Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)

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(2006/C 318/10)

On 24 February 2006 the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the abovementioned proposal.

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 26 July 2006. The rapporteur was Mr Frank von Fürstenwerth.

At its 429th plenary session, held on 13/14 September 2006 (meeting of 13 September), the European Economic and Social Committee adopted the following opinion by 191 votes to one, with five abstentions:

1. Summary of EESC conclusions and recommendations

1.1 The European Economic and Social Committee welcomes the Commission’s plan for a European regulation on conflict-of-law rules in the field of contractual obligations. The regulation will develop European conflict-of-law rules in a logical way and close a loophole in the current system of Community law. The regulation is useful and necessary for the development of a single European area of justice, since the 1980 Rome Convention (1) that currently regulates this field is in need of modernisation but, as a multilateral agreement, the prospects of that happening are doubtful and would in any case involve time-consuming negotiations.

1.2 The Committee offers its encouragement to the Commission and urges it to complete its work as rapidly as possible, taking account of the proposals set out below, so that the regulation can enter into force.

1.3 The Committee welcomes the Commission’s efforts to introduce full harmonisation so as to close the legislative gap that exists due to the absence of any European legal act applicable to the Member States in the field of conflict-of-law rules for contractual obligations. This will make matters much simpler for those applying the law, who, given that the regulation will be directly applicable in all Member States, can, in future, work on the basis of a single set of identical rules. The regulation is a necessary complement to the proposed Rome II regulation (2), which has reached an advanced stage in the legislative process. Together with the Rome II regulation, the present document will ensure that, for the first time, the EU has a (more or less) complete system of conflict-of-law rules on contractual obligations.

1.4 The Committee urges the Community legislative bodies to incorporate the following amendments:

— Article 3(1)(3) should be changed into a rule of interpretation,

— Article 3(3) should be amended so that a subsequent choice of the law applicable to consumer contracts may be made after a dispute has arisen.


— the introduction of less rigid rules than those set out in Article 4(1) on the law applicable to particularly circumstanced exceptional cases should be considered,

— with reference to Article 5, it should be checked whether and under what conditions the freedom to choose applicable law may also be granted in cases in which a company operates in the consumer’s country or directs its activity to that country.

— Article 22(c) should be deleted.

Work on the regulation should be completed as rapidly as possible so that it can enter into force.

1.5 The Committee is pleased to note that Ireland intends to become a party to the regulation on a voluntary basis. It regrets that the regulation will not apply in the United Kingdom and Denmark, as the impact of harmonisation will not be felt as strongly as could otherwise have been the case. The Committee urges the Commission to use all possible means to bring about the application or adoption of the regulation in these two countries.

2. General comments

2.1 Grounds for the initiative

2.1.1 The regulation creates a unified set of conflict-of-law rules on contractual obligations in the EU. Admittedly, such a set of rules has to some extent already been in place since 1980, when the majority of western European states decided to conclude the Rome Convention. Other states subsequently acceded to the Convention. The vehicle of a multilateral convention was chosen because, at that time, the EC Treaty did not provide a legal basis for the adoption of an appropriate legal instrument by the Community. After over twenty-five years of applying the Convention, it is widely acknowledged as a real step forward, and the solutions which it provides remain broadly applicable today. However, revision and modernisation are needed to remedy certain acknowledged weaknesses. Given that the Rome Convention was a multilateral agreement, it can
only be revised on the basis of a new round of negotiations, which would be time-consuming and uncertain in terms of outcome. However, this is no longer necessary as the TEC now includes a legal basis for a Community legal act in this area (Articles 61(c) and 65(b) of the TEC). To make it easier to apply the law, rules should be identical in all EU Member States. This means that the only possible legal instrument is a regulation.

2.1.2 In 2004 the Commission conducted a public hearing on the basis of a 2003 Green Paper (1). A large majority at the hearing were in favour of a regulation. The EESC (2) and the EP (3) have also spoken out in favour of modernising the Rome Convention and converting it into a European regulation.

2.2 The legislative background

2.2.1 The regulation should be seen in the context of the Commission’s activities in the field of civil law and procedural civil law, which contribute to establishing a uniform European legal area and facilitating public access to the law. The Committee has on several occasions commented on a series of Commission proposals (4).

2.2.2 The initiative ties in particularly closely with the Commission’s work on conflict of substantive laws, i.e. its proposal for the Rome II regulation. Rome II is complementary to Rome I and the two are entirely compatible.

2.3 Legal base/Subsidiarity/Proportionality/legal status

2.3.1 The regulation aims to harmonise conflict-of-law rules in the field of contractual obligations. The legal base for the harmonisation of conflict-of-law rules is Article 61(c) TEC, cf. Article 65(b) TEC. This means that the Commission is empowered to act where this is necessary for the smooth operation of the internal market. In the Committee’s view this condition is met, as harmonising conflict-of-law rules will help to ensure equal treatment of economic operators in the Community in cross-border cases, increase legal certainty, simplify application of the law and thus promote willingness to enter into cross-border business. It also promotes the mutual recognition of legal acts by making it easier for nationals of other Member States to check that they are legally sound.

2.3.2 These objectives cannot be achieved through measures at the level of individual Member States, and they require EU action. EU action in this area is consistent with the subsidiarity and proportionality principles (Article 5 TEC).

2.4 The Commission has rightly chosen to use the form of a regulation, as, unlike a directive, it does not leave the Member States any room for manoeuvre in implementation; this would result in legal uncertainty, which should be avoided.

3. Specific comments

3.1 Material scope, application of third-country law (Articles 1, 2)

3.1.1 The regulation is intended to apply to contract law conflict rules in civil and commercial matters (Article 1(1)). The Commission could therefore use the terminology of Council Regulation (EC) No 44/2001 (Article 1), which is also used in the proposed Rome II regulation, as this is clearly defined. The exclusion of tax, customs and administrative matters follows logically. Although it is not necessary to mention it, there is no harm in doing so.
3.1.2 The regulation is not intended to cover the entire area of conflict between civil law systems, nor even to the extent of making it applicable to individual cases, for example to the evaluation of a contract law case. The Commission is well advised not to aim too high and thereby make the project unwieldy. Thus, the exclusion of questions involving the status or legal capacity of natural persons (Article 1(2)(a)) is justified, as these matters are traditionally dealt with in conflict-of-law rules by means of separate instruments (so far, nearly always multilateral agreements) in view of their social implications. The exclusion of obligations arising from family relations and maintenance, and from property, marriage, wills and successions (Article 1(2)(b), (c)) is warranted for similar reasons, or should be dealt with in separate legal instruments.

3.1.3 The exclusion of obligations arising under the bills of exchange or cheques (Article 1(2)(d)), is justified by the fact that these matters are adequately dealt with in separate agreements, the scope of which extends beyond the Community and the continued existence of which should not be called into question.

3.1.4 The exclusion of arbitration agreements and agreements on the choice of court (Article 1(2)(e)) has to do with the fact that these matters are covered by international civil procedural law, as they can be better dealt with in this context and to some extent are also regulated in agreements whose applicability extends beyond the EU. The same arguments apply to evidence and procedure issues (Article 1(2)(f)).

3.1.5 The exclusion of company and association law matters and issues concerning legal persons in Article 1(2)(f) is unavoidable, as the issues in question are so closely bound up with the company statute as to require regulation in this context. Trusts are a specific feature of Anglo-American law. They were already excluded in the Rome Convention (Article 1(2)(g)), which the regulation rightly follows (Article 1(2)(g)).

3.1.6 The exclusion of obligations arising out of a pre-contractual relationship (Article 1(2)(h)) refers to matters of tort. These are part of the proposed Rome II regulation and their exclusion is therefore justified.

3.1.7 The Committee is pleased to note that Ireland intends to become a party to the regulation on a voluntary basis. It regrets that the United Kingdom has not decided to follow suit. In Denmark the regulation will not apply (Art. 1(3)) until an agreement on application is concluded by Denmark and the Community or until Denmark voluntarily transposes it into national law. The Committee urges the Commission to use all possible means to bring about the application or adoption of the regulation in these two countries. Opting out by individual Member States would undermine the objective of Europe-wide harmonisation of conflict-of-law rules which the regulation is intended to achieve. It would be unfortunate if the Rome Convention continued to apply to those countries as there will be discrepancies between the Rome Convention and the Rome I regulation. This might mean that, depending on the location of the court before which a case is heard — a matter which, despite the Brussels and Lugano Conventions and Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments (the Brussels I regulation) is still somewhat arbitrary — the same case could produce different judgements. Such a state of affairs would be difficult to accept in the Community.

3.1.8 The regulation requires the specified law to be applied, whether it is the law of a Member State or that of a third country (Article 2). In so doing it follows a recognised standard in conflict of laws, which prohibits discrimination against other systems of law. The Committee endorses this approach. If the circumstances of a case require that a system of law be applied, it makes no difference whether or not it is that of a Member State.

3.2 General rules on applicable law (Articles 3, 4)

3.2.1 Article 3(1) declares that in principle it is the law chosen by the parties which applies. The Committee welcomes this provision, which reflects the principle of contractual freedom, which is a basic principle of contract law and ties in with the acknowledged standard of private international law. It is broadly consistent with the provisions of Article 3(1) of the Rome Convention, which are generally felt to be appropriate. The Committee endorses this approach. However, it sees a risk that, when applying this standard in practice, courts could attempt to establish a hypothetical will of the parties without adequate evidence to support it. Such a risk should be ruled out and this point should ideally be clarified in the recitals (No 7). Article 3(3) puts such emphasis on the freedom of choice of applicable law that the parties may choose a different law at any time. Although the Committee welcomes this in principle, it feels that there is a potential threat to the protection of consumers, who might be unable to fully anticipate the consequences of such a step. The Committee suggests that such subsequent changes in the law chosen to apply to consumer contracts should — in line with the rule on agreements on the choice of jurisdiction (Article 17(1), Brussels I regulation) — only be allowed after a dispute has arisen, as the consumer will then be on the alert and will act more cautiously.

(1) Cf. the various Hague Conventions, for example the Convention relating to the settlement of the conflict of the laws concerning marriage of 12.6.1902, the Convention on the law applicable to maintenance obligations towards children of 24.10.1956, the Convention on the law applicable to maintenance obligations of 2.10.1973, etc.

(2) The Geneva Convention providing a uniform law for bills of exchange and promissory notes of 7 June 1930 and the Geneva Convention providing a uniform law for cheques of 19 March 1931.
3.2.2  On the basis of the parties' agreement on the choice of courts, the third sentence of Article 3(1) presumes that they have chosen the law of the Member State in which the court is situated (unless they have explicitly chosen a different law). This provision reflects an endeavour to align forum and law. Alignment usually makes it simpler to pass judgment. However, the Committee has its doubts as to whether such strict wording of the rule would not interfere with the intention of the parties. It would be better to tone down and re-word the rule so that it simply guides interpretation of the second sentence, for example as follows:

'In particular, this choice should take account of the court chosen by the parties.'

3.2.3  The Committee would like to discuss one aspect in greater depth, as it is of central importance for the future of the European legal area, i.e. the possible creation of an 'optional instrument' or 26th regime by the European Community. This would mean that the parties could opt for Community civil law, an idea which is currently under discussion. Work has begun on a Common Frame of Reference (CFR), which could represent a first step in this direction. Article 3(2) includes a clause which gives parties the option of such supranational rules. At present this possibility is not straightforward in private international law, and the Committee therefore strongly welcomes this development. This would for the first time allow parties to use European standard contracts, which to a large extent would be genuinely harmonised and would represent a significant step towards completion of the Internal Market (*)

3.2.4  Article 4(1) includes rules on the law applicable to a variety of contracts: in terms of content, these amplify the provisions of Article 4(2) of the regulation, which are taken from the Rome Convention. Under the Rome Convention, these rules could only have been derived by interpreting Article 4(2). Although the Commission's proposed rules can be seen as ensuring greater legal certainty, this happens at the price of rigidity and inflexibility, barring any exceptions even when individual circumstances may warrant them. The Committee is concerned that this is a retrograde step relative to the Rome Convention which could have negative repercussions, as cases are conceivable in which the rigid rules on the applicable law could, exceptionally, result in an inappropriate solution. In such exceptional cases, the option for judges to apply a more appropriate law might possibly lead to a more satisfactory outcome. Admittedly, if the goal of legal certainty and predictability in terms of the applicable law is to be met, such waivers cannot under any circumstance be allowed to result in judges invoking the applicable law in an arbitrary way; they will therefore have to give very careful consideration and deliver a very solidly reasoned judgement. With this in mind, the Committee suggests considering an amendment to the regulation.

3.2.5  The Committee understands what the Commission is trying to achieve in Article 4(1)(b). However, it would point out that, because of the grounds on which they are substantiated, many industrial property rights are assignable under conditions that differ from those provided for under the law of the right-holder's country of habitual residence. As Article 4(1) does not establish applicability of the law of the place of habitual residence in substantiating the legal relationship, a change in the applicable law due to a subsequent change in the right-holder's country of habitual residence would raise difficulties in such cases in relation to the legal basis of property rights. The Committee recommends that the Commission look into this problem and propose an appropriate solution.

3.3 Specific rules on applicable law (Articles 5-17)

3.3.1  The Rome Convention rules on consumer contracts have often been criticized and there have been numerous calls for their revision; Article 5 is a thorough re-working. The Committee feels that the Commission has taken a step in the right direction, as the complex application of two different sets of laws to the same case required by Article 5 of the Rome Convention will be avoided in future. There is no doubt that a consumer who signs contracts with a person who pursues a trade or profession needs protection, including in the area of conflict-of-law rules. In most cases, this is ensured by applying the law of the Member State in which the consumer has his habitual residence (Article 5(1)), as this is the law which consumers know (best), the language of which they can speak and on which it is easiest to obtain professional advice. In addition, the proposed text stipulates that the activity of the company must have been directed to or conducted in the country in which the consumer has his habitual residence. Professionals tend to prefer application of home-country rules, as this is more convenient for them; the Commission's proposal serves their interests by allowing this in other cases, in line with the Rome Convention. However, the Committee wonders whether it is really necessary to deprive the parties to consumer contracts within the meaning of paragraph 2 of any possibility of choosing applicable law. In the Committee's view, it is much more likely that consumers would also benefit from the possibility of choosing the applicable law, at least provided that certain protective measures are in place, which they — as the less experienced and weaker party to the contract — undeniably need. The Committee therefore recommends that the Commission review these provisions once again with the above in mind.

3.3.2  The provisions for employment contracts (Article 6) reflect the fact that employees are in particular need of protection. These provisions are taken from Article 6 of the Rome Convention, with additional provisions to duly reflect developments in the field of dependent employment. The addition of the words 'or from which' is a change arising from ECJ case law (*)

If an optional instrument/26th regime ever comes into being, this would then claim to be the best of all possible systems of civil law. If it were agreed to apply this instrument rather than a national system of law, there would logically no longer be any need to align it with national laws or allow interference on the grounds of national mandatory rules (or even public policy considerations — Article 20). Instead, choice of the optional instrument would lead to a fully unrestricted application of this set of rules, as it would represent the generally acknowledged standard in the EU. As Article 3(2) already allows in principle for the choice of such an instrument, this would also be the logical place to create the conditions enabling the benefits of the optional instrument to be put into practice. It should be explicitly stated that Article 8 is without effect if it is agreed to apply a supranational system of law (the same applies to public policy — Article 20).
relating to Article 18 of the Brussels Convention. However, in the absence of a precise definition in the regulation itself or of clarification in the recitals, the Committee is unclear as to what constitutes ‘temporary work’ in another country (Article 6(2)(a)). It is vital to put this right, as the ‘temporary’ nature of employment is of particular relevance to the rule for determining the applicable law. Nor can this shortcoming be remedied by falling back on Article 2 of the directive on posting workers (10), as this does not contain a precise definition either. Moreover, the Committee finds it difficult to understand why a provision is needed for ‘territory subject to no national sovereignty’ (Article 6(2)(b)). Perhaps this refers to drilling platforms in international waters. This should at least be clarified in the explanatory memorandum.

3.3.3 Article 7 deals with representation in legal transactions, an area which is only partially regulated in the Rome Convention, and does not include the legal relationship between agents and third parties. Closure of this loophole is timely (Article 7(2)). It is difficult to answer the question of which law should be applied here as the interests of both agents and third parties are concerned. In cases of agents exceeding their authority or acting without authority, third parties are usually more in need of protection. The proposed text aims to strike a balance between the interests of both sides and therefore meets with the Committee's approval.

3.3.4 The issue of mandatory rules is a difficult one; where possible, the results of the choice of law by the parties should not be impeded more than absolutely necessary, and application should not be hindered by rules which are extraneous to the governing law. Article 8 is broadly consistent with Article 7(2) of the Rome Convention. The regulation takes into account relevant ECJ case law (11) in defining mandatory rules and making them applicable. For those applying the law, such cases are associated with the difficulty that there is no longer a uniform basis for assessing a case, and that non-harmonised or even contradictory rules are supposed to be applied and brought in line with one another. This is time-consuming, technically complicated and results in greater legal uncertainty. However, given the situation with regard to alignment of national laws, the Committee does not feel that there is any alternative, especially seeing that even legal theorists are overwhelmingly in favour of applying such rules in conflict-of-law cases.

3.3.5 On the whole, the remaining Articles 10–17 present few problems in the Committee's view and no detailed comments are necessary, especially when they simply take over the provisions of the Rome Convention.

3.3.6 Given the growing frequency of distance contracts, Article 10 (formal validity of the contract) meets the need for simpler rules on formal validity of contracts or unilateral acts by introducing additional rules on the applicable law.

3.3.7 Voluntary assignment and contractual subrogation of the creditor's rights from the creditor to a third party discharging the debt, which is a feature of many systems of law, serve the same purpose in economic terms (12). The proposed text does well to deal with both in Article 13. Article 13(3) introduces a new conflict-of-law rule on the question of which law should determine whether the assignment may be relied on against third parties. This rule rightly follows the solution adopted by the United Nations Convention on the assignment of receivables in international trade of 12 December 2001.

3.3.8 Article 14 includes a conflict-of-law rule for a statutory subrogation, which is a feature of most systems of law. A conflict-of-law rule is therefore necessary. Article 15 completes Article 14 with a conflict-of-law rule on joint liability of multiple debtors in the case of statutory subrogation. Although it would have made sense to combine this with Article 14 in a single rule, no change is needed here.

3.4 Other provisions/final provisions (Articles 18 — 24)

3.4.1 The matters dealt with in Chapters III and IV are predominantly technical rules consistent with general standards in conflict of laws and require no detailed comment. This applies in particular to Article 19 (Exclusion of renvoi), which is consistent with Article 15 of the Rome Convention, Article 21 (States with more than one legal system), which is consistent with Article 19 of the Rome Convention, Article 20 (Public policy), which is consistent with Article 16 of the Rome Convention and Article 23 (Relationship with existing international conventions), which is consistent with Article 21 of the Rome Convention.

3.4.2 The habitual place of residence (Article 18) of a person plays a central role in current private international law when determining the applicable law. Although determining the habitual place of residence of a natural person is unproblematic, doubts may arise in relation to legal persons. The regulation disposes of such doubts in an appropriate way by declaring the main place of business to be the decisive criterion. It would not have been appropriate to model this provision on Article 60 of Council Regulation (EC) No 44/2001, as this regulation generally takes the place of permanent residence rather than that of habitual residence as the criterion, and also as the threefold solution adopted there would have meant less legal certainty.

3.4.3 Sub-paragraph (c) of Article 22 is difficult to understand. What it seems to be stipulating is that Community legal acts adopted at a later stage may include conflict-of-law rules of their own, which could override application of the regulation. However, existing achievements in harmonising private international law should be preserved in future. Dispersal of legal sources with substantively divergent rules is to be avoided. If the need for special rules should arise in future, they should be integrated into the regulation.

The Committee suggests deleting sub-paragraph (c).

(12) Note: this is only clear from the French language version of the proposal; incomprehensibly, in the German language version it has not been translated, as German law lacks an equivalent legal instrument. However, for the sake of completeness it should at least be paraphrased.
3.5 Annex I

3.5.1 The third and fourth items listed in the Annex are the 'second non-life insurance Directive' and the 'second life assurance Directive'. Apart from the fact that the latter directive has been repealed and that presumably the intended reference is to the life assurance Directive (13) which replaced it, both of these bullet points cause problems, although the Committee would not go so far as to call for their deletion. However, it would definitely draw the Commission's attention to the major problems to which the proposal gives rise. A golden opportunity to simplify and harmonise conflict-of-law rules and to solve problems in the relevant area is being squandered as a result. Used in conjunction with Article 22 (a), the third and fourth bullet points of Annex I would mean that the regulation could not be applied to conflict of laws on direct insurance contracts (14) covering risks located within the EU, as this is regulated by these two directives.

3.5.2 However, conflict-of-law rules on insurance contracts covering risks located outside the EU, on insurance of risks inside the EU (although only if contracts are concluded with a non-EU insurance company) and on re-insurance contracts are very much within the scope of the regulation. This would perpetuate a situation which has already led to confusion on the part of those applying the law (19). Since enactment of the insurance directives, the conflict-of-law rules for insurance contracts differ from general conflict-of-law rules for contracts (Article 1(3) of the Rome Convention), even though insurance contracts also entail contractual obligations. There were no objective reasons for drawing this distinction, other than that at the time of concluding the Rome Convention work had not yet begun on the second generation of insurance directives, and it was decided to wait and see what kind of regulatory framework would emerge before determining the conflict-of-law rules (19). However, this reason no longer applies.

3.5.3 Private international law rules were at odds with the directives, which are influenced by regulatory law. Without specialist knowledge, lawyers applying the law would not expect to find them. The division between various cross-cutting and sector-specific legal sources complicates private international law on insurance. For the sake of legal consistency, a comprehensive approach superseding special rules would be desirable.

3.5.4 There is no point in incorporating the private international law of the directives in the Rome I regulation without substantive changes, as it would maintain different rules for insurance contracts with risks located inside and outside the EU without good reason. This cannot be justified by reference to regulatory law. Insurance companies are regulated according to the country of establishment principle, which in any case tends to lead to a discrepancy between regulation and risk location for cross-border operations. The situation for insurance contracts covering risks inside and outside the EU is not the same. It makes sense to bring insurance contracts covering risks located inside the EU within the scope of the regulation's general rules on applicable laws. Due to the introduction of rules on the choice of law by the regulation, the insurance sector and its clients in the non-consumer segment would in future benefit from enhanced choice-of-law options. An intelligent choice of law from the contract law perspective would make it possible to offer identical products throughout Europe, obviating much of the necessity to develop separate products. In the past, problems in this area have deterred insurance companies from making much use of the freedom to provide services for anything less than coverage of major risks. In terms of choice of law, only consumers are in general need of protection, including in the area of insurance. Compared to them, businesses and the self-employed enjoy a lesser degree of protection, but do not have full freedom in choice of law, and do not require any special protection. They have sufficient business experience to understand the risks which they are taking in operating outside their home country’s system of law or to recognise when they need legal advice.


The President
of the European Economic and Social Committee
Anne-Marie SIGMUND

(14) In distinction to re-insurance contracts.
(19) At present, the situation is as follows: according to Article 1(3) of the Rome Convention, insurance contracts are excluded from the scope of the Convention, provided that they are direct insurance contracts, but only if the risk is located in the EU. When this happens cannot be deduced from the Rome Convention itself, but from the insurance directives. However, the Rome Convention applies to re-insurance contracts and to risks located outside the EU.