



**International Chamber of Commerce**

*The world business organization*

**Department of Policy and Business Practices**

**Commission on Commercial Law and Practice**

**Commission on E-Business, IT and Telecoms**

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**Task Force on Jurisdiction and Applicable Law**

**ICC Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization.**

International Chamber of Commerce (ICC) is the world's largest and most representative business organization that speaks on behalf of enterprises from all sectors in every part of the world.

ICC appreciates the opportunity to provide comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization.

ICC would also like to express its satisfaction with the transparency of this process including the planned hearing later this year. These comments are submitted to outline the issues that are of particular importance to businesses around the world.

International trade and the increasing economic integration are based on business contracts concluded and performed across country borders. Thus, the rules concerning choice of law for international contractual relationships have a significant impact on the global economy.

Companies base their decisions and business models on current laws and regulations. Tampering with the text of legal instruments therefore necessarily has a negative side effect that must be balanced against the expected benefits. ICC has not received feedback from its members that indicates any fundamental problems with the current text of the Rome Convention. Thus, ICC respectfully recommend to the European Commission that the principle "If it's not broken, don't fix it" should be the preferred approach when examining the Rome Convention of 1980.

The Green Paper in its first chapter makes a reference to other projects of the European Commission, namely the proposed Rome II Regulation and the initiative to harmonize European contract laws. ICC has reservations about the link between these initiatives and has submitted separate comments on all three projects. ICC stands ready to work with the European Commission on each of these projects.

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

ICC represents companies from all over the world. While the Rome Convention is well known to the European business community, companies from other parts of the world do not have the same knowledge of the Convention. However, the Convention affects them since European national courts apply the provisions of the Convention when addressing a choice of law issue that involves a party from a non-EU member state.

The European Commission is urged to keep a truly international focus when setting these rules, and ensure that any instruments are consistent with international rules and business practices.

Regarding Article 3, ICC's Commission on Commercial Law and Practice (CLP) develops the widely used ICC model contracts that give parties a neutral framework for their contractual relationships. International business experts carefully draft these model contracts that reflect current business practices without seeking to favour or promote any particular legal system. All ICC model contracts contain voluntary choice of law clauses as well as second clauses for the choice of national courts, arbitration and mediation. The choice of law is a key issue in a business contract negotiation, and ICC can confirm that companies of all sizes and sectors are well aware of their fundamental right to freely choose the law applicable to their contracts.

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

ICC does not favour a modification of the Convention, although ICC acknowledges the marginal benefit that converting into a Community instrument would bring, i.e. uniform interpretation by the European Court of Justice. In other words, ICC believes that if the Convention is finally modified, in spite of our reservations, then it should become a Community instrument.

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

The use of the term 'weaker party' in 1.4 and in Chapter 3 of the Green Paper is unfortunate since it does not clearly limit the scope of the proposal to contracts involving individuals. The use of this term gives the impression that the European Commission means to address all contractual relationships, including those between two companies (B2B).



ICC wishes to stress that party autonomy goes to the very heart of business between companies. The binding nature of contracts and the enforceability of their terms form the very foundation of modern business. To allow the possibility of attacking B2B contracts on the basis that one party has more economic strength than the other, would cast doubt over all business, since the economic strength of two businesses will always be different, i.e. there is always a weaker party. It is important to recognize that a business of any size always retains the option of seeking the best business terms available from the different actors in the market, except in the relatively rare case of a true monopoly.

Party autonomy should be respected for choice of law as it is for price and other commercial conditions. Since awards that ignore the mandatory laws of a country having a significant connection with a transaction will not be recognized in such a country for enforcement purposes, this issue does not appear critical enough to justify modifying the Convention. As with respect to the second question, if a modification to the Convention is made, then ICC believes that the text proposed in 3.1.2.2 attains the stated objective of promoting a Community minimum standard and should be included. However, ICC is concerned that the application of this principle if contained in a directive could lead to confusion if there is a difference between the text of the national laws that implements the directive. An example is directive 86/653 on commercial agents which leaves it to the member states to choose between two different types of remuneration (indemnity) of the agent in case of contract termination: the “compensation of damage” taken from French law and the “indemnity” taken from German law. These two principles are substantially different, and such lack of consistency in a directive creates uncertainty for business, and should be avoided if at all possible.

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

ICC sees no need to modify the existing system of rules on this issue. However, ICC stands ready to discuss this question in greater detail with the European Commission.

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

ICC does not favour modifying the Convention. However, should the European Commission decide to further explore the possibilities of revising the Convention, ICC believes that it could be beneficial to examine the conflict of law rules for insurance contracts with a view to addressing the changes of the last two decades in European supervisory law for the insurance industry.

A fragmented legal system could obstruct international trade. Thus, the rules for situations where the risk is located either inside or outside the EU should follow the same principles. Furthermore, the principle of freedom of choice of law is essential, and should be applied to B2B insurance contracts in the same way as it is applied to other types of B2B contracts.



ICC look forward to discussing these issue in greater detail at the public hearing that the European Commission will organize later this year.

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

Party autonomy is vital for the development of commerce. Companies have become accustomed to resolving many issues through carefully drafted contractual clauses and incorporate deliberately references to non-state law, and frequently in conjunction with an arbitration clause. ICC wishes to stress the importance of protecting and preserving the principle of freedom of contract intact to allow parties in business-to-business transactions to decide for themselves the terms they wish to govern their contractual relationship.

Companies engaged in international business may have good reasons for choosing an international instrument such as CISG to govern their contractual relationship. It is essential that their choice is recognized and respected by governments and national courts.

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

International business parties that omit to include a clear choice of law normally do so because they are unable to agree on the point, preferring to leave the determination to a judge or an arbitrator, rather than simply by oversight. In such cases, the parties make their own assessment of the potential outcome. ICC believes that no new treatment of this subject is necessary (while acknowledging that proper translation of Community instruments is of course desirable).

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

ICC believes that Article 4 is clear as presently written, and was properly applied in the case cited in footnote 51 of the Green Paper. This being said, no damage would be done by deleting paragraph 1. Adding Rome II style language would, on the other hand, render interpretation more difficult, as it could be difficult to determine whether “some” connection with a particular country is significant or not.

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

**A. How do you evaluate the current rules on consumer protection? Are they still appropriate, in particular in the light of the development of electronic commerce?**

**B. Do you have information on the impact of the current rule on a) companies in general; b) small and medium-sized enterprises; c) consumers?**



C. Among the proposed solutions, which do you prefer, and why?

D. Are other solutions possible?

E. In your view, what would be the impact of the various possible solutions on a) companies in general; b) small and medium-sized enterprises; c) consumers?]

ICC would like to point out the tremendous increase in consumer empowerment which the Internet and other media have been instrumental in promoting. The voluntary efforts of businesses today to satisfy consumers' demands far exceed what could be envisaged in any code or law. For example, the practice "full refund – no questions asked" was unheard of in Europe a few years ago. ICC thus believes that the current rules on consumer protection are sufficient. The proposed reforms envisaged in the Green Paper could hamper such healthy, competitive developments to the detriment of consumers' legitimate interests.

ICC believes that consumer protection is adequately ensured at present by reference to existing instruments and industry self-regulation such as ICC's codes on marketing and advertising. The usefulness of these models should not be underestimated. They achieve a high level of consumer protection while at the same time avoiding unnecessary or unreasonable burdens on business and providing a mechanism to adapt requirements over time to address new issues and respond flexibly to national circumstances.

Self-regulatory programmes generally are business-driven and business-led. Although initiated by business, they require consumer interest, support and confidence. The different forms of redress made available to consumers by business is an example of business taking seriously the need to maintain a positive relationship with its consumers and to provide a means by which consumers can seek redress quickly and inexpensively.

ICC would have the strongest reservations regarding any new approach that would systematically subject business to the laws of countries having no particular connection with the business, and especially where the business has made no active efforts to target sales.

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

ICC submits that the present wording of the Convention is unambiguous and need not be changed. The term "mandatory rules" appearing in Article 3 is set up as a definition used "hereinafter". Article 3 itself simply directs a court not to permit parties to avoid mandatory rules by a counter-intuitive choice of law ("... all other elements ... are connected with one [another] country only..."). Article 7 is admittedly broader in application, applying to the Convention as a whole and with respect to "...the law of another country with which the situation has a close connection...", but here, too, the mandatory rules are to be defined.

The national courts of the whose "mandatory rules" are at issue, that would determine the applicability of such rules only after conducting a conflict of law analysis would in fact be reviewing rules susceptible to derogation by contract, rather than rules crucial for the protection of the State. In addition, the second sentence of Article 7 provides ample room for the reviewing judge to apply mandatory rules of another jurisdiction or not.



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

As indicated in its comments with regard to Question 13, ICC favours the present drafting of Article 7(1) that permits the judge a certain margin of discretion regarding the application of the mandatory rules of other countries.

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

ICC sees no need to modify Article 9, agreeing with those who view contracts concluded by e-mail or on the Internet as simply another contract at a distance, i.e. calling for a determination of the country the persons were in when concluding the contract.

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

ICC would prefer to see this issue dealt with within the Bankruptcy Directive or the UNCITRAL Assignment Convention. ICC believes that the European Commission's best choice would be a mandate to collectively ratify the UNCITRAL Assignment Convention for all EU countries and drop the current Article 12 out of the Rome Convention, if revised.