



Seminar Series on Private International Law

'Private International Law in the UK: Current Topics and Changing Landscapes'

The series consists of evening seminars led by leading academics and practitioners which explore developments of topical importance for current legal practice and study in the field of Private International Law

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The 'Rome I' Proposal: The Law Applicable to Contractual Obligations

26 April 2006

Chair:

- **The Rt Hon Lady Justice Arden**

Speakers:

- **Andrew Dickinson**, Consultant, Clifford Chance LLP; Honorary Fellow, British Institute of International and Comparative Law
 - **Professor Jonathan Harris**, University of Birmingham
 - **Oliver Parker**, Department for Constitutional Affairs
- **Jacob Van de Velden**, British Institute of International and Comparative Law

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UPDATE

UK Government Decides Not to ‘Opt in’ to the Proposed Rome I Regulation

On 15 December 2005 the European Commission published the latest fruit of the initiative it began in the field of private international law after the entry into force of the Treaty of Amsterdam in 1999: the proposal for a Regulation on the law applicable to contractual obligations (Rome I) [COM (2005) 650 final].

The proposed Rome I Regulation is to replace the Rome Convention of 1980 which, since its entry into force in 1991, has become an essential element of the legal structure under which international businesses choose to determine and regulate their contractual relations. An overwhelming majority of professionally drafted commercial contracts with an international element contain a choice of law clause relying on the principle of party autonomy, as enshrined in Article 3 of the Convention. Overall, the Convention has brought a significant degree of certainty and harmonisation to the question of applicable law for contracts, which is one of the most important constituents of legal certainty in international transactions.

The proposal is based on Article 61(c) in conjunction with 67(5) of Title IV EC. Pursuant to Article 1 of the Protocol added by the Treaty of Amsterdam on the position of the United Kingdom and Ireland (No. 4, 1997), in principle neither country takes part in the adoption by the Council of proposed measures covered by Title IV of the Treaty. Nonetheless, based on Article 3 of the Protocol, both the UK and Ireland could have notified the President of the Council within three months after the presentation of the proposal to the Council that they wish to take part in the adoption and application of the proposed Rome I Regulation. The UK was to take this decision before 9 of May 2006. It chose not to do so.

Meetings on Rome I are due to start in June 2006 but negotiations will probably not be starting in earnest until autumn of this year. According to Oliver Parker of

the Department for Constitutional Affairs, the United Kingdom will be keen to participate fully in the negotiations, although the UK will have no vote when the instrument comes forward for the adoption by the Council which may affect the Government's negotiation position. If Rome I is subsequently adopted, the UK will have, in accordance with Article 4 of the Protocol, a purely national decision whether it would nevertheless wish to be party. If the decision is taken that the UK would seek not to become a party to a Rome I Regulation, the UK will remain a party to the Rome Convention.

On 26 of April 2006 the British Institute of International and Comparative Law organized a highly successful seminar on the Rome I proposal. The seminar was chaired by The Rt Hon Lady Justice Arden DBE, and the proposal was introduced and analyzed by four experts: Professor Jonathan Harris (University of Birmingham) Andrew Dickinson (Consultant, Clifford Chance LLP; Honorary Fellow, BIICL) Oliver Parker (Department for Constitutional Affairs) and Jacob Van de Velden (BIICL). A report of the seminar can be found [here](#). The institute hopes to organize more seminars in the field of European conflict of laws in due course. These in turn may lead to a publication which comprehensively analyzes the prospective European instruments on the conflict of laws for contractual and non-contractual obligations.

REPORT OF THE ROME I SEMINAR

The 'Rome I' Proposal: The Law Applicable to Contractual Obligations

On Wednesday 26 April 2006 the British Institute of International and Comparative Law provided a platform for the discussion of the proposal for a Regulation of the European Parliament and Council on the law applicable to contractual obligations ('Rome I') which was adopted and made public by the European Commission in December 2005. Prior to a discussion on the floor, the Commission proposal was analyzed by four speakers.

The first speaker, Jacob Van de Velden, addressed the background of the proposal and the Community legal context for a European conflict of laws instrument. He stressed the importance of assuring that the prospective actually delivers on the main goal of harmonizing conflicts rules: to ensure identity of decision irrespective of the tribunal seized with a case. He highlighted in particular the ambiguous relationship between European integration and private international law with reference to their disparate premises. In this regard he noted that in 1969, when the work on the Rome Convention started, the uniform rules on conflict of laws were designed for a European Economic Community of six (later nine) Member States which was only beginning to develop a single market strategy, and that in 2006, European conflict of laws is intended for a European Union of 25 Member States (soon to be 27 and then more) which has firmly established an internal market common to all Member States by a process of rigorous negative and positive integration. Furthermore, this has seen its breadth and depth greatly extended by means of four consecutive Treaty changes. He indicated that the idea of diversity of legal systems, a precondition for conflict of laws, is logically inconsistent with the idea of an internal market without legal frontiers, because such a market implies a homogeneous legal framework.

He further noted that the fundamental principles of private international law at times appear to be outright contrary to the means deemed necessary to ensure the effectiveness of Community law. This was illustrated with reference to the case of *Ingmar GB Ltd v Eaton Leonard Technologies Inc* in which the ECJ stated that the aim of effectiveness of Community law precludes the idea of a general right for parties in international contracts to choose the applicable law. Finally, he provided a comprehensive overview of the events leading up to the proposal and an analysis of the contributions to the Commission's Green Paper published in January 2003.

The second speaker, Professor Jonathan Harris, addressed the question whether the proposed provisions of Rome I stand up to the challenges posed by the internet. He subsequently dealt with issues related to party autonomy, such as the requirement of essential and formal validity of the choice of law clause and the problem of actual consent which the proposal raises by providing for an implied choice of law in case of a jurisdiction clause in accordance with the Brussels I Regulation. In relation to the choice of law rule applicable in the absence of a choice by the parties as proposed in Article 4, he noted that the proposal may give rise to serious problems of classification of various types of electronic contracts. He further questioned the exclusion of the possibility of displacement of the applicable law because recent English cases indicate that there can be a good case for displacing the general rule. As regards the rule proposed for consumer contracts, he generally welcomed the clarification of the basic preconditions of Article 5. However he was critical of the proposed choice of law rules and in particular the lack of appropriate consultation and a proper impact assessment. Finally, he briefly highlighted possible difficulties with Article 8(3) of the proposal regarding the application of third country mandatory rules which in case of electronic contracts may prove onerous because it will be difficult to determine which countries would be regarded as having "a close connection", and with Article 23, which deals in an unsatisfactory way with the relationship between the Regulation and other international conventions.

The third speaker, Andrew Dickinson, addressed the issue of Article 8(3) of the proposed Regulation which contemplates the discretionary application of certain foreign rules. He identified a so-called ‘legal uncertainty multiplier’: the discretionary application of law, the possible breadth of the ‘close connection test’, the complexity of the new definition of ‘mandatory rules’, the complexity of asserting and balancing legislative intention(s), and the possibility of retrospective application of law. As a result he said a such provision was to be considered harmful because it would create major uncertainty. It requires the courts of the forum to determine whether or not they should give effect to the “mandatory rules” of countries that are deemed to have “a close connection” with the matter, in addition to the law chosen by the parties. He stated that this would increase uncertainty and undermine the effective exercise of party autonomy because it would be difficult for market participants, in advance, to determine which countries would be regarded as having “a close connection” with the matter and which mandatory rules might undermine the enforceability of their contracts, and also to predict how the discretion will be exercised. In terms of a possible solution, he put forward four options: (i) delete Article 8(3) altogether; (ii) grant Member States the possibility of entering a reservation with respect to the Article; (iii) water down the provision substantially; or (iv) introduce a more targeted Article. However, Article 8(3), even in an amended form, should only feature in a prospective Rome I Regulation in case of a genuine problem for which the Article would be the appropriate solution.

The last speaker, Oliver Parker, very much welcomed on behalf of the UK Government the organization of the seminar by the British Institute of International and Comparative Law and he strongly encouraged the during the process of negotiations. He addressed three points: what has happened, what are the procedural aspects, and lastly what is likely to happen next. He restated the Government’s position - that the Commission should not spend its scarce resources on a conversion of the Convention which was considered to be

operating reasonably successfully. He gave several reasons for the Commission's decision to put forward the proposal: the move of private international law within the sphere of Community competence, the opportunity to modernise the rules of the Convention, the facilitation of future amendments to and review of a Community instrument, and the wish to enhance legal certainty by providing hard rules, for example in Article 4.

He subsequently explained the nature of the Protocol which is attached to the Treaty of Amsterdam, which governs the position of the UK and Ireland in relation to business in this area of the Community. If, within a three month period from the formal presentation of the proposal from the Commission, one of them fails to opt in to the proposal, then in principle that country is formally outside the negotiations. On the other hand, were the UK to opt in then it would be in the same position as all the other Member States. He stressed that this was a decision to be taken by 9 May 2006.

Mr Parker further explained that if the UK does not opt in, the United Kingdom has no vote when the instrument comes forward for the adoption by the Council. However, if the Regulation is then adopted, the UK does have the right to take a decision at purely national level whether it wishes to be party to the instrument. If the decision is taken that the UK would seek not to become a party to a Rome I Regulation, the UK will remain a party to the Rome Convention - which Mr Parker thought would not produce significant problems. As regards the negotiations, he noted that meetings were to start in June, but the negotiations will probably not be starting in earnest until the autumn. He concluded by stating that if the Government would not opt in, it would nevertheless be keen to nevertheless participate fully in the negotiations.

Further information can be found in the Financial Markets Law Committee's Legal assessment of the conversion of the Rome Convention to a Community

instrument and the provisions of the proposed Rome I Regulations. This is available at <http://www.fmlc.org/papers/April06Issue121.pdf>.