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CCBE RESPONSE TO 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

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1. INTRODUCTION

The Council of Bars and Law Societies of the European Union (CCBE) is the representative body of over 500,000 European lawyers through its member bars and law societies. In addition to membership from EU bars, it has also observer representatives from a further 13 European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

This paper is the response of the CCBE to the questions listed in the Green paper issued by the Commission on 14 January 2003 (COM (2002) 654).

It has been prepared by a working group composed of practitioners from Austria, Belgium, Italy and the United Kingdom, and was subsequently approved by a CCBE Standing committee on 5 September 2003 which is composed of CCBE heads of national delegations.

The CCBE has recently sent its comments on other consultation documents from the Commission which are all related to the same global process of harmonisation of law and legal procedure in the EU (Consultation paper on a more coherent European Contract Law, Green paper on European order for payment procedure and on measures to simplify and speed up small claims litigation). As this Green paper is part of the same process, the CCBE felt that it should submit its comments to the Commission, especially as the Rome Convention is such a difficult text to use in practice that it has resulted in its misuse by the courts themselves or has resulted in the courts using their national conflict of laws rules.

It was decided to answer all questions listed in the Green Paper according to the following guidelines: favour freedom of choice in contract law, leave to the European Court of Justice the task to interpret the various concepts to which the Rome convention referred to and consider as much as possible the definitions already in existence in the *acquis* to improve coherence in the general process of harmonisation of law and procedure.

This document also takes into account the statement made by Helge Jakob Kolrud, President of the CCBE, during the hearings organised by the European Parliament on 25 March 2003 on improvements to European procedural law, especially regarding the need that the applicable law should be clear, simple and certain both for consumers and lawyers. The legal certainty will be able to be guaranteed, by the Court of Justice in the new context of the judicial space (especially the civil judicial co-operation) present in the draft Treaty for a Constitution for Europe (Articles 3 and 41 of Part I; Articles 153 and 165 of Part III).

2. RESPONSES TO THE GREEN PAPER QUESTIONS

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 in sufficient, do you think that this situation has a negative impact on the parties' conduct in their contractual relations or on court proceedings?

Legal practitioners recognise that parts of the Convention (e.g. the presumptions, mandatory rules) are difficult to apply and to interpret. More particularly, the knowledge of this text by the public is limited either due to its application and interpretation which is not very accessible, or due to poor knowledge of the text itself and its use in contract relationship and judicial proceedings. In this respect, the Commission's initiative to finance the establishment by the Academy of European Law in Trier of a

database accessible by Internet on the application of the Convention is a positive step but not enough. This poor knowledge also comes from the fact that the Rome Convention does not fall under the jurisdiction of the Court of Justice (Articles 68 and 234 of the EC Treaty).

This situation has the following negative consequences:

- on the one hand, the danger in having the Convention interpreted in many different ways, or even opposite ways, by national judges;
- secondly , the absence of jurisprudence for the legal professions (judges, lawyers) and economical players (consumers, companies, civil society in general)

It is possible that in practice freedom of choice of law provided by the Convention is not exercised as widely as would be the case if the Convention was more widely known and understood. We believe that there would be advantages in this respect if the Convention were to be incorporated into a Community instrument.

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?

The Convention should indeed be converted into a Community instrument.

The direction, in general, adopted by the Commission with the view of the "modernisation" of private international law is justified by Articles 61§1(c) and 65 of the EC Treaty. It follows the objective aimed at by Article 65, i.e. "*proper functioning of the internal market*" and falls within the scope of Article 65(b) which refers to the need to "*promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction*".

The regulation, as in all the other cases of conversion of Community conventions, would therefore be the proper instrument to ensure homogeneity and conformity with previous initiatives due to its recognised efficiency and features (Article 249 of the CE Treaty).

Question 3: Are you aware of difficulties encountered because of the proliferation and dispersal of rules having an impact on the applicable law in several horizontal and sectoral instruments of secondary legislation? If so, what do you think is the best way of remedying them?

Sources of applicable law have been introduced through Community acts, mainly Directives and Regulations, and are therefore different from "Convention" instruments as sometimes used for contract obligations. The proliferation and dispersal of rules were determined by the need to fill the gaps of an instrument which had general aims and which, therefore, could not cover the various sectors of contracts.

A codification of the "*acquis communautaire*" would be desirable due to a number of advantages which would result from it: certainty of the applicable law, transparency of the rules and therefore better protection of weak parties. In case a codification would be too difficult or too complex to realise (due to technical reasons, time or absence of common will), the Commission should then opt for a list attached to the future regulation in which would appear the text of the relevant Community legislation.

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?

A general clause guaranteeing the application of a Community minimum standard would be desirable. This standard could be qualified as being part of the mandatory rules of Community law which can not be subject to dispensation.

Question 4 refers to the possibility that this standard is applied when "*all elements or at least certain highly significant elements*" are located within the Community. The reference to "*certain*" highly

significant elements could create uncertainties and difficulties of interpretation, but the proposal according to which "*all*" elements are present, could be an excessive restriction.

Therefore it seems desirable to foresee that a localisation of the contract within the Community will take place when all the elements "*or the elements which characterise*" the contract will be located in one of the Member States. The choice of the applicable law would therefore not be jeopardised due to such a clause; the difficulties of interpretation, which in any case could be solved by the Court of Justice, should not be a barrier to this solution (for a significant example regarding the application of interpretation standards, see the submission from the Advocate General Léger in the case *Ingmar*, C-381/98, par. 86 and fol.; decision of 9 November 2000, par.21 and fol., p. I-9305).

Question 5: Do you have comments on the guidelines with regard to the relationship between a possible Rome instrument and existing international conventions?

The international conventions concluded by the Member States are part of the "acquis" of the Member States themselves who are competent regarding the application of these conventions.

We could therefore suggest to the Commission to follow the practice already adopted, for instance, in the regulation n°44/2001 (Brussels I), Articles 69-72 or in the regulations n°1347/2000, Articles 60-61, n°1348/2000, Article 20 and n°1206/2001, Article 21.

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

It does not seem to us necessary to include conflict rules applicable to arbitration and choice of forum clauses in the future Community instrument inasmuch as it deals with a purely conventional field and that it is important to preserve as much as possible the freedom of contract. Several conventions regarding arbitration exist and it is important that any future instrument maintains provisions equivalent to Convention Articles 20 and 21. It will be the arbitrator or the court designated by the parties in the contract who will apply the conflict of law rules of the future instrument.

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)?

We do not believe there is a compelling case for a change to the existing rules.

The key issue is whether the application of the Convention gives adequate protection to the individual policy holder (whom we assume would be a consumer for the purposes of Article 5.)

Where the Convention applies, the parties are given freedom of choice over applicable law (this may not be the case in all jurisdictions where the risk is located in the EU and therefore the Convention does not apply). Since most insurance contracts are on standard terms, this freedom of choice will effectively be the choice of the insurer. In these circumstances, where the chosen law is unfavourable to the policy-holder, he will look to Article 5 and the protection of 'mandatory rules'.

The Green Paper refers to the provisions of the Life Directive providing for the applicable law of the policy holder's place of residence – there is a similar provision on the Non-Life Directive although in certain circumstances the parties may choose otherwise. The question is therefore whether reliance on mandatory rules under Article 5 leaves the consumer worse off than having the entirety of his own law apply as a presumption. To that extent, the policy holder is in the same position as any consumer in a cross border contract. The same consideration will frequently apply where the parties have chosen the law other than that of the Policy Holder's place of residence where permitted under e.g. the Non-Life Directive.

The question therefore is ultimately one of appropriate mandatory rules applicable to insurance contracts (and consumer contracts generally), and is thus inseparable from the general considerations of consumer protection considered elsewhere in the Green Paper. The issue purely as a question of conflict of laws is not substantial enough merit change.

On the issue of transparency, much law (including community law) is by its nature not particularly transparent to consumers, and complexity in itself is not sufficient reason (in the absence of widespread confusion and misapplication of the law) for incorporating special rules for insurance contracts into a future community instrument. An annex, as suggested in 3.2.2.3 (iii), would probably be helpful.

Third, we believe that 3.2.2.1 (c) does not represent a difficulty, for the reasons given in the Green Paper.

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?

The choice by the parties for the applicability of an international convention or general principles of law should be allowed as soon as they are applicable in the law of the named Member State. If the convention or principles are codified in internal law or have the same status in one way or another (or, of course, if they are part of law itself), the parties should be allowed to choose.

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?

In principle, once the Convention is adopted as a community instrument, Court of Justice jurisdiction will help bring certainty. The difficulty with this approach is that the necessary certainty will be contingent on a sufficient number of cases being referred to the Court of Justice. It would be preferable if some clarity and consistency could be achieved at the level of national courts by laying down guidelines for certain categories of cases where it is reasonable to infer tacit choice.

The CCBE would suggest that tacit choice should be inferred where there is express choice of forum, express choice of law in related contracts, express choice in previous contracts between the same parties of the same nature (where there is no evidence of a change of policy), or finally the use of a standard form contract known to be governed by a particular form of law. These straightforward 'paradigm' cases of tacit choice should not require the confirmation of the Court of Justice (avoiding incidental and unnecessary delays).

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?

This is one of the principle difficulties with the drafting of the current convention – there is evidence that the rebuttal of the presumptions in Article 4(5) has been misinterpreted and misapplied, and that consequently there is an uncertainty as to the proper weight to be attributed to it.

It should be made clear that 4(5) is exceptional. We believe that the proposal by the European Group for the Private International Law should be adopted (which is in substance the same principle adopted in Rome 2) as follows:

"*The law designated by paragraphs 1 and 2 shall, as an exception, not be applicable if it is clear from the circumstances as a whole that the contract does not have a significant connection with that law and is much more closely connected with the law of another country.*"

Question 11: Do you believe one should create a specific rule on short-term holiday tenancy, along the lines of the second subparagraph of Article 22(1) of the Brussels I Regulation, or do you consider the present solution satisfactory?

A homogenous solution consistent with the Brussels I Regulation (second subparagraph of Article 22(1)[1]) would be desirable. The proposal by the European Group for Private International Law

[1] Article 22

(regarding the *ratio* of provisions which protect the consumer and his right to holidays, see the submission by the Advocate General Tizzano in the case *Leitner*, C-168/00, especially §43 ; decision of 12 March 2002, p. I-2631), follows this line.

The concerns expressed in footnote 54 of the Green Paper on the consistency of legal terminology in Brussels I and in the future instrument Rome I, and therefore the safeguard of the "natural person" rather than the "consumer", should be generalised to all cases where a comparison with the texts already adopted might reveal uncertainties or differences in the interpretation.

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?

Although we have no empirical data about the effects of the current legal provisions concerning the applicable law in the field of consumer protection, we are convinced that Article 5 of the Rome Convention (which has been written at a time when distance selling techniques have been of minor importance and at a time with only rudimentary consumer protection law) is not appropriate any more, especially when it comes to contracts which are concluded by way of electronic commerce: for example, the scope of the protective rule is strictly defined to certain precise circumstances which are not applicable to contracts concluded by e-mail or while surfing through the web. It therefore has to be stated that Article 5 of the Rome Convention in fact does not achieve its aim to preserve a degree of balance between the parties.

Moreover, since the creation of the Rome convention in 1980 there have been issued a couple of regulations which have an impact on the applicable law to a contract, such as Article 12 (2) of the Directive on the protection of consumers in respect of distance contracts (97/7), Article 9 of the Timeshare Directive (1994/47), Article 6 (2) of the Unfair Terms Directive (1993/13): these provisions are differing from each other as well as from Article 5 Rome Convention; moreover the underlying concept of these new provisions is completely different from Article 5 of the Rome Convention.

Bearing in mind the recent development of consumer protection regulations in Europe and the technical development since the creation of the Rome Convention, a harmonisation of the various different conflicts of law rules is required.

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?

We cannot provide information on the impact of Article 5 of the Rome Convention on companies, enterprises and consumers.

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

Firstly we would like to underline that the analysis of the problems and inconsistencies of Article 5 and the presentation and evaluation of proposals by the Commission in the Green Paper are excellent, exhaustive and well balanced.

Secondly, we would favour <u>option iv</u>:

The following courts shall have exclusive jurisdiction, regardless of domicile:
1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.
However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;
(…)

- Generalisation of Articles 3 and 4 of the Rome Convention (free choice of law; in absence of a choice of law: the law of the place of the business being applied); this will also include as a matter of course the mandatory rules of protection of the law of the consumer's place of residence.
- In order to avoid that by this rule the consumer will be deprived of the EU minimum standard of consumer protection, the mandatory rules of the law of the country of the consumer's habitual residence will apply in matters not harmonised at EC-level (including the case that a EU-Member State has not yet transformed a EU-directive in national law or that the law of a non EU-member state is applicable which does not have the same consumer protection level)
- Furthermore the mandatory rules of the law of the country of the consumer's place of residence will only apply when the supplier deliberately intervenes in the country of the consumer ("*purported use*").

The advantages of that solution are:

- This solution in general does not require the identification of the mandatory rules of the law of the consumer's habitual place of residence.
- It reduces the cases of "dépecage": as far as the law applicable under the general rule corresponds to the EU minimum consumer protection standard only this law is applicable.
- The consumers are sufficiently protected, because in the countries of the European Union in a lot of fields a high degree of harmonised consumer protection legislation has already been achieved; if this standard is not met by the law applicable under the general rule, the consumer is protected by its mandatory national consumer law.
- The course of business for the companies which are dealing on the international market would be easier, because usually the law of the country where the supplier resides will apply.
- This solution is applicable without discrimination to all contracts irrespective of the place where the contract is concluded and irrespective by which kind of technique (Pay TV, Internet, Phone, etc) the contract is concluded.
- This solution will also have a positive influence on the progress of the harmonisation of consumer protection law on EU level; since different consumer protection laws in EU-member states have to be considered as trade barriers that solution finally will promote the free transfer of goods and services.

As far as the "*mobile consumers*" (as defined by the Commission: consumers travelling to another country to make a purchase or receive services) are concerned, we are of the opinion that they actually do not need any protective measures: mobile consumers have to be aware that the local laws will apply. For contracts with mobile consumers the general rule (Articles 3 and 4 of the Convention) shall apply.

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

We have to admit that we are not in a position to assess the impacts on companies, small and medium-sized enterprises and consumers of the various solutions for the rules of international private law in the field of consumer protection, which are proposed by the European Commission in the Green paper. As pointed out above we are convinced, however, that the solution iv finally will promote the free transfer of goods and services within the EU.

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?

1/It should be noted that the terms "overriding rules", "mandatory rules", "mandatory provisions", and "provisions of immediate enforcement" are sometimes considered by the doctrine as similar or even identical concepts.

The "mandatory provisions", under Article 3 of the Convention, are rules or part of national rules from which the parties cannot derogate by contract.

In the Rome Convention, the words "mandatory provision" covers multiple realities.

If the aim to elaborate a regulation is to ensure the legal certainty and the simplification of regulatory provisions complying with freedom of conventions, it seems obvious that a common definition should be adopted.

The mandatory provision aims at protecting a particular interest considered as essential. The public-policy provision aims at protecting an essential interest of the State.

The mandatory rules could indeed be defined from the decision in Arblade as suggested by the Commission and as follows: "*national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.*"

2/ As it is desirable that the Rome Convention is replaced by a Regulation as it was indeed the case for the Brussels I Convention, possible conflicts either about the qualification of a standard (is it or not mandatory/public policy?), or about its application (is it or not complying with a European law mandatory provision/public policy mandatory provision?) could be ruled by the Court of Justice within the framework of Article 234 of the EC Treaty. Legal certainty would at least be guaranteed in some way.

3/ Some make a distinction between legal provisions of immediate enforcement which the judge can apply even before addressing the problem of ruling the conflict of laws and overriding rules, or mandatory rules, which will be considered by the judge who will rule the conflict of laws (the distinction is made in the Commission Green paper which proposes to make clear that Article 5 designates an objectively applicable law whereas Article 7 regards overriding rules).

It seems essential that Article 7 should have a general scope and be applied in all cases, including cases aimed at by special overriding rules which in application terms fail. This solution is very much like the one proposed by the Commission.

For instance, a consumer would like to benefit from the protection offered by Article 5. Unfortunately, in cases where one of the conditions to apply Article 5 is missing; the consumer should be allowed to benefit from Article 7.

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

Uncertainties relating to the interpretation of 'temporary employment' of employees in Article 6

This matter is characterised by an important lack of consistency between the various Community texts in existence.

Article 6 should be clarified regarding the definition of "temporary employment" while ensuring that it is still consistent in relation to these texts.

Indeed, temporary employment is only skimmed over by the Rome Convention whereas it is detailed in the Directive 1996/71/EC of 16 December 1996 and defined in Regulation 1408/71/EC regarding social security.

The Rome Convention leaves to the national judge the task to appreciate on a case by case basis whether there is or not temporary employment.

The definition of temporary employment is different according to whether the matter concerns social security law or employment law. In Regulation 1408/71/EC, "temporary" means an employment of 12 months, extendable with 12 months or a temporary employment in order to carry out a particular mission, a clearly defined work. The Directive, as far as it is concerned, does not provide any indication on the duration but considers that it is not temporary employment as soon as a new employment contract is concluded with the host company.

In this respect, we suggest that the Commission keeps a broad definition of the meaning of "temporary employment", taking into account the various definitions present in the existing Community texts. The intention of the parties should be retained as the main criteria for appraisal of the assignment's temporary nature, and if there is no intention, or if the intention by the parties is not compatible with the mandatory provisions of the country where the work is carried out, several examples from existing texts could be mentioned and be used as criteria: the assignment as it is meant in Regulation 1408/71/EC (12 months extendable) and in the Directive 96/71/EC and the assignment which might be considered as such owing to the specific circumstances of the case (assignment with a view of carrying out a mission or a defined work). It should also be included the possibility to conclude a new employment contract with an employer from the same group without questioning the assignment's temporary nature (possible solution iii § 3.2.9.3.).

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

It seems to us that Article 6 should not be amended within the framework of the adoption of a "Rome I" instrument.

The system of conflict of laws rule should be adaptable to unexpected situations considering the evolution of technologies and the particular situation of enforcement of contracts.

We deem it impossible to provide details of all particular employment situations (online work, seamen …) in a regulation which should be both practical and efficient.

If, in the future, Directives are adopted on particular subjects, the text of these Directives should, according to us, comply with existing regulations or explicitly mention that it departs from these regulations.

Question 16: Do you believe there should be rules concerning foreign mandatory rules in the meaning of Article 7? Would it be desirable for the future instrument to be more precise on the conditions for applying such rules?

1/ The adoption of a Regulation integrating the Rome Convention seems incompatible with the reserves emitted by some Member States: either the States subscribe to the Regulation or they do not.

Within this framework, the essential question of Article 7(1) is even more acutely raised.

2/ Application of foreign mandatory rules - Article 7(1)

It is obvious from jurisprudence that Article 7 (1) is a complex rule which is rarely applied. It assumes that the judge should decide on the nature of the "foreign mandatory rule", hence he is likely tempted to be willing to "bypass the barrier" through the application of the national mandatory rule or the rule designated by the parties.

The writing of the current text which allows the judge to take into account the foreign mandatory rule is not useful at all, except to politely refer to the foreign mandatory rule.

3/ The foreign mandatory rule should have the same statute as a national mandatory rule.

If a sole definition of the notion of mandatory rule/overriding rule was adopted, the foreign mandatory rule, as it is only an application of the existing principle in another State than the one where the conflict of laws arises, it might be useful to define criteria of prior appraisal. In this case, European pubic policy provisions should prevail. In the absence of such provisions, if there is a conflict between mandatory provisions from two or more States, the judge will have to examine, for instance, if this is a law of safeguard, what safeguard is the most extended among these laws (foreign or national mandatory rules), and apply in priority the law which guarantees the most extended safeguard.

In these assumptions, the mandatory provision will prevail over the parties will.

This question should be raised within the framework of the question of hierarchy of standards and pre-eminence of European law.

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

Law applicable to formal validity of contracts (Article 9)

We support the position that the conflict rule on form of contracts should be modernised, especially with respect to distant contracts and contracts concluded by electronic means.

We agree with the proposal of the Commission which provides for the subsidiary application of the law of the habitual residence of the author of the statement of intention in cases where it is not possible to determine the place where the contractual intention was expressed. If it is enough for the statement to be valid to satisfy the requirements of one of the three laws it is more unlikely that contracts will be invalid simply because of breach of formal requirements: the proposal therefore favours the validity of contracts and thus the certainty of law. It also is not reasonable to allow the author of a statement of intention to contract to plead the nullity of the contract because of breach of formal requirements under the law of the place of conclusion although under the law of the habitual residence of the author such a formal requirement does not even exist. In our opinion, therefore, we should propose to generally add to the existing provision the application of the law of the habitual residence of the author of the statement, and not only in cases where it is not possible to determine the place where the contractual intention was expressed.

However, we also like to mention that we should be careful with respect to the form of arbitration agreements; the ongoing discussions as to the form of arbitration agreements should not be prejudiced by the revision of the Rome Convention.

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?

It would be useful to specify such a rule, and each of the options proposed in the Green Paper has its merits. The problem arises in those legal systems which may not give full efficacy to the assignment of the debt.

One way of looking at the problem is this: the assignee of the debt takes some risk on the efficacy of the assignment against the assignment debtor, pursuant to the rule set out in Article 12.2. In other words, it is in theory possible that under the law applicable to the original debt, the assignee cannot enforce the debt (on the basis for example, that the under that law the debt was not assignable.) The assignee is able to 'manage' this risk by, for example, declining the assignment of debts subject to the prohibitive law, or charging a risk premium.

A third party claimant on the other hand is at risk where the law of the original debt permits the assignment to defeat his claim to the debt. He can only disregard this risk where he can be sure that the applicable law does not so exclude his claim. The only certainty he could have is where (i) the applicable law is the assignor's country of residence/establishment and (ii) the law of that country recognises his claim. In this way the option referred to in 3.2.13.3 (iii) favours the minimisation of risk to third parties.

Under the system of law which gives primacy to the third party claim, the effect of such a rule would be to increase the risk to the assignee of the debt. It follows that if that rule applied the process of factoring debts would be more difficult and more expensive, and those commercial operators subject to the rule would not be able to choose a governing law to avoid application of the rule giving primacy to the third party (in other words, they would be denied the possibility of forum shopping implicit in options (i) and (ii) in the Green Paper.)

We are therefore left with two competing principles:

- that third party creditors should be able to fully manage the risk of being unable to take over the debtor's assigned claims by considering the law of the debtor's place of establishment;
- or that parties should be permitted to facilitate the factoring process by choosing law which recognises the efficacy of the debt assignment.

We believe that the second of these is consistent with the philosophy and approach of the convention – in other words freedom of choice subject to mandatory rules, and on that basis the third option should be rejected.

Since the rationale behind option (iii) is unclear, that leaves (i) or (ii). As noted, the assignee of the debt takes the risk of the efficacy of the assignment against the assignment debtor. It is not unreasonable that it should also take the risk against the assignment of the debt against third parties – this risk they are able to manage by considering or anticipating the applicable law of the original claim.

It follows that option (ii) is the preferred option, and as noted in the Green Paper, this has the additional advantage of precluding the possibility of an internal conflict of laws within the transaction.

Question 19: Would it be useful to specify the respective scope of Articles 12 and 13? Do you believe that there should be a conflict rule for subrogation payments made in the absence of an obligation?

The convention is sufficiently clear, and it is not apparent why change is necessary. The CCBE thinks there should be conflict rules in absence of obligation, and this should be the law of the original debt.

Question 20: In your view, would it be useful to specify the law applicable to legal compensation [*sic*]? If so, what conflict rule do you recommend?

It would be useful to specify the law applicable to legal offsetting, and this should be the law of the primary claim (the option suggested in paragraph 3.2.15.3 (ii) of the Green Paper).