Civil and commercial judicial cooperation: converting the Rome Convention on the law applicable to contractual obligations into a Community Regulation, Rome I

2005/0261(COD) - 15/12/2005 - Legislative proposal

PURPOSE : to convert the law applicable to contractual obligations (Rome I) into a Community Regulation and to modernise certain of its rules.

PROPOSED ACT : Regulation of the European Parliament and of the Council.

CONTENT : in 1980, Member States signed the Rome Convention on the law applicable to contractual obligations. Following the impetus which the Amsterdam Treaty gave to private international law of Community origin, the Commission proposes to transform the Rome Convention into a Community instrument. Hitherto, it is the only Community private international law instrument that remains in international treaty form. The Commission describes the adoption of the "Brussels I" Regulation to replace the Brussels Convention of 1968 in relations between Member States, and also discusses the proposal for a Regulation on the law applicable to non-contractual obligations (Rome II). It points out that Brussels I, Rome II and the Rome Convention of 1980 form an indissoluble set of Community rules of private international law relating to contractual and non-contractual obligations civil and commercial matters.

The proposal is based on the importance of compatibility between conflict-of-laws rules for achieving the objective of mutual recognition of judicial decisions. In addition, harmonisation of the conflict of- laws rules relating to contractual obligations is necessary for the proper functioning of the internal market. It does not set out to establish a new set of legal rules but to convert an existing convention into a Community instrument. Some of the amendments made will help to modernise certain provisions of the Rome Convention. The main points are as follows:

Scope: the proposed changes seek to align the scope of the future Rome I instrument on that of the

Brussels I Regulation and to reflect the work done by the Council and the European Parliament on the proposed Rome II Regulation. Arbitration agreements and agreements on the choice of court will be excluded from the scope. Also excluded are questions governed by company law and the law relating to other bodies corporate or unincorporated.

Freedom of choice: the text requires the courts to ascertain the true tacit will of the parties rather than a purely hypothetical will: they suggest that the parties' conduct be taken into account and seek to clarify the impact of the choice of court, so as to reinforce the foreseeability of the law. To further boost the impact of the parties' will, a key principle of the Convention authorises the parties to choose as the applicable law a non-State body of law. The form of words used would authorise the choice of the UNIDROIT principles, the *Principles of European Contract Law* or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognised by the international community. The text shows what action should be taken when certain aspects of the law of contract are not expressly settled by the relevant body of non-State law. It also deals with the issue of fraudulent evasion of the law.

Applicable law in the absence of choice: The rule in the Convention, whereby the applicable law is the law of the place where the party performing the service characterising the contract has his habitual residence, is preserved, but the changes seek to enhance certainty as to the law by converting mere presumptions into fixed rules and abolishing the exception clause. Since the cornerstone of the instrument is freedom of choice, the rules applicable in the absence of a choice should be as precise and foreseeable as possible so that the parties can decide whether or not to exercise their choice. It should be noted that with regard to franchise and distribution contracts, both types of contract shall be governed by the law of the country in which the franchised person/distributor has his habitual residence.

Consumer contracts:the general rule is thatconsumer contracts shall be governed by the law of the Member State in which the consumer has his habitual residence. This shall apply to contracts concluded by a natural person, the consumer, who has his habitual residence in a Member State for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession. The proposal discusses the targeted activitycriterion, already present in Article 15 of the Brussels I Regulation to take account of developments in distance selling techniques without substantially changing the scope of the special rule.

Individual employment contracts: Notwithstanding the principle of freedom of choice, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded him by the mandatory rules of the law which would be applicable in the absence of choice. A contract of employment shall, in the absence of choice be governed by the law of the country in or from which the employee habitually carries out his work in performance of the contract. The paper discusses the interpretation of the habitual place of work.

Contracts concluded by an agent: Among the three legal relationships that arise from a contract concluded by an agent –between principal and agent, between agent and third party and between principal and third party – only the first two are covered by the Convention. The question of the agent's powers is excluded, due to the diversity of the national conflict rules when the Convention was negotiated. The exclusion is no longer warranted. The proposal brings together in a single Article all the rules governing legal relationship arising from agency contracts.

Mandatory provisions:there isa definition of international mandatory provisions which is inspired by the Court of Justice's judgment in Arblade. The fact that national rules are categorised as mandatory provisions legislation does not mean that they are exempt from compliance with the provisions of the

Treaty. The text specifies the criteria that may be used by the courts to decide whether it should apply the mandatory provisions of another Member State.

Formal validity: Given the growing frequency of distance contracts, the rules in the Convention governing formal validity of contracts are now clearly too restrictive. To facilitate the formal validity of contracts or unilateral acts, further alternative connecting factors are introduced.

Voluntary assignment and contractual subrogation: theseperform a similar economic function and are now covered by a single Article. The text introduces a new conflict rule relating to the possibility of pleading an assignment of a claim against a third party.

Statutory subrogation:this applies, for instance, where an insurer who has compensated a person who has suffered a loss is subrogated to the victim's rights against the person who caused the loss. The amendment reflects the work done by the Council and the European Parliament on the Rome II proposal to explain this mechanism, unknown in certain legal systems, in terms that are easier to understand.

Assimilation to habitual residence: like the Rome II proposal, the text contains a definition of "habitual residence", in particular for legal persons.

States with more than one legal system: where a State consists of several territorial units each with its own substantive law of contractual obligations, this Regulation must also apply to conflicts of laws between those territorial units so as to ensure foreseeability and certainty on the law and the uniform application of European rules to all conflict situations.

Relationship with other provisions of Community law: this Articlecovers the conflict-of-laws rules in instruments of Community secondary legislation in the specific subject-areas listed in Annex 1. It also aims to secure consistency with a possible optional instrument in the context of the European Contract Law project.

Relationship with existing international conventions: the purpose of the proposed amendments is to strike a balance between compliance with the Member States' international commitments and the objective of establishing a genuine European judicial area while enhancing the transparency of the body of law in force by publishing the conventions to which the Member States are Parties. The text sets out the basic rule that international conventions take precedence over the proposed Regulation. But there is an exception where at the time of conclusion of the contract all material aspects of the situation are located in one or more Member States. The co-existence of two parallel schemes – application of conventions rules for Member States which have ratified and application of the proposed regulation elsewhere – would be contrary to the smooth operation of the internal market.