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**CCBE Position Paper on the Proposal for a regulation of  
the European Parliament and of the Council on the law  
applicable to contractual obligations (ROME I)  
COM(2005)650 – COD 2005/0261**

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**Conseil des barreaux européens – Council of Bars and Law Societies of Europe**

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## **CCBE Position Paper on the Proposal for a regulation of the European Parliament and of the Council on the law applicable to contractual obligations (ROME I) Com(2005)650 – COD 2005/0261**

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### **I. Introduction**

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 lawyers through its member bars and law societies.

This paper represents the position of the CCBE to the Proposal for a Regulation from the European Commission on the Law applicable to contractual obligations (Rome I) COM (2005)650, hereafter "Rome I".

The CCBE in September 2003 has expressed its opinion on the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernisation.<sup>1</sup>

The CCBE has expressed the view that it favours the conversion of the Rome convention into a Community Instrument since it would thus ensure homogeneity, certainty of the applicable law, transparency of the rules and therefore protection of weaker parties. However, party autonomy as the major principle of contract law in a free society needs to be upheld.

Furthermore, the conversion would guarantee a certain level of coherence with other EU legislation regarding Community private law, e.g. "Brussels I", "Brussels II bis" etc.

After a more general remark (II.), the CCBE would like to emphasise six passages of the proposal which prove problematic in practice.

### **II. General remark:**

In order to ensure consistency with the existing *acquis communautaire* on the choice of law rules in EU Law and to ensure a minimum level of legal certainty, the CCBE recommends to include all existing EU conflict rules for all types of contracts into the Rome Convention, especially those on insurance contracts in order to create one coherent and comprehensive set of EU-conflict rules to replace the various provisions scattered in different instruments.

### **III. Article 3 paragraph 1 of the proposal for a regulation (Freedom of choice)**

Due to Article 3 paragraph 1 of the proposal for a regulation, a contract shall be governed by the law chosen by the parties. However, Article 5 of the Proposal for a regulation on the law applicable to contractual obligations as presented by the Commission provides that business to consumer contracts shall be governed by the law of the Member State in which the consumer has his habitual residence. That would deprive consumers of party autonomy in the field of cross border business to customer (B2C) contracts. The CCBE strongly supports party autonomy as a fundamental principle in contract law which is also part of the general principles of the European Union and included in the notion of free market economy as well as the general freedom of action. It should therefore not be limited to the far going extent foreseen in Article 5 of the proposal for a regulation. Furthermore, this restriction has not been foreseen by the Rome Convention and for the reasons given above, there is no need to change the Rome convention at this particular point. The CCBE therefore proposes to delete the restriction of Article 3 of the proposal for a Regulation with regard to Article 5 (consumer contracts).

However, the CCBE acknowledges that on the other hand in business to consumer contracts choice of law clauses should not allow the evasion of otherwise applicable minimum standards of the material contract law. Therefore, the CCBE prefers the choice of law rules for business to consumer contracts as set out in the Rome Convention.

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<sup>1</sup> [http://www.ccbe.org/doc/En/ccbe\\_response\\_rome\\_convention\\_en.pdf](http://www.ccbe.org/doc/En/ccbe_response_rome_convention_en.pdf)

European Commission's proposal for a Regulation	CCBE's proposal for an amendment
<p><b>Article 3 – Freedom of choice</b></p> <p><b>Paragraph 1</b></p> <p>1. Without prejudice to Articles 5, 6 and 7, a contract shall be governed by the law chosen by the parties.</p> <p>The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract behaviour of the parties or the circumstances of the case. If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State.</p> <p>By their choice the parties can select the law applicable to the whole or a part only of the contract.</p>	<p><b>Article 3 – Freedom of choice</b></p> <p><b>Paragraph 1</b></p> <p>1. Without prejudice to Articles <b>5 (deletion)</b>, 6 and 7, a contract shall be governed by the law chosen by the parties.</p> <p>The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract behaviour of the parties or the circumstances of the case. If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State.</p> <p>By their choice the parties can select the law applicable to the whole or a part only of the contract.</p>

#### IV. Article 3 paragraph 2 of the proposal for a regulation (Freedom of choice)

According to Article 3 paragraph 2 of the proposal for a regulation, the parties may choose as the applicable law principles and rules of substantive law of contract recognised internationally or in the Community. The aim of such a provision is to enable the parties to choose e.g. a possible future optional Community instrument. These kind of non-state laws (e.g. UNIDROIT principles, Principles of European Contract Law) tend not to be comprehensive so far as the totality of legal implications of a contract is concerned.

The CCBE has serious doubts whether this proposal creates certainty and a better orientation for contracting parties. What are internationally recognized principles? Do religious/ canonic laws belong to it? What are the criteria for internationally recognized principles? Further the proposed conflict rule allows the direct application of rules not democratically legitimized as the applicable law (as opposed to the law of a state), not just as substantive law as part of the set of rules of the contract itself. Further there is no need for such a rule. Parties already may choose a set of rules where the applicable law of a state does not contain mandatory rules. Another, pure practical point for attorneys is the question whether professional insurances for lawyers will cover the application of recognized principles within state law as well as through a direct application via a conflict of law rule. Normally, professional insurances offer cover only for the application of state law. Therefore the CCBE proposes to delete Article 3 subsec. 2 of the draft proposal

European Commission's proposal for a Regulation	CCBE's proposal for an amendment
<p><b>Article 3 – Freedom of choice</b> (...) <b>Paragraph 2</b></p> <p>The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community.</p>	<p><b>Article 3 – Freedom of choice</b> (...) <b>Paragraph 2</b></p> <p>The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community.</p>

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<p>However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.</p>	<p>However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.</p>
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**V. Art. 4 of the proposal for a regulation (applicable law in the absence of choice)**

Article 4 of the proposal for a regulation determines the law applicable in the absence of choice by the parties. The Rome convention allowed more flexibility with regard to the applicable law where no choice was made by the contracting parties. The proposed regulation reduces this flexibility by providing specific rules in relation to specific contracts. The CCBE prefers a greater degree of flexibility, as foreseen by the Rome convention. The past has shown that courts and practitioners were able to work with the existing set of rules, and the need for stronger regulation is not apparent at this point. Therefore, the CCBE prefers to keep the wording of Article 4 as set out in the Rome Convention of June 19, 1980.

However, if the conflict of law rules for contracts without a choice are to be changed at all, then only one amendment is conceivable: namely to add an additional rule in favour of the validity of contracts (*lex validitatis*) to Article 4 Paragraph 5 of the Rome convention. In order to ensure legal certainty through validity of contracts, the CCBE supports the respect for justified expectations of the parties for a valid agreement at the conclusion of a contract.

<b>European Commission's proposal</b>	<b>CCBE's proposal for an amendment</b>
<p><b>Article 4 - Applicable law in the absence of choice</b></p> <p>1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law determined as follows:</p> <p>(a) a contract of sale shall be governed by the law of the country in which the seller has his habitual residence;</p> <p>(b) a contract for the provision of services shall be governed by the law of the country in which the service provider has his habitual residence;</p> <p>(c) a contract of carriage shall be governed by the law of the country in which the carrier has his habitual residence;</p> <p>(d) a contract relating to a right in rem or right of user in immovable property shall be governed by the law of the country in which the property is situated;</p> <p>(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be governed by the law of the country in which the owner has his habitual residence, provided the tenant is a natural person and has</p>	<p><b>Article 4 – applicable law in the absence of choice</b></p> <p><i>1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.</i></p> <p><i>2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than</i></p>

<p>his habitual residence in the same country;</p> <p>(f) a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence;</p> <p>(g) a franchise contract shall be governed by the law of the country in which the franchised person has his habitual residence;</p> <p>(h) a distribution contract shall be governed by the law of the country in which the distributor has his habitual residence.</p> <p>2. Contracts not specified in paragraph 1 shall be governed by the law of the country in which the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract. Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.</p>	<p><i>the principal place of business, the country in which that other place of business is situated.</i></p> <p><i>3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.</i></p> <p><i>4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph, single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.</i></p> <p><i>5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.</i></p> <p><b>For the determination of the law of the country with which the contract is most closely connected, the justified expectations of the parties to enter into a valid agreement at the conclusion of a contract should be respected.</b></p>
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## VI. Art. 5 of the proposal for a regulation (Consumer contracts)

Article 5 of the proposal for a regulation introduces a new conflict rule consisting of applying only the law of the place of the consumer's habitual residence. As indicated above under III. (Article 3 paragraph 1 of the proposal for a regulation (Freedom of choice)) and IV. (Article 3 paragraph 2 of the proposal for a regulation (Freedom of choice)): this would be an unjustified limitation of freedom of choice for consumers.

The CCBE strongly opposes the planned abolition of the free choice of law for consumers. The existing restriction for consumers, until now contained in the Rome Convention, is already an extraordinary strong restriction of party autonomy in the field of international private law. The principle of freedom to choose the applicable law should certainly be preserved also for consumer contracts.

Bearing in mind the recent development of consumer protection regulations in Community Law (e.g. 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)) and the technical development since the creation of the Rome Convention, a harmonisation of the various different conflicts of law rules is required.

On the other hand, albeit a choice of law clause in consumer contracts, the mandatory provisions of the *acquis communautaire* and/or the mandatory provisions of the home state of the consumer should apply in business to consumer contracts.

Furthermore, Art. 5 of the draft regulation is too narrow as it only applies to contracts with EU-consumers.

The CCBE therefore recommends the following wording of Article 5 as set out earlier in the CCBE response to the Green Paper (page 7):

<b>European Commission's proposal for a regulation</b>	<b>CCBE's proposal for an amendment</b>
<p><b>Article 5 - Consumer contracts</b></p> <p>1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.</p> <p>2. Paragraph 1 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. It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.</p> <p>3. Paragraph 1 shall not apply to:</p> <p>(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;</p> <p>(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;</p> <p>(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.</p>	<p><b>Article 5 – Applicable mandatory rules in consumer contracts</b></p> <p><b>Notwithstanding Art. 3 and 4, mandatory rules of the law of the country of the consumer's habitual residence should apply in business to consumer contracts and in matters not harmonised through specific provisions in Community Law if the other, non consumer party deliberately intervenes in the country of the consumer.</b></p>

## VII. Article 8 paragraph 3 of the proposal for a regulation (Mandatory rules)

Article 8 Paragraph 3 of the proposal for a regulation allows for the application of mandatory rules from a different jurisdiction with which the contractual situation has a close connection. The CCBE would like to refer to the fact that five countries (the UK, Germany, Ireland, Luxembourg and Portugal) have not applied this principle on mandatory rules in their domestic law. The possibility that mandatory rules from a different jurisdiction may be applied, notwithstanding that, the forum is not in that jurisdiction and notwithstanding that, the applicable law is not the law of that jurisdiction is alien to the private international law traditions of some countries. In particular, it is arguable that this principle is inconsistent with the emphasis on party autonomy laid down in both the Convention and the new Regulation. Parties will not have their choice of law fully reflected if Courts take advantage of this Article, and apart from being inconsistent with the principle of party autonomy, this possibly may generate a degree of legal uncertainty. It is notable that this provision has been removed from Rome II. In the view of the CCBE, Art.8 Paragraph 3 unnecessarily limits party autonomy and creates legal uncertainty and should therefore to be deleted.

European Commission's proposal for a regulation	CCBE's proposal for an amendment
<p><b>Article 8 – Mandatory rules</b> <b>(...)</b> <b>Paragraph 3</b></p> <p>Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.</p>	<p><b>Article 8 – Mandatory rules</b> <b>(...)</b> <b>Paragraph 3</b></p> <p>Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.</p>

## VIII. Article 16 of the proposal for a regulation (Statutory offsetting)

Article 16 of the proposal for a regulation determines the law applicable for an offsetting which is not a contractual offsetting.

The CCBE has doubts regarding Article 16 of the proposed draft regulation: offsetting leads to the redemption of the claims of both parties. The redemption is governed by (national) material law. Therefore, the offsetting can only be effective if the laws governing both claims would come both to the result that the offsetting redeem the claims. As a consequence, both laws need to be applied cumulatively.

European Commission's proposal for a regulation	CCBE's proposal for an amendment
<p><b>Article 16 – Statutory offsetting</b></p> <p>1. Statutory offsetting shall be governed by the law applicable to the obligation in relation to which the right to offset is asserted.</p>	<p><b>Article 16 – Statutory offsetting</b></p> <p>Statutory offsetting shall be <b>cumulatively</b> governed by the laws applicable to <b>each</b> obligation <b>to be redeemed by means of offsetting</b>.</p>