PROPOSAL FOR A REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME 1)

Comments of ECSA, ICS, BIMCO and the International Group of P&I Clubs

Introduction

The shipping industry, represented by the European Community Shipowners' Associations (ECSA)[1], the International Chamber of Shipping (ICS)[2], BIMCO[3] and the International Group of P&I Clubs[4] takes the opportunity to comment on the proposal for a Regulation on the law applicable to contractual obligations (Rome 1) and the amendments submitted by members of the European Parliament JURI Committee.

Proposed Regulation

Freedom of choice and overriding mandatory provisions

Maritime contracts and the rights and obligations arising under them are essentially a matter of private as opposed to public law. Other than certain consumer contracts where one party is a private individual buying goods or services, the parties to maritime contracts, in particular in relation to the carriage of goods, are almost invariably commercial entities engaged in international trade. One of the prime concerns for such entities is certainty, particularly in respect of their rights and obligations under contracts into which they enter. Such contracts will generally therefore contain a choice of law clause.

The parties may choose a particular applicable law for a variety of reasons e.g. an established and internationally recognised legal system, expertise in that jurisdiction in adjudicating particular types of commercial activities, a body of case law precedent built up over many years, perceived neutrality, etc. Giving effect to choice of law provisions is accordingly of a very real importance to commercial entities. This is particularly so in the context of contracts relating to international trade which may involve rights and obligations arising in a number of different jurisdictions. Maritime contracts fall into this category.

The shipping industry therefore welcomes the retention in the Regulation of the fundamental right of the parties to choose the applicable law, as contained in Article 3 § 1.

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[1] The European Community Shipowners' Associations (ECSA) is the trade association representing the national shipowners' associations of the EU Member States and Norway, the members of which control over 40% of the world merchant fleet.

[2] The International Chamber of Shipping (ICS) is the international trade association for merchant ship operators. The ICS membership comprises national shipowners' associations representing over 70% of the world's merchant tonnage.

[3] BIMCO's membership spans 123 countries and includes more than 2,550 companies. Owner members alone control 65% of the world merchant fleet. One of the organisation's core activities is the development of standardised maritime contracts, such as Charter Parties, Bills of Lading and other specialised maritime contracts. It has been estimated that over three quarters of transactions within the shipping industry take place using BIMCO approved forms.

[4] The 13 P&I Clubs that comprise the International Group of P&I Clubs are mutual not-for-profit insurance organizations that between them cover the third party liabilities (which include pollution, loss of life and personal injury, cargo loss and damage, wreck removal and collision risks) of approximately 92% of the world's ocean-going tonnage.

The shipping industry does remain concerned however that the proposed Article 3 § 4 and 5, as well as Article 8 in its entirety, will introduce a very substantial and undesirable degree of uncertainty, and will clearly promote a lack of uniformity in that they are vague and ambiguous. One of the main objectives of the Regulation is to promote uniformity. Parties to a contract wish certainty and the law governing the contract is therefore of prime importance and will as indicated above have been deliberately chosen by the parties for sound commercial reasons.

Contracts of Carriage

The shipping industry supports the Commission's wording for Article 4 § 1, but would include replacing the term "habitual residence" with "principal place of business". It is a term that is well recognised in the maritime industry and is incorporated in many standard form maritime contracts of carriage. It will create certainty in that only a single system of law could govern a contract of carriage. The shipping industry also welcomes the Commission's proposal not to create separate rules for the carriage of goods and the carriage of passengers.

Insurance Contracts

The shipping industry does not believe that the Regulation should cover insurance contracts. Neither the Rome Convention nor the Commission's original draft text govern the law applicable to insurance contracts covering risks situated within the Member States since the current regime of the law applicable to insurance contracts is laid down in the First Council Directive 73/239/EEC of 24 July 1973 and the Second Council Directive 88/357/EEC of 22 June 1988. The rules contained in these Directives are well understood and have not led to any significant problems that would suggest that there is either a pressing need to extend the scope of the Regulation to govern insurance contracts covering risks within the Member States and in a third country, or to provide distinctions between insurance contracts governing large risks and those that do not.

P&I insurance contracts between the Club and the entered member (shipowners and charterers) are a form of maritime contract and accordingly the rights and obligations arising under them are as indicated above a matter of private as opposed to public law. As already noted, one of the prime concerns for commercial entities is certainty, particularly in respect of their rights and obligations under contracts into which they enter. P&I insurance contracts therefore contain a choice of law clause that is contained in the contract terms and conditions. These terms and conditions are known as Club Rules and are individual to each Club (although it should be noted that they differ little between the Clubs in any material respects).

As indicated above, the applicable law is chosen for a variety of reasons and is of very real importance to the Clubs and their members. Moreover, the Clubs are mutual insurance entities. That is the Clubs are owned by their insured members and most importantly claims against individual members are shared between the totality of the members. It is therefore essential for all members that Club Rules and the rights and obligations arising under them are determined consistently and uniformly, and that can only be achieved by ensuring that total effect is given to choice of law provisions. For the reasons given above we also do not believe that this can be achieved if Articles 3 § 4 and 5 and Article 8 are retained. The IG Clubs do therefore make use of the existing freedom to choose the applicable law.

The shipping industry would urge that this document be given careful consideration.

Amendments put forward by MEPs that the industry supports:

Topic	Am#	Tabled by	Shipping industry position
Freedom of choice	46	Lehne	The industry agrees with the proposal to delete Article 3 § 4. The legal uncertainty and increased costs that could arise from Article 3 § 4 applies equally to contractual relationships in the shipping industry as it does to contractual relationships in the financial markets.
Insurance contracts	68	Berger	In the event that insurance contracts are brought within the scope of the Regulation (see industry's position below in respect of amendment 48), industry would agree that contracts covering large risks as defined in the Council Directives are excluded from the scope. This would ensure that IG Clubs retain the existing freedom to choose the applicable law.
Overriding mandatory rules	74	Gauzés	The proposal to delete Article 8 § 3 would remove a degree of ambiguity that Article 8 will introduce. The uncertainty of the criteria employed by Article 8 § 3 could well detract from legal certainty and encourage speculative attempts to evade contractual obligations.
Insurance contracts	84, 85	Gauzés, Gargini	As we have said, we do not believe the scope of the Regulation should extend to insurance contracts. If this is not accepted we agree that,,at the very least, there is a need for an economic impact study and extensive consultation with the insurance industry to assess the advantages and disadvantages of including insurance contracts in the Regulation.
Consumer contracts	92	Lehne	The shipping industry believes that the principle established under Article 5 § 4 (a) of the Rome Convention of excluding contracts of carriage from consumer contracts should be retained and therefore agrees with the proposal.

Amendments put forward by MEPs that the industry strongly opposes:

Topic	Am#	Tabled by	Shipping industry comments
Law applicable in the absence of choice	47, 51	Gauzés, Berger	These proposals would give rise to considerable uncertainty with regard to maritime contracts. Maritime contracts of carriage usually contain a choice of law clause. However, in the absence of such choice, the

			applicable law should be aligned as closely as possible with the governing law that is generally contained in such contracts and that is the principle place of business of the carrier. Maritime contracts regularly cover international transactions which may involve rights and obligations arising in a number of different jurisdictions. Determining the governing law in the absence of choice by reference to the country with which it is most closely connected would therefore create a considerable degree of uncertainty. This could be a recipe for considerable confusion.
Assumption of choice of law in the event that parties have agreed to confer jurisdiction on a Member State court	40	Gauzés	This proposal would create a degree of ambiguity since it would be most unlikely that parties would agree the exclusive jurisdiction of a court or tribunal without also intending that the law governing such courts or tribunals should also govern the contract, unless there is clear wording to the contrary.
Specific presumption for insurance contracts	48	Berger	P&I insurance contracts between the Club and the entered member contain a choice of law clause in accordance with the present rules. The rapporteur's proposal would remove this freedom and create significant confusion and uncertainty given the wide international geographical spread of entered members in IG Clubs. Moreover, in the case of liability insurance it is difficult to determine where the risk is situated. The existing rules are well understood and have not led to any problems that would suggest that there is a pressing need for change.
Consumer contracts	58	Wallis	This proposal would also create substantial uncertainty. Pre-contractual dealings should not form part of the contract itself since they are, as described, dealings prior to the parties entering into a contract.