

Second consolidated version of a proposal to amend Articles 1, 3, 4, 5, 6 and 7 and 9 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations (Rome I), and Article 15 of Regulation 44/2001 (Brussels I). tenth, eleventh & twelfth meetings, Rome, 2000, Lund, 2001, Paris, 2002

A. If the Rome Convention on the law applicable to contractual obligations of 19 June 1980 is re-enacted as Community legislation,

I. Paragraphs 3 and 4 of Article 1 should be deleted.

II. A new provision should be inserted at the end of Article 3 (1), worded as follows:

“In particular, the choice of a court or the courts of a given State shall not in itself be equivalent to a choice of the law of that State.”

III. Article 3 (3) of the Convention should be supplemented by a new paragraph worded as follows:

“The fact that the parties have chosen the law of a non-Member State, whether or not accompanied by the choice of a tribunal of a non-Member State, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one or more of the Member States, prejudice the application of the mandatory rules which are contained in or originate in acts of the institutions of the European Community and which are applicable in a Member State whose law would be applicable in the absence of a choice of law by the parties.”

IV. Article 4 of the Convention should be replaced by the following:

“1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration.

However, if the contract is entered into in the course of that party’s trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

‘Characteristic performance’ means, in particular:

[...]

2. Notwithstanding the provisions of paragraph 1 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property, the contract shall be governed by the law of the country where the immovable property is situated.

Nevertheless, a tenancy of immovable property concluded for temporary private use for a maximum period of six consecutive months shall be governed by the law of the country where the landlord has his habitual residence or place of business, provided that the tenant is a natural person and has his habitual residence in the same country.

3. If the characteristic performance cannot be determined, the contract shall be governed by the law of the country with which it is most closely connected.

Nevertheless, if part of the contract is severable from the remainder and is more closely connected with another country, the law of that

country may, as an exception, be applied to that part of the contract.

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

V. Article 5 of the Convention shall be replaced by the following text:

“1. This Article applies to a contract the object of which is the supply of property, whether movable or immovable, or of services to a person (‘the consumer’) for a purpose which can be regarded as being outside his trade or profession, by a person who is acting in the course of his trade or profession (‘the supplier’).

2. The law applicable by virtue of Articles 3, 4 and 9 cannot deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence at the time of the conclusion of the contract, unless the supplier can establish that he was not aware of the country in which the consumer had his habitual residence, as a result of the conduct of the consumer.

The preceding paragraph does not apply:

- (a) when the consumer travels to the supplier’s country and there concludes the contract, or
- (b) when property or services were or ought to have been supplied in the country in which the place of business through which such supply was or ought to have been effected was situated,

unless, in either case, the consumer was induced by the supplier to travel to the aforementioned country to conclude the contract.”

VI. Article 6 (2) (a) of the Convention is replaced by the following text:

“2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

- (a) by the law of the country in which the employee habitually carries out his work in performance of the contract. The place where the work is habitually carried out is not to be regarded as having changed if the employee is posted for a limited period to work in another country. The conclusion of a contract of employment with an employer belonging to the same group as the original employer shall not exclude a finding that such a posting has taken place.”

VII. Article 6 of the Convention is supplemented by a paragraph 3, as follows:

“3. The foregoing provisions are without prejudice to the application of the mandatory rules of the law of the country to which the employee is posted as provided for by Directive 96/71 of 16 December, 1996, concerning the posting of workers in the framework of the provision of services.”

VIII. Article 7 of the Convention should be supplemented by a third paragraph worded as follows:

“3. Effect may only be given to the mandatory rules of a Member State to the extent that their application does not constitute an unjustified restriction on the principles of freedom of movement provided for in the treaty.”

IX. Article 9 of the Convention is amended as follows:

Paragraphs 1 and 2 are replaced by the following paragraph:

“1. A contract is formally valid if it satisfies the formal requirements of the law which governs it under [this convention] or of the law of the country where either of the parties is present at the time of the conclusion of the contract or of the law of the country in which either party is habitually resident at that time.”

Paragraph 3 becomes paragraph 2 and the expression “paragraphs 1 and 2” is replaced by the expression “paragraph 1.”

Paragraph 4 becomes paragraph 3 as follows:

“3. An 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 under [this Convention] governs or would govern the contract or of the law of the country in which the act was done or of the law of the country in which the person who effected the act was habitually resident.”

Paragraph 5 is removed.

Paragraph 6 becomes paragraph 4 and the expression “Notwithstanding paragraphs 1 to 4” is replaced by the expression “Notwithstanding paragraphs 1 to 3”.

B. Moreover, sub-paragraph 3 of the first paragraph of Article 15 of the Regulation 44/2001 of 22 December 2000 on jurisdiction and the enforcement of judgments in civil and commercial matters (the Regulation known as Brussels I) should be replaced by the following text:

“(3) in all other cases, when the contract has been concluded with a person (‘the supplier’) in the course of that person’s trade or profession unless the supplier can establish that he was not aware of the country in which the consumer was domiciled, as a result of the conduct of the consumer; this provision does not apply, however:

- (a) when the consumer travels to the supplier’s country and there concludes the contract, or
- (b) when property or services were or ought to have been supplied in the country in which the place of business through which such supply was or ought to have been effected was situated,

unless in either case, the consumer was induced by the supplier to travel to the aforementioned country to conclude the contract”