The Law Society of England and Wales EU Committee Response to Rome I Consultation on Applicable Law in Contractual Negotiations
LAW SOCIETY EU COMMITTEE RESPONSE TO THE COMMISSION’S CONSULTATION ON THE APPLICABLE LAW IN CONTRACTUAL NEGOTIATIONS (“ROME 1”)

INTRODUCTION

The Law Society of England & Wales (“The Law Society”) is the professional body representing the interests of its 100,000 solicitor members. It is responsible for regulating the legal profession and also carries out law reform and representational work. It is very active in the sphere of law reform. This includes EU matters, carried out through the Law Society’s EU Committee, which is composed of experts in the field of EU law.

In responding to Rome I, we have responded to most of the twenty questions posed by the Commission in its consultation document, other than those which deal with areas outside our remit.

The Law Society has consulted with its members on the issues at stake in order to be able to present an overall response that reflects the diversity of clients and issues that come before our members. Further, we organised a half-day roundtable in London at the end of April 2003 bringing together key stakeholders (principally practitioners, and two academics) in order to debate the related Action Plan on contract law, which touches on some common themes. We also consulted with a number of Law Society committees whose membership is made up of practitioners with considerable practical experience of the issues (e-commerce committee, consumer reference group, civil litigation committee and the EU committee). We have attempted to reflect their views in our submissions below.

EXECUTIVE SUMMARY

The Law Society is of the view that the Rome Convention of 1980 (“the Convention”) is in urgent need of updating. Already on its entry into force, some ten years after it was agreed, a number of its provisions were arguably in need of review, not least in the light of technological developments and the growth in e-commerce. The Law Society believes that there are areas that were initially excluded from the scope of the Convention, in particular arbitration, which should now be included. The Law Society also believes that the time is ripe to transform the Convention into a community instrument in order to ensure that the European Court of Justice (ECJ) is able to interpret and deliver rulings on the provisions of the Convention. Finally, the Law Society considers it is essential that work on the revision of the Convention is not carried out in isolation. In particular, due regard must be paid to the parallel work taking place on the Action Plan on contract law. It would also be useful if the Rome Convention could be mapped against related international Conventions such as the Hague Convention on private international law and the Vienna Convention on the international sale of goods.
Question 1

Do you have information concerning economic actors’ and legal practitioners’ actual knowledge of the Rome Convention of 1980 and of its rules, in particular the rule allowing parties to freely choose the law applicable to their contract? If you consider that such knowledge insufficient, do you think that this situation has a negative impact on the parties' conduct in their contractual relations or on court proceedings?

The Law Society is aware of firms that apply the Convention on a daily basis on behalf of their clients. The fundamental elements of the Rome Convention are taught to practitioners on the Legal Practice Course, a post-graduate vocational course which forms a compulsory part of the qualification process for solicitors in England and Wales. On this basis, the vast majority of legal practitioners should be aware of the freedom to choose the applicable law, although admittedly it is difficult to ascertain exactly how many are aware of this freedom. It would be regarded in many cases as incompetent for a lawyer to omit a clear choice of law when drafting a contract.

Question 2

Do you believe the Rome Convention of 1980 should be converted into a Community instrument? What are your arguments for or against such a conversion?

As the Green Paper correctly points out, the principal aim of the Convention is to improve the coherence of conflict of laws across the EU. However, maintaining the Rome Convention in the form of an international treaty may serve to undermine this objective. For example, it may now be appropriate to re-visit the question of whether certain Member States still feel it necessary to maintain reservations in relation to Articles 7 and 10. If not, then making all Member States subject to the same rules would certainly promote coherence.

The Law Society would favour the introduction of a Regulation. There seems no reason to deviate from the approach taken from the other principal conflict of rules instrument, the Brussels Regulation. A Regulation, given that it is directly applicable would provide homogeneity. A further key argument in favour of a Regulation, compared to an international Treaty, is that it then becomes much easier to amend and update in the future. This would facilitate adaptations such as those necessary to take into account for instance new forms of marketing products, such as over the Internet and any other such future developments. If it remains as Treaty it is far harder to review.

The Law Society believes that the possibility of rulings from the ECJ is a key advantage. Allowing such rulings was the intention of the Contracting States, who have signed a protocol on the Interpretation by the Court of Justice of the European Communities of the Rome Convention. Unfortunately, because that Protocol has not been ratified by the requisite number of states, it has not entered into force. Currently, therefore, the ECJ has no jurisdiction to interpret the Rome Convention. By turning the Convention into an EU instrument, it also becomes possible for national courts to draw upon the jurisprudence of the ECJ in applying the

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1 First Protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on the Law Applicable to Contractual Relations.
Convention. This could be useful, for example, in defining who is a “consumer” for the purposes of the Convention, as there may well be cases relating to the interpretation of the Unfair Consumer Contracts Directive\(^2\) upon which national courts can draw. Although the *acquis communautaire* may itself, on occasion, be self-contradictory, it would at least provide a common point of reference for national courts. This is a more unified solution than reference to national law alone. It would be unfortunate if the jurisdiction to refer were however limited to courts of final appeal as in the case of Regulation 44/2001.

On reflection, the Law Society sees no advantages in maintaining the Rome Convention as an international treaty, rather than as a Community instrument. It is submitted that the effectiveness of the Convention will be limited if it continues to take the form of an international treaty. There is a great deal of uncertainty surrounding the application and interpretation of the Convention. If, however, the Convention were to be maintained in its current form, we would suggest that the profile of the current Rome Convention website be raised\(^3\). The website is a very useful source of information about the Convention and we believe it would be particularly useful for courts to refer to the case database. This would facilitate the development of a more coherent body of jurisprudence.

**Question 3**

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

While it is true that there has been a growth in the number of Community instruments dealing with the question of applicable laws, it is important to keep this growth in perspective. The annex to the Green Paper lists only eight such instruments where the question of applicable law has been dealt with – so it is perhaps an overstatement to talk about a proliferation. That said, it is obviously unhelpful for practitioners, but even more so for consumers or business that the rules are dispersed throughout different instruments.

While it is desirable for rules on conflict of laws to be unified as far as possible, it is also important to remain realistic and to maintain an appropriate degree of flexibility. Each of the eight instruments mentioned has been enacted as a Directive. There are possibly good reasons why this is the case – for example, in the case of the insurance Directives, this has been done to allow each Member State to take into account the modalities of its own national industry. Before the EU decides to embark upon the project of codifying the rules laid down in the *acquis* it is important to weigh the perceived advantages against the cost of reduced flexibility.

In order to evaluate the merits of codification, we would find it very useful if the Commission could be more specific as to how it would do this. It is more likely to bring a significant benefit if all choice of law rules were set out in a single instrument.

In any event, codification would be a time-consuming process and this, being outside the scope of the project at hand, should not delay the process of converting the


\(^3\) Available at www.rome-convention.org.
An annex summarising the rules having an impact on the applicable law could be attached to the future Rome I instrument and could be a useful first step towards greater coherence. Such an annex should explicitly state, however, that it will be updated at regular intervals, and should direct the reader to an internet address where the latest version of the annex will be available (primarily to avoid the reader relying on an outdated hard-copy).

However, such an annex would not necessarily solve all problems related to anomalies contained in EU legislation – for example the applicable rules to insurance contracts concluded electronically. Listing both the insurance Directives and the e-commerce Directive does not aid the practitioner/consumer seeking to ascertain the applicable rules.

As updating the annex would be a fairly straightforward and technical process, it should not be subject to complex EC comitology procedures or inter-institutional consultations. This limited solution would at least assist practitioners/consumers seeking an overview of the rules.

Question 4

Do you think a possible future instrument should contain a general clause guaranteeing the application of a Community minimum standard when all elements, or at least certain highly significant elements, of the contract are located within the Community? Does the wording proposed at 3.1.2.2 allow the objective pursued to be attained?

The question aims to deal with problems relating to parties’ choosing the laws of third countries as a means of circumventing the mandatory rules of the Community. This problem was dealt with by the ECJ in the Ingmar Eaton case4. There, the EU-based agent and US-based principal had concluded a contract that was subject to Californian Law. The US-based principal sought to resist the application of the Commercial Agents Directive5, which gave the agent a right to compensation. Notwithstanding the parties’ choice of law, the ECJ held that because the contract to be performed was closely connected with the Community, Articles 17 – 19 of the Directive could apply.

As we understand it, the Community minimum standard would require the application of Community mandatory rules even if the parties had chosen the law of a third state as the applicable law to the contract. It has been argued that this approach has the advantage of preventing the evasion of consumer protection rules. However, we can foresee potential difficulties.

As the minimum standard would encompass “mandatory rules”, it would be important to be as clear as possible from the outset which rules qualify as mandatory. This issue is discussed in greater detail below (in response to Question 13).

Furthermore, the objection could be made that the minimum standard would limit further the parties’ freedom to contract and that imposing rules on third-country suppliers, theoretically at least, could be a disincentive to concluding contracts with EU undertakings, particularly as the minimum standard would be invoked to give protection in business to business contracts, where traditionally freedom of contract has been allowed to prevail.

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4 Case C-381/98. Decision of 9 November 2000.
5 Directive 86/653.
Question 5

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


We consider that an adequate way of doing this would be to follow the precedents in earlier EU Law Regulations, for example Articles 69-72 of Regulation 44/2001/EEC. This lists the instruments which were superseded by that Regulation, and those which remained in force unaffected.

One further point we would make is that the relationship between Articles 20 and 21 of the existing Convention may need to be clarified, insofar as Article 20 gives precedence to Community Law over the Convention, and Article 21 states that the Convention shall not prejudice the application to other Member States of other international treaties. In the event of conflict between those two provisions, which is to be given precedence?

Question 6

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

The Law Society fully supports the inclusion of arbitration agreements within the scope of the Convention. We acknowledge, as the Green Paper says, that international arbitration has been the subject of several discrete conventions. We do not agree though that this means there are no problems as a result and believe that instead it is necessary to ascertain how these Treaties work in practice: What is the scope of these Treaties and what practical results do they produce? More particularly, do they produce the same result as would the Rome Convention? Have the relevant Treaties been ratified by each of the EU-member states? Even if they have, have they been ratified in a consistent and coherent manner across the EU?

If arbitration were included within the scope of the future instrument, there should not be a conflict between this and the existing Treaties for two reasons. Firstly, as the Green Paper states, most of the existing Treaties deal with questions other than

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applicable law\textsuperscript{7}. Indeed, we ourselves are aware of international arbitration cases where parties have tried to invoke the conflict of law provisions of the Rome Convention. We feel that this in itself evidences that conflict of law issues are not dealt with comprehensively by other international instruments. Secondly, Article 21 of the Convention states that this shall not prejudice the application of other international Treaties.

The Law Society would remind the Commission that the original exclusion of “arbitration agreements” from the Convention’s scope was not intended to be a permanent solution, but rather arose due to the inability of the Working Groups to reach agreement on whether and how the Convention should govern arbitration agreements. The groups agreed to exclude arbitration temporarily in the mistaken expectation that the matter would be revisited at a later stage. It is worth pointing out that certain delegations at the time (including the UK) found total, permanent exclusion unacceptable, as in appropriate cases, this would mean that the whole contract, except for the arbitration agreement would be governed by the Convention.

In the original Working Group discussions on the Convention, one of the key arguments deployed against the inclusion of arbitration agreements was the existence of other international agreements devoted to this subject. We find this line of argument unconvincing. The Convention itself currently co-exists with other international agreements on conflicts of laws rules. As stated above the Brussels Regulation has a mechanism for clarifying its inter-relationship with other instruments. We consider that the current situation creates unnecessary uncertainty at present.

There seems to be no reason for the Convention to regulate all aspects of a contract, save for the arbitration agreement. Does this make a solution apparent in the event of litigation?

Moreover, it seems to us that the possibility should be excluded that an arbitration clause could be subject to a different applicable law to that governing the rest of the contract.

Furthermore, there are complications surrounding the scope of the exclusion in practice. For example, where the parties conclude an agreement for the law governing the procedure or cost of an arbitration on the effect of the award, it is not clear whether this would fall outside the Convention rules.

The conclusion of the Law Society is that the continued exclusion of arbitration agreements may be to the detriment of EU-based parties. There may be cases where an EU based party wishes the law of a Member State to apply to the contract, whereas a party based in a third country will wish for its home law to apply. It is unhelpful that the EU based party is unable to invoke the Rome convention – as this does not apply to arbitration agreements. There may be rules within the Rome Convention that the EU based party wishes to rely on, for example, if the characteristic performance of the contract has taken place in the EU. Admittedly, the characteristic performance rule may equally apply to the detriment of the EU-based

\textsuperscript{7} In fact, only the New York Convention on the recognition and enforcement of foreign arbitral awards reflects a choice of law rule in relation to arbitration agreements and only in relation to the context of enforcement of foreign awards. Article 6 of the Europe Convention on International Arbitration deals with this question, but has not been signed by all Member States, (see p.1202, Lawrence Collins et al. “Dicey and Morris The Conflict of Rules (Volume 2)”, 12\textsuperscript{th} ed. [1993], Sweet and Maxwell, London).
party where performance has taken place in a third country, but at least in these circumstances it is fairer for the law of the third country to apply.

The Law Society would also question whether there is a lacuna insofar as EC Commission Recommendation 98/257/EC on the Principles applicable to the bodies responsible for out-of-court settlement of consumer disputes provides that “In case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions applying under the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.”. Consideration should be given to whether this recommendation suggests the need for arbitration agreements to be brought within the scope of the Convention.

Finally, notwithstanding the exclusion, it seems that courts have, in certain cases, applied the Rome Convention to determine the validity of an arbitration clause – one example is the French case Société Château Tour Saint Christophe c/ Aström. In this case, a Swede had been taken on as sales promoter by a French wine company. The employment contract was concluded in Sweden in October 1991 and included a dispute resolution clause which provided for arbitration in Stockholm. The employee was then dismissed in October 1992. Notwithstanding the arbitration clause, he claimed for dismissal allowance before the French “Conseil des Prud'hommes”. Contesting the jurisdiction of the French court, the French company pleaded for the application of the arbitration clause. As stated in the case report:

“To decide whether the arbitration clause was valid or not, the French Court of Appeal applied the Rome convention according to which a contract is governed by the law chosen by the parties. As for article 6 (concerning individual employment contracts), it provides that in the absence of choice of law by the parties, a contract of employment shall be governed "... by the law of the country in which the employee habitually carries out his work in performance of the contract ....".

Accordingly, the court reached the conclusion that the arbitration clause should not apply. This case demonstrates that courts are sometimes motivated by a desire to protect the weaker party, even if it means not strictly adhering to the text of the Convention. This fact, and also the fact that other courts refuse to apply the principles of the Convention to arbitration agreements mean that legal certainty is being impaired.

**Question 7**

How do you evaluate the current rules on insurance? Do you think that the current treatment of hypotheses (a) and (c) is satisfactory? How would you recommend resolving the difficulties that have been met (if any)?


9 See http://www.rome-convention.org/cgi-bin/search.cgi?screen=view&case_id=376.

10 The Cour de Cassation has held that that arbitration clauses should be regarded as valid, whatever the nature of the contract, and therefore that the Rome Convention did not apply. (Civ., 1ère, 5th January 1999, "Zanzi", Rev. arb. 1999, 260, obs. Fouchard).
There are a number of points raised in the question, relating to each of three hypotheses. We will deal with each of the different hypotheses in order.

Firstly, regarding hypothesis (a), the Green Paper raises the question whether consumers are adequately protected where the risk is located outside of the European Union. In this situation, the Convention applies to the contract between the policy-holder and the insurance company. We would assume that, at least where the policy holder is based in the EU, the consumer’s home mandatory rules would apply by virtue of Article 5.

But if the policy is taken out in the EU, the various EC sectoral Directives prescribe the law to be applied. Broadly, the life insurance Directives\(^\text{11}\) lay down that life insurance policies are governed by the law where the policy-holder is habitually resident.

The non-life insurance Directives\(^\text{12}\) prescribe that the applicable law will be the law of the state in which the risk is situated, unless this is different from the country of which the policy-holder is a national, in which case the parties may also choose as an alternative the law of the latter.

For the purpose of the Directive, the state in which the risk is deemed to be situated shall be:

- For travel or holiday insurance, the country where the policy is taken out;
- For car insurance the country where the insured vehicle is registered;
- For property insurance relating either to buildings or to buildings and their contents (insofar as the contents are covered by the same insurance policy), the country where the property is situated, and
- In all other cases not covered by the above rules, the risk is deemed to be situated in the country of habitual residence of the policy holder.

As a derogation from these rules, the non-life insurance allows parties to choose the law of a different state if the law of the country where the policy is issued so permits.

The main criticism of hypothesis (b), like that of the insurance rules generally, is that it is complex and not transparent. We are aware that there are two opposing schools of thought on this issue – those who feel that a more consumer friendly solution would be to provide for the law of the consumer. On the other hand, there is a counter-argument that while these rules may be complex, the solutions they provide are logical and, in most cases, are in line with what the consumer would realistically expect. In both cases however, we do believe that more could and should be done to make the rules more transparent.

The Law Society also wishes to add that an annex which lists the relevant insurance rules would be a useful step towards greater coherence, but we submit that this would not solve all the problems related to lack of transparency. As we state above (in response to question 3), it should not be too difficult procedurally to keep such an annex up-to-date. We are aware though that an annex may not be the best mechanism for making consumers aware of the relevant legislation. The Commission should give some thought as to how this could be averted – perhaps by including an early reference to the annex in the relevant provision and/or a recital referring to the annex.

One aspect of the existing law which adds an element of uncertainty is the derogation within the non-life insurance Directive. The situation would be improved by including within the annex on insurance law a list of countries where this derogation takes effect.

Hypothesis (c) concerns the situation regarding the provision of insurance where the policy covers a risk inside the EU but the policy-issuer is based outside the EU. We take the Commission’s point that in practice, this hypothesis is not likely to be a problem, as the insurers are very likely to have an address for service within the EU. In practice, we believe that this situation will be rare in any event.

On the other hand, we are concerned by the interplay between the e-commerce Directive\(^{13}\) and the Insurance rules. Where insurance is sold over the internet, there seems to us to be a potential conflict between the e-commerce Directive (which stipulates that the applicable law will be that of the country where the service provider is based, the “country of origin” principle) and the insurance Directives, which, in most cases, state that the applicable law will be that of the consumer’s home state. Some clarity and/or guidance on the applicable rules would be very useful in practice.

**Question 8**

**Should the parties be allowed to directly choose an international convention, or even general principles of law? What are the arguments for or against this solution?**

It is essential for the freedom of choice of contracting parties to be maintained wherever possible. For that reason, parties should be allowed to choose the law applicable to their contract, whether this is laid down in a national system of law or an international convention (including, for example, the Vienna Convention on the International Sale of Goods).

Further, in the Law Society’s response to the Action Plan on contract law, we made the point that should the “optional instrument” referred to in that consultation be realised, parties should be entitled under the Rome Convention to choose this optional instrument as a valid system of law, albeit not a national system of law per se. The difficulty is that the optional instrument is unlikely to amount to a full system of law.

**Question 9**

**Do you think that a future Rome I instrument should contain more precise information regarding the definition of a tacit choice of applicable law or would conferring jurisdiction on the Court of Justice suffice to ensure certainty as to the law?**

Firstly, on this question, the Law Society would agree with the Commission that an amendment should be made to the French language version of the Convention, for “with reasonable certainty” in our opinion does not translate accurately as “de façon certaine”. These different language versions denote varying degrees of certainty. It

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is unsurprising, and perhaps inevitable, that this has led to a divergence of interpretation.

It appears to us that it would be useful for the Rome Convention to contain non-exhaustive criteria which a court may consider appropriate to apply in determining the tacit choice of applicable law. Such criteria could include past dealings of the parties (or an explicit choice of law in previous similar contracts), the choice of forum (with the presumption being the applicable law will be that of the country of the forum), and perhaps also the place where the contract was signed.

As we have stated elsewhere in this paper, it would be useful, and perhaps prevent injustice, if in difficult cases courts were to analyse the choice of law with reference to all relevant facts on an *ex post* basis up to the time when the cause of action, or subject matter of the dispute arose. This would prevent the stronger contracting party from manipulating Article 3(2) once the claim had arisen, *i.e.* by making the contractual relationship appear to have a closer connection with a particular country.

**Question 10**

Do you believe that Article 4 should be redrafted to compel the court to begin by applying the presumption of paragraph 2 and to rule out the law thus obtained only if it is obviously unsuited to the instant case? If so, how do you think it would be best drafted?

It is to be regretted, although in a sense understandable, that national courts on occasion have not followed the letter laid down in Article 4. We believe that this is one further aspect of the Convention where greater certainty should be introduced. It is helpful for everyone affected by the Convention to know how the court will reason in a particular case. This does not mean that the presumption should be strengthened, but merely that in the interests of uniformity, the court should follow the intentions of the Contracting States and to give reasons why it has chosen not to apply the presumption.

There are in our view no reasons to weaken the presumption contained in Article 4(2), as to do so would create more uncertainty. Although the concept of characteristic performance was innovative to some Contracting States at first, it was even then based on a long-standing concept from Swiss Law. Swiss Law had gone so far as to develop the concept of characteristic performance for different typologies of contracts. By now the concept has also been quite extensively discussed in the case law of each Contracting State. Insofar as further clarification may be needed or inconsistencies may arise, recourse could be had to the ECJ, assuming that the Convention is transformed into a Community instrument.

An amendment to the wording of the provision could help to resolve the problem. It would seem to us that some courts have gone straight to Article 4(5) as a result of the words “Subject to Article 4(5)”, which appear at the beginning of Article 4(2). We feel that the problem could be alleviated in part by the deletion of the words “Subject to Article 4(5)…”, which are in any case superfluous, given that Article 4(5) begins with the words “Paragraph 2 shall not apply if…”.

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14 Though there are examples of national courts finding the concept of characteristic performance and which party was to effect it to be a matter of some complexity: *Iran Continental Shelf Oil Co & Ors v IRI International Corp* [2002] EWCA Civ 1024, English Court of Appeal.
Comparably, under Article 6(2), courts are first to apply the presumption contained in that sub-section, but may ultimately depart from this under Article 6(4). There, it has not been deemed necessary to begin Article 6(2) with the words “Subject to Article 6(4).”

The situation may also be improved if, at the end of Article 4(5), the following was added “…provided always that before applying this article the national court shall give reasons why it has rebutted the presumption contained in Article 4(2).”

On the point of the clarity of drafting of the article, we would also wish to point out that Article 6 of the Rome Convention refers to Article 4 with the words “notwithstanding the provisions of Article 4. Article 4(2) then states “Subject to the provisions of [Article 4(5)].” We feel that such multiple cross-referencing is apt to confuse.

**Question 11**

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

We have no comments in relation to this question.

**Question 12**

A: How do you evaluate the current rules on consumer protection? Are they still appropriate, in particular in the light of the development of electronic commerce?

We would make the following observations:

Firstly, in relation to Article 4(2), where this applies in the case of selling through a website and there has been no express choice of law, the rule seems to imply that the applicable law shall be that of the law of the seller’s residence, head office, or principal place of business. Many practitioners advising on e-commerce law do not feel there is a compelling case for choosing any other system of law in such circumstances.

When the Law Society consulted practitioners, some of them expressed dissatisfaction with the current drafting of Article 5 on the basis that complexity is caused by applying foreign mandatory rules before a court. The general view was that dépeçage as a solution is unsatisfactory in many respects (see further comment on this below). It obviously is more costly for parties to obtain legal advice on foreign laws. National judges may struggle to apply correctly (and perhaps even understand) laws from another jurisdiction, which are likely to be drafted in a language which is not their own. Matters may be helped slightly if any new instrument were to make reference to the little used London Convention\(^\text{15}\), under which judges may request and exchange information from counterparts in other signatory states relating to their national laws.

One of the main problems of the existing approach, discussed in more detail below (in response to Question 13), is uncertainty among practitioners as to the meaning of “mandatory rules”.

Another problem is that there are different definitions of “consumer” under EU law and the Rome Convention. Under Article 2 of Council Directive 93/13/EEC on Unfair Contract Terms and Article 13 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters “consumer” means any natural person who is acting for purposes which are outside his trade, business or profession. Under the Rome Convention, on the other hand, for the purposes of Article 5, a person has to act “primarily” outside his trade or profession before he is treated as a consumer; and even then, if the other party was not aware that he was acting primarily outside his trade or profession, he is not treated as a consumer.

This test obviously has an element of subjectivity and clearly weights the rule in favour of the supplier. We would therefore suggest that this “subjective” element be removed, and that the definition of “consumer” under the Rome Convention be aligned with the definition contained in the Brussels Convention.

A common concern is that the provisions of Article 5(2) were drafted to take account of distance-selling techniques which have now become outdated, and should now be re-drafted. A member of our e-commerce committee considers that by virtue of Article 20, Article 5(2) of the Rome Convention on this point has been superseded by the E-Commerce Directive, and that if Rome is to become a Regulation, the two need to be brought into line. It would be helpful if it were clearer whether in 5(2) “advertising” through a website takes place everywhere or only somewhere (and if so, where): but it is more important to deal with this as a matter of substantive consumer protection law than as a matter of determining the choice of law, for which purpose the concept of where someone advertises is no longer a satisfactory test.

B. Do you have information on the impact of the current rule on a) companies in general; b) small and medium-sized enterprises; c) consumers?

No.

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

As to the specific proposed solutions put forward by the Commission, following Law Society consultations, there was no overall consensus but rather arguments for and against the different solutions.

On the one hand, many lawyers who practise in the area of consumer law would favour the application of solution (v), “systematic application of the law of the consumer’s place of residence”, which they believe would promote greater certainty, particularly for consumers.

On the other hand, this solution does come at a cost of uncertainty to the supplier, and could act as a disincentive to cross-border trade. It also involves throwing overboard much of the Convention’s finely calibrated solutions to the issues of freedom, protection and legal certainty. While the application of mandatory rules from a second system of law may be unsatisfactory, it may in fact be the only way to protect freedom of contract, promote trade, and grant adequate protection, for
example to consumers. As EU consumer law becomes more developed, the impact of mandatory rules should be reduced, and as Community trade expands the costs involved in unravelling such contracts should likewise diminish on the back of increased awareness. It is also worth remarking that in practice the systematic application of the consumer’s own law, while coming at a cost to suppliers, will not necessarily substantially improve the position consumers enjoy under the mandatory rules/dépeçage approach.

As regards solution (ii), some solicitors do consider it unsatisfactory that Article 5 excludes protection for the mobile consumer, i.e. a consumer who travels to a country other than that of habitual residence to make a purchase or receive a service. There is a concern that the development of distance selling methods, for example by way of e-commerce, has meant that certain of these contracts will fall outside the scope of Article 5. This is because, in order to determine whether or not a contract is within the scope of Article 5, it is always necessary to locate it in space by reference to an aspect such as advertising, the signing of a contract or the receipt of an order. In such circumstances therefore, the general conflict rules of Articles 3 and 4 will apply. This will in turn generally cause the law of the seller or service provider’s place of business to be applicable. This is because either the seller or service provider will often choose the laws of the country of his place of business under the provisions of Article 3. In the absence of choice, Article 4 provides that the laws of the country of domicile of the person effecting the essence of the contract will apply. In the context of a consumer contract, it will inevitably be the seller or service provider who will fulfil this role.

On the other hand, there are strong counter arguments from those who consider solution (ii) to be weighted unduly in favour of the consumer. For the supplier, this solution would in many cases render practically unknowable the law applicable to any contract. It could also seriously discourage suppliers from selling to known foreign customers (for example, where advice reveals that to do so could lead to the application of rules of strict liability). This could lead to a considerable increase in costs for suppliers, particularly SMEs, who would have to take foreign legal advice. At the end of the day, there is not even any guarantee that the consumer would be better protected by the mandatory rules of his home state (although it must be conceded that these laws are more familiar to the consumer and more easily accessible).

In relation to a “minimum protection” approach (option iii), we take the Commission’s point that this minimum would be based on consumer protection Directives, whose coverage is piecemeal rather than comprehensive. There could be advantages, however, insofar as this “minimum protection” would be based on legislation which is applicable throughout the EU and therefore create greater certainty. Where necessary, recourse could be had to the ECJ for clarification of the minimum standard.

On the other hand, practitioners have acknowledged many of the same limitations of the “minimum protection” approach that are recognised in the Green paper which can summarised as follows: firstly, they state that minimum protection would derive from EC Directives, which only cover certain aspects of consumer protection law; secondly, if a directive has not been transposed, or has been transposed incorrectly, there can still be differences from one country to another, and a consumer cannot directly rely on a Directive to ensure she benefits from that minimum standard. Equally, it could be argued that the jurisdiction of the ECJ would not assist in the short and medium term, as waiting for the ECJ to generate jurisprudence on the minimum standard could take several years.
As an alternative, some lawyers have suggested the introduction of uniform Community consumer laws, which would have several advantages: firstly by creating a uniform set of laws with which consumers can familiarise themselves; secondly, by providing legal certainty in terms of the laws of the contracts; and thirdly, by providing a fully comprehensive set of fallback provisions, providing a high level of protection in relation to domestic consumer contracts. The minimum standard could also be seen as a "seller protective" option, as that would at least ensure that traders would face a single set of consumer protections in the EU, and reduce some of the anomalies that are faced at present.

There are obviously disadvantages to this approach. Firstly, as touched upon above, problems arise over the setting of the minimum standard. In the interests of the consumer, the level of protection should be as high as possible, but this would cause higher costs for businesses, particularly SMEs. Secondly, drafting and implementing the legislation would prove a lengthy and costly process requiring extensive deliberation and consultation. Thirdly, such an approach is still likely to rely on national legislation and if a Directive has not been transposed, or transposed late, incorrectly, or at different times or in a contradictory way across the EU, there can still be differences from one country to another.

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

As a body representing the interests of legal practitioners, we cannot provide the Commission with empirical evidence in relation to any of the three groups.

Question 13

Should the future Rome I instrument specify the meaning of “mandatory provisions” in Articles 3, 5, 6 and 9 and in Article 7?

We believe that it would be very helpful to define the meaning of “mandatory provisions” in the above-mentioned Articles, both in the interests of legal certainty and uniformity of interpretation. Given that both Article 5 and Article 7 both use the same terminology, confusion will almost inevitably result as to the different aims of Articles 5 and 7. A recital in the new instrument could perhaps explain the different roles of the two Articles, as well as the kind of provisions they entail.

Regarding Article 7, the court’s definition of overriding mandatory provisions laid down in the Arblade case could be a useful starting point. To recap, in that case, the ECJ characterised mandatory rules as “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.” The difficulty with this in so far as Article 5 is concerned is that certain consumer protection provisions, while desirable, may not be crucial to protection of the social order, a somewhat grandiloquent concept. As such, it may in fact undermine Article 5. The definition could be amended to read “national provisions compliance with which has been deemed necessary for the protection of the political order, and/or the social and economic interests of the State or particular interests therein, such that such provisions must be complied with by all persons.

16 Cases C-369/96 and C-374/96 (judgment given on 23.11.1999), at Para 30.
present on the national territory of that State and within that State cannot be
derogated from in any legal relationship”. Of course, this principle would still require
further elaboration by the ECJ, but an element of vagueness/flexibility will be inherent
in any definition.

**Question 14**

**Should Article 6 be clarified as regards the definition of “temporary employment”? If so, how?**

Various commentators have requested that the notion of “temporary employment”,
contained in Article 6(2) of the Rome Convention, be better explained in the
Convention. What is meant by “temporary?” Is the temporary nature of the posting
judged by quantifying the time the parties initially anticipated the posting to last (i.e. *ex ante*), or in relation to the duration of the posting to date (i.e. *ex post*)?

The Law Society believes, however, that in assessing the temporary nature of
employment, courts should be allowed to take into account all the circumstances of
the employment leading up to the point in which the cause of action arose. If a
strictly *ex ante* approach were taken, then this may allow an employment relationship
to be artificially characterised as “temporary” ».

To illustrate this, in the French case of *Trans Mediterranean Airways c. Raphaël*\(^{17}\),
the employee, a Lebanese national, had been recruited in his home state, and
subsequently was transferred to several countries. Eventually he was sent to work in
Paris, where he remained for ten years. When his employer directed him to return to
the Lebanon, he refused, which the company interpreted as a resignation. The
company argued that given that the place of execution of the contract was in the
Lebanon, the fact that both parties were of Lebanese nationality and that the
currency provided for the payment of wages was Lebanese, Lebanese law was to
govern the contract. The French Cour d’appel, however, relied on *ex post* factors. It
held that the as the employee had been carrying out his work in performance of the
contract for more than ten years in France and that as he was registered in the Trade
Register as manager of the French subsidiary the contract was to be governed by
French law.

Furthermore, determining the temporary nature of employment from an *ex ante*
standpoint would contradict the actual wording of Article 6(2)(a), which says the
applicable mandatory rules are those of the country in which the employee “*habitually carries out his work*”. In our view, this requires an assessment of the
circumstances surrounding the employment following the conclusion of the contract.
If this were not the intention the clause may state “*where the employee was intended habitually to carry out his work at the time of conclusion of the contract*” (emphasis
added). The underlined words appear in Article 4(2) of the Convention, but are not
found at Article 6(2), and this omission is significant. We believe that this
interpretation would introduce a subjective element of consideration which was
intended for assessment under the first paragraph of Article 6. We submit that had
the Cour d’appel been restricted to *ex ante* considerations, injustice could have
resulted in the above case.

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\(^{17}\) soc. Trans Mediterranean Airways c. Raphaël, Cour de cassation, ch. soc., 1996, December 10,
On the other hand, injustice could also result if the court were required to evaluate the relationship *retrospectively* at the moment of the hearing. As Richard Plender QC points out, the possibility of varying the choice of law after the occurrence of the cause of action is unacceptable. It could lead to the possibility of abuse on the part of the employer, as illustrated by the case of *Re Anglo-Austrian Bank*. In that case, a bank manager, habitually employed at the Rio de Janeiro office of a German bank, was transferred to the bank’s London office after bringing a case against his employers. It is thought that this transfer was a determining factor in the court holding that German (and not Brazilian) Law was applicable to the contract of employment. Although this case dates from 1920 it does demonstrate the danger of taking into account factors that emerge in and have a bearing on the employment relationship once the cause of action is established.

The Law Society would therefore recommend that the text of the Convention be amended to clarify that the assessment be made on an *ex post* basis from the point at which the claim arose. On this basis, a body of jurisprudence could develop, and at a later date, based on this jurisprudence and consultation of interested parties, the Commission could turn its attention to the possible drafting of instruments laying down durations for application of the relevant mandatory rules. In order to maintain flexibility, the Commission may wish to consider laying down such guidelines in the form of recommendations.

This approach would therefore lay down, to a desirable extent, a common and, in our opinion, fair approach to the problem, while leaving a needed margin of discretion for judges to evaluate employment relationships on a case-by-case basis.

The second element of Question 14 is how well (or otherwise) Article 6 inter-relates with the Posted Workers Directive. We agree with the Commission’s observations that the Rome Convention and the Posted Workers Directive are relatively complementary rather than contradictory in their respective aims. The Rome Convention lays down rules for determining the applicable law of an employment contract, primarily by reference to the intention of the parties, albeit that the employee shall not be denied the protection of the mandatory rules with which the contract is most closely associated.

The Posted Workers’ Directive, on the other hand, aims to prevent employers from circumventing the mandatory rules of the home state when posting workers abroad. For this reason, we do not consider it appropriate for the definition of “temporary worker” as laid down in the directive to be imported into the Rome Convention. Unlike the Rome Convention, it is not the aim of the Posted Worker’s Directive to determine the applicable law of an employment contract, primarily by reference to the intention of the parties, albeit that the employee shall not be denied the protection of the mandatory rules with which the contract is most closely associated.

19 [1920] 1 Ch. 69.
20 Directive 96/71/EC, OJ 1997 L 18/1
As we have stated elsewhere in this paper, it is important to balance the interests of certainty against the desirability of flexibility. We do not believe that the interest of flexibility would be served by importing the more rigid definition of posted worker into the Rome Convention. We would also observe that the Posted Worker’s Directive has left some latitude to Member States to give their own definition of “posted worker”\(^\text{22}\).

**Question 15**

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

We have no comments in relation to this question.

**Question 16**

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

We have no comments in relation to this question.

**Question 17**

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

We have no comments in relation to this question.

**Question 18**

Do you believe that a future instrument should specify the law applicable to the conditions under which the assignment may be invoked against third parties? If so, what conflict rule do you recommend?

We have no comments in relation to this question.

**Question 19**

Would it be useful to specify the respective scope of Articles 12 and 13?

We have no comments in relation to this question.

Do you believe that there should be a conflict rule for subrogation payments made in the absence of an obligation?

We have no comments in relation to this question.

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Question 20

In your view, would it be useful to specify the law applicable to legal compensation? If so, what conflict rule do you recommend?

We have no comments in relation to this question.