

# EUROPEAN PARLIAMENT

2004



2009

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*Committee on Legal Affairs*

PROVISIONAL  
**2005/0261(COD)**

22.8.2006

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## **DRAFT REPORT**

on the proposal for a regulation of the European Parliament and of the Council  
on the law applicable to contractual obligations (Rome I)  
(COM(2005)0650 – C6-0441/2005 – 2005/0261(COD))

Committee on Legal Affairs

Rapporteur: Maria Berger

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)  
(COM(2005)0650 – C6-0441/2005 – 2005/0261(COD))**

**(Codecision procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2005)0650)<sup>1</sup>,
  - having regard to Article 251(2) and Articles 61(c) and 67(5) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0441/2005),
  - having regard to Rule 51 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A6-0000/2006),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1  
Recital 7

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<sup>1</sup> Not yet published in OJ.

(7) Freedom for the parties to choose the applicable law must be one of the *cornerstone* of the system of conflict-of-laws rules in matters of contractual obligations.

(7) Freedom for the parties to choose the applicable law must be one of the *cornerstones* of the system of conflict-of-laws rules in matters of contractual obligations. ***Such freedom comprises the right to choose as the applicable law principles and rules of substantive law of contract recognised internationally. However, such principles and rules must comply with certain minimum standards in order to be eligible. In particular, they should be created by an independent, impartial, and neutral body; their content should be balanced and protected against evasion and abuse by certain mandatory rules; and they should regulate rights and duties in a reasonably comprehensive way. These conditions are met, for instance, by the UNIDROIT Principles of International Commercial Contracts.***

*Justification*

*The additional wording is to be read in conjunction with the amended first subparagraph of Article 3(2).*

Amendment 2  
Recital 11

(11) Regarding individual employment contracts, the conflict rule should make it possible to identify the centre of gravity of the employment relationship, looking beyond appearances. ***This rule does not prejudice*** the application of the mandatory rules of the country to which a worker is posted in accordance with Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

(11) Regarding individual employment contracts, the conflict rule should make it possible to identify the centre of gravity of the employment relationship, looking beyond appearances. ***This Regulation is without prejudice to*** the application of the mandatory rules of the country to which a worker is posted in accordance with Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

*Justification*

*The original wording is too narrow (“this rule”) and not altogether clear.*

Amendment 3  
Article 2

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

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

*Justification*

*Corrects a manifest error.*

Amendment 4  
Article 3, paragraph 2, subparagraph 1

2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally **or in the Community**.

2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally.

*Justification*

*The amended recital 7 is intended to clarify this provision.*

*Moreover, it seems undesirable to refer obliquely in this Regulation to the common frame of reference, which does not yet exist, particularly since it is unclear what shape that body of contract terms will take and on what legal basis it will be adopted.*

Amendment 5  
Article 4, paragraph 1

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law **determined as follows:**

***(a) a contract of sale shall be governed by the law of the country in which the seller has his habitual residence;***

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

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law **of the country with which it is most closely connected.**

***(c) a contract of carriage shall be governed by the law of the country in which the carrier has his habitual residence;***

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

***(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be governed by the law of the country in which the owner has his habitual residence, provided the tenant is a natural person and has his habitual residence in the same country;***

***(f) a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence;***

***(g) a franchise contract shall be governed by the law of the country in which the franchised person has his habitual residence;***

***(h) a distribution contract shall be governed by the law of the country in which the distributor has his habitual residence.***

#### *Justification*

*It is considered that the Commission's proposal is excessively strict and fails to make sufficient allowance for judicial discretion. It is also out of step with the conflict rules of non-EU jurisdictions, which is undesirable from the point of view of the worldwide harmonisation of conflict-of-law rules. Moreover, the amendments set out herein to Article 4 are designed on similar lines to the corresponding provisions of Rome II as amended by Parliament in first reading so as to strike a proper balance between having a strict rule and allowing for discretion. This is achieved by setting out a basic rule in Article 4(1) and following it by a series of presumptions in paragraphs 1a and 1ab and an exceptional provision in paragraph 2.*

*Furthermore it is considered that there is no need for a specific rule on franchise contracts.*

Amendment 6  
Article 4, paragraph 1 a (new)

***1a. It shall be presumed that the contract is most closely connected with the country in which the party who is to effect the performance which is characteristic of the contract has his habitual residence at the time when the contract is concluded.***

Amendment 7  
Article 4, paragraph 1.b (new)

***1b. In particular, a contract shall be presumed to be most closely connected as follows:***

Amendment 8  
Article 4, paragraph 1b, point (a) (new)

***(a) a contract of sale shall be presumed to be most closely connected with the country in which the seller has his habitual residence;***

Amendment 9  
Article 4, paragraph 1b, point (b) (new)

***(b) a contract for the provision of services shall be presumed to be most closely connected with the country in which the service provider has his habitual residence;***

Amendment 10  
Article 4, paragraph 1b, point (c) (new)

***(c) a contract of carriage shall be presumed to be most closely connected with the country in which the carrier has his habitual residence;***

Amendment 11

Article 4, paragraph 1b, point (d) (new)

***(d) a contract relating to a right in rem or right to use immovable property shall be presumed to be most closely connected with the country in which the property is situated;***

Amendment 12

Article 4, paragraph 1b, point (e) (new)

***(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be presumed to be most closely connected with country in which the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;***

Amendment 13

Article 4, paragraph 1b, point (f) (new)

***(f) a contract relating to intellectual or industrial property rights shall be presumed to be most closely connected with the country in which the person who transfers or assigns the rights has his habitual residence;***

Amendment 14

Article 4, paragraph 1b, point (g) (new)

***(g) a distribution contract shall be presumed to be most closely connected with the country in which the distributor has his habitual residence;***

Amendment 15

Article 4, paragraph 1b, point (h) (new)

***(h) a contract of insurance shall be presumed to be most closely connected with the country where the insured risk is situated.***

*Justification*

*It is considered useful to include a specific presumption for insurance contracts. Insurance contracts are certainly an integral part of the law of obligations and, as service contracts, could be considered to fall within the scope of Article 4(1a)(b). However, this would not be very helpful, because making the law of the country where the insurer resides the applicable law would neglect the interests of the weaker party to the insurance contract and conflict with what is already standard practice for contracts insuring a risk situated within the EU. Therefore, the location of the risk insured, which is specifically regulated by EU directives, should be included as an element which indicates the existence of a particularly close link between an insurance contract and the law of a particular country.*

Amendment 16

Article 4, paragraph 2

***2. Contracts not specified in paragraph 1 shall be governed by the law of the country in which the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract. Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.***

***2. By way of exception, the presumptions set out in paragraphs 1a and 1b may be disregarded if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country.***

*Justification*

*It is considered that the Commission's proposal is excessively strict and fails to make sufficient allowance for judicial discretion. It is also out of step with the conflict rules of non-*

*EU jurisdictions, which is undesirable from the point of view of the worldwide harmonisation of conflict-of-law rules. Moreover, the amendments set out herein to Article 4 are designed on similar lines to the corresponding provisions of Rome II as amended by Parliament in first reading so as to strike a proper balance between having a strict rule and allowing for discretion. This is achieved by setting out a basic rule in Article 4(1) and following it by a series of presumptions in paragraphs 1a and 1ab and an exceptional provision in paragraph 2.*

*Furthermore it is considered that there is no need for a specific rule on franchise contracts.*

Amendment 17  
Article 5 a (new)

***Article 5a - Compulsory insurance contracts***

***The law applicable to compulsory insurance contracts shall be the law of the State which prescribes the obligation to take out insurance.***

*Justification*

*There is a lack of specific rules for insurance contracts concluded on the basis of a statutory obligation to take out insurance. Compulsory insurance is subject to the public-policy rules of the country which, acting in the public interest, has prescribed the obligation to take out insurance. Those rules usually include legal requirements as to the form, scope and content of the insurance contract. Insurance contracts must comply with those rules in order to meet the legal requirements. This can only be ensured by subjecting a compulsory insurance contract completely to the law of the country which prescribes the insurance obligation. There is no room for choice of law by the parties to the contract.*

Amendment 18  
Article 6, paragraph 1

1. Notwithstanding the provisions of Article 3, in **a** contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded him by the mandatory rules of the law which would be applicable under this Article in the absence of choice.

1. Notwithstanding the provisions of Article 3, in **an individual** contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded him by the mandatory rules of the law which would be applicable under this Article in the absence of choice.

*Justification*

*It is necessary to make it completely unambiguous that what is covered is individual contracts of employment and not collective agreements.*

#### Amendment 19

##### Article 6, paragraph 2, introductory part

2. *A* contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

2. ***An individual*** contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

#### *Justification*

*It is necessary to make it completely unambiguous that what is covered is individual contracts of employment and not collective agreements.*

#### Amendment 20

##### Article 6, paragraph 2, point (a)

(a) by the law of the country in ***or from*** which the employee habitually carries out his work in performance of the contract. ***The place of performance shall not be deemed to have changed if he is temporarily employed in another country. Work carried out in another country shall 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 does not preclude the employee from being regarded as carrying out his work in another country temporarily;***

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract;

#### *Justification*

*Article 6 has been restructured so as to introduce a three-tier system in the case of individual contracts of employment. In accordance with the case-law of the ECJ on the Brussels I Regulation, the primary rule should designate the law of the locus laboris, i.e. the place where the work is actually carried out. The secondary rule (the law of the country “from which“ the employee habitually carries out his work) would cover, for instance, flight*

*attendants. The tertiary rule then designates the law of the place where the business is situated for cases in which the primary and secondary rules cannot be applied. Lastly, paragraph 3 allows for the law of another country to be applied where it appears that the individual contract of employment is manifestly more closely connected with that country.*

Amendment 21

Article 6, paragraph 2, point (a a) (new)

***(aa) if the employee does not habitually carry out his work in any one country, by the law of the country from which the employee habitually carries out his work in performance of the contract;***

Amendment 22

Article 6, paragraph 2, point (a b), first subparagraph (new)

***(ab) For the purposes of points (a) and (aa), the place of performance shall not be deemed to have changed if the employee is temporarily employed in another country. Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out specific tasks abroad.***

*Justification*

*This text appears in point (a) of the Commission's proposal and is unchanged in substance from that of the Rome Convention. The qualification of "tasks" by "specific" is intended to indicate that temporary activity in another country should be narrowly construed.*

Amendment 23

Article 6, paragraph 2, point (a b), second subparagraph (new)

***Any posting to another country for longer than one year shall be presumed not to constitute temporary employment within the meaning of this provision and any posting to another country for longer than two years shall not be regarded as temporary employment within the meaning of this provision.***

*Justification*

*This provision is designed to increase legal certainty. The time span proposed reflects the rules on posted workers in Regulation No 1408/71.*

Amendment 24  
Article 6, paragraph 3

3. The law designated by paragraph 2 may be excluded where it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

3. The law designated by paragraph 2 may be excluded where it appears from the circumstances as a whole that the ***individual contract of employment*** is ***manifestly*** more closely connected with another country, in which case the contract shall be governed by the law of that country.

*Justification*

*It is necessary to make it completely unambiguous that what is covered is individual contracts of employment and not collective agreements. The addition of the adverb “manifestly” reinforces the three-tier system embodied in Article 6(2).*

Amendment 25  
Article 8, paragraph 1

1. ***Mandatory*** rules are rules the respect for which is regarded as ***crucial*** by a country for safeguarding 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.

1. ***For the purpose of this Article, international mandatory*** rules are rules the respect for which is regarded as ***necessary*** by a country for safeguarding 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.

### *Justification*

*The notion of mandatory rules has a more restricted and specific meaning than, for instance, in Article 6 on contracts of employment. There, and in the case of Articles 3(5) and 10(4), what is meant is internal mandatory rules. It should therefore be made clear that the definition in paragraph 1 refers only to Article 6 itself and to international mandatory rules. “Crucial” has been replaced by “necessary” since the latter term appears more objective and is more usual in legislation.*

### Amendment 26 Article 8, paragraph 3

**3. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.** Deleted

### *Justification*

*A reservation was entered to the corresponding provision of the Rome Convention by Germany, Ireland, Latvia, Luxembourg, Portugal, Slovenia and the United Kingdom. It is also considered that its discretionary nature, the uncertainty of the criteria which it employs and its potential breadth could detract from legal certainty and encourage speculative attempts to evade contractual obligations, thereby increasing uncertainty and risk for economic operators and entailing higher costs.*

### Amendment 27 Article 18, paragraph 1, subparagraph 2

Where the contract is concluded in the course of operation of **a subsidiary**, a branch or any other establishment, or if, under the contract, performance is the responsibility of such an establishment, this establishment shall be considered the habitual residence.

Where the contract is concluded in the course of operation of a branch, **agency** or any other establishment, or if, under the contract, performance is the responsibility of such an establishment, this establishment shall be considered the habitual residence.

*Justification*

*This change brings Article 18 into line with the wording of the Brussels I Regulation (Article 60(1)). See also Article 23 of the Common Position relating to Rome II.*

Amendment 28

Article 22

This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:

(a) in relation to particular matters, lay down choice-of-law rules relating to contractual obligations; a list ***of such*** acts currently in force is provided in Annex 1; or

(b) govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations; or

(c) lay down ***rules to promote the smooth operation*** of the internal market, ***where such rules cannot apply at the same time as*** the law designated by the rules of private international law.

This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:

(a) in relation to particular matters, lay down choice-of-law rules relating to contractual obligations; a list ***including some*** acts currently in force is provided in Annex 1; or

(b) govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations; or

(c) lay 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 private international law.

*Justification*

*As far as point (a) is concerned, the list in Annex 1 is not exhaustive and the wording of this provision should reflect this.*

*Point (c) has been aligned with the corresponding provision of the proposal for a Rome II regulation as amended by Parliament at first reading.*

Amendment 29

Article 23, paragraph 2 a (new)

***2a. A State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units.***

*Justification*

*This provision has been taken over from the proposal for a Rome II regulation as considered by Parliament and Council in first reading. It would allow Member States consisting of several jurisdictions to decide for themselves whether or not to enact provisions modelled on Community law to deal with purely internal cases.*

Amendment 30  
Article 24, paragraph 3

It shall apply to contractual obligations arising after its entry into application.  
***However, for contractual obligations arising before its entry into application, this Regulation shall apply where its provisions have the effect of making the same law applicable as would have been applicable under the Rome Convention of 1980.***

It shall apply to contractual obligations arising after its entry into application.

*Justification*

*As a matter of principle, legislation should not be retroactive. This provision seems to add a needless complication and would be liable to undermine legal certainty.*

Amendment 31  
Annex 1

- Directive on the return of cultural objects unlawfully removed from the territory of a Member State (Directive 7/1993/EC of 15.3.1993)

- Directive concerning the posting of workers in the framework of the provision of services (Directive 71/1996/EC of 16.12.1996)

- Directive on the return of cultural objects unlawfully removed from the territory of a Member State (Directive 7/1993/EC of 15.3.1993)

-Directive concerning the posting of workers in the framework of the provision of services (Directive 71/1996/EC of 16.12.1996)

**- Second non-life insurance Directive  
(Directive 357/1988/EEC of 22.6.1988, as  
amplified and amended by Directives  
49/1992/EC and 13/2002/EC)**

**- Second life assurance Directive  
(Directive 619/1990/EEC of 8.1.1990 as  
amplified and amended by Directives  
96/1992/EC and 12/2002/EC)**

#### *Justification*

*Apart from the fact that the second life assurance directive has been repealed and replaced by Directive 2002/83, the last two indents should be deleted.*

*Insurance contracts covering risks located inside the EU should be brought within the scope of the general provisions on factors connecting the contract to a specific law. The insurance sector and its customers in the non-consumer segment would benefit from enhanced choice-of-law options. A careful choice of the law applicable to contracts would make it possible to offer identical products throughout Europe, obviating much of the need to develop separate products for each market. In the past, problems in this area have deterred insurance companies from making much use of the freedom to provide services for anything less than the coverage of major risks. With respect to the choice of law, only consumers are in general need of protection, including the insurance sector. Businesses and self-employed have sufficient business experience to understand the risks they are taking in operating outside their home country's system of law or to recognise when they need legal advice.*

## EXPLANATORY STATEMENT

The proposal for a regulation (Rome I) purports to convert the 1980 Rome Convention into a Community instrument and to revise it, where necessary.

Although the need for the adoption of a regulation has been called in question in some quarters, your rapporteur considers that it is worthwhile on the following grounds: (a) a regulation is more readily amended than a convention and, as part of the *acquis communautaire*, can be more rapidly extended to new Member States; (b) the possibility of references to the Court of Justice for preliminary rulings will be secured (see Belgium's delay in implementing the protocols to the Rome Convention on its interpretation by the Court of Justice); (c) a regulation will afford a single instrument directly binding on national courts, whereas ratification of an international convention in many countries necessitates the adoption of national legislation in order to make the convention binding in domestic law. The only drawback is that the regulation will not apply to Denmark. It is to be hoped that the United Kingdom will overcome its initial reluctance and ultimately take part in the adoption of the regulation.

Having said this, your rapporteur notes that many of the provisions of the proposed regulation are novel as compared with the Rome Convention. She is confident that these will be discussed in depth in committee and reserves the right to move further amendments in the light of those discussions and the submissions she receives.

The amendments contained in this report are designed to improve the text as proposed by the Commission in the light of the various submissions that have been made to the rapporteur and with a view to making it more consistent with the Rome II project as it stands at present. She has concentrated particularly on certain key provisions, such as Article 4 (Applicable law in the absence of choice) and Article 6 (Individual employment contracts), where she advocates an approach closer to that adopted by Parliament in its first reading of Rome II and to the conflict-of-law rules of non-EU jurisdictions. Your rapporteur has also sought to distinguish between internal and international mandatory rules by amending Article 8 on the ground that the various references to "mandatory rules" in Articles 3(5), 6(1), 8 and 10(1) could give rise to confusion.

An attempt has also been made to accommodate the concerns of the insurance industry, which should bring tangible benefits to the functioning of the internal market in insurance.

Lastly, the rapporteur observes that there are numerous discrepancies between the language versions of the Commission's proposal. She trusts that these will be eliminated by the lawyer-linguists of Parliament and the Council in the course of the procedure.