Ministry of JUSTICE

Rome I – Should the UK Opt In?

Response to Consultation

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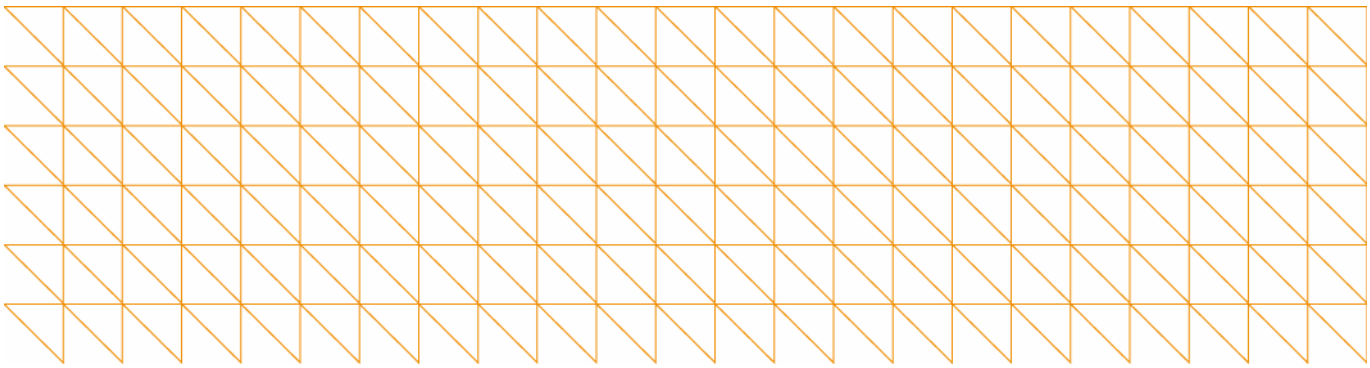

Department of Finance and Personnel

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The Scottish Government

Ministry of JUSTICE

Rome I – Should the UK Opt In?

Response to consultation carried out by the Ministry of Justice, the Department of Finance & Personnel, Northern Ireland and the Scottish Government, with the assistance of HM Treasury, the Department for Business, Enterprise and Regulatory Reform, and the Department for Transport.

This information is also available on the Ministry of Justice website: www.justice.gov.uk

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Foreword

This document is the response to the consultation paper (CP 05/08) entitled '*Rome I – Should the UK Opt In?*', published by the UK Government on 2 April 2008. It covers:

- the background to the consultation;
- a summary of the responses received;
- responds to specific questions raised; and
- states the conclusions reached and the next steps.

Extra copies

Further copies of this report and the consultation paper can be obtained by contacting **Andrew Lee** at the address below:

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This report and the consultation document are also available online at www.justice.gov.uk

Alternative format versions of this publication can be requested from Andrew Lee who can be contacted using the details above.

Executive Summary

The consultation paper '*Rome I – Should the UK Opt In?*' was published on 2 April 2008. It addressed the issue of whether the UK should seek to participate in the Rome I Regulation on choice of law in contract, which had been agreed between other Member States in December 2007.

The twelve-week public consultation closed on 25 June 2008. An analysis of the responses received indicated that there was almost unanimous support for the Government's recommendation that the United Kingdom should now seek to participate in the Rome I Regulation. The responses, together with issues raised by respondents were considered carefully before a final decision was made by the Government. The Government's decision to participate in the Rome I Regulation was made in conjunction with the Minister for Finance and Personnel (Northern Ireland) and the Cabinet Secretary for Justice in Scotland.

On 21 July 2008, the Permanent Representative to the United Kingdom in Brussels wrote to the European Commission and Council giving notice of the United Kingdom's intention to participate in the Rome I Regulation. The European Commission adopted a decision to extend the application of the Rome I Regulation to the United Kingdom on 22 December 2008.

As a result of the United Kingdom's participation in the Regulation, it shall be binding and directly applicable in the UK (England, Northern Ireland, Scotland and Wales) and also to Gibraltar. The Regulation will come into force on 17 December 2009.

The Ministry of Justice, the Department for Finance & Personnel (Northern Ireland) and the Scottish Executive will shortly progress implementation planning for the Regulation. The UK is required to implement the Regulation by 17 December 2009.

Part 1: Introduction

Background

1. Choice of law in contract affects all UK businesses entering into or advising on cross-border transactions, as well as UK consumers buying goods or services from abroad. The scale of the economic activity is immense, with UK's financial markets alone dealing with billions of pounds worth of international transactions on a daily basis. This business extends beyond the City of London, with Edinburgh and Glasgow (taken together) being among the ten largest European centres in several financial markets. It is therefore important to the UK that there are sound choice of law rules giving traders, investors and consumers confidence in the legal effect of their contracts and underpinning their value. These rules are at present based on the 1980 Rome Convention, which established uniform choice of law rules in contract between EU Member States. Since its implementation in the UK through the Contracts (Applicable Law) Act 1990, the Convention has generally been considered a success.

2. In December 2005, the European Commission published its proposal to replace the Convention with a European Regulation. In May 2006, following consultation with stakeholders, the UK decided to exercise its right, under its Protocol to Title IV of the Treaty of the European Community, not to participate in the Regulation because of concerns about the legal and economic consequences of some of the provisions. The UK did, however, participate in the negotiations with the aim of securing amendments that could enable it to participate in the proposal in the future. The constructive nature of the negotiations, and the undoubted recognition of the UK's concerns that were shared by other Member States, certainly helped to ensure that there was a positive outcome for all parties. The Government is grateful to the Commission and other Member States for their part in securing the final result.

3. Negotiations on the Rome I Regulation concluded in December 2007 and the Regulation was formally adopted by the European Parliament and the Council of the European Union on 17 June 2008[1]. It will come into force on 17 December 2009.

4. Following the conclusion of the negotiations, the Government analysed the text of the Regulation with a view to deciding whether the result was sufficiently satisfactory for the UK to participate. Overall the Government considers that it is. The final Regulation is very similar to the Rome Convention. Both are built upon the same principles:

[1] See weblink: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:01: EN:HTML

- choice of applicable law for the parties in most circumstances,

- clear rules to determine that in the absence of choice a degree of flexibility exists for courts to exercise discretion on whether a contract should be determined by its type or if it has a close connection with a another country, and

- appropriate protection for weaker parties such as consumers.

As a result of the negotiations, the Regulation does not include the provisions in the European Commission's proposal that were of greatest concern to UK stakeholders. Some were removed, others were substantially revised and some were returned to their Convention form subject to later review. In the case of those provisions subject to review, future amendments will not automatically bind the UK.

5. In addition, the Government believes that the final Rome I Regulation improves upon the Convention in a number of respects. Foremost among these is the improved drafting. In particular, some Articles have been clarified in light of the experience gained under the Rome Convention. The Government welcomes these improvements.

6. Having reached this preliminary conclusion, the Government decided to consult UK stakeholders on whether the UK should participate in the Regulation. The consultation paper asked stakeholders whether they considered if it would be in the national interest to participate. The paper explained that by participating in the Regulation, the UK would benefit from the improvements to the Rome Convention. It also explained that in contrast, by not doing so, the UK would fail to preserve all the benefits of the present system because the new rules would apply throughout most of Europe, and UK businesses would be forced to adapt to them in the course of cross-border contracting, particularly with consumers in other Member States. Only opting in would continue to provide the benefits of Europe-wide uniformity.

7. The consultation ended in June 2008. Thirty-seven responses were received and were almost unanimous in supporting the UK's participation in the Rome I Regulation. A list of respondents to the consultation is at Annex A. As a result, the Government notified the European Commission and Council of its intention to participate in the Regulation on 23 July 2008.

8. The European Commission adopted a decision to extend the application of the Rome I Regulation to the United Kingdom on 22 December 2008. The Regulation will come into force in the UK at the same time as in other participating Member States on 17 December 2009.

9. The Government is grateful to all stakeholders for their support and expert assistance throughout the negotiations. Their advice has enabled the Government to understand the real impact of the proposal. This impact has been analysed in the impact assessment included in the consultation paper, which sought views on its accuracy. Of those who felt able to comment, the majority agreed that it was accurate.

10. The impact assessment has now been updated as a result of the views received from those who responded to the consultation. A copy can be found at Annex B.

Devolution and Gibraltar

11. The UK consists of three separate jurisdictions: England and Wales, Scotland and Northern Ireland. The responsibility for the law of contract is devolved to each jurisdiction and, accordingly, choice of law rules for contract are devolved to the Scottish Executive and the Department for Finance and Personnel (Northern Ireland).

12. Gibraltar, though a British Overseas Territory, is also subject to EU Regulations in this field. The UK has responsibility on behalf of Gibraltar for the negotiation of the relevant European instruments, and those instruments are directly applicable in Gibraltar if the UK decides to participate.

13. The consultation paper sought views as to whether the Rome I rules should apply throughout the UK if the UK were to participate in the Regulation. The vast majority of those who responded to the consultation agreed that they should.

Part 2: Summary of responses

14. There were **thirty-seven** responses to the consultation which can be aggregated to the following groups:

- 5 were from the academic sector (13%);
- 18 were from commercial, financial and insurance organisations (and individuals) (49%);
- 2 were from consumer organisations (5%);
- 11 were from the legal sector (30%); and
- 1 was from the transport sector (3%).

15. The majority of respondents indicated a clear '**Yes**' or '**No**' to the three questions posed in the consultation. The questions posed were:

- **Q1. Is it in the national interest for the Government, in accordance with Article 4 of the UK's protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why;**
- **Q2. Should the Rome I rules apply throughout the UK if the UK opts in to the Regulation? If not, please explain why; and**
- **Q3. Do you agree with the Partial Impact Assessment? If not, please explain why.**

16. Responses to the consultation were analysed to gauge the level of support for the UK's participation in the Rome I Regulation. Consideration was also given to evidence provided in relation to any impact that might arise for a particular sector or group if the Regulation were to be adopted. A number of respondents also asked questions about specific issues or suggested drafting amendments to the Regulation.

17. In response to:

> ***Q1. Is it in the national interest for the Government, in accordance with Article 4 of the UK's Protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why.***

- 35 respondents (95%) agreed that the UK should participate in the Regulation;
- 1 respondent (3%) was undecided; and
- 1 respondent (3%) disagreed.

18. In response to:

> ***Q2. Should the Rome I rules apply throughout the UK if the UK opts in to the Regulation? If not, please explain why.***

- 29 respondents (78%) agreed that the Rome I rules should apply throughout the UK; and
- 8 respondents (22%) did not reply to the question.

19. In response to:

> ***Q3. Do you agree with the Partial Impact Assessment? If not, please explain why.***

- 17 respondents (46%) agreed with conclusions drawn in the Partial Impact Assessment;
- 17 respondents (46%) were undecided; and
- 3 respondents (8%) disagreed.

20. Responses to the specific points made on the various Articles in Rome I are contained later in this response paper.

Part 3: Responses to specific questions

Q1 **Is it in the national interest for the Government, in accordance with Article 4 of the UK's Protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why.**

21. Thirty five respondents (95%) agreed that it was in the national interest for the Government to participate in the Rome I Regulation. The following reasons were given:

- 29 respondents (78%) felt the Regulation was now thought to be as good as or better than the Rome Convention. As the UK currently applies the Convention, there would be a continuing advantage to British business in applying uniform choice of law rules, ensuring a consistent approach across as wide an area of Europe as possible. Aligning UK law to that in the rest of the EU would achieve this and in turn should lead to a reduction in both legal and transaction costs.

- 4 respondents (11%) felt that the UK's decision not to participate had helped achieve a better Regulation, which the UK should now adopt. It was considered that if the UK were now not to participate in the final Regulation, having achieved a positive result, it could significantly weaken UK's negotiating power on other EU matters which could in turn adversely affect the exercise of the UK's right, under its Protocol to Title IV of the EC Treaty, not to participate in future.

- 1 respondent (3%) agreed that the UK should participate in the Regulation, but made the point that they did not necessarily agree that the Regulation represented an improvement on the Convention as the Regulation had not addressed the weaknesses that the latter had contained. They acknowledged, however, that the issues that had led to UK's earlier opt out had largely been addressed.

- 1 respondent (3%), albeit in agreement to the UK's participation in Rome I, had concerns about the impact of Article 6 (consumer contracts). These concerns related to services normally of a type that could be obtained by a person exercising a trade or profession but were not sought in that capacity from a professional in another jurisdiction. The respondent was concerned that the law of the contract could deem that the applicable law would be that of the residence of the consumer/client.

22. One respondent (3%) neither agreed nor disagreed that the UK should participate in Rome I, stating they felt unable to comment on whether it was in the national interest to do so.

23. One respondent (3%) argued that the UK should remain outside the Regulation because of specific concerns in relation to Article 9(3) (Overriding mandatory provisions). It was their view that Article 9(3) of the Regulation represented a significant change to the current position under English law and only served to add uncertainty and create an unwelcome burden.

Q2 Should the Rome I rules apply throughout the UK if the UK opts in to the Regulation? If not, please explain why.

24. Twenty-eight respondents (76%) agreed that the Rome I rules should apply throughout the UK. The main reasons given were:

- 24 respondents (65%) stated that it would be in the interests of certainty and predictability for the rules to apply intra-UK;
- 3 respondents (8%) felt that not to do so would cause unnecessary complication;
- 1 respondent (3%) agreed that the rules should apply intra-UK subject to the provisions relating to the applicability of consumer contracts (Article 6). It was their view that this provision created an undesirable effect through the creation of exceptional cases in which the law of the consumer/client could apply. The respondent's preference would be for this not to apply between UK constituent countries.

25. Nine respondents (24%) elected not to respond to the question.

Q3 Do you agree with the Partial Impact Assessment at Annex A of the consultation paper? If not, please explain why.

26. Seventeen respondents (46%) agreed with the conclusions reached in the Partial Impact Assessment. One respondent stated that they mainly agreed with the partial impact assessment but felt that the implications of each Article of the Regulation should have been assessed rather than the thematic approach taken.

27. A further 17 respondents (46%) elected either not to respond to the question or responded that they did not feel qualified to reply.

28. Three respondents (8%) disagreed with the impact assessment. Those who disagreed were, in the main, not convinced that a proper assessment of Article 6 had been carried out.

29. A more detailed response to the points raised by respondents to the consultation are contained in Part 4 of this response paper.

Part 4: Specific points raised by respondents on Rome I

Article 3 - Freedom of choice

> ***Article 3***
>
> ***Freedom of choice***
>
> *1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.*
>
> *2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.*
>
> *3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.*
>
> *4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.*
>
> *5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.*

30. Article 3 of the Rome I Regulation enshrines, as the cornerstone of the Regulation, the principle of party autonomy in relation to choice of law. This principle, which is also central to the Rome Convention, is important in delivering the benefits of legal certainty in international commerce.

31. The terms of this provision are substantively the same as those in Article 3 of the Rome Convention. However, the Rome I Regulation contains two useful clarifications:

- that choice of law by the parties need not be made only in express terms; and
- Recital 14 clarifies the position on the parties' agreement to confer exclusive jurisdiction on one or more courts in the event of a dispute under the

contract. This reflects, in general terms, the current position under English law.

32. As a result of these clarifications, the Government believes that Article 3 of the Rome I Regulation represents an improvement on the equivalent provision in the Rome Convention. However, points were raised on the interpretation to be given to the phrase 'clearly demonstrating' and on drafting generally. The Government's response to these points are set out below.

Queries raised on Article 3 as a result of the consultation

'Clearly demonstrating'

33. While satisfied that the principle of party autonomy was appropriately upheld, one respondent felt that there may be a risk of satellite litigation relating to the level of certainty necessary when a choice is not expressly made in a clear applicable law clause. The respondent considered that the test of 'clearly demonstrating' by the terms of the contract or the circumstances of the case (as in the Regulation) would be harder to satisfy than demonstrating with 'reasonable certainty' by the terms of the contract or the circumstances of the case (as in the Rome Convention). The respondent also suggested that perhaps it was unfortunate that the test in the Rome I Regulation differed from that of the Rome II Regulation (which appeared to follow the wording contained in the Rome Convention).

Government response:

34. Although there has been a change to the wording, which occurred through compromise in trying to find clarity of interpretation for all Member States, the Government believes that the overall effect of Article 3 should result in there being very little difference to that of the Rome Convention. The compromise reached provides a more uniform interpretation of the effect of this provision across all Member States. Any difficulties that could arise could easily be overcome by ensuring that contracts include a clause that sets out in clear terms what the applicable law to the contract will be. Recital 14 of the Regulation also provides for an exclusive jurisdiction clause to be one of the determining factors in whether a choice of law has been demonstrated. This latter point reflects the current position under UK law and has usefully been incorporated into the Regulation. As commercial practice dictates a degree of flexibility by both parties to the contract and terms can be included to protect them, there was consensus amongst Member States that alignment with Rome II was not necessary here. This flexibility is not necessary for non-contractual obligations.

Drafting issue

35. One respondent made the point that the Rome I Regulation contained no definition of the mandatory rules (as had appeared in Article 3(3) of the Rome Convention), nor had this omission been fully discussed in Part 3 of the consultation paper. Although it was recognised that the wording in Article 3.3 of the Rome I Regulation had a similar effect, it did not purport to be a definition of the mandatory rules. The respondent felt that different concepts had been introduced into Article 9 of the Rome I Regulation (Overriding Mandatory Provisions) in which the "overriding mandatory provisions" were defined as:

> *Provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*

Government Response:

36. There are two points to make in response. First, no substantial change was ever intended between the rule in the Regulation and the rule in the Rome Convention. The change in the wording to Article 3.3 of Rome I was made to align the position with that of Rome II. Further explanation behind the meaning of the rule is reflected in Recital 15 of the Rome I Regulation which states:

> *Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations, the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007 (Rome II)."*

Secondly, the rules reflected in Article 9 of Rome I cover a different concept. These rules are more restrictive and should be distinguished from those provisions that cannot be derogated from by agreement. Recital 37 of Rome I explains this further:

> *Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on the public policy and overriding mandatory provisions. The concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed more restrictively.*

Article 4 - Applicable law in the absence of choice

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

(c) *a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;*

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) *a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;*

(f) *a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;*

(g) *a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;*

(h) *a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.*

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

37. Article 4 contains the general choice of law rules that operate where the parties have failed to choose an applicable law to their contract under Article 3. At first sight, with its lengthy list of types of contracts, the provisions appear to differ widely from the equivalent rule in Article 5 of the Convention. However, its effect in practice is not likely to be significantly different from the way in which UK courts have applied Article 4 of the Rome Convention.

38. The approach taken by Article 4 is one based on a much simpler structure and proceeds initially by applying various specific choice of law rules for particular types of contract. These rules are then subject to various rules of displacement which give the necessary degree of flexibility for those situations where the mere application of one of the specific choice of law rules would not, for various reasons, produce appropriate results. The mixture of specific rules, coupled with rules of displacement, generally strikes an appropriate balance between the competing objectives of certainty and flexibility. The Government regards this as an improvement on the Convention. It is also seen as securing greater predictability for parties operating in multiple jurisdictions, as a result of a clearer legal scheme. This should represent a benefit for both business and legal practitioners.

39. Two aspects of Article 4 deserve special mention. First, Article 4(1)(h). This provision covers certain types of financial contracts as defined by the Markets in Financial Instruments Directive (MiFID) which provides a harmonised regulatory regime for investment services across the Member States of the European Economic Area (EEA). Article 4(1)(h) ensures certainty as to the applicable law in this area (through the application of a single law governing such financial transactions) in order to retain the integrity and certainty needed by financial systems. The second aspect arises out of Article 4(3) which provides for the application of the law of the country of "closest connection". This rule should be of particular value in the context of related contracts where it is commercially important for a single law to be applied to the whole transaction rather than having different laws applying to each of the component parts of the transaction.

40. The Government believes that the improvements to the structure of this Article, and the clarifications provided, represent an improvement on the Rome Convention position. However, one respondent raised a query in relation to derivative contracts. The Government's response to this is set out below.

Derivative contracts – where no choice of law has been made

41. It was suggested by one respondent that there was uncertainty as to how Article 4 would apply to certain complex financial instruments where the parties had not selected the applicable law to their contract. The respondent felt that the majority of derivative contracts would not fall within any of the categories listed in Article 4(1). It may, therefore, be necessary to fall back to the 'habitual residence' of the party to effect the characteristic performance of the contract or the country where the contract is manifestly more closely connected where this is clear from the circumstances of the case. The 'habitual residence' of the party in itself may not always be clear which would cause difficulty in practice for such transactions.

Government response:

42. Article 4(1)(h) provides for certain types of financial contracts as defined by the Markets in Financial Instruments Directive (MiFID) which provides a harmonised regulatory regime for investment services across the Member States of the European Economic Area (EEA). Article 4(1)(h) ensures certainty as to the applicable law in this area (through the application of a single law governing such financial transactions) in order to retain the integrity and certainty needed by financial systems. MiFID covers the following financial instruments:

- transferable securities;
- money-market instruments;
- units in collective investment undertakings;
- options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivative instruments, financial indices or financial measures which may be settled physically or in cash;
- options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);
- options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;
- options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned above and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, *inter alia*, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;
- derivative instruments for the transfer of credit risk;
- financial contracts for differences;
- options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned previously, which have the characteristics of other derivative financial instruments, having regard to whether, *inter alia*, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.

Article 5 - Contracts of carriage

Article 5

Contracts of Carriage

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

(a) the passenger has his habitual residence; or

(b) the carrier has his habitual residence; or

(c) the carrier has his place of central administration; or

(d) the place of departure is situated; or

(e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

43. Article 5 of the Rome I Regulation covers both contracts for the carriage of goods and contracts for the carriage of passengers. Article 5(1), together with the general rule of displacement in Article 5(3), sets out the rules relating to contracts for the carriage of goods. These are broadly similar to those in the Rome Convention and appear to be generally satisfactory. In particular, freedom of the parties to choose the applicable law, which is routinely exercised in relation to contracts for the international carriage of goods, remains unaffected.

44. Article 5(2), together with the general rule of displacement in Article 5(3) sets out the rules relating to contracts for the carriage of passengers. The Rome Convention does not contain any special rules for such contracts either when the parties have chosen an applicable law or when they have not done so. As a consequence, Articles 3 and 4 of the Rome Convention would apply. The

inclusion of a special rule for such contracts in the Rome I Regulation resulted from a desire by the majority of Member States to establish a greater degree of consumer protection in this field than currently exists under the Rome Convention. The rules here are also subject to limited party autonomy albeit that such specific rules go beyond the Rome Convention.

45. On balance, the Government believes that the changes imposed by the Regulation are reasonable and offer some advantage in terms of providing added protection for consumers. There were, however, a few points raised by respondents on passenger contracts. The Government's response is set out below.

Passenger contracts

46. While satisfied that the provisions for the carriage of goods were largely unchanged, one respondent initially expressed concern that the provisions for passenger contracts might be less clear, when compared with the wide degree of freedom given under the Convention. The Rome I Regulation introduces certain restrictions - set out in Article 5(2). On further reflection, however, the respondent felt that the inclusion of the carrier's place of central administration (Article 5(2)(c)) would help to ensure that a single law could be applied and enforced where international operators were issuing tickets in different jurisdictions.

47. Another respondent expressed concern that the rules relating to the carriage of passengers may lead to "some marginal loss" for UK-based law firms.

Government response:

48. The Government believes that the changes to be imposed on contracts for the carriage of passengers are moderate. They have the advantage of providing greater clarity, gained through the explicit treatment of this particular class of contract, and have the added benefit of giving greater protection to consumers. The limitation on choice of law will prevent the application of a law not reasonably connected with the contract, and will protect consumers who are not in a position to bargain for a choice in contracts with major carriers. Where no choice of law has been made for the contract, protection for the consumer will continue as it will only be the law of the country that is most closely connected with the contract that will apply. This again limits the applicable law in such circumstances.

49. The cost of this provision will be in the limitation it imposes on party autonomy. Ministry of Justice enquiries into carriage of passengers by ship and air revealed that all major UK operators that provide choice of law information publicly choose the law of their place of central administration. To the extent the limitations have an effect on the UK, this is likely to be through limiting situations where foreign carriers can choose UK law, rather than their own. Figures are not available on the extent to which this occurs. There is, however, no evidence that it is widespread matter. Nevertheless, in this limited field, there is a possibility of a small decrease in business directed to UK law firms by foreign carriers, resulting from a change in the choice of governing law. The Government does not consider that this outweighs the advantage of the Regulation.

Article 6 - Consumer contracts

Article 6

Consumer contracts

1. *Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:*

   (a) *pursues his commercial or professional activities in the country where the consumer has his habitual residence, or*

   (b) *by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.*

2. *Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.*

3. *If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.*

4. *Paragraphs 1 and 2 shall not apply to:*

   (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;*

   (b) *a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours;*

   (c) *a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;*

   (d) *rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;*

   (e) *a contract concluded within the type of system falling within the scope of Article 4(1)(h).*

50. Article 6 governs the choice of law applicable to consumer contracts. It is the Government's view that the heart of the Rome Convention system has been retained for consumer contracts, albeit subject to substantial modification. Party autonomy has been restored in much the same vein as that in the Rome Convention. In addition, as the Regulation would affect UK businesses in dispute with consumers in other Member States whether the UK participated in the Regulation or not, the restoration of limited party autonomy now makes things less difficult. This is a benefit as is the addition of the exclusions for financial market issues. These exclusions now provide greater clarity in this area.

51. Some risk will remain, however, because it is not entirely clear what is meant by the term 'directing activities'. It remains difficult to determine the scope of this concept but if it were to be construed broadly, businesses with cross-border sales would need to be more conscious of the potential application of foreign law. Nevertheless, the capacity to choose the applicable law under the Regulation should mitigate these risks and confine the issues arising from the definition of 'directed activities' to a narrow range of cases. Moreover, where activities are directed, it is only the mandatory provisions of foreign law that will apply to the contract, which limits the risk further.

52. There are benefits for consumers who will enjoy a higher degree of consumer protection and there will, in better regulation terms, be greater consistency across Member States on the rules applicable to consumer contracts. Overall the Government believes that the final provisions of the Regulation are now substantially in accord with the Rome Convention and strike an appropriate balance between consumer and business interests.

53. Some respondents, however, raised queries on 'directing activities', mandatory laws and the costs associated with Article 6. The Government's response to these points is contained below.

Directing activities

54. Concern was expressed by one respondent that Article 6 had an undesirable impact in relation to services that were normally of a type obtained by a person exercising a trade or profession, but were not sought in that capacity from a professional in another jurisdiction (especially one who was subject to national state regulation). The respondent considered that there was uncertainty as to what "directs such activities to such country" meant.

Government response:

55. In most respects, Article 6 reflects the position under Article 5 of the Rome Convention if a choice of law is made. However, Article 6 does alter the wording of the qualifying conditions that entitle the consumer to greater protection. Article 5 of the Rome Convention refers to "advertising" whereas Article 6 of Rome I refers to "directing activities" by the professional. The Government recognises that the Regulation does not bring any greater clarity to this area than the Convention, but in the absence of any conclusive ruling from the European Court of Justice as to whether, and if so how, this latter requirement applies to sales over the internet, for example, that uncertainty will remain. Given the overall policy on consumer protection that underlies Article 6, it is

likely that the European Court of Justice would, in such a case, interpret the concept as generally applying to e-commerce transactions. If this assumption is correct, then the application of the concept of "directing activities" under Article 6 of Rome I will not in itself result in significant change. It should be noted that under the Regulation, as under the Convention, there is an exception provided for services rendered exclusively in the service-provider's jurisdiction.

56. Under the Regulation, the law of the consumer's habitual residence will only apply where no choice of law has been made in those contracts where the professional has pursued their commercial or professional activities in the consumer's country of habitual residence or has directed activities to that country. The Government's view is that it is unlikely that a British business would engage in business directed at consumers in other Member States and fail to take advice on a choice of law clause in their commercial contracts. Where this does occur, however, it is not unreasonable for the consumer's expectations to prevail. This is presently the case under Article 5(3) of the Rome Convention.

Mandatory laws

57. One respondent considered that the new wording raised questions as to whether specialist consumer services (for example the provision of wealth management services to EU domiciled individuals) went beyond that already covered by the Rome Convention and would be subject to the mandatory laws of the state in which clients/customers were 'habitually resident'.

Government response:

58. Under the Rome I Regulation, it will be necessary to consider the possibility that the mandatory rules of another country will apply (Article 6(2) of the Regulation). This could be seen as creating an additional burden for businesses but businesses are already required to comply with such mandatory rules under the Rome Convention (Article 5(2)). The Government believes that the Rome I Regulation should not add an additional burden in this respect.

Costs of Article 6

59. Two respondents were concerned about the significant costs likely to result from Article 6 because of the need to consider the mandatory rules of a consumer's habitual residence.

Government response

60. These concerns were well-founded at the time of the European Commission's original proposal but the position in the final Regulation has changed significantly and now reflects the position of the Rome Convention if parties to a consumer contract choose the law that will apply to their contract. In particular, the revised Regulation maintains the limited party autonomy for consumer contracts found in the Rome Convention if a choice of law is made. Article 6 as it stands should not appreciably increase business costs. If such costs are incurred, they will be incurred irrespective of whether the UK opts in or remains outside the Convention.

General comments

61. Two respondents, although not posing specific questions for response, made the following positive observations about the Rome I Regulation:

- Article 6 was consistent with the approach of the Convention but was also an improvement upon it as it aligned the choice of law rule with the jurisdictional rules of the Brussels I Regulation; and

- Article 6 provided sufficient flexibility to meet the key concern that where mortgage lenders lend to customers across Member State borders, the loan contract and associated documentation relation to the security on the property should be subject to the same law, and that this law should be the law applying in the State where the property is situated.

Article 7 - Insurance contracts

Article 7

Insurance contracts

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (2) shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

Article 7 (continued)

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) *by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance*.

5. *For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.*

6. *For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.*

62. Choice of law in relation to insurance is currently covered by both the Rome Convention (for direct insurance risks situated outside of the Community and all reinsurance risks) and the Insurance Directives (for direct insurance risks situated within the Community). The original Commission proposal on Rome I envisaged that insurance should be dealt with in broadly the same way as under the Convention.

63. During negotiations on the Regulation, a proposal was made to include insurance in Rome I. This proposal was made at the request of a number of Member States who wished to see the subject covered comprehensively in

64. With no impact assessment carried out in this area, the UK Government conducted a consultation with UK stakeholders who indicated that there was no pressure from consumers or the market to change the choice of law rules. It was also their view that any change would bring about transition costs. Stakeholders also noted that the legal framework in relation to insurance was complex and combined complexity with inflexibility. Nevertheless, it was clear that before any change could realistically be made, a cost benefit analysis would need to be undertaken and any new rules would have to provide a significant improvement in certainty and predictability.

65. Compromise was reached in accepting a consolidation of the rules (ie those of the Directives and the Convention) in Rome I. The Government believes this has been achieved by the text of Article 7 which retains the substance of the current law and ensures that all the relevant applicable law rules are situated in one instrument. This will also help facilitate reform in this complex area of law at a future date. The Government regards this as a satisfactory outcome.

General comments made on Article 7

66. There were no specific questions raised by respondents to the consultation on the area of insurance that require response. There were, however, a number of general observations. These are as follows:

- it was acknowledged that the compromise reached on this provision by the Government was an acceptable outcome as it retained the fundamental principles of the Rome Convention, namely freedom of choice and legal certainty. It was suggested that the improved drafting of the text of the Regulation made it clearer and easier to understand. To comply with the Rome I Regulation, there would likely only be minimal compliance costs;

- consolidating the Directive rules into the Regulation represented a satisfactory outcome. It was envisaged, however, that there might be scope in future for aligning those rules more closely with the rest of the Regulation. It was also noted that the review required by Article 27(1) on insurance included the need for an impact assessment before any future amendment of the rules took place;

- it was acknowledged that earlier key concerns with this provision had now been addressed. Whilst the legislative process had been less than satisfactory, the transposition of the substance of the existing Insurance Directives to the Regulation could be supported. The revised legislation retained the freedom of contract rules inherent in the existing framework and maintained flexibility on the treatment of mass risks and compulsory insurance; and

- it was noted that reinsurance contracts were specifically excluded from Article 7. These would be covered by the general rules contained in Articles 3 and 4 of the Regulation.

Article 9 – Overriding mandatory provisions

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. *Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

67. Article 9(3) focuses on the discretionary application of certain rules of the country where a contract is to be or has been performed and which renders contractual performance unlawful. This provision, particularly because of the UK's reservation on the equivalent provision in the Rome Convention, was principal in the Government's decision in exercising its right under Title IV of the EC Treaty to opt out of the Regulation because of the legal uncertainty it posed.

68. The Government's assessment of Article 9(3) is that it represents a satisfactory outcome. It generally reflects the English law position in light of *Rali Bros v Cia Naviera Sota y Aznar [1920]* 2 KB 287and to that extent it is not thought likely to introduce any significant additional uncertainty into the law. It also constitutes an improvement in terms of legal certainty. It removes the current ambiguity as to whether the European Court of Justice would consider that the old English jurisprudence would continue to be applied under the Convention in light of the UK's reservation. In addition, the provision is formulated in terms that are sufficiently broad to cover situations of unlawful contractual performance where the applicable law is foreign. There is no such clarity under English law.

69. Article 9(3) also provides a uniform solution on this topic for the whole of the EU. This contrasts favourably with the situation under the Convention where no such uniformity exists. This should create greater legal predictability for British businesses in all cases where they are involved in contractual litigation in another Member State.

70. A number of points were made by respondents to the consultation on the practical effect of Article 9(3). The Government's response to these are outlined below.

Practical effect of provision

71. It was acknowledged by one respondent that the revisions to the Regulation had removed a number of areas of concern and it was now a considerable improvement on earlier versions of the text. However, they remained concerned that the practical effect of Article 9(3) was that supervening illegality would now be determined in accordance with the law of the place of performance and not the law of the contract, which would be a change to the position under English law. The respondent considered that the use of the word "may" would allow courts discretion as to when to apply overriding mandatory provisions and this would add to the uncertainty on the enforceability of contracts.

72. Another respondent anticipated that the definition in Article 9 might cause problems from two perspectives. First, Article 9 did not embrace the Rome Convention definition of mandatory rules. Secondly, the provision seemed to introduce new concepts under the label "overriding mandatory provisions". This could lead to confusion, particularly amongst those familiar with the Rome Convention definition of mandatory rules.

73. Commenting on the inclusion of the word "may" in Article 9(3), one respondent envisaged that the courts would have discretion when deciding whether or not to apply overriding mandatory provisions, but was of the view that the extent of this discretion was not clear. The respondent remarked that it would be interesting to see how the new importance of the place of performance played out before the English courts.

Government response:

74. The Government has considered the points raised on Article 9(3) but remains of the view that the final provision represents a satisfactory outcome to the negotiations. There are two reasons for this:

- first, the only aspect of Article 9(3) which differs from English law is the level of discretion that can be given by courts to contractual obligations that have been, but did not have to be, performed in a place where performance was unlawful. For example, if a payment was made in a place where either the payment or the fact of the payment was illegal, this could be resolved by ensuring that performance in relation to financial obligations was made in a country where they were legal. If the obligation was to make a payment, then the place of payment could in most cases be changed to one where the payment was lawful. Analysis suggests that even this in itself is unlikely to have any significant impact on the UK. Indeed it is possible that the effect on contracts may even be less than existing English law; and

- second, the concerns expressed by the respondent do not appear to be shared by others. Some respondents have made reference to Article 9(3) suggesting that it is less than ideal. Nevertheless, they agree that overall it appears less problematic than the Convention particularly in the context of litigation in the English courts. Others have stated that there may be some limited uncertainty as a result of the wording of the provision, whilst others suggest that although reservations in legal opinions on contract may need

some adjustment, overall the substance would not be much different. The respondents making these views have clearly stated that these concerns are not sufficient reason in themselves for remaining outside the Regulation.

75. On mandatory rules, the Government does not believe that there is anything in this provision which either severely restricts the application of mandatory provisions or expands their scope. Although Article 9 may be more restrictive in some sense than the Convention, overriding mandatory provisions continue to relate to a restricted number of laws which are important to a Member State in terms of protecting their public interests.

General comments made on Article 9

76. In addition to the questions raised, two other respondents made general comments on Article 9(3) that did not require response. These were:

- it was acknowledged that Article 9(3) represented an improvement on Article 7(1) of the Convention on which the UK and several other contracting states understandably made a reservation; and

- although there may be reserved concerns about Article 9(3), these concerns were outweighed by the benefits of participating in an EU-wide choice of law regime.

Article 14 - Voluntary assignment and contractual subrogation

Article 14

Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

77. Article 14 deals with the issue of assignment, including in particular transactions that involve the assignment of debts contained in financial instruments. For example, under a financial contract governed by one law, a debtor undertakes to pay his creditor a sum of money. Under a later contract, governed by another law, the creditor assigns their right under the first contract to a third party.

78. The functions of Article 14 include identifying the law which regulates the legal relationship between the creditor and the third party and determines whether there is a valid contract of assignment between the creditor and that third party, the rights of those parties under that contract, whether they have complied with it and, if its terms have been breached, what remedies are available. The Article also identifies the law that will determine whether the creditor's rights are assignable under the first contract, and if so, under what conditions. The wide range of issues covered by this Article explains the critical importance for the financial markets that the rules are satisfactory.

79. Subject to some minor changes in drafting, Article 14(1) and Article 14(2) reflect the substance of the equivalent rules in the Rome Convention (Articles 12(1) and 12(2)). The Government considers that these provisions are satisfactory.

80. A further rule in this area to regulate the priority of successive assignments in respect of third parties will form part of a review to be carried out by the European Commission under Article 27(2) of Rome I. This review is to be completed by 17 June 2010. Currently, there is no equivalent rule in the Rome Convention; national law currently governs this matter. Nonetheless there is a desire to find a solution. In light of the importance of this area to the UK's financial sector, the Government intends to engage constructively with the review process and will consult fully with expert stakeholders in the field.

81. In terms of the consultation, respondents raised points on Recital 38 and generally on Article 14 as a whole. The Government's response to the points raised are set out below.

Recital 38

82. One respondent commented that Article 14 was, in substance, the same as Article 12 of the Rome Convention. As such, this was not objectionable. The interplay between Article 14 and Recital 38 was of particular interest, given market discussion of the meaning of Recital 38 and the importance generally of Recitals to a European law instrument in assisting in its interpretation. The respondent deduced that Recital 38 simply meant that issues such as the form of an assignment or the assignor's capacity could not be characterised as proprietary and would therefore fall outside Article 14. It was also felt that Recital 38 was largely directed at legal systems that take account of proprietary issues and impose requirements as to the form of property transfers. The respondent enquired whether the Government was satisfied that even though the UK's proposal of codifying the position in *Raiffeisen Zentralbank Strerreich AG v An Feng Steel Co Ltd* [2001] EWCA Civ 86 in Article 14 was not implemented, Recital 38 did not, at least, conflict with that case.

Government response

83. The Government agrees that the effect of the decision in the *Raffeissen* case, in particular its ruling as regards issues concerning the priority of successive assignments and their effectiveness against third parties, has not been explicitly incorporated into Article 14. It considers that, although Recital 38 is not inconsistent with that ruling, there is uncertainty as to whether the European Court of Justice would, like the Court of Appeal in relation to Article 12 of the Convention, decide that such issues fall within the scope of Article 14. It may well be that the European Court of Justice would decide that such issues should fall outside that scope and therefore under the national laws of the Member States.

General queries raised on Article 14

84. Deletion of the Commission's provision on the issue of whether an assignment could be relied on as against a third party should be governed by the law of the assignor's habitual residence had been warmly welcomed by UK stakeholders. However, one respondent noted that this was to be reviewed by the Commission within 2 years of the Regulation coming into effect and could give rise to concern. It had been understood that in the event of a proposal from the Commission, the UK could exercise its opt out. The respondent considered that the review would be of considerable importance as it would provide a further opportunity to persuade our European partners of the merits of the UK law provision and so create consistency across Member States.

Government response

85. The Commission's review of this area is expected to be completed by 17 June 2010. In light of the importance of this area to UK's financial sector, the Government intends to engage constructively with the review process. To that end, the Government will be consulting with expert stakeholders in the field early next year so that appropriate submissions are made to the Commission during their deliberations. In the interests of maximizing legal certainty, every effort will be made to ensure that, at the end of this review, there is an appropriate uniform rule that will operate throughout the European Union. As rightly stated, if any rule devised is unworkable or is likely to have a significant adverse economic impact on UK markets, then the UK could exercise its right under the Protocol to Title IV of the Treaty to opt out.

Article 27 – Review clause

> ***Article 27***
>
> ***Review clause***
>
> *1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:*
>
> *(a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and*
>
> *(b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.*
>
> *2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.*

86. Article 27 commits the European Commission to undertake a number of reviews and, if appropriate, produce proposals to amend the Rome I Regulation. The reviews cover:

- a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and
- a review of the application of Article 6, in particular in terms of consumer protection.

Both these reviews are to be completed by 17 June 2013.

87. In addition, the European Commission is committed to carrying out a review on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. This review is to be completed by 17 June 2010.

General comments made on Article 27

88. Respondents to the consultation did not raise any particular points on Article 27 which required response by the Government. The points made were general observations. These are as follows:

- it was noted that Article 27 required the Commission to carry out a number of reviews, particularly in relation to insurance contracts; consumer contracts and assignment or subrogation of a claim against third parties; and

- given the inclusion of Article 27 of the Regulation which required the Commission to report on the application of the Rome I Regulation five years after its adoption, support for the UK's participation in the Regulation could be given;

- it was noted that various reviews would be carried out which included "a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any". This would provide a welcome opportunity to reflect on the new regulatory regime after it had been given sufficient time to operate in the market.

Other comments received from respondents

89. Respondents to the consultation raised a number of points which did not necessarily relate to any specific Article within the Regulation. The points made, and the Government's response to them, are set out below.

Lack of an impact assessment

90. Concern was expressed about the Commission's overall handling of this Regulation and the approach they had taken to drafting, without an appropriate impact assessment.

Government response:

91. The Government agrees. Indeed, it was a point made frequently during negotiations as well as to the Commission directly.

Insurance provisions not applying to Denmark, Iceland, Liechenstein or Norway

92. One respondent commented that while the Regulation would not apply to Denmark, Iceland, Liechtenstein or Norway, the choice of law provisions in the insurance directives did apply to these countries. It was hoped that steps would be taken to amend the directives to ensure that the same rules applied across the EEA (European Economic Area) to insurance.

Government response:

93. The Insurance Directives provide for the application of the law of the Member State of the risk as a presumption for risks situated inside the EEA. Under

Article 4 of the Rome Convention, the result would be the application of the law of the habitual residence of the insurer. In amalgamating the rules of the Insurance Directives and the Rome Convention in the Rome I Regulation, the *status quo* position could not be completely retained but this did not attract any criticism during negotiations. The Regulation does, however, provide for a closest connection provision (Article 7(2)).

Denmark

94. While establishing uniformity across Member States was desirable, one respondent noted that this would not be entirely possible as Denmark would continue to be excluded. Another respondent had a similar point, stating that while there might be a benefit in alignment of the law between the UK and other Member States, Denmark remained outside the Rome I Regulation.

Government response

95. Denmark has four opt outs relating to the introduction of the Euro, defence policy, union citizenship and justice and home affairs matters. The Rome I Regulation falls under the latter category. As a result, Denmark does not take part in justice and home affairs matters, nor participates in the adoption of acts or is bound by them. Denmark's opt outs cannot be changed without Danish consent and will be maintained for as long as Denmark wishes. In November 2007, the Danish Government announced its ambition to put the opt outs to a referendum in the course of its present four year term. The ambition has been confirmed by the Danish Prime Minister on several occasions but a referendum date is yet to be announced.

Opting in - Future EU dossiers

96. One respondent was of the view that the outcome of the negotiations vindicated the Government's decision not to participate in the Regulation at the outset and had resulted in the United Kingdom being better able to influence the final outcome. They felt this should be borne in mind for future cases where a decision had to be made on whether or not to participate in proposed legislation under Title IV.

Government response:

97. The Government will continue to consider carefully, in conjunction with key stakeholders, the advantages, disadvantages and impact of any proposed new legislation from the European Union. The Government has to take into consideration the overall benefit of any legislation for UK citizens and businesses and what impact it will have on the UK economy.

European Court of Justice's interpretation of the Regulation

98. One respondent anticipated that the European Court of Justice's interpretation of the Regulation might lead to strictures being placed on contracting parties which UK businesses would not want.

Government response:

99. The Government cannot predict what the European Court of Justice's view may be on such matters but any view taken will apply uniformly to all Member States. As the Regulation is fairly close to that of the Convention, it is likely that any interpretation that would apply would be consistent with that of the Convention.

Legal Diversity

100. One respondent suggested that a choice of law solution, however uniform and well devised throughout Europe, did not necessarily fully answer the problems posed by legal diversity within the EU. The respondent envisaged that there would still be cases under Rome I where UK firms actively seeking to do business in many EU Member States would have to investigate many different sets of laws or take risks. The respondent considered that further harmonisation of EU contract laws seemed necessary, and the idea of an EU optional instrument containing a neutral set of uniform rules which parties could opt to have governing their contracts was also well worth pursuing.

Government Response:

101. The Government is concerned about EU harmonisation of national contract laws and is not in favour of such a route being taken. The Government is, however, participating in the European Commission's work aimed at increasing the clarity and coherence of EU legislation in the area of contract law through the development of a Common Frame of Reference (CFR). The Government considers that the Common Frame of Reference for European Contract Law (CFR) could:

- be a useful tool to improve the quality and coherence of European legislation in the field of contract law;
- it should be a non-binding legislative guide or toolbox for the European legislator and NOT a putative European contract law code; and
- should respect all the diverse legal traditions of Member States.

102. The Government also considers that the CFR should be drawn from a wide variety of sources and should be prepared in accordance with Better Regulation principles by identifying the problems to be addressed before proposing solutions.

Conclusion and next steps

103. The Rome I Regulation provides EU wide uniform rules to determine the law applicable to contractual obligations. Thirty seven responses were received to the consultation and all but one agreed with the Government's recommendation that the UK should now participate in the Rome I Regulation.

104. The majority of respondents to the consultation were of the view that, given the satisfactory outcome of the negotiations, there was an advantage to British business if the rules determining the governing law were uniform throughout the EU. Aligning UK law in this respect to that in the rest of the EU would reduce legal expense and transaction costs. In addition, some respondents expressed the view that our original decision to opt out of the Regulation had helped to achieve the final positive result. However, they also made the point that if the UK did not participate in Rome I now, having achieved such a good result, it could significantly weaken the effectiveness of our right to not participate in future and damage our negotiating strength in relation to other EU dossiers.

105. As a result of the positive response to the consultation, the Permanent Representative to the United Kingdom in Brussels wrote to the European Commission and giving notice of the United Kingdom's intention to participate in the Rome I Regulation. The European Commission adopted a decision to extend the application of the Rome I Regulation to the United Kingdom on 22 December 2008. The Ministry of Justice, the Department for Finance & Personnel (Northern Ireland) and the Scottish Executive will shortly progress implementation planning for the Regulation. The UK will be required to implement the Regulation by 17 December 2009.

106. By opting in to the Regulation, it shall be binding and directly applicable to the UK. The Regulation will apply to the UK (England, Northern Ireland, Scotland and Wales) and also to Gibraltar. The UK's participation in the Regulation does not, however, undermine the UK's future use of the Protocol to Title IV of the EC Treaty.

107. Article 27 of the Rome I Regulation proposes reviews in relation to insurance, consumers and assignment which could result in new amending proposals. The UK can decide, once the Commission has issued an amending proposal, whether to bound by it. It remains the Government's intention, however, to engage constructively with the review process. To that end it will consult fully with experts in the field so that appropriate submissions can be made to the Commission during its deliberations. The first review will be on the area of assignment and subrogation. The European Commission is required to complete their review by 17 June 2010. As this is a particularly important area for the UK, and in the interests of maximising legal certainty, every effort should be made to ensure that at the end of the Commission's review there is an appropriate uniform rule that will operate throughout the European Union. The reviews on insurance and consumers are due for completion by 17 June 2013.

Consultation Co-ordinator contact details

If you have any complaints or comments about the **consultation process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 3334 4496, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
102 Petty France
7th floor Zone B - 7.14
London
SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 6.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

Academic Sector

Professor Adrian Briggs – University of Oxford

Professor Eric Clive – University of Edinburgh

Professor Elizabeth Crawford and Dr Janeen Carruthers – University of Glasgow

Professor Jonathan Hill – University of Bristol

Professor Robin Morse – King's College, University of London

Commerce, Finance and Insurance Sectors

Jan Babiak – Ernst and Young LLP

Hugh Bailey – British Exporters Association

David Baker and Hugh Hurst – International Group Of Protection and Indemnity Clubs

Peter Beales – London Investment Banking Association

Charlotta Blomberg – Confederation of British Industry

Roger Brown – British Bankers' Association

James Dalton – Association of British Insurers

Clare Dawson – Loan Market Association

Lindsey Dolton – Lloyd's

Paul Double, City Remembrancer – City of London

John Grout – Association of Corporate Treasurers

Andrea Harris, WPP – GC100 Group (General Counsel 100 Group)

Andrew Heywood – Council of Mortgage Lenders

Christopher Jones – International Underwriting Association

Robin Nott – Licensing Executives Society (Britain and Ireland)

Nelson Ogunshakin – Association for Consulting and Engineering

Peter Werner and Edward Murray – International Swaps and Derivatives Association

Lord Woolf, Chairman – Financial Markets Law Committee

Consumer Organisations

Ron Gainsford and David Sanders – Trading Standards Institute

Nijole Zemaitaitis – Office of Fair Trading

Legal Sector

Andrew Dickinson – Clifford Chance LLP

Angela Fox – Law and Practice Committee of the Institute of Trade Mark Attorneys

Richard Gwynne – Stephenson Harwood

Joanna Hughes – Allen and Overy LLP

Giles Hutt – Lovells LLP

Andrew Laidlaw – Law Society of England and Wales

Robert Leeder – City of London Law Society

Kate Menin – Addleshaw Goddard LLP

Tolek Petch – Slaughter and May

Alasdair Poore – Chartered Institute of Patent Attorneys

Fergus Randolph – Law Reform Committee of the Bar Council of England and Wales

Transport Sector

Donald Chard – British Shipping Organisation

Annex B

REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 17 June 2008

on the law applicable to contractual obligations (Rome I)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee←

Acting in accordance with the procedure laid down in Article 251 of the Treaty ↑

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial co-operation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial co-operation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters →. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

← OJ C 318, 23.12.2006, p.56
↑ Opinion of the European Parliament of 29 November 2007 and Council Decision of 5 June 2008
→ OJ C 12, 15.1.2001, p1

(5) The Hague Programme **(4),** adopted by the European Council on 5 November 2004, called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations (Rome I).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters **(5)** (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) **(6).**

(8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

(15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations **(7)** (the Rome Convention), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

(4) OJ C 53, 3.3.2005, p. 1.
(5) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).
(6) OJ L 199, 31.7.2007, p. 40.
(7) OJ C 334, 30.12.2005,p.1

(16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.

(17) As far as the applicable law in the absence of choice is concerned, the concept of 'provision of services' and 'sale of goods' should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.

(18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments∩ regardless of whether or not they rely on a central counter-party.

(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term 'consignor' should refer to any person who enters into a contract of carriage with the carrier and the term 'the carrier' should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

∩ OJ L 145, 30.4.2004, p.1. Directive as last amended by Directive 2008/10/EC(OJ L 76, 19.3.2008, p.33).

(24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities'. The declaration also states that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

(26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) **(9),** should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

(27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights *in rem* in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (**10**).

(9) OJ L 375, 31.12.1985, P.3. Directive as last amended by Directive 2008/18/EC of the European Parliament and of the Council (OJ L 76, 19.3.2008, p.42).

(10) #OJ L 280, 29.10.1994, p.83

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.

(29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, *inter alia*, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

(30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

(31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (**11**).

(32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.

(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.

(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services **(12).**

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.

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(11) OJ L 166, 11.6.1998, p. 45.
(12) OJ L 18, 21.1.1997, p. 1.

(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

(37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.

(38) In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term 'relationship' should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

(39) For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.

(40) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) **(13).**

(41) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(42) The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.

(13) OJ L 178, 17.7.2000, p.1.

(43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.

(44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.

(45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

   It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

   (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;

   (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;

   (c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

   (d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

   (e) arbitration agreements and agreements on the choice of court;

   (f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

   (g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;

   (h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

   (i) obligations arising out of dealings prior to the conclusion of a contract;

   (j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance **(1)** the object of which is to provide benefits for employed or self-

(1) OJ L 345, 19.12.2002, p.1. Directive as last amended by Directive 2008/19/EC/ (OJ L 76. 19.3.2008, p.44)

employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.

4. In this Regulation, the term ‘Member State’ shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

Article 2

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II

UNIFORM RULES

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

   (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

   (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

   (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

   (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

   (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

   (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

   (g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

   (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Article 5

Contracts of carriage

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

   The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

   (a) the passenger has his habitual residence; or

   (b) the carrier has his habitual residence; or

   (c) the carrier has his place of central administration; or

   (d) the place of departure is situated; or

   (e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

Article 6

Consumer contracts

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

   (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

   (b) by any means, directs such activities to that country or to several countries including that country,

   and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

   (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;

   (b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours **(1);**

   (c) a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

   (d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

   (e) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

Article 7

Insurance contracts

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance **(2)** shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

(1) OJ L158, 23.6.1990, p.59.
(2) OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective

exercise of freedom to provide services **(1)** and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1) (g) of Directive 2002/83/EC.

Article 8

Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

(1) OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2005/14/EC of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 14).

Article 10

Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 11

Formal validity

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

   (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and

   (b) those requirements cannot be derogated from by agreement.

Article 12

Scope of the law applicable

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:

   (a) interpretation;

   (b) performance;

   (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

   (d) the various ways of extinguishing obligations, and prescription and limitation of actions;

   (e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

Article 13

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 14

Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Article 15

Legal subrogation

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 16

Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

Article 17

Set-off

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

Article 18

Burden of proof

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER III

OTHER PROVISIONS

Article 19

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

   The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

Article 20

Exclusion of *renvoi*

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

Article 21

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 22

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 23

Relationship with other provisions of Community law

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

Article 24

Relationship with the Rome Convention

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

Article 25

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 26

List of Conventions

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the *Official Journal of the European Union*:

   (a) a list of the conventions referred to in paragraph 1;

   (b) the denunciations referred to in paragraph 1.

Article 27

Review clause

1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:

   (a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and

   (b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.

2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

Article 28

Application in time

This Regulation shall apply to contracts concluded after 17 December 2009.

CHAPTER IV

FINAL PROVISIONS

Article 29

Entry into force and application

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*. It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 17 June 2008.

For the European Parliament	*For the Council*
The President	*The President*
H.-G. PÖTTERING	J. LENARČIČ

Partial Impact Assessment Summary: Intervention & Options		
Department: **Ministry of Justice**	**Title:** **Partial Impact Assessment of the EU Regulation on the law applicable to contractual obligations (ROME I)**	
Stage: Final Proposal	**Version**: 4	**Date:** 1 July 2008
Related Publications: Ministry of Justice Consultation Paper 'Rome I – should the UK opt in?'		

Available to view or download at: http://www.justice.gov.uk/publications/consultations.htm

Contact for enquiries: Jean McMahon **Telephone:** 020 7210 0787

What is the problem under consideration? Why is government intervention necessary?

To consider whether the UK should participate in the Rome I Regulation. Only the Government can make this decision and request the agreement of the European Commission.

What are the policy objectives and the intended effects?

To establish choice of law rules in relation to contractual obligations that are no less favourable to UK business and consumers than the current rules in this area. The rules should provide sufficient party autonomy, appropriate protection for weaker parties and the requisite degree of legal certainty and predictability.

What policy options have been considered? Please justify any preferred option.

***Option 1*: Do nothing – remain outside the Regulation**

Option 2: ***To participate in the Rome I Regulation***. This is the preferred option. It will allow UK business and consumers to benefit from a single satisfactory set of choice of law rules. These rules will be applicable in all Member States of the European Union (except Denmark).

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The European Commission is required to report to the European Parliament, the Council and the European Economic and Social Committee, on the application of the Regulation within 5 years of its entry into force. The UK will contribute to this review. The UK will also participate in the studies and evaluations to be carried out on specific topics by the Commission pursuant to the Regulation.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Bridget Prentice

.....Date: **1 July 2008**

Summary: Analysis & Evidence

Policy Option: Participate in Rome I	Description: Opting in to the Rome I Regulation

COSTS

ANNUAL COSTS	
One-off (Transition)	**Yrs**
£ Minimal	0
Average Annual Cost (excluding one-off)	
£ Minimal	

Description and scale of **key monetised costs** by 'main affected groups'

The transition costs of familiarisation with the new Regulation for lawyers and businesses will be minimal, given that the Regulation is very similar to the Convention. Some business may be lost to UK law firms from foreign passenger carriers that can no longer choose UK law as applicable to their contracts. It is not possible to quantify these costs.

Total Cost (PV) **£ Minimal**

Other **key non-monetised costs** by 'main affected groups': None.

BENEFITS

ANNUAL BENEFITS	
One-off	**Yrs**
£ Nil	0
Average Annual Benefit (excluding one-off)	
£ Moderate	

Description and scale of **key monetised benefits** by 'main affected groups'

Opting in will avoid the costs associated with operating two legal regimes simultaneously. The improvements in drafting are likely to bring some benefits to cross-border contractors, including decreasing legal costs in the long term. It is not possible to quantify these benefits.

Total Benefit (PV) **£ Moderate**

Other **key non-monetised benefits** by 'main affected groups':
Non-monetised public benefits of greater legal certainty, clarity and uniformity.

Key Assumptions/Sensitivities/Risks There is a low-level risk that the European Court of Justice will adopt an unexpected legal interpretation of the Rome I provisions. However, this risk presently exists under the Convention. This assessment assumes the Commission and Council of Ministers accept the UK's participation.

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) £	**NET BENEFIT** (NPV Best estimate) £

What is the geographic coverage of the policy/option?	UK and Gibraltar
On what date will the policy be implemented?	September 2009 (TBC)
Which organisation(s) will enforce the policy?	N/A
What is the total annual cost of enforcement for these organisations?	£ N/A
Does enforcement comply with Hampton principles?	N/A
Will implementation go beyond minimum EU requirements?	No
What is the value of the proposed offsetting measure per year?	£ Nil
What is the value of changes in greenhouse gas emissions?	£ N/A
Will the proposal have a significant impact on competition?	No

Annual cost (£-£) per organisation (excluding one-off)	Micro **Nil**	Small **Nil**	Medium **Nil**	La rg
Are any of these organisations exempt?	No	No	No	No

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of	£ Nil	Decrease of	£ Nil	**Net Impact**	**£** Neutral

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Evidence Base (for summary sheets)

1. This impact assessment is an updated version of the assessment that accompanied the Ministry of Justice consultation paper 'Rome I – should the UK opt in?', published in April. Revision has been made to reflect the responses received to the consultation paper.

Proposal

2. The Government proposes that the UK should participate in the Rome I Regulation and, as a consequence, denounce the 1980 Rome Convention and repeal the relevant provisions of the Contracts (Applicable Law) Act 1990, which came into force in 1991. In December 2005, the European Commission published its proposal for the Rome I Regulation, the purpose of which was to update the Convention and include choice of law rules in a new Community Instrument. This proposal was the subject of extensive negotiations in the course of which the text was substantially altered. The outcome of the negotiations was that the Rome I Regulation broadly follows the 1980 Rome Convention. The instrument therefore preserves the benefits that currently exist in the Rome Convention, consistent with the UK's policy objectives in this area. The final Regulation continues to provide the same overall benefits as the Convention: party autonomy, legal certainty, flexibility and protection of weaker parties.

Background

3. Contracts are the basic legal building block of national and international commercial transactions. The law to which a contract is subject determines its meaning and effect. If there is uncertainty as to the identity of the relevant law or its content, confidence in the ready enforceability of the contract will be undermined. The 1980 Convention provides tried and trusted rules by which the applicable law can be determined.

4. The UK has a particular interest in the effect of choice of law rules because UK law, which delivers a high degree of certainty and clarity, is the international law of choice for international contracts, particularly in the financial field. The 1980 Convention is part of the legal framework that supports this activity, and any replacement rules must be no less advantageous to commerce.

The Rome Convention

5. The fundamental principle of the Rome Convention is that parties are able to choose the law they want to apply to their contract (party autonomy). While the Convention provides a body of harmonised choice of law rules, its application is not uniform among all its signatories. For example, seven Member States do not apply Article 7(1) of the Convention.[2] The Convention is generally considered to have been a success.

Commission's Rome I Proposal

6. The Commission's proposed Rome I Regulation was not a mere update to the Rome Convention, but included a number of substantive changes. In view of the possible adverse impact of these changes, the UK Government, having consulted stakeholders, decided not to participate in the proposed Regulation, but to nevertheless participate in negotiations. The principal areas of concern for the UK were aspects of the proposed rules on freedom of choice, applicable law in the absence of choice, consumer contracts, agency contracts, overriding mandatory provisions and assignment. Notwithstanding the UK's opt out of Rome I, the UK fully participated in negotiations.

Choice of Law in Practice

7. In most international contracts, the choice of law will be specified by a simple clause stating, for example, 'this contract is made subject to the law of England and Wales'. This may be complemented by an equivalent clause vesting exclusive jurisdiction in the courts of one country in the case of a dispute.

8. Choice of law is not a matter overseen by Government and is for the parties to determine. As the contract law of different countries can differ substantially, parties may negotiate extensively to determine which law will apply to a given contract. However, once a law has been settled upon, it is generally a simple matter to make that choice legally effective.

9. In the vast majority of cases under the Convention and, were it to apply, the Regulation, a simple clause will suffice to give the necessary legal certainty and commercial confidence for the parties to contract efficiently. Where there is substantial legal uncertainty, allowance must be made for

[2] Germany, Ireland, Latvia, Luxembourg, Portugal, Slovenia and the UK

difficulties with the enforcement of a contract. Consequently, legal uncertainty can affect the value of a contract as an asset.

Outcome of Public Consultation

10. The responses to the Rome I Consultation, which included an earlier version of this impact assessment, are overwhelmingly in favour of UK's participation in the Regulation and the Rome I rules applying to intra-UK cases. Of the 35 responses, 34 were in favour of opting in. The consultation also sought further evidence of the potential impact of Rome I in order to develop the impact assessment. However, very few specific remarks have been received. Where comments have been made, the impact assessment has been expanded to address concerns or provide additional details. The most substantial change is in relation to Article 6, which is now addressed in a separate section.

The Impact of Rome I

11. Rome I, while an advance on the Rome Convention in a number of respects, does not represent a radical change to the law in this area. Indeed, the UK elected not to participate in the Commission's proposal on Rome I because of concerns that it would cause significant damage to a system of law that already functioned well. However, through negotiation, a number of changes have been made to the final Regulation to bring it closer in effect to the Rome Convention. When the Rome I Regulation comes into force in other Member States, the Rome Convention will cease to operate as a uniform, Europe-wide set of rules. For such uniformity to continue, the UK would have to participate in the Regulation. If it does so, Denmark will be the only Member State to which the Regulation does not apply because of their opt out from all Justice and Home Affairs measures. The impact of Rome I, therefore, is as much about the costs of not opting in as the benefits of doing so.

Methodology

12. The purpose of this impact assessment is to consider the effect of the Rome I proposal. The relevant point of comparison for each option is the Rome Convention as it presently operates. As a result, a comparative methodology has been adopted which considers the Rome I Regulation against the baseline of the Rome Convention, rather than attempting to determine absolute costs or benefits, or comparing the Regulation against the earlier Commission proposal. While the final text of the Regulation is a significant improvement on the Commission's original proposal, a comparison undertaken on that basis would fail to take account of the fact that only two options are presently available. The comparative approach adopted, therefore, focuses on practical differences.

13. In comparing the two instruments, and assessing whether to participate, some further points should be noted. Irrespective of the UK's decision on whether or not to participate, the Regulation will apply in other Member States. This has a number of practical effects. UK businesses will need to address the Regulation as it applies in other Member States regardless of the regime applying in the UK. This is particularly relevant where European consumers bring actions in their home state, where the Rome I Regulation will apply.[3] Consequently, those involved in cross-border contracting will need to become familiar with the Regulation, and the costs of familiarisation will be incurred regardless of the UK decision. Finally, businesses presently enjoy the advantages of a single, uniform, Europe-wide set of rules, and those advantages will be lost of if the UK decides to remain outside the Regulation. In fact, businesses would incur the additional cost of dealing with two systems.

14. Given the extent of the similarities between the Regulation and the Convention, it is unsurprising that a comparative analysis reveals that the overall impact is slight. Many Articles retain the Convention system verbatim, whilst others alter its wording but not its effect. Moreover, as an analysis of policy goals demonstrates, the Regulation is built upon the same foundational principles as the Convention. It is only the provision on contracts for the carriage of passengers in which a difference is evident, and even then an initial comparison of commercial practice indicates the practical impact of the changes would be negligible. These similarities are positive, as the Convention has generally worked successfully for many years.

15. The Government has been unable to quantify monetarily the benefits and costs of opting in to the Rome I Regulation in this Impact Assessment. This is for a number of reasons:

- in the absence of identifiable changes in commercial practice, it has proved difficult to assess the amount of particular costs or benefits;
- choice of law rules are bound up with other aspects of contract law and not readily separable for statistical purposes; and
- choice of law rules form part of the contractual relationships between legal persons. There is therefore no separate and direct government burden to quantify.

These problems are exacerbated by the absence of key costings and supporting evidence from which a more detailed analysis might proceed. In particular:

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[3] Consumer are entitled to bring actions in their home state under the Brussels I Regulation: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

- no data exists on the current volume of cross-border contracts to which UK individuals or businesses are party; and
- no data is available on how often choice of law provisions are an issue in drafting or in litigation.

The costs of obtaining any reliable statistics in this area would have been disproportionate compared to the relatively minor changes that are being proposed by the Regulation. In the absence of general data on choice of law in contract and without evidence of change in commercial practice, descriptive measures of the effects of the Rome I Regulation have been adopted in the impact assessment.

16. We agree with the observation made by a number of stakeholders that Commission proposals in this area should have been accompanied by a full pan-European impact assessment. This impact assessment relates only to the United Kingdom's potential participation in the Regulation, and to the substantially revised final proposal. Therefore, we note that this impact assessment is not a substitute for those originally requested of the Commission. Nor does it remove the need for full and proper investigation of the impacts under any review of the Regulation.

Policy Goals

17. Given the similarities between the Regulation and the Convention, the impact of the Regulation is best assessed through policy themes, referring to Articles where necessary within each theme. Four themes are evident: party autonomy, legal certainty, flexibility and protection of weaker parties. In each case, the Regulation has either nil effect, or provides a small cost or benefit that is either non-monetised or very difficult to quantify. Given the particular sensitivity of Article 6, this is dealt with separately, though we reach the same conclusions.

18. One respondent to the public consultation suggested that an article by article analysis would have been appropriate for the impact assessment. This approach was indeed adopted in the consultation document. After consideration, we have maintained our original approach of focussing on policy themes. We feel the detail of an article by article analysis would have been inappropriate given the Regulation now so closely follows the Convention, and as a consequence, there is little impact. We are reassured in this conclusion by the generally supportive responses to the consultation.

Party Autonomy

19. Party autonomy is the principle that parties to a contract should be able to determine the law that will apply to that contract. An express choice of law clause is a standard term in commercial contracts, as it results in the greatest certainty as to the interpretation of the contract. In the absence of a good public policy rationale (for example, the need to protect weaker

20. Article 3 of the Rome I Regulation provides for party autonomy in the same fashion as the Rome Convention, subject to minor amendments for clear application. As a result, the impact on commercial practice will be negligible – in the vast majority of cases, parties will continue to be able to decide the law applicable to their contracts exactly as before.

21. In those cases where party autonomy has been limited, it is generally in the name of protecting weaker parties, and is considered below.

Legal Certainty

22. Legal certainty affects the value of contracts and the likelihood of litigation. Where legal rules are very clear, contracts are made with significantly lower risk of later difficulties, and parties are less likely to test legal rules in court.

23. The Rome I Regulation provides clearer rules than the Convention in a number of areas. Article 3 has been updated to clarify what constitutes a choice. Article 4 has been structurally revised so that its application is clearer. In the case of Article 4, this should help overcome the divergent styles of interpretation adopted in the courts of Member States. Article 19 provides a definition of habitual residence that makes the meaning of this concept clearer.

24. ***The accumulated impact of these changes is likely to be a small but unquantifiable decrease in legal costs.*** The market value of contracts will be maintained through continued confidence in their enforceability. Savings will be appreciable both for the parties to the contract and the courts of the Member State.

Flexibility

25. In some cases, the certainty of legal rules must be tempered by a degree of flexibility. The importance of flexibility is most apparent where parties have not exercised their freedom to choose the applicable law. While Rome I provides default rules, the inflexible application of these rules could sometimes lead to unexpected results that do not properly reflect the expectations of the parties.

26. Flexibility and certainty are balanced in the Regulation through the use of 'displacement provisions'. These operate to override the usual rules in certain circumstances. For example, Article 4(3) provides for a different applicable law where 'the contract is manifestly more closely connected with another country'. Similar provisions are included in Article 5(3) on contracts for carriage.

27. ***The impact of the Regulation on flexibility will be negligible***. The Regulation provides for reasonably flexible rules in the same fashion, and to the same extent, as the Convention.

Protection of Weaker Parties

28. Both the Rome Convention and the Regulation make clear that free party choice is not appropriate in all circumstances. This is particularly the case where one party, such as a consumer, is not in an equal position to bargain about applicable law.

29. In these cases, the rules on applicable law protect the weaker party by circumscribing party autonomy. A number of provisions in Rome I operate on this basis. For example, employment contracts under both the Rome Convention and the Rome I Regulation allow for choice of law, but not such that the protections under local law are removed. In a similar fashion, consumer contracts under the Convention and under the Regulation allow for choice of law, but not such that the consumer is deprived of protection under their own law. ***In the case of consumer contracts and employment contracts, the Rome I Regulation is equivalent to existing law and the impact will be negligible.***

30. Protection of weaker parties has also motivated a change in the rules applying to contracts for the carriage of passengers under Article 5. Under the Rome Convention, there were no special rules for the carriage of passengers, and unfettered choice of law applied as a result. That is no longer the case under the Regulation, which sets out a limited list of valid choices, including the habitual residence of the carrier or

passenger, the place of departure or destination, and the carrier's place of central administration.

31. The list of available choices was considered acceptable to the UK on the basis that it includes the place of central administration of the carrier, which is the law overwhelmingly favoured in contracts for the carriage of passengers. Ministry of Justice enquiries into carriage of passengers by ship and air revealed that all major UK operators that provided choice of law information publicly chose the law of their place of central administration.

32. To the extent the limitations have an effect on the UK, it will be by limiting the situations in which foreign carriers can choose UK law. Figures are not available on the extent to which this occurs, though there is no evidence that it is widespread. Nevertheless, in this limited field, ***there is a possibility of a small decrease in business directed to UK law firms by foreign carriers, resulting from a change in the choice of governing law***.

Article 6 – Choice of Law in Consumer Contracts

33. The Confederation of British Industry (CBI), in response to the consultation, suggested that the impact of Article 6 had not been fully considered. Ernst & Young LLP joined in the CBI response, and the Chartered Institute of Patent Attorney's voiced similar concerns, while the Licensing Executives Society (Britain and Ireland) wrote in support of Article 6(2) as revised. The Government shares the desire among stakeholders to ensure that the impact of Rome I is properly measured. We also share their concerns about the lack of such an assessment by the European Commission. This section has been inserted with the aim of allaying those concerns, and to explain in more detail the impact of the two options available in Article 6. Overall, we maintain that the likely impact of Article 6 will be negligible.

34. Article 6 is recognised as a key provision for business and consumers. Its impact, however, has little bearing on the question of whether the UK should participate in Rome I as its effects will be felt whether the UK adopts the Regulation or retains the Convention. The reason for this is straightforward – consumers who intend to bring an action for breach of contract are likely, for reasons of convenience, to do so in the country where they live. For example, a French consumer purchasing goods from England will be entitled to bring proceedings in the French courts, where the Rome I Regulation will apply. Remaining with the Rome Convention, therefore, will be of little or no benefit for UK businesses with regards to Article 6.

35. The CBI and a number of other groups have provided details of significant costs likely to result from Article 6. These costs, however, were based on the European Commission's original proposal, in which the law of the consumer's habitual residence would have been imposed on all consumer contracts. The concerns of CBI and others were well founded at that time but the position in the final Regulation has changed significantly. In particular, the revised regulation maintains the limited party autonomy for consumer contracts found in the Rome Convention.

36. Under the final Regulation, the law of the consumer's habitual residence will only apply where no choice of law has been made in the contract, and where the professional pursues commercial or professional activities in the consumer's country of habitual residence or directs activities to that country. The Government's view is that it is unlikely that a British business would engage in business directed at consumers in other Member States and fail to take advice on a choice of law clause in their commercial contracts. Where this does occur, however, it is not unreasonable for the consumer's expectations to prevail. We would also note that this is presently the case under Article 5(3) of the Rome Convention.

37. In most respects, Article 6 reflects the position under Article 5 of the Rome Convention. However, Article 6 does alter the wording of the qualifying conditions that entitle the consumer to greater protection. Article 5 of the Rome Convention refers to "advertising" whereas Article 6 of Rome I refers to "directing activities" by the professional. The Government recognises that the same ambiguities exist between the Convention and the Regulation but in the absence of any conclusive ruling from the European Court of Justice as to whether, and if so how, this latter requirement applies to sales over the internet, that uncertainty will remain. Given, however, the overall policy on consumer protection that underlies Article 6, it is likely that the European Court of Justice would interpret the concept as generally applying to e-commerce transactions. If this assumption is correct, then the application of the concept of "directing activities" under Article 6 of Rome I will not in itself result in significant change. We would note that under the Regulation, as under the Convention, there is an exception provided for services rendered exclusively in the service-provider's jurisdiction.

38. Under the Rome I Regulation, it will be necessary to consider the possibility that the mandatory rules of another country will apply (Article 6(2) of the Regulation). One consultee said that researching the mandatory rules of other Member States in this context might give rise to an additional burden for businesses. However, businesses are already required to comply with such mandatory rules under the Rome Convention (Article 5(2)). We believe therefore, that the Rome I Regulation adds no additional burden in this respect.

39. As a result of the analysis conducted for Article 6, the Government does not believe that opting in will prejudice any of the interests of British business or limit use of contracts with consumers in other Member States. Article 6 as it stands should not appreciably increase business costs. If such costs are incurred, they will be incurred irrespective of whether the UK opts in or remains outside the Convention.

Sectors and Groups Affected

40. All sectors and groups involved in international trade and commerce would be subject to Rome I, should the UK decide to participate. In particular, the rules would apply to:

- **the legal profession** – specialist lawyers or law firms working on international contracts;
- **financial sector** – any organisation involved in international contracting for financial purposes. This extends to trading in stocks and derivatives, insurance contracting, banking and related fields. The City of London has a particular interest. The City of London has, for example, more foreign banks than any other financial centre – over 250 of the 347 authorised banks in the UK are branches or subsidiaries of foreign banks.
- **enterprises of all sizes** involved in international business transactions or those contemplating new business links with overseas traders;
- **consumers involved in contracts**, such as those purchasing goods or services from abroad by contract, including over the internet; and
- **employees** – those who are employed on contracts which involve working abroad, such as those employed on ships that spend significant periods of time at sea or elsewhere in the world.

41. The manner in which private international law rules of this kind can affect some of these groups can be illustrated through a case study:

Choice of Law – A Case Study

A contractual relationship between an English company and a Spanish company breaks down. On consultation with their lawyers, the English company discovers that there is some legal ambiguity over whether early representations in negotiations constituted a choice of law, and over which law will apply if no choice has been made. If English law is not chosen, then the English company stands to lose £20 million. If there is a 10% chance that litigation will result in the application of English law, then the English company will litigate so long as their legal costs do not exceed £2 million. Moreover, should the two companies settle instead of litigate, the English company will offer 10% less than it would ordinarily, as a reduction based on their chances of winning any litigation.

In the case of litigation, the cost for both companies will be their legal costs - up to £2 million on each side (after which further litigation would be irrational) - and there will be costs for the courts in supporting protracting litigation. Courts in the London area cost approximately £18 million to maintain in the year ending 31 March 2008. If only 0.1% of that were spent supporting this litigation, it would amount to £18,000.

In contrast, if the English company took advice from their lawyers that there was only a 1% chance of English law being applied, then the company would only litigate to prevent the loss of £20 million if their legal costs were less than £200,000. In practical terms, this would mean that litigation would never occur. While the English company would thereby be forced to pay an unreduced amount to the Spanish firm, legal costs for both sides would be minimal, as there would be little motivation to litigate. Equally, the courts would not be required to support the litigation.

This very simple example fails to take into account a number of important variables, such as the award of legal costs and any ongoing relationship between the parties. Nevertheless, it indicates how, over many transactions and disputes, greater legal certainty in choice of law can result in reduced costs for parties and the courts.

Options

42. There are two options:

- to remain outside the Regulation by not opting in; or

- to notify the European Commission of the UK's intention to participate.

Option 1 – `Do nothing': Remain Outside the Regulation

The Current System

43. The UK is party, along with the other Member States of the EU, to the 1980 Rome Convention on the Law Applicable to Contractual Obligations. This has been implemented into UK law by the Contracts (Applicable Law) Act 1990, which came into force in 1991. The Convention provides a body of harmonised choice of law rules for Member States.

Benefits and Costs

44. The main advantage of remaining with the Convention is that nothing needs to be changed. Current legislation would remain intact.

45. Remaining with the Convention, however, could result in significant disadvantages. It could lead to a new and undesirable complexity for British business in having to operate two different sets of choice of law rules: one for proceedings brought in the UK (under the Convention) and another for proceedings brought in the courts of other Member States (under the Regulation).

46. The latter situation would arise whenever a British business finds itself involved in contractual proceedings in the courts of any other Member State (except Denmark, which is excluded under its own Title IV protocol). This would be particularly true in respect of Article 6 of the Regulation (consumer contracts) and does not aid better regulation. There would also be a disadvantage in that the UK would not benefit from those improvements in the Regulation that will bring greater clarity and legal certainty in this area of law. In particular, UK business would not enjoy any benefits arising from improved language, or from judgments of the European Court of Justice that are based on the Rome I Regulation.

47. Although there would not be any additional costs arising directly from the Convention, there could be additional costs in terms of operating two sets of choice of law rules. These costs are not easily quantifiable but would certainly affect the legal profession, the financial sector and small and medium sized enterprises.

Delivering this Option

48. No action would be required, as the current legislation would remain.

Option 2 – Participate in the Regulation

The Regulation

49. The aim of the Regulation is to convert the 1980 Rome Convention into an EC Regulation with updating where necessary. The intended result is to establish uniform choice of law rules within Member States that can be easily amended in the future. The European Court of Justice will have jurisdiction over interpretation, in order to facilitate the application of standardised conflict rules across all participating Member States.

Benefits

50. The Rome I Regulation will bring greater clarity and legal certainty. This is evident in a number of provisions:

- Article 3 on freedom of choice provides greater clarity in the application of rules while maintaining the necessary flexibility;

- a more simply structured Article 4 also represents an improvement on the Convention and brings the benefit of a more appropriate and reasonably predictable balance between the competing objectives of certainty and flexibility; and

- the positive rule now established under Article 9(3) enables its application in a uniform way across all Member States.

Overall, the Regulation offers an appropriate level of party autonomy. In addition, it provides appropriate protection for weaker parties, adequate certainty on the applicable law and an appropriate level of flexibility.

51. As it is a Community Regulation, it will be easier to modify Rome I in the future using the resources and mechanisms of the European Community than it would be to renegotiate the Rome Convention. As a result, the Regulation is better suited to future change, should it be necessary.

Costs

52. Costs to the legal profession, the financial sector and small and medium sized enterprises are likely to be minor adjustment costs as the new rules come into force and will be incurred whether or not the UK opts in. Moreover, the Regulation is likely to bring savings in the longer term due to the greater clarity and legal certainty it will bring. Foreign passenger

Delivering this Option

53. The Regulation will be binding and directly applicable if the UK elects to participate. In seeking to participate in the Regulation, the UK will need to request the permission of the European Commission. In the interests of consistency and simplicity, rules of national law which conflict with the Regulation would need to be replaced.

54. A comparison of the two options reveals that Option 2 (Participate in the Regulation) is preferable to remaining with the Rome Convention (Option 1 – do nothing). It brings benefits in terms of legal certainty and clarity, and would retain the benefits of Europe-wide uniformity. The relative net impact of opting in (removing costs or benefits that appear for both options) is expressed in the table below.[4]

Relative Net Impact of Opt-In	
Benefits	*Costs*
Europe-wide uniformity (except Denmark) Businesses and lawyers need to apply only one system for choice of law in contract Different choice of law regimes not an obstacle to trade with other Member States Greater clarity (e.g. Articles 3 and 4) Greater legal certainty (e.g. Article 4) Decrease in legal costs (due to certainty, clarity and uniformity) Greater capacity for future reform	Need for legislative change Small potential loss of business to UK law firms from foreign passenger carriers

[4] Adjustment costs will result from both options. Article 6 will apply as a result of both options.

Application within the UK

55. The Rome I Regulation leaves internal choice of law rules to be determined by Member States, reflecting the position under the Rome Convention. The Contracts (Applicable Law) Act 1990 applied the Rome Convention rules between jurisdictions internal to the UK, as well as with foreign jurisdictions, thereby ensuring a single set of choice of law rules throughout the UK. The policy established then has proven successful, and there seem to be no special reasons to apply a different policy under the Rome I Regulation. The analysis in this Impact Assessment regarding the benefits and costs of the Rome I Regulation is equally applicable to the question of whether or not to apply the Regulation to intra-UK issues. The Regulation would bring benefits of clearer wording and structure, as well as uniformity, if applied to cross-border choice of law issues within the UK. Accordingly, the Government considers that rules based on Rome I Regulation should be applied to intra-UK conflict of laws issues.

Small Firms Impact Test (SFIT)

56. Throughout negotiations, the Government has consulted with the Small Business Service and the Federation of Small Business. Their earlier concerns with the Commission's original proposal appear to be satisfied in the final text of the proposed Regulation.

57. Small and medium-sized enterprises (SMEs) would be at a particular disadvantage were the UK to remain outside the Regulation. Where those enterprises traded locally and in Europe, they would be forced to address two somewhat different sets of choice of law rules – the Rome Convention for proceedings that could be brought in local courts, and the Rome I Regulation for those that could be brought in foreign courts. Whilst larger enterprises would be able to absorb the costs of operating two systems, they may prove prohibitive for small firms. This could have a detrimental effect for small firms who pursue cross-border trade, presenting an obstacle to trade expansion in Europe.

58. In contrast, opting in should maintain lower costs in the longer term. The application of a European Union-wide system would ensure trade with other Member States continues to be simple for small and medium sized enterprises. We have considered the possibility that e-commerce trade by small firms may be particularly disadvantaged by the consumer provisions under the Rome I Regulation. This seems unlikely but we appreciate there is ambiguity in the law. This ambiguity also exists under the Rome Convention, and is unlikely to be resolved until the European Court of Justice makes a judgment on the issue. For these reasons, and given the fact that many foreign consumers will bring claims under the Rome I Regulation in other Member States, this uncertainty cannot be avoided.

59. The Rome I Regulation is not a measure from which SMEs can be exempted. It is an aspect of the general law of contract, and not an administrative burden imposed by Government. Maintaining a separate set of rules for contracts with SMEs would be unduly complex and unlikely to bring significant benefits. As the Regulation has been agreed and adopted, it is also now impossible for the UK to make special provision for SMEs.

Competition Assessment

60. The final text of the Rome I Regulation is very similar to the Rome Convention in terms of its impact on competition. The uniform application of the rules on applicable law should ensure that the Rome I Regulation provides a level playing field.

61. Failure to participate in could result in a comparative disadvantage for UK firms trading locally and in Europe. These companies, unlike their equivalents in other Member States would be required to address two sets of choice of law rules on a regular basis.

62. Opting in is unlikely to have any effect on competition. The same rules will be applicable throughout the European Union for all cross-border transactions. The rules have not changed significantly enough to have an effect on competition with States outside the EU.

Other Impacts

Legal Aid

63. We do not consider that the proposals will have any impact on legal aid expenditure.

Sustainable Development

64. Having read and followed the guidance, including the screening against the five principles of sustainable development, the Ministry of Justice is satisfied that there will be no impact on the environment.

Carbon Assessment

65. Having assessed this proposal against the DEFRA guidance on carbon assessment, the Ministry of Justice does not consider that opting in to the Rome I Regulation will have any effect on emissions of greenhouse gases. We have not, therefore, conducted a full carbon impact assessment.

Other Environment

66. This proposal has been screened against the DEFRA guidance on environmental impact and the questions on greenhouse gas emissions, climate change, waste management, air quality, landscape change, water pollution, habitat or wildlife and noise. The Ministry of Justice is satisfied that there are no significant impacts.

Health Impact Assessment

67. The Ministry of Justice has concluded that a health impact assessment is not necessary. The proposal will not have a significant effect on human health or have an effect on the wider determinants of health. In addition, it will not impact on the lifestyle-related variables provided in the guidance or on health or social care services.

Race/Disability/Gender Equality Assessment

68. On carrying out a screening exercise for race, disability and gender there was no evidence to suggest that opting in to the Rome I Regulation would have any specific race, disability, gender or equality effects. Consequently, the Ministry of Justice has decided that a full equality impact assessment is not required.

Human Rights

69. Having regard to the guidance on this specific impact test from the Cabinet Office, the Ministry of justice considers this proposal to be human rights compliant and will not result in any restriction of these rights.

Rural Proofing

70. Having screened this proposal against the rural proofing guidance, the Ministry of Justice considers that opting in to the Rome I Regulation will have no significant or different impact on rural areas.

Enforcement, Sanctions and Monitoring

71. The decision to participate or not does not require any specific enforcement, sanction or monitoring mechanisms. The Regulation will be applied by the courts on a case by case basis, where issues of applicable law arise.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

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