paper.
(18) Clearly, this will not prevent substantive reference to such bodies of rules which although depending on the position of lex contractus, would be considered to form part of the contractual content, especially since some of these rules will be in force in certain countries. Filtering recourse to such bodies of substantive rules through national conflict laws does not seem to seriously obstruct international trade, and may be a way of boosting legal certainty (although individual countries can retain a considerable degree of autonomy for the parties in this area, and there is the possibility of dépeçage of the contract within certain limits). In fact, even though such a choice may be permitted, states can block the application of some of these international rules by drawing up rules of necessary and immediate implementation.
4.5.2 With regard to the possibility of choosing the system contained in an international convention, it should be made clear that it is acceptable for this choice to be a valid resolution of a conflict of laws provided that the convention in question stipulates that the agreement of both parties is a precondition for its application (19). Such a choice would be subject to the usual constraints imposed by other international obligations upon the forum, by its rules of necessary and immediate implementation, and by international public policy (20).

When a convention to which the forum is a party is chosen and which provides that it shall be applicable by virtue of the choice of the parties, the question will be different: the regulation must ensure that it does not prejudice the application of special conventions to which the states may be, or become, bound at international level (cf. Articles 21 and 24).

4.5.3 Turning to agreements on the choice of court and arbitration clauses, the close link between procedural questions (to be governed by lex fori and, provided that the case falls within the scope of the Brussels I Regulation, by its rules, and possibly by other international rules) and contractual questions means that the continued exclusion of this matter is acceptable, at the cost of some erosion of the ambition of uniformity.

4.5.3.1 However, if it is decided to adopt a rule on this matter, care will have to be taken to safeguard the existing provisions of Community law or international treaties, whether general or specific, and the specifically contractual aspects which are to be submitted to such a conflict rule will have to be carefully defined, leaving the regulation of procedural aspects and effects to the individual states, since these aspects invariably affect their judicial systems.

4.5.3.2 Provided that the scope of any such rule is clearly defined, its choice of law in the event of conflict of laws could indicate the lex contractus, the law which would be applicable in governing the contract, provided the contract exists and is valid.

4.5.4 Given the specific nature of the problems involved in determining the tacit choice of the parties and their dependence on the particular circumstances, it would seem appropriate to leave such determination in the hands of the judge and evidential procedures within the terms of the procedural rules.

(19) Moreover, the argument exists in such cases that, even in the light of the existing version of the Rome Convention, it should be accepted that reference be made to a body of rules contained in an international convention in order to resolve conflicts of law, even if the state of the forum is not a party to that convention, provided that provision is made for this type of electio iuris.

(20) From this point of view, this would amount to no more than a clarification, although this may be controversial. The overall aims of the Rome Convention not only do not rule out this conclusion; indeed, they would appear to encourage it. Thus basing the electio iuris directly on a convention would amount to an indirect choice, i.e. choosing (explicitly or tacitly) a national system providing for such referral to the system contained in an international convention which would, in principle, be the case of the law of a country bound by the convention which explicitly allowed the parties to trigger its implementation through an option provision, a profession iuris (cf. the case of the Hague-Visby Rules of 1968 and the Hamburg Convention of 1978 on the carriage of goods by sea).

The objectives of the Rome Convention and the basic values of private international law point to this conclusion. Firstly, the Rome Convention urges scrupulous respect for the wishes of the parties; secondly, it is clear that accepting the referral made by the parties regarding conflict of laws to international arrangements of this kind (provided the real agreement of the parties has been ascertained) will always be the best way to safeguard legal certainty and predictability, i.e. to uphold the expectations of the parties who have given their agreement and the contractual content, while reflecting the rules laid down by the international convention. This conclusion would also serve to prevent forum shopping.

Lastly, this solution could eventually help to encourage unity of international law, especially where there are different versions of a single convention which has been revised and the parties do not agree on these versions. In this case, unless it is obliged to apply an earlier version of the convention in question on account of the objective connection arising in the case, the forum may agree to apply a different version to that by which it is bound, specifically because it has been chosen by the parties who could always have chosen the law of a country bound by the new version, which might provide for its application in accordance with the wishes of the parties.

Referral by the parties to a convention which does not consider private autonomy as a connection liable to trigger its applicability may always be interpreted as a substantive referral, i.e. as a substantive incorporation of the rules of the international system into the contract.
4.5.5 Although subsequent choice or subsequent variation of the law chosen by the parties (Article 3(2)) is based on the interpretation of the rules and objectives of the conflict rule of the Rome Convention, it should be made clear that making such a choice at a later stage may have ex tunc effects, since the position of third parties is safeguarded.

4.6 Additional criterion for determining applicable law (Article 4)

4.6.1 Principle of proximity (Article 4(1)) (21)

4.6.1.1 Question

Debate continues on whether the degree of flexibility in determining the applicable law should be reduced where there is no electio legis or, at least, the appearance of flexibility should be reduced which in the final analysis is not wanted by the Rome Convention itself, when the presumptions of Article 4(2) are interpreted in a certain way.

4.6.1.2 Proposal

This could be achieved, for example, by choosing to delete the enunciation of the principle of closest connection in Article 4(1). It is clear that the additional conflict options are based on the principle of the ‘most significant relationship’ or ‘engste Beziehung’: this would remain equally clear if the rule set out in Article 4(1) were to be deleted.

This measure might also serve to clarify the quality of the rules contained in the following provisions, helping to reduce differences regarding the quality of the presumptions of Article 4(2), (3) and (4). Consequently, the relevant connections would no longer be indicated by these rules as presumptions identifying the closest connection, but they would be considered as additional general or specific connections and no more, at all times subject to the final exception clause.

The exception clause in Article 4(5) should therefore be left unaltered, and the possibility could be added for a judge to perform dépeçage of the contract, as currently set out in the second part of Article 4(1).

4.6.2 Concept of characteristic performance (Article 4(2)) (22)

4.6.2.1 Question

There are suggestions that the concept of characteristic performance, which is the key to determining the additional applicable law, should be clarified. However, not only are there differing theoretical conceptions of the determining criterion, but there are also cases in which observation of the specific circumstances of the case contributes significantly to such determination, taking account in particular of the recent nature of certain contractual contents of varying degrees of complexity.

(21) See question 10 of the Green Paper.
(22) Ibidem.
4.6.2.2 Proposal

Independently of the reliance that must be placed on the sound judgment of the judge, the Committee believes it would be helpful to draw up a list, purely by way of example, of characteristic performances, for the least controversial cases. It must be recognised that such a list may in fact already be known, as well as the fact that judges may always have recourse to the exception clause in Article 4 (although it should be pointed out that, when such a list exists, a judge who decides not to take account of it must provide even greater grounds for his decision than he must already give if he wishes to make use of the exception clause). However, the advantage of such a list lies in the possible strengthening of legal certainty, arising from predictability, itself tied in with the prescriptive value always attached to such an indication, although this is reduced to some extent by its purely exemplary quality and the possibility that it is of a typically general nature.

4.6.3 Short-term leasing agreements (23)

4.6.3.1 Question

At present, the law of the place of the immovable property is in principle applicable to these contracts in a suppletive capacity (Article 4(3)). However, such short-term contracts (holiday leasing agreements) are often concluded between parties who do not reside and are not established in the country in which the object of the contract is located; moreover, the tenant is less likely to have a sound knowledge of the provisions of the lex rei sitae, the same not applying to the other party. It may be that the law of conflict of laws of the country in which the property is located decides that the lex rei sitae is applicable, since it lies outside the scope of the regulation. On the other hand, however, it may be necessary to comply with mandatory or public policy rules of lex rei sitae.

4.6.3.2 Proposal

Consideration should be given to the possibility of applying not the lex rei sitaei to such contracts, but rather the lex domicilii communis, also thereby identifying the law applicable in a suppletive capacity, through an accumulation of connections which point to the law of the economic and social environment of both parties, provided the tenant is a natural person (bearing in mind that the Brussels I Regulation also awards jurisdiction to the courts of the Member State in which both parties are domiciled – Article 22(1)). It may be necessary to take account of or apply certain mandatory public policy provisions of the lex rei sitae, if it is thought that compliance with them is not adequately safeguarded by the provisions of Article 7 (although the lex rei sitae may always be invoked under the terms of the general exception clause).

4.6.4 Contract for the carriage of goods (Article 4(4))

4.6.4.1 Question

It has been questioned if these contracts need to be dealt with separately, since the law applicable in a suppletive capacity is based on a series of connection revolving around the connection involving the place of establishment of the carrier, even if this refers to the principal place of business.

4.6.4.2 Proposal

Although this question has not been raised by the Commission, in the light of the safeguard provided by the exception clause in the current Article 4(5), it would not be inappropriate to remove the provision of Article 4(4) regarding carriage of goods, which would be subject to the general suppletive rule. Moreover, the aim of protecting carriers, which is implicit in several uniform substantive arrangements for various types of carriage of goods, does not require the present wording of the provisions, since if the accumulation of connections cannot be materialised, recourse will have to be had to either paragraph (1) or paragraph (2).

(23) See question 11 of the Green Paper.
4.7 Certain consumer contracts

4.7.1 Questions

4.7.1.1 It is broadly recognised that it was not the fundamental concern of the constant provisions of the Rome Convention to protect consumers or other ‘weak parties’ in contractual relations and that, in consequence, the ensuing system is not overall best suited to provide effective consumer protection.

4.7.1.2 A number of questions must therefore be resolved in order for the system resulting from the new regulation to take proper account of the particularly disadvantageous position of individual consumers in international contracts, especially when confronted with pre-established, standard-form contracts, most particularly in highly specialist fields, such as financial services or contracts for electronic services. Prominent among these questions is the concept of consumers and of consumer contracts which may be covered by the provisions of Article 5 (the current exclusion of certain ‘movable’ or ‘active’ consumers; the non-inclusion of certain contracts concerning immovable property and possible services relating to the use of such property – timesharing; the problem of its application to contracts concluded by means of the same new electronic media through which the relevant advertising and/or provisional offer was communicated; the appropriateness of the suppletive connection chosen in the current Rome Convention; the need to ensure compatibility between the provisions of Article 4, 5 and 9; the present exclusion of straightforward contracts of carriage; the relation with the Brussels I Regulation; without, at the same time, overlooking the need to ensure that the regulation is not weighted in turn against the position of a seller entering into a contract with a consumer, given that in private international law the expectations and security of the former must also be protected.

4.7.2 Proposals

4.7.2.1 Article 5(1) and (2). It is recommended that ‘mobile’ or ‘active’ consumers also be covered by this special rule governing consumer contracts.

4.7.2.1.1 In view of the important issue of electronic media, there should be a single rule of conflicts for consumer contracts, whether or not electronic commerce is involved, in order to avoid possibly discouraging the use of electronic media.

4.7.2.1.2 Consequently, in order to achieve these two objectives, no account should be taken in defining the scope of Article 5 of the location of certain elements at present considered to be significant, such as the provisional offer and advertising for the product or service, or the issuing of a declaration of negotiations or, in general, the steps required for the conclusion of a contract.

4.7.2.1.3 Therefore cases where the consumer, without being so advised or encouraged by the supplier, travels to the latter’s country or should or actually does take receipt of the product or service in that country, should nevertheless remain outside the scope of the provision.

4.7.2.2 Article 5(1). This provision should be extended to contracts the object of which is immovable property – right in rem of periodic occupation or time-share contract.

4.7.2.3 Article 5(3). Consideration should be given to applying the suppletive rule of Article 4 and replacing the present suppletive criterion for application of the law of the place of residence of the consumer. This approach would continue to safeguard the security and the expectations of both parties; moreover, it is far from certain that the law of the place of residence of the consumer is in fact more favourable to him.


(25) This applies in particular to the principle of freedom of choice given the lack of real equality between the parties, especially in ‘standard-form contracts’; it applies to the general presumption of Article 4(2) insofar as in most cases it points to the law of the business operator; it also applies to a narrow interpretation of Article 7, which does not include consumer protection provisions as ‘administrative law’.
4.7.2.4 Article 5(2) and (3). The substantive minimum level of protection of the consumer must continue to be assured by the mandatory provisions of the law of the consumer's habitual place of residence, which would prevail over the system dictated by the competent law in the light of Articles 3, 4 and 9, unless the supplier were to provide sufficient evidence that in spite of having been reasonably diligent, he was unaware of the place of residence of the consumer.

4.7.2.5 Article 5(2). With regard to contracts entered into remotely through electronic media and the inclusion of mobile consumers vis-à-vis the protection of the legitimate expectations of the business operator, it must be established that the minimum level of protection under the lex domicilii cannot be invoked if the supplier proves that he was unaware of the place of residence of the consumer, or that he was unaware of it without such unawareness being attributable to his negligence, or that it was a consequence of a holding back of information on the part of the consumer, i.e. if such unawareness is attributable to the consumer (which would not be the case, for example, if the supplier had not given the consumer the opportunity, in a contract concluded by electronic means, to send him data concerning his place of residence).

4.7.2.6 Article 5(2) and (3). It is not considered necessary to maximise the substantive protection of the consumer, for example by means of a rule of alternative multiple connection, as this would run counter to what has been said with regard to the present understanding of the principle of protection of the weaker party. It is enough that a minimum level of protection be guaranteed. It is equally important not to unnecessarily jeopardise the value of the security and certainty of both parties or to entirely negate the importance of the wishes of the parties, even in this field.

Consumer contracts could therefore be subject to the general rules of conflict of laws (present Articles 3, 4 and 9), with the proviso that the protection afforded to a consumer by the mandatory provisions of their country of residence may not be reduced, unless the supplier was, in good faith, unaware of the consumer's place of residence; it always being incumbent upon the supplier to prove unawareness in spite of reasonable diligence.

4.7.2.7 Article 5(4) and (5). The exclusion of simple contracts of carriage from the scope of Article 5 is unjustified, although this entails invoking different laws for different credits (it would seem more reasonable for such an exclusion to be retained in Article 15 of the Brussels I Regulation in order to bring proceedings under a single jurisdiction).

4.7.2.8 There is perhaps no need for this article to include inevitable recourse to certain mandatory provisions of a Member State, provided that the contract contains a close connection with that Member State which is not the Member State in which the consumer is resident (the connection could be the place of publication of an offer or of advertising – cf. German legislation of 27 June 2000 (26)), having regard to both current proposals for ‘intra-Community’ contracts and the provisions of Article 7(1), although, in this case, the decision to apply such rules may always lie with the judge (quite apart from the well-known doubts concerning the type of rules under this provision).

4.7.2.9 Since the reasons justifying the favor personae under the Rome Convention and the Brussels I Regulation are the same – in spite of the fact that rules of conflict contain differing stipulations on account of the differing objectives of these two legal texts – the extension which may be made to consumer contracts under Article 5 should be brought into line with Article 15 of the Brussels I Regulation, especially if account is no longer taken of the location of certain steps prior to the contract or which are necessary for it to be concluded (cf. Article 15(1)(e) of the regulation).

4.8 Employment contracts (\(^2\))

4.8.1 Questions

Similarly, a number of questions arise with regard to employment contracts, including: matching the Rome Convention with the Community rules on temporary employment and differing definitions of ‘postings’; the question of whether or not the signing of a new contract with a member of the original employer’s group terminates the posting for the purposes of application of the respective conflict rule; the problem of the necessary implementation of the rules of transposition of Community law in the field of postings; the issue of work on board certain modes of international transport which are subject to registration and on maritime platforms; and the role of collective agreements in international labour relations together with the question of international collective agreements.

4.8.2 Proposals

4.8.2.1 Without prejudice to the free choice of applicable law under the terms set out in the current Article 6, the Committee believes that the competence of the law of the place in which the work is habitually carried out should be confirmed, provided that a temporary placement is involved, it being made clear that the conclusion, in the host country, of a contract with an employer belonging to the same group as the original employer does not prevent continuation of the placement.

4.8.2.2 Thought should however also be given to whether it is necessary to include a rule ensuring implementation in the host country of the transposal provisions of Directive 96/71 (\(^2\)).

4.8.2.3 Regarding temporary postings, in spite of attempts at definition, and in view of the wide range of possible scenarios and circumstances in the business world, it might be better to continue without a rigid definition of the concept (either ex ante or ex post), leaving the judge to decide on the existence of a temporary posting in each specific case.

4.8.2.4 Notwithstanding the contribution made by the Report on the Rome Convention, mentioned above, and the trend towards agreement within international legal theory, this opportunity could be taken to provide an explicit solution for work carried out on board vessels or aircraft regularly making international journeys, and on maritime platforms. They could be covered by the suppletive criterion contained in Article 6(2)(b), with the exception clause in Article 6(2) in fine being permanently retained.

4.8.2.4.1 This would also go some way to countering the temptation to grant a degree of extraterritoriality to these modes of transport and to apply the law of the flag state which, as is known, does not always have the most substantial connection, particularly in light of the use of flags of convenience.

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(\(^2\)) See questions 14 and 15 of the Green Paper.
4.8.2.4.2 Thus, without prejudice to the present Article 6(1), the law of the place of the body having hired the worker would be applicable, if the worker did not habitually carry out his work in that country, or if he carried it out on board a means of transport subject to registration and not travelling in the same country, on a maritime platform, or in a territory not subject to state sovereignty, unless another law displayed a closer connection, the specific circumstances of the case having been considered.

4.8.2.5 It should be remembered, concerning collective agreements in force in countries in contact with a given multi-location employment relation that, in keeping with consistent international legal theory, and in spite of the debate on the authoritative nature of such agreements, the provisions of collective agreements are applicable provided they have the nature of mandatory rules in the field of one of the relevant laws, in the light of either Article 6 (involving an agreement in the country of the law chosen, lex loci laboris or the law of the place of the body hiring the worker) or Article 7.

4.8.2.6 On the other hand, the opportunity should be taken to make clear whether the regulation applies to international collective agreements. The particular nature of this approach, even if not developed in international practice, together with the theoretical argument over the nature of collective agreements, is enough to justify it.

4.8.2.6.1 The approximation of regulatory solutions in the field of employment would be best carried out within the framework of Community steps to unify or align the substantive laws of the Member States. Such steps may or may not entail drafting international or Community collective agreements and defining the conditions for doing so. This work therefore will focus not so much on the strictly-defined field of rules of conflict, the subject of the regulation, but rather on approximation of substantive law.

4.9 Timesharing rights in rem and contracts (cf. point 4.6 above)

4.9.1 Question

In view of the broader content of the provision contained in Article 15(1)(c) of the Brussels I Regulation, which did not make exclusive reference to movable goods, and in the light of the content of such contracts and the position of the parties normally involved, the questions arises of whether the protection provided in contracts concluded with consumers should not apply, even where availability of immovable property is involved, particularly in view of the proposals to amend the suppletive criterion to determine which law should govern contracts with consumers (and consequently recourse to Article 4(3) and (5) under the current numbering).

4.9.2 Proposal

The conceptual framework of Article 5 should be extended to include mention of immovable property: the rules of rex rei sitae remain relevant, particularly those protective provisions resulting from the transposal of Community law (either because it is understood that with the new wording of Article 5, such law should remain competent in a suppletive quality, in the light of Article 4(3), or under the terms of Articles 7 and 9(6)).
4.10 Mandatory rules, rules of necessary and immediate implementation, provisions which, whether or not they transpose Community directives, require their application regardless of the jurisdiction of their legal systems (29)

4.10.1 Questions

These provisions involve a series of complex questions, of which the following are among the most important: reconciling the rules contained in Articles 5, 6, 7, 9(6) and 10(2), and the different way in which these rules must be considered by judges (margin of appreciation in Article 7(1)); the difficulties encountered in attempting to specify which rules are to be included in the provisions of Article 7 and the task of the judge in this respect; discrepancies in transposition of directives into national law and the problem of non-transposition, questions which do not seem to compete with the specific field of the conflict rules, but rather with harmonisation efforts; the possible obstacle which ‘mandatory rules’ or rules of necessary and immediate implementation may place in the path of achieving single market objectives and its inherent freedoms; the need, where the objectives of private international law are concerned, to reconcile the solutions found with the aim of harmony of international judgments, and hence Community judgments, preventing differing assessments of identical situations, especially within Community territory.

4.10.2 Proposals

4.10.2.1 The present Article 3(3), concerning an objectively internal contract (since, even in the absence of an explicit rule, the approach will necessarily be maintained), should be replaced, because a rule of conflicts should not be brought to bear on a purely internal situation. No referral by the parties to a foreign law in connection with an objectively internal contract can ever override the application of the mandatory rules of the legal system within which all the objective connections exist.

4.10.2.1.1 In consequence, this referral should not be seen as conflict-related (kollisionsrechtliche Verweisung); it is bound to have a purely substantive value or that of a substantive transposal (materiellrechtliche Verweisung). In other words, it should be seen as the expression of private free choice in the field of internal substantive law, not as an expression of free choice of law by the parties, who can only choose which law is competent when they are parties to a contract presenting connections with more than one state.

4.10.2.1.2 The gap created by the abolition of this rule could be filled by a provision encompassing the concept of an objectively ‘intra-Community’ contract to which, regardless of any choice of the law of a third country, the mandatory rules of Community law or of transposal of Community law in force in the legal system which is competent in a suppletive quality must always be applied, also because this gap (matching Article 3(3)) is appropriate from the point of view of consolidation.

4.10.2.1.3 The Committee believes that this restriction should only be effective when all the objective connections set out in the contract tie it to Member States. However, particularly in the view of the possibility of a choice or change of choice of competent law after the contract was signed, conjunction of all the connections of the contract within Community territory should perhaps relate to the moment at which the law was chosen and not, as proposed in the current version of the Green Paper, the moment when the contract was signed.

4.10.2.1.4 In this way compliance with a minimum level of efficacy of Community secondary law will immediately be ensured, provided that the parties invest professio iuris in an ‘intra-Community’ contract.

4.10.2.2 Consideration must be given to the question of whether it is appropriate or advisable to insert a general provision governing the implementation of mandatory protective rules arising from the transposal of Community law, where the contract displays a close connection with a Member State (that Member State’s transposal rules being applicable in this case), as in the example of the German law of 2000.

(29) See questions 13 and 16 of the Green Paper.
4.10.2.2.1 However, it may suffice to recognise that the provisions of Article 7 (which always leave the judge with some margin of appreciation), together with the primacy of Community law and Articles 3(3) and 5, even with the adjustments to be made (cf. above, enabling the competent law in a suppletive capacity to be the law indicated in Article 4, subject only to the minimum level of protection) and Article 6 (compelling the application of certain transposal rules of certain legal systems and particularly that which would be objectively competent, or that of the host country of a worker on placement) are enough to lead to such implementation (30).

4.10.2.3 On the other hand, in addition to the comments concerning Article 3(3), it is worth re-stating that disparities in the transposal of directives by Member States and the issue of non-transposal do not appear to be relevant to the specific field of rules of conflict, but rather to the drive for harmonisation; it is up to the Member States, in their internal law, to ensure that the objectives of Community law in this area are achieved in those cases covered by directives.

4.10.2.4 In spite of the possibly ambiguous nature of the title, evoking a certain historical background to the concept of ‘mandatory rules’, the definition of the rules covered by the provisions of Article 7 should be maintained at formal level, i.e. by reference to the immediate character of their application, regardless of the law applicable by virtue of the rules of conflict, rather than opting for a substantive interpretation of these rules based on their object or content.

4.10.2.4.1 In reality, the provisions of Article 7 are another effort to harmonise judgments, but with the aim of promoting the application of certain rules for the transposal of Community law which might not be applied because of other Rome Convention rules (or possibly on account of imperfect transposal into a national legal system to be taken into account in the light of a rule of conflicts, or simply because such transposal has not occurred at all) – although this latter does not appear to be the underlying legal objective, particularly since Article 7(1) is of universal character.

4.10.2.5 With regard to the mandatory rules or of necessary and immediate implementation of third countries, it must be decided which is the best means: either the principle of international harmony of judgments, at which private international law aims, or the unifying approach underpinning the Rome Convention and the future regulation (32).

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(30) In this case, it is possible that the transposal rules of the law of the country where the building is located would not apply – although not necessarily in the light of Article 7 – in the event that the law of a third country has been chosen to cover the timeshare and even then, only when the consumer did not live in a Member State. In the event of residence, the minimum level of protection under lex domicilii would still be applicable, if Article 5 were to cover consumer contracts involving immovable property.

If this approach were to be followed, it must be made clear what is meant by close connection in the various directives on rules of protection, which generally establish that states must ensure implementation on their own territory of transposal rules, provided that the contract displays a close connection with a Member State, and if implementation of certain mandatory provisions of other legal systems were still possible in the light of Article 7 (it should be pointed out that even under secondary law, what constitutes a close connection liable to trigger application of the rules of protection resulting from transposal may always be determined by the judge, depending on how the directives have been transposed i.e. it would depend on knowing whether the national legislators had or had not defined this concept for the purpose of triggering application of the rules of necessary and immediate implementation of transposal).

(32) On the one hand, it must be acknowledged that the provision contained in Article 7(1), although it could serve as a means of invoking mandatory rules for the transposal of Community law (provided they meet the requirements laid down), is not based on the intention to give importance to foreign legislative policies (whether of Member States or third countries), or the wish to examine the ways in which third-country legal systems (i.e. neither lex fori nor lex causae) give body through law to certain concepts of the socio-economic organisation of states. The purpose of such a rule must be found among the legal objectives of private international law, which is where the grounds for the consideration or application of those rules which would not be invoked through the normal functioning of the rules of conflicts lie. It therefore appears that this provision sets out to bring about uniform assessment of specific legal situations extending over different locations, while taking account of the legitimate expectations of the parties, since the relevant rules would belong to the legal system displaying a close connection with the case. This is intended to prevent a judgment in the forum differing from that which would be obtained elsewhere, and also to prevent forum shopping (and, possibly, to avoid making it possible, for example, that a judgment might clash, in the place of recognition or implementation, with the public policy reservation of a third country, because rules are involved touching upon the sphere of that country's public international policy – in this regard, it might be proper to admit that the rules of greatest concern to the judge of the forum would be none other than those which forward public interests, even though a non-substantive definition of the rules set out in Article 7 persists).

On the other hand, interference on the part of these rules may always constitute an obstacle to legal certainty, in addition – and necessarily – to problems of implementation which may arise in specific cases, especially where rules deriving from other legal systems are involved.
4.10.2.5.1 Assuming that it is preferable to take account of, or apply, such rules from third-country legal systems, in order to put the values of private international law into practice, the Committee deems it sufficient to grant a margin of appreciation to the judge, as is the case at present, bearing in mind that a decision on such consideration or application will, provided it tallies with the objectives of private international law, entail careful analysis of the circumstances of the case and the overall content of such third-country legal systems (the current text, moreover, calls for the judge to take careful account of the nature, purpose and possible consequences of not invoking these rules, which must be compared with the effects of application or consideration).

4.10.2.5.2 This margin of appreciation may be enough, especially considering that the risks to certainty and predictability have already been allowed for when consideration of the rules was first accepted. Imposing excessive detail on the conditions for application or consideration of the rules may not only prove difficult, if done in an abstract manner, but may influence the judge to the extent that he may not be able to make a proper assessment of the requirements of legal certainty in each individual case: the final result being that the details provisions would undermine their own purpose.

4.10.2.6 In view of the established primacy of Community law, it may be decided – in spite of the instructive interest of such an exercise – that it would be unnecessary to enshrine explicitly the approach taken in the Arblade case, i.e. Article 7 should contain a reminder that the application of rules of necessary and immediate implementation cannot constitute an unjustified obstacle to the freedom of movement embodied in the original law.

4.11 Form of contracts and electronic commerce (cf. point 4.6 above) (*)

4.11.1 Question

In view of the difficulties in establishing location caused by the new means of communication and the need to avoid discriminating against them, given their usefulness, the question arises as to whether a single rule should be adopted, regardless of the means used by the parties to conclude the contract, and if the formal validity of contracts should be maintained.

4.11.2 Proposal

Designation of the lex causae in matters of form may depend on the choice between lex contractus, the law of the place where the parties meet at the time of declaration of negotiations and the law of the place of residence of the parties, as well as a reference to Article 5, according to which the provisions of Article 9 shall not prejudice application of the protecting rules of Article 5 (i.e. those under the law of the place of residence of the consumer).

(*) See question 17 of the Green Paper.
4.12 Incapacity and legal persons (Article 11)

4.12.1 Question

In the area of capacity, by indicating application of lex loci celebrationis (not applying to contracts inter absentes), Article 11 seeks to uphold the validity of the transaction and to protect the confidence of one of the parties in the apparent capacity of the other. This rule is grounded in the ‘theory of national interest’. It may, however, be wondered if this approach can be applied to legal persons (which would be contrary to their capacity in the light of a possible principle of speciality, and to aspects of organic representation), considering that the Rome Convention refers also to natural persons (\(^3\)).

4.12.2 Proposal

If it is intended to take a legislative position on this issue, then the exception could be extended to legal persons, in the interests of clarification and harmonisation.

4.13 Voluntary assignment and subrogation \(^4\)

4.13.1 Comparative question of clarification of conceptual frameworks (e.g. case of factoring). The question is whether to introduce clarifications which, by contributing to the drive for unification, will come into conflict with the differing nuances of national legislation. Account will also have to be taken of the proximity of the two rules (Articles 12 and 13) with regard to the judgment concerning conflict of laws underpinning them, and of the connections chosen, which reflect the trilateral nature of these relations.

4.13.1.1 Since this is in reality a question of qualification, it should be left in the hands of the judge, particularly since legal certainty does not seem to be subject to an unacceptable level of risk in the light of the similar structure of the two rules of conflicts, which both eventually trigger the distributive application of different laws.

4.13.2 Question of the invocation of assignment against third parties (possible holders of rights which may be assigned to the original assignor/creditor). The problem arises of whether the regulation should expressly state which law is most appropriate to regulate this question, given the risks of forum shopping. The aim of unification would suggest unifying the rule applicable to this question, therefore deterring those involved from forum shopping. Due consideration must be given to the value of certainty and predictability, and to the risks of invoking different laws. Since predictability would not be jeopardised, and uniform treatment would be guaranteed for third parties with claims competing with those of the assignee vis-à-vis the assignor, the Committee considers that preference should be given to application of the law governing the assignment.

\(^{3}\) The existing text appears to allow three possible interpretations. Firstly, the reference to natural persons could be understood as being exclusive, ruling out application to legal persons. Secondly, it would be possible to argue for application of the provision to legal persons by analogy. Lastly, in view of the extreme prudence which must be exercised in the application by analogy of the provisions of all international instruments – which entail sovereign will and state policies – in order not to undermine the internationally accepted compromise and the degree of unification sought, and in the light of the differences which have emerged with regard to the ‘theory of national interest’, and of the fact that the Rome Convention did not set out to govern either the question of capacity or matters relating to legal persons, then it may be concluded that the Rome Convention intended to address the question of capacity only to this limited extent and that the agreement on unification of the contracting states went no further; in consequence, it may be concluded that any aspect concerning capacity which exceeds the provisions of Article 11 remains a matter for the contracting states. Each state would then decide for itself whether or not to extend this precept to legal persons since no unification has been achieved on this specific question.

\(^{4}\) See questions 18 and 19 of the Green Paper.
4.13.3 Question of conflict between assignees and their resolution. The considerations set out in the point above would, mutatis mutandis, be valid here. Possible recourse to the law governing the assignment is suggested in the event of a contradiction between the legal systems governing the various assignment relations (although the primacy of this law could lead to different laws being applied to the assignees and to third parties intending to press their claims on the original assignor/creditor – cf. the previous paragraph).

4.13.4 The problem of subrogation not based on fulfilment of an obligation by the assigned creditor.

4.13.4.1 The very helpful Report on the Convention of Rome explained that there was no intention to exclude subrogation resulting from payment not based on an obligation, but rather on simple 'economic interest recognised by law' (35), from the scope of Article 13, although the subrogation may then be ex lege.

4.13.4.2 The text should perhaps now be amended to make it clear that this hypothesis should also cover this rule, indicating which connection will prevail.

4.13.4.3 It might also be advisable to flesh out this rule by specifying, similarly, which law should govern the existence or extension of subrogation in the event that satisfaction of the credit is based on a well-founded economic interest, and which law should govern or which situation should provide the grounds for this economic interest – although the judge must be given an adequate margin of appreciation, safeguarded inter alia by the inclusion of an exception clause.

4.14 Law applicable to credit compensation (36)

If it is judged necessary to include a rule of conflicts relating to compensation, the cumulative application of the leges contractuum will have to be determined.

V. SUMMARY OF THE REPLIES TO THE QUESTIONS

5.1 As mentioned above (point 1.14), although the Committee has touched upon other matters in order to make the fullest possible contribution to the issues raised by the Commission, it sets out below a summary reply to each of the questions contained in the Commission's questionnaire.

5.2 QUESTION 1

5.2.1 The experiences gathered by EESC members in their places of origin point to an overall feeling that judges in general have little, and purely theoretical, knowledge of the Rome Convention: very few judges, particularly in the lower courts, possess a sound knowledge of its tenor and potential.

5.2.2 The same broadly applies to economic actors, especially consumers and SMEs. Only large companies, principally multinationals, have the specialist legal know-how to derive benefit from the Rome Convention in the wording of their contracts, especially standard-form contracts.

5.2.3 On the basis of their personal experience in their places of origin, EESC members are also convinced that this state of affairs is damaging to smooth contractual negotiating, and underlies the increasing conflicts in cross-border transactions.

(35) See M. Giuliano and P. Lagarde, op.cit.
(36) See question 20 of the Green Paper.
5.3 QUESTION 2

The reply to this question is given in points 1.2 to 1.10 of the present opinion.

5.4 QUESTION 3

As mentioned in several of its opinions, quoted throughout the present opinion, the EESC has always pointed out the disadvantages of a large number of scattered rules, which affect the law applicable under several Community instruments, and it has underlined the desirability of coherent and consistent consolidation of these rules into a single Community instrument in this field.

5.5 QUESTION 4

5.5.1 The EESC would welcome the introduction of a clause as described by the Commission in point 3.1.2.2 of the green paper, particularly insofar as it counters abuse of freedom of choice, as a means of blocking application of the rules providing greatest protection to the rights of certain weaker parties to contracts.

5.5.2 The reply is given in point 4.10.2.1 of the present opinion, where an amendment to the proposed wording of the green paper is suggested, since rules which, although grounded in Community legislation, would be of internal origin, are involved.

5.6 QUESTION 5

In relation to international agreements containing rules of conflict to which the Member States are party, the Committee believes that the minor disadvantage arising from the application, in specific cases, of rules of conflict differing from those laid down in a Community instrument is far less serious than withdrawing from such agreements. The general thrust of the first part of Article 21 of the Rome Convention should therefore be retained. In view of the primacy of Community law, possible future links with existing or potential conventions on the unification of rules of conflict should only be established if they have no effect on the objective of the regulation. The regulation should not therefore prejudice accession to conventions of uniform substantive law, or prevent Member States from acceding to conventions extending the legislative aspects of the regulation to other, non-EU countries.

5.7 QUESTION 6

A detailed reply to this question is given in point 4.5.3.

5.8 QUESTION 7

The EESC does not consider the solution set out in the Rome Convention to provide the best protection for the rights of insured persons/policy holders. The position of insured persons/policy holders should be put on the same footing as that of consumers, regardless of whether insurers are established within the Community territory or not. It is general knowledge that certain insurance directives contain rules which influence the applicable law (cf. Directives 88/357/EEC of 22 June 1988, 90/619/EEC of 8 November 1990 and 83/2002/EC of 5 November 2002) but, in the interests of the aim of unification, consideration should be given to including all insurance policies in the regulation, adopting a special rule of conflicts encompassing the most advantageous aspects in this field.

5.9 QUESTION 8

A reply to this question is given in points 4.5.1 and 4.5.2.
5.10 QUESTION 9

A reply to this question is given in point 4.5. The terms of the 'either/or' formulation laid down by the Commission are not in fact mutually exclusive and are perfectly compatible. It should however be acknowledged that it is the role of the judge to determine, in each case, if a tacit choice has been made in accordance with the factual and evidential elements available to him.

5.11 QUESTION 10

A reply to this question is given in point 4.6.1.

5.12 QUESTION 11

A reply to this question is given in point 4.6.3.

5.13 QUESTION 12

 Replies to these questions, and other related questions, are given in point 4.7.

5.14 QUESTION 13

A reply to this question is given in point 4.10.

5.15 QUESTION 14

A reply to this question is given in point 4.8.

5.16 QUESTION 15

A reply to this question is given in point 4.8.

5.17 QUESTION 16

A reply to this question is given in point 4.10.

5.18 QUESTION 17

A reply to this question is given in point 4.11.

5.19 QUESTION 18

A reply to this question is given in point 4.13.

5.20 QUESTION 19

A reply to this question is given in point 4.13.

5.21 QUESTION 20

A reply to this question is given in point 4.14.

5.22 It is pointed out that, in addition to these questions, the present opinion has touched upon other matters not specifically included in the questionnaire, such as issues concerning the structure of the Rome Convention (point 4.2.2 and 4.2.3), the effects of subsequent choice of competent law by the parties (4.5.5), contracts for carriage of goods (4.6.4.2) and the law applicable to the capacity of legal persons (4.12.2).
VI. CONCLUSIONS AND RECOMMENDATIONS

6.1 The Committee supports the two main objectives of the Green Paper, to convert the Rome Convention into a Community instrument and to modernise its content, and urges that this be done as quickly as the complex nature of the subject allows.

6.2 It is the Committee’s view that the Community instrument should take the form of a regulation, and agrees that the legal basis should be Articles 61(c) and 65(b) of the Treaty, as suggested by the Commission.

6.3 The Committee reaffirms the main principles underpinning the convention, and believes that they should be carried over into the regulation.

6.4 The Committee’s proposals, which are set out in detail above, are based on the need not only to update some of the provisions of the Rome Convention in line with intra-Community commercial transactions and new contractual instruments, especially distance selling, but also to settle a number of questions of interpretation raised in the study of law and in the courts during the period in which the Rome Convention has been in force.

6.5 In its opinion and its replies to the Commission’s twenty questions, as well as in its own questions, the Committee has striven to put forward solutions which preserve a balance between the interests of the parties concerned, in compliance with the established principles of law constituting the common heritage of the legal systems of the Member States.

6.6 The Committee is however aware that the issue has not been exhaustively examined and therefore urges the Commission to take proper account, in the final draft of the text it is to submit, of all the contributions it receives in response to its highly positive initiative represented by the Green Paper.


The President
of the European Economic and Social Committee
Roger BRIESCH