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

The Future of Private International Law in England and Wales

24 October 2006, 17:30-19:30

Chair:
- The Rt Hon Lord Mance

Speakers:
- Professor Jonathan Harris, Birmingham University and Brick Court Chambers
- Adeline Chong, Nottingham University
- Adam Johnson, Herbert Smith

SEMINAR TRANSCRIPT

Lord Mance:
Good evening. I think we can begin at 5:30, the reason for that being I’m afraid is that I have to disappear personally at 7:00, but you don’t – Alex Layton is going to take over from me. This is an interesting theme, particularly for the timing. There is hectic European activity in the field – the Commission is producing proposal after proposal and the United Kingdom has opted out, that is in respect of Rome I but is vigorously participating, I gather, to some respects in the negotiations and it may be that having opted out, the bargaining position will be stronger than if we had opted in. That is an interesting, perhaps not first experience, but certainly one of significant experience which the government has hitherto been reluctant to undertake, but it seems, from my feedback, to be quite positive so far. There are also the proposals under consideration for Rome III that is, jurisdiction and proper law in respect of divorce which are, to say the least, interesting to matrimonial lawyers. Their significance in the UK context is not entirely easy, indeed their significance in any context is not entirely easy to
foresee because of the decoupling on the face of it from any question of matrimonial property but there is a green paper on matrimonial property which is undoubtedly the more significant area, and the significance of that is also difficult to see in the UK context because we don’t distinguish matrimonial property from maintenance very readily, at any rate and not hitherto. Then there is a review of Brussels I, as you know and on a wider field, not directly connected with private international law but possibly originally conceived in the sense that it might abolish the need for private international law there was the Commission’s CFR contract law project, the idea being to develop harmonized general principles. That seems to have run into one or two buffers, not entirely originating in the United Kingdom. I was a stake-held lawyer, I think theoretically I still am, but we are no longer being summoned to express our views and certainly there is a lot of continental scepticism about the CFR project. Personally, I find it extremely interesting and I think that there is scope for work in the area but not at the pace which the Commission was proposing to undertake which was effectively to repeat the whole of the work of Justinian but in about 10% of the time, or possibly even 1% of the time.

The interesting question I always think when one looks at Europe is really represented by today’s speakers. The academic contribution compared to the practitioner contribution. There is a very strong theoretical content in a lot of what the Commission puts forward and certainly very considerable academic influence in what the ECJ decides. The search for pure European principle, sometimes for UK practitioners, seems to dwarf any interest in practical consequences and I think we may hear a little about Gasser and the Turner and Owusu cases, and the Lugano Convention case from our first speaker who is the academic representative, Adeline Chong, from Nottingham University, a specialist in this area. We are then going to have a practitioner, that’s Adam Johnson from Herbert Smith, and Jonathan Harris, professor of private international and comparative law at Birmingham University and Deputy Head of the school there and also a recently-qualified door tenant of the Brick Court Chambers. He’s going to give a combined view of an academic/practitioner. I think Adeline is going to touch on the subject of Rome and perhaps some of the other subjects. Adam Johnson similarly, perhaps, and then Jonathan Harris tells me that he’s going to give a rather different perspective on the relation between academic and practitioner work in the context of trust law and overseas jurisdictions. So, can I hand over the floor to Adeline Chong. Thank you very much indeed.
Adeline Chong:
Private international law used to be a predominantly common law based subject but significant areas of this subject are now based on legislation, with most of the legislation stemming from the European Community. The EC’s encroaching influence is particularly acute in civil and commercial matters. The Brussels Convention on jurisdiction and the recognition and enforcement of judgments entered into force in the UK in 1987. This Convention was replaced by the Brussels I Regulation in 2002. In the area of choice of law, the Rome Convention on the law applicable to contractual obligations was enacted into English law in 1990. There are now plans to transpose the Rome Convention into a Regulation, the Rome I Regulation. The EC is also pressing ahead with plans for a Rome II Regulation which will cover choice of law for non-contractual obligations.

Both the proposed Rome I and Rome II Regulations fall within Title IV of the Treaty establishing the EC. According to the Protocol (on the position of the UK and Ireland) that is attached to the Treaty, measures falling within Title IV do not apply to the UK unless the UK indicates to the Council that it wishes to take part in the adoption and application of a particular measure. The UK has decided to opt into negotiations over Rome II but opt out over Rome I.

What I’d like to do today is look at both these proposed Regulations. My intention is not to look at the merits of the substantive provisions contained in the proposals but rather to consider generally whether the respective opt-in and opt-out are to be supported.

Although the UK has opted into negotiations over Rome II, various commentators have argued that the EC does not have competence to legislate in this area. The legal basis relied upon to establish the EC’s competence is Article 61(c) which allows the Council to adopt ‘measures in the field of judicial cooperation in civil matters as provided for in Article 65’. Article 65 in turn refers to ‘measures in the field of judicial cooperation in civil matters having cross-border implications … in so far as necessary for the proper functioning of the internal market.’ The need for there to be a real and substantial connection between the proposed Rome II Regulation and the internal market was emphasised by the House of Lords Select Committee on European Union in its 8th Report and they expressed doubts, as have various commentators, as to whether the Commission has convincingly demonstrated the case of ‘necessity’ for Rome II within the meaning of Article 65.

Although there are grounds for arguing that the competence of the EC to legislate in this area is questionable, we have certainly passed the point of no return on this particular issue. The EC is pushing ahead with the legislation. The latest development is that the Commission has accepted the common position adopted by the Council in August and the next step will be a consideration of the Council’s common position by the European Parliament.
One should recall that the original plan back in the late 1960s, early 1970s (albeit the UK was not a contracting state at that time) was actually to come up with a convention covering both contractual and non-contractual obligations and a draft convention covering both these areas was produced in 1972. Due to reasons of time, it was decided that the Convention should first focus on contractual obligations. The fruit of all this was of course the Rome Convention. But this illustrates that the idea of having a harmonised choice of law regime for non-contractual obligations at the European level is not a new one.

So given that Rome II looks set to become a reality and part of UK law, the question then becomes: what advantages or disadvantages will arise out of the UK’s decision to opt into Rome II?

The original Commission proposal divided non-contractual obligations into two categories: those arising out of tort/delict, and those arising out of an act other than tort/delict.

One concern that was raised against having a harmonised EC regime for non-contractual obligations was that there are too many diverse views amongst Member States in this area. This though seems to me to be an argument for having Rome II and not an argument for not having Rome II.

For non-contractual obligations arising out of tort/delict, the proposed Rome II Regulation provides that the choice of law rule should be the law of the country in which the damage occurs. The principle of the *lex loci delicti* is adopted by most of the Member States for torts. However, the means by which the *locus delicti* is worked out differs. Some European countries use a general flexible test concentrating on the centre of gravity of the case. Others use specific rules eg place of conduct or place of harm. Some others use different rules to work out where the tort is committed depending on the kind of tort itself, for example, there may be different rules for defamation and negligence.

All this indicates that it would be beneficial to have harmonised EC choice of law rules for torts and delicts in terms of curtailing forum shopping and increasing predictability. Practitioners would be able to advise their clients with more confidence on what law will apply to their claim in a cross-border tortious case. In addition, one could point out that the English choice of law rules for torts is not in a satisfactory state. The English common law double actionability rule can be said to be overly parochial in nature while the Private International Law (Miscellaneous Provisions) Act 1995 which imposes a new choice of law rule for torts (apart from defamation) has been criticized for oblique drafting. Rome II therefore represents an opportunity for the UK to come up with better tort rules at the EC level.

Furthermore, the proposed Rome II Regulation introduces a particular innovation for choice of law for non-contractual obligations, that is, it recognises party
autonomy in this area. Allowing the parties to choose the law applicable to their dispute whether before or after the dispute, is certainly something to be welcomed.

For the second category of non-contractual obligations i.e. those arising out of an act other than tort or delict, the types of actions included here are unjust enrichment and negotiorum gestio claims. The Council, in its common position published in August has added a third action within this category i.e. culpa in contrahendo, which covers dealings prior to the conclusion of a contract. Negotiorum gestio and culpa in contrahendo are claims which are unknown in English law so I would like to focus here on unjust enrichment and consider whether the inclusion of unjust enrichment claims within the scope of Rome II is a good idea.

Objections have been raised that it is not appropriate for the Regulation to cover UE. The HoLs’ Select Committee on European Union (in its 8th Report) thought that the UE provision should be deleted as it sought to deal with an area of law which they referred to as being in an ‘embryonic state’. These objections have been echoed by the UK government and various commentators. The main concern is that since the law of restitution is still developing, and there is no great uniformity between the substantive laws of individual Member States, it would be unwise and premature to harmonise the choice of law rules for UE. Is this a reasonable fear?

One of the main drivers behind harmonisation is of course to restrict forum shopping. However, if what the UE choice of law rules in a certain country exactly are remain uncertain, then there would not be much scope to forum shop. For example, Dicey and Morris’s Rule 230 (14th edition) attempts to set out the choice of law rule for restitution in English law. Rule 230 is prefaced with the word ‘semble’. So any would-be forum shopper would be uncertain what law would apply to his claim. One might also argue that having a European choice of law regime may on the one hand be incapable of dealing with new developments in the domestic laws of UE or on the other hand, restrict developments by seeming to set out this settled framework for the law. All these appear to be reasons against the inclusion of UE claims within the scope of Rome II.

However, having a harmonised choice of law regime for unjust enrichment would be beneficial in that it would add predictability and increase legal certainty in this area. English law certainly has not been able to come up with definitive choice of law principles on its own and it would be better for the UK to arrive at principled UE choice of law rules with the benefit of discussion with other Member States than for the English courts to continue to develop the rules on a piece-meal basis. Furthermore, it may well be that this would indirectly assist the development of the English domestic law of restitution alongside established principles. This is because the choice of law framework would have been arrived at in consultation with other Member States, some of whom may have a more
established law of restitution. On balance, the inclusion of UE claims within the scope of the Rome II Regulation is to be welcomed.

All in all, I think that the Rome II Regulation represents an opportunity for the UK to add clarity in choice of law for torts and unjust enrichment claims. It is important that the UK is able to engage fully in negotiations over the Regulation and have a hand in shaping the legislation. In my opinion, the opt in is to be supported.

Conversely to the proposed Rome II Regulation the UK decided not to opt into the negotiations on the proposed Rome I Regulation. This is rather surprising in my view since Rome I is intended to modernise the Rome Convention and the Rome Convention has been part of English law since 1990.

Why has the UK opted out? First, the UK Government has raised the same point that has been made for the Rome II Regulation, namely that there are doubts about the competence of the EC to legislate in this area. This is because the proposed Regulation, like the Rome Convention, is to be universal in scope. The legal basis here is again Article 65 of the EC Treaty which refers to measures necessary for the proper functioning of the internal market. But, as has been pointed out, where an English court is hearing a dispute between two South Korean domiciliaries regarding an alleged breach of contract outside the European Union, the connection with the European Union and the proper functioning of the internal market is ‘highly tenuous’.

Nevertheless, the alternative: for the M.S. to share a harmonised choice of law system for intra-Community disputes whilst retaining their own individual choice of law systems for extra-Community disputes would be a recipe for complexity and confusion. In addition, the European Economic and Social Committee has pointed out that to maintain two different systems for intra and extra Community disputes would be to discriminate against other systems of law.

So the argument about the questionable legal basis is not a sufficient reason to opt out of Rome I.

The predominant reason given for the opt out is that the UK disagrees with certain substantive provisions in the proposed Regulation. The main concern centres on Article 8(3) of the Commission proposal. This provision is the successor to Article 7(1) of the Rome Convention which allows the court a discretion to apply the mandatory rules of a third country with a close connection to the contract. (third country - a country which is not the forum nor the country which provides the applicable law of the contract). The UK had entered into a derogation against Article 7(1) of the Rome Convention on grounds that it was too uncertain. Such derogations however are not available against provisions in a Regulation.
The concern over Article 8(3) becoming part of UK law is misplaced as it merely reflects English common law cases such as Foster v. Driscoll and Regazzoni v. KC Sethia albeit that those cases were decided under a different label i.e. that of application of the head of English public policy which aims to maintain comity between the UK and friendly foreign states. The net effect though is the same – a third country’s mandatory rules were given effect by the English courts.

On this point, one should take note of recent developments concerning the equivalent provision in the proposed Rome II Regulation: Article 13(2) of the Commission’s amended Rome II proposal (21.02.2006)\(^1\) allows courts the discretion to give effect to the mandatory rules of a third country with which the situation is closely connected. This provision was deleted by the Council when it adopted its common position (11.08.2006) and the Commission, in its response (27.9.2006) to the Council’s common position, stated that (i) Article 13(2) had been added in order to achieve consistency with Article 7(1) of the Rome Convention, and (ii) it accepts the Council’s deletion. Rome II is due for a second reading at the European Parliament\(^2\) but it looks likely that application of a third country’s mandatory rule will not become part of Rome II. Given the emphasis on consistency between the two proposed Rome I and Rome II instruments, it is highly probable that Article 8(3) of Rome I will be deleted in the final version. In fact, latest developments on the Rome I front also indicate that this will be so. Article 8(3) has been deleted in the European Parliament’s Draft Report by Maria Berger\(^3\) which was published in August of this year. And the most recent development is that the Council Presidency text on Rome I, dated 12\(^{th}\) Oct 2006, also gets rid of Article 8(3). So the big hurdle according to UK perception on opting into Rome I looks set to disappear.

Another point that arises concerns the role of the ECJ. The ECJ will be able to make rulings on the interpretation of the Rome I Regulation. The Brussels Protocol, which enables courts of Member States to make a reference to the ECJ with respect to the Rome Convention, was only ratified recently. This means that there is no body of ECJ rulings pertaining to the Rome Convention. What will happen when the ECJ starts to make rulings on the Rome I Regulation? Could an English court take note of the ECJ rulings on the Rome I Regulation for the purposes of the Rome Convention if the ruling concerns an identical or similar provision? The answer must be ‘yes’ by virtue of section 3(1) of the Contracts (Applicable Law) Act which enacted the Rome Convention into English law. Section 3(1) provides that the UK is bound by the principles and decisions laid down by the ECJ in another context which is relevant to the Rome Convention. So in one respect, the UK opt out will not pose a problem as the UK can still have recourse to ECJ rulings on the Rome I Regulation for the purposes of applying the Rome Convention.

---

1 Article 12(1) in the original Commission proposal (22.7.2003).
2 The provision was retained in Diana Wallis’ Report (European Parliament’s Committee on Legal Affairs) (27.6.2005).
3 Committee on Legal Affairs (22.8.2006).
However, significant changes are being proposed in the draft Regulation. Problems will be caused if the UK continues to apply the Rome Convention while other EC Member States apply the new Regulation. So, for example, if the parties have not made an express or implied choice of law, Article 4(2) of the Rome Convention provides that the applicable law of the contract is presumed to be the law of habitual residence of the characteristic performer of the contract. Article 4(5) provides that the presumption may be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. Courts in different Member States have interpreted the relationship between Articles 4(2) and 4(5) differently. This obviously undermines the object of harmonisation in the first place. The Commission’s version of the new draft Article 4 however replaces the series of presumptions with fixed rules\(^4\) which sets out choice of law rules in favour of the law of habitual residence of the characteristic performer for different categories of contracts.\(^5\) If these, and other changes remain in the final version of the Regulation, a different law, and hence potentially different result, may be obtained depending on whether a litigant sues in the UK (or Denmark) or in other Member States. This obviously raises the problem of forum shopping.

The UK is continuing to take part in the discussions in the Council Working Group. The subtext, as I understand it, is that the UK hopes still to be able influence the shape of the legislation and should satisfactory changes be made, may decide to opt in after all once the Regulation has been adopted. I am not sure though whether more weight will be given to UK views in the hopes of persuading the UK to sign up to the Regulation after all, or whether less weight will be given. There might be a risk that the opt out will turn out to be a negotiating tactic that may backfire if the rest of the EC (bar Denmark) goes ahead with the Rome I Regulation and with provisions which the UK disapproves.

The Rome I Regulation is intended to form a harmonised EC private international law system for civil and commercial matters alongside the Brussels I Regulation and the proposed Rome II Regulation. All three instruments are intended to act in a complementary fashion to each other and work as a cohesive whole. Given that the UK has signed up to the other two instruments, there is a strong argument that the UK should also sign up to Rome I. Inevitably, there has to be compromises when dealing with a big pool of Member States, all of which have diverse and proud legal traditions. However, the UK signed up to the Rome Convention years ago because we recognised that having a harmonised EC

---

\(^4\) Fixed rules retained in Council Presidency’s text (12.10.2006), but addition of Article 4(3) : ‘Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected’ with another country, the law of this other country shall apply.

\(^5\) ‘The European Parliament’s Committee on Legal Affairs, Draft Report by Maria Berger (22.8.2006) converts the fixed rules back into a series of presumptions on the grounds that the Commission’s proposal is excessively strict and does not make sufficient allowance for judicial discretion.'
choice of law regime for contract was a good idea, and it still remains a good idea today.

In conclusion, the future of private international law looks largely European. The best approach that the UK can take is to fully engage in all developments that occur and thereby make sure that it can influence the shape of any future legislation.

**Lord Mance:**
Thank you very much indeed. It might be interesting to know if anyone here was at the Department of Constitutional Affairs Rome I Stakeholder forum which was earlier this afternoon, maybe they can add something in a moment. Just to break up the series of talks, is there one question that anyone would like to ask at this stage?

**Discussion:**
Talking about text of current proposal and discussing how the UK seems to have a good influence over issues such as agency, therefore indicating that what the UK wants hasn’t been diminished.

Adam Johnson then entered the discussion and related a story of attendance at a roundtable discussion with Diana Wallis who emphatically believes the UK’s position has been greatly weakened by the opt out and people around the table commented on how all the other Members must care a great deal that the UK wouldn’t be in the system, but the answer was that the 24 other Members don’t care and can live without the UK therefore making the UK much worse off than they would be if they participated and will give them less of a say over what happens. Lord Mance commented that that seems to be a characteristic parliamentary view and that there’s a definite feeling of disappointment there, but on the practical negotiating front, the signs are slightly different.

**Lord Mance:**
Shall we move on to the second talk then by Adam Johnson?

**Adam Johnson:**
Thank you. Good evening everyone. I'm invited this evening to give a practitioner’s perspective. I prepared by reading a number of English articles, most of them by academics and most of them dealing with the now infamous trio of ECJ decisions, that’s to say Turner, Owusu, and Gasser. What I detected from a review of these articles was an air of considerable gloom appears to have settled on practitioners and academics in the PIL area. The feeling seems to be developing based partly on these cases but also on proposals of further legislation by Europe, some of which have been discussed by Adeline already this evening. That the common law is being systematically dismantled and that in consequence the future for London, there’s a sense that the large-scale international litigation is under threat. I’m not here to tell you that there is no
cause for gloom at all. The Gasser decision in particular gives rise to some particular disquiet. But, from a practitioner’s perspective, it seems to me that the future might not be quite as gloomy as some people would have you believe and so, here are my five reasons not to be gloomy, my five reasons to be cheerful, if you will.

The first is that we have before now had predictions of impending disaster, but they have not come to fruition. Some of you may remember that in the July 1991 edition of the Law Quarterly Review shortly after the coming into courts of the Contracts (Applicable) Law Act 1990, Dr Mann published a note provocatively entitled “The Proper Law of the Contract: an Obituary” and in it he predicted “what could become severe losses for the city of London” arising from the incorporation in Eng law of the Rome Convention which carried with it amongst other things “the odious method of interpretation which involves a reference to reports by two continental academics” among other things. And yet, I have to say that my own experience in dealing with the Convention has been largely positive; positive in the sense that it enables one to give advice to clients within a relatively well established framework, with some knowledge – at least in outline – of what the framework is, and with reasonable confidence that the same framework or something like it, is going to be applied in other jurisdictions which have adopted the Convention. In other words, the Convention has promoted, it seems to me, a degree of legal certainty and certainty in the law is a good thing, especially as far as practitioners and businessmen are concerned. In fact it seems to me that more than ever in the modern commercial world litigants are coming to place a premium on certainty and predictability and that’s because of the growing emphasis emanating from a number of sources, including judicial pressure on the use of alternative means of dispute resolution, including in particular mediation.

The users of legal services, clients if you like, are telling us increasingly that what they want when a dispute arises is a reliable risk assessment speedily given so that they can form a view of their rights and liabilities and position themselves for a speedy resolution. They then immediately want litigation management – that’s something that comes later in the piece, but very much as a last resort. But instead what some people are beginning to call “dispute counselling” which seems to be a mix of practical advice and care. It seems to me that the reform of our PIL has to be viewed in this wider context. And if it’s part of our concern to maintain England and London as a premium forum among the world’s available dispute resolution fora, then certainty and predictability ought to be somewhere at the forefront of our plan.

So, that leads me on to my second point. I set myself the task of saying something possible about the three ECJ decisions I’ve mentioned, but this is not easy. However, one potentially positive feature both in the opinions of the relative AGs and of the Court is the suggestion – the acceptance of the proposition – that legal certainty is to be one of the guiding principles in the
interpretation of the jurisdiction convention. Very good, we would all applaud that I’m sure, and if the principle of legal certainty is more generally adopted as a yardstick for measuring success, then wonderful, including in particular as far as practitioners are concerned. But that’s talking in the abstract; what about the decisions themselves?

*Turner v. Grovit* it seems to me was an accident waiting to happen. This you will recall is the case which outlaws the anti-suit injunction within the framework of the Brussels Convention, now Brussels Regulation. Perhaps it’s an inevitable result because the doctrine that the anti-suit injunction operates against the person of the defendant and does not impinge directly on the competence of the foreign court is not one which will obviously commend itself to the foreign judge. One is reminded of the comments of the US judge, Judge Green in one of the *Laker Airways* cases in the early 1980s. “It can hardly be said”, he observed, “that an order which, for example, directs a party not to file further papers in this Court, as did the order of the British court...is anything other than a direct interference with the proceedings in this Court.” Now it seems to me perhaps heretical in my view, but nonetheless, whatever the English law analysis, it is understandable that the judge in the position of Judge Green should have reacted as he did. And it also seems to me, that if one takes that kind of reaction as an obvious and direct by-product of the AS injunction, then the case for its incompatibility with the Convention, now a Regulation, framework which is designed expressly to encourage cooperation and respect among Member States becomes very strong. So *Turner and Grovit* we may think of as an unfortunate case, but it’s one which seems to me, we have to accept with a certain degree of resignation.

*Owusu* is a much more difficult proposition. There, an English defendant was told that he could not seek a stay of English litigation on the grounds of *forum non conveniens* because the Brussels Convention precluded it, even though the claimant was English, the principle defendant was English, the other defendants were Jamaican, and he wanted to stay proceedings in favour of Jamaica and not in favour of any other EU State. The problems of this decision are very well-documented elsewhere but if one is looking for positives, it seems to me that at least in a limited sense, one could say that the position of an English domiciled defendant sued in England has been simplified. The advice to such a person in many cases will now be pretty straightforward – you will have to file your case in England and you will not be able to stay. Now, you might say with some reasonableness, that the inflexibility of this rule might in some cases lead to injustice and very well it might, but in many other cases it will not and there is at least some merit at parties knowing at the outset where they stand. The *forum non conveniens* doctrine is itself not without difficulties and there is a sense in which the very strength of the doctrine mainly its flexibility and its adaptability comes at a cost and the cost is the uncertainty of the outcome of many foreign applications. Viewed from the perspective of the judge whose concern after careful scrutiny of the evidence and careful consideration of the authorities, is to
do practical justice to parties in the cases before him, the doctrine is highly valuable because it’s flexible and it’s highly sensitive. But to the client at the outset of the case who wants really nothing more than to know precisely where he stands, who is presented with an opinion which at best will express only cautious optimism and likely something less convincing than that, the doctrine is rather less-obviously helpful.

Then there’s the Erich Gasser decision, the effect of which is that the party who has the benefit of an exclusive jurisdiction clause will not be able to proceed with an action in the party’s elected court if the defendant has in the meantime, started proceedings elsewhere. This can be dealt with very briefly – I haven’t been able to think of anything good to say about it. In fact, it does nothing, it seems to me, anything to promote legal certainty; in fact, it does quite the opposite, so Gasser I would not defend for a moment. It seems to me that in gathering out fire power to persuade the European institutions that some change to the rules on jurisdiction is required, Gasser should be the focus of attention. So that’s my second point. There are some good things arising from these decisions even though you have to search quite hard to find them.

My third point is simply to observe really for the benefit of those who think that these proceedings will take some of the enjoyment out of international litigation and in particular might limit the possibility for creative forum shopping, in fact there is already quite a body of evidence that forum shopping is continuing, albeit we are having to learn to shop in a slightly different way. For example, it’s fair to say that the law on domicile has not really been the focus of attention or interest for international litigators in England but now that may change because the practical effects of Owusu will be to place a considerable premium on being able to say your defendant is domiciled in England. Not only will that mean that jurisdiction over that defendant is assured, but also if there are other nautical defendants in different JD overseas, the claimant has a better chance of bringing them all into the action if the principle defendant is domiciled in England for fear that otherwise, proceedings will be fragmented. A Lexis search conducted yesterday revealed one case which deals with just these issues and not surprisingly. It’s a decision from Mr Justice Patton in April of this year in a case called Foote Cone & Belding v. Theron [2006] EWHC 1585 in which the Judge in concluding that English proceedings should not be stayed in favour of an action in Turkey, conducted a careful analysis of the evidence relating to the domicile of the defendant, a South African national who was resident in England and concluded ultimately that he was domiciled in England and proceedings therefore continued.

Another case which demonstrates what will surely be an important characteristic in international litigation within the EU post-Gasser is WPP v Bonatti [2006] EWHC 1641 and that demonstrates the benefits of lack of moving with some speed. This was the case where the parties had contracted on the basis that the English courts have exclusive jurisdiction much like Gasser and the issue for the
court was which courts were first seized. Frankly in that case, the Italian defendant had been rather slack in launching his torpedo, and so the English proceedings were allowed to continue.

That leads me on to my fourth point which is, although Europeanisation is and will continue to be undoubtedly a powerful influence on law in this area, it’s not the only influence and I wanted to identify two factors which I think are significant. One is the continuing effect of the relationship between public international law and private international law and in the course of the last few months we’ve seen a number of cases dealing with the Act of State Doctrine and related doctrines concerning the competence of the courts to adjudicate on matters of foreign public law and English executive policy. For example, in February of this year, the British Council in a case called *President of the State of Equatorial Guinea and RBS* was forced to remark on the potential non-justiciability in England of claims against those alleged to be responsible for an attempted military coup. In April the Court in *AY Bank v. Bosnia Herzegovina* [2006] EWHC 830 had to deal with the justiciability of issues arising between a successor state to the former Yugoslavia related to bank deposits in England, and just a few days ago on the 12th of October, the Court of Appeal decided that it could not grant relief to non-UK detainees at Guantanamo Bay against the English Foreign Secretary in part because to do so would have involved the court invading the “forbidden area of foreign relations”. That’s a case called *R (on the Application of Al Rawi) v. the Secretary of State of Foreign Affairs* [2006] EWCA Civ. 1279 and there are other decisions in the same area. I mention these cases now not to analyse them but to point out one area which it seems to me is hugely important in practical terms and where there is much to be done I hope in this forum and elsewhere which will stimulate the interest of academics and practitioners alike.

The other factor influencing the development of the law which I wanted to identify, is what one might call client activism. Campbell McLachlin who many of you might know, has persuasively argued in an article in the Law Quarterly Review back in October of 2004 that the very powerful influence on the development of the COL in England at least over the last 25 years or so, has been the actions of the litigants themselves. The practical requirements of litigants involved in international asset tracing have led for example to the development of the world-wide freezing injunction and laterally to the continuing jurisprudence on the issue of when it’s appropriate for the English court to make injunctions in respect of litigation abroad. There’s no reason to my mind why, despite perhaps the unwelcome intrusions of the ECJ in some areas, the impact of client demands as a driving force behind legal innovation should be materially diminished. I would add this further point which is that although the *Gasser* decision may be in some ways highly troublesome, it has had I think one positive effect which is that it’s generated quite a high degree of direct activism on the part of users of legal services in England which to me is very pleasing to see. One’s observed recently the financial institutions in London galvanize into action and engage vigorously in the process of debate over amendments to the
Brussels Regulation. One’s seen this through not only private initiatives but also through the work of ISDA and of the Financial Markets Law Committee and indeed the work of this Institute. It’s quite one thing for lawyers and legislators to guess at what the users of legal services want but quite another to hear, as it were, from the horse’s mouth, and sometimes what you hear is quite surprising. So this is a good thing and it marks a step forward from the more indirect activism identified by Professor McLachlin to a more aggressive form of activism through lobbying the institutions of Europe and other influential bodies. Let’s hope that something can be done about the Gasser decision. It should not be too complicated; it’s simply a question of whether the political and diplomatic will exists.

That leads me neatly onto my fifth and final point which is about Rome II. You have heard already the detail, or some of the detail, from Adeline, but I again two general and related observations. The first is that these are, of course, important initiatives. In assessing their effect, however, on the attractiveness of England as a dispute resolution forum, it seems to me important to bear in mind that we shouldn’t be misled into thinking that choice of law per se, or perhaps more accurately, the application of choice of law rules, is very often in fact which drives a choice of jurisdiction by litigants. More significant in practice, in my experience, is the available procedural framework within the selected court. Italy is an attractive forum for some, not because of its conflict of law rules or even because of its substantive law, but because its litigation procedures have the reputation of being unspeakably slow. The United States is an attractive forum to some usually not because of any material differences between their COL rules and ours, in my experience there’s nothing much to choose between them actually in terms of their practical impact, but the difference is because of the special features of the US litigation system – contingency fees, extensive pre-trial discovery and depositions, the jury trial, and the possibility of claiming punitive damages. So that’s my first point under this heading – the difficulties of the draft proposal for choice of law rules will not particularly impact the choice of London as a dispute resolution centre.

Much more significant in this regard is the state of our civil justice system generally and the question marks which now unfortunately seem to exist about our ability to manage large-scale litigation including large-scale international litigation effectively. We have had a first-rate reputation as a dispute resolution centre for a long time and we must make sure it stays that way and that to my mind means ensuring that the courts are adequately funded and the judges properly resourced.

My second point about Rome II takes me back to the beginning of this presentation. I mentioned Dr Mann’s article, but leaping idly through the same volume of the Law Quarterly Review, I came across a further obstacle which I thought might be interesting particularly with regard to Rome II. This was an article by Dr. Peter North published in 1991 about the then reasonably produced
report of the Law Commission on choice of law in tort which of course culminated several years later in the enactment of Part III of the Private International (Miscellaneous Provisions) Act of 1995. Dr. North, like Dr. Mann, was also something of a harbinger of doom. He drew attention in his article to a remark by Cheshire in the 1935 edition of his book on private international law to the effect that PIL had until that stage “had been only lightly touched by the paralysing hands of the Parliamentary draftsman.” Dr. North said that any statutory intervention was likely to have a freezing effect on the development of the law and any attempt to minimise this by couching the statutes in loose terms would only give rise to confusion. It seems to me that in practice, from my perspective, none of this has happened. Indeed, my view is that the legislation has been largely beneficial in its impact and that its simple framework of rules, although they can give rise to some issues (see Harding v. Wealands) is infinitely preferable in practice to that unfortunate creation of the common law the Double Actionability Rule. Interestingly, for present purposes, Dr. North concluded his article in this way: He said “Finally, it is to be observed that if the Commission’s proposals were to be enacted, the English and Scot’s private international law of tort and delict would become materially different from that in force in every other Commonwealth country, in every EEC country, and indeed it would seem, in every country in the world with a developed system of private international law.” But then he goes on, and notes this: “This result would be achieved at a time when the advantages of uniformity, or at least a basic similarity, in private international law are becoming increasingly apparent.” So my final point is that if the advantages of uniformity, or at least a basic similarity, were apparent to Dr. North in 1991, they should be apparent to us now. And despite the now infamous decisions of the ECJ, we should all be open-minded about the benefits of the Rome I and Rome II proposals. Thank you.

Lord Mance:
Yes, thank you very much indeed. One of the other developments which hasn’t been mentioned so far is the Convention on Choice of Jurisdiction Clauses which was prepared by the Hague Conference where those involved in the draft, I know, where very conscious of the need to try and produce something different from the European structure and did so, and one hopes that that will be ratified and that it may have an influence on the way in which Brussels I is revised in accordance with the pressures which we heard about. Again, is there any question that anyone would like to ask at this time?

Discussion:
Question on floor on Bonatti and whether the defendant’s lack of speed was what actually hurt him. Respondent discusses the decision of the ECJ in Roche Nederland of 13 July as one that goes a long way in chilling off the Italian torpedo in the application of Article 6(1) of the Brussels Regulation. Although it may work somewhat contrary to the idea of legal certainty in terms of practical justification, the policy justification was apparent. The speaker believes this decision means that one shouldn’t be worried about the decision-making process of the ECJ. He
goes on to run through a brief example of filing a lawsuit against subsidiaries for negative declaratory relief to the effect that you are not infringing their patents and you then join as co-defendants all the other companies in the group which also have an interest as parties under Article 6(1) to the effect that you're not infringing their patents either. Then when the patent owner tries to start proceedings against you in any other country you say, "ah, no, this is pending before the Italian court, you have to stay your proceedings." That's been rather effective in allowing them to have several years of patent infringement before they're caught up with. What Roche Nederland did is say that Article 6(1) cannot be used in that way, so where you have different patents in different countries, even if the same policy is being pursued by the same group of companies, and the same activity in issue, it does not give rise to the risk of inconsistent judgments and so Article 6(1) cannot be relied upon to join co-defendants. This is a very narrow reading of what constitutes inconsistent judgments. The very fact that it’s in another country and it may be a different system of law renders it unlikely that it will be an inconsistent judgment therefore you can’t rely on Article 6(1). There is argument as to how widely that can be replicated in non-IP circumstances.

**Lord Mance:**
Well, thank you very much indeed. Shall we move on then to Jonathan Harris?

**Jonathan Harris:**
Ok, I'll make a start anyway; I won't get to the handouts for a few minutes and it's fair to say that this is something totally and utterly different – as different as you could get. I was asked to come along and speak from an academic/practitioner perspective. Being a very new qualified practitioner, I didn't feel especially qualified to do that and I thought, well, what am I going to talk about. I decided that what I would talk about is the difference in approaches of academics and practitioners to private international law: whether there is a gulf, whether it's unhealthy, and whether it's likely to be bridged in the future if there is. So that's in a nutshell, what I'm going to be talking about and I'm going to illustrate it with some rather unusual examples. It seemed to me that this was timely. Private international law in recent years has really changed its spots: it's never been so popular, it's never been so practical, it's never been so commercial, and yet it still goes on in university classrooms as ever it did, but with this very practical commercial edge and most of the people who sit there doing conflict of laws in your class tell you they're doing it because they're going off to X city law firm, so it led me to think about differences in approach.

I was thinking first about my position as a private international law academic. As an academic, there are whole areas of private international law that are virtually ignored, or there may be one person in the country qualified to deal with them at all and I sit in wonder when I go to meetings about these European regulations about what everyone else thinks about them and think 'I wish I knew about that'. And areas in Rome I like the rules on agency, subrogation would be another
example, are areas in which not many academics will have very much to say. They tend to fall into a black hole in academic discipline. Insurance would be another example. And then there are these things that come out of Europe like the European Enforcement Order Proposal, proposals for small claims procedures, payment order which I think ‘oh dear I’d better read that later, I know it’s important but I’m not sure I can quite bring myself to read it’ and you’ll find a chronic lack of specialism in the universities on these sort of areas that clearly are tremendously important but don’t excite any academic opinion at all. And I think if you’re talking about England, there are also other alarming gaps, notably conflict of laws in family law is increasingly left of syllabuses around England and the number of experts in England in the universities sis alarmingly small and the pool of expertise is diminishing all of the time. And the other pressure on universities is the pressure of research assessment that we’re subject to which very much requires you to say something different that someone has not said before when you’re writing research and that requires you to push yourself towards academic journals and giving a theory which may or may not be worth hearing; and I think it is faintly alarming, to give you an idea – the government assessment exercise that universities are subject to every six to seven years, it would be borderline whether a book like Dicey & Morris would be returnable since it’s said to be re-stating the known world and however well it does it, that is not putting forward a new theory. There is, in some respect, bad news there – the gap is getting wider with the pressure on universities, but there is so much that academics can bring to the table and to practitioner audiences and there are great areas in which academics have the luxury to sit there and rationalise about what fantastic work has been done there in recent year and two examples I pick would be the rationalisation of the conflict of laws in equity and the body of excellent literature that’s starting to come out on e-commerce and private international law. Academics have really something to say there which you would hope would be listened to by practitioners. There’s also a lot of excellent comparative work. We’re increasingly subject to European meanings of key terms and one could look to academics to do the comparative work to help us in our understanding to help us in these definitions and I think in some ways, a lot of this work is still not picked up on and used all that often in practice, at least that’s my perspective.

I’ll say something about the other side before I get onto my examples. Firstly, a word on Dicey & Morris which I was involved in for the first time on the new edition. I found it a faintly alarming process because it was contrary to everything I knew. I had to be concise, which pretty much terrified the life out of me. Most of the skills of chasing down thousands of statutory instruments that often never get changed is the kind of research that university academics are generally not doing at all, so there is a big gap there.

I found, personally, doing a pupillage was an amazingly informative experience. I won’t say much about it – it’s faintly unnerving to have my pupil master sitting right in front of me while I’m here, but enormously difficult again because one has
to make up one’s mind; one doesn’t say to the client ‘well, you know it be this and it could be that’ and it’s an enormously different thing writing about the rules of service out of the jurisdiction and actually advising a client whether they’re likely to get it on the fact and I certainly found my understanding of that process and how the CPR rules actually work was enormously enhanced.

So, to my examples: I was thinking how I might illustrate how differently an academic might approach a particular subject to a practitioner and could you bridge the two. Although it doesn’t relate to England and Wales, the most graphic example I know of a difference in attention between principle and practice is actually in an area I’ve worked in extensively which relates to COL and the off-shore trust industry. So I thought, as many of you will not be familiar with this at all, it might be fun to take you somewhere totally different. Excuse the rather off-the-wall handouts with the speech bubbles on them. I should just take you through a few examples to see whether I’ve completely lost leave of my senses with these examples.

The first two examples come from Jersey and this is on the table at the moment: the Trusts Amendment No. 4 Jersey Law which is likely to enter into force before the end of 2006. I’ve called my first handout “A Principles Critique”. This is, if you like, me wearing my ultra-conservative academic hat looking at this legislation and saying what is right and what is wrong with it. The context of this legislation is, it’s applicable only to (I’ve just given you one section) trusts governed by Jersey law and the idea is to provide clarity to outside investors for whom this is mainly aimed who might want to invest in Jersey law trusts. The legislation is about as radical as any conflicts legislation you’ll ever find anywhere in the world, I think. I’ll give you a few examples: Article 9(1) which you see in front of you lists a number of things that, when Jersey law governs a trust, will be subject to Jersey law. So it’s a list of things that, when you’ve chosen Jersey law to govern your trust, will be subject to Jersey law. They rather illustrate where you could go wrong if you don’t have a firm principled background. The first one, which is in a way not surprising, “the validity of a trust is governed by Jersey law”, is perfectly true; however, it’s a complete duplication because it’s already contained in another instrument to which Jersey is party – the Hague Trust Convention, abbreviated throughout to HTC and is really rather pointless in one view, wearing my academics hat emphasising duplication – no real harm done. [Article] 9(1)(b) is more radical. If I want to transfer property to you to hold on a Jersey law trust, so I’m going to alienate my property: give it to you to hold on trust subject to Jersey law. That property transfer from A to B is not governed by the lex situs as any traditional academic conflicts lawyer would think; it’s governed by the law the parties chose: Jersey law. It unsettles everything I know wearing my academic hat and if I transfer property to you, I expect the lex situs but I don’t get it here. I get the law that we chose, Jersey law and it doesn’t look right, wearing my orthodox hat.
The third one, 9(1)(c) is even more extraordinary because capacity to set up the trust is governed by the very law that you chose to set up the trust. It’s the equivalent of saying in contract law, if you and I want to enter into a contract governed by French law, my capacity to do so is governed by the chosen law, French law. It’s contrary to everything we know about capacity as a form of quasi-mandatory rule and it’s extremely radical. I won’t go through all of them, but a couple of more examples of things over the page that wearing my academic hat just doesn’t look right at all. Perhaps I’ll take you to Article 9(2)(a) which says that “without prejudice to the previous Article”, which determines the scope of Jersey law, “the matter shall be determined without consideration of 1) whether any foreign law prohibits or does not recognize the concept of a trust.” So the fact that a trust is not recognized in any foreign law system is completely and utterly irrelevant to its validity if you’ve chosen Jersey law to govern it. My academic hat says that creates enormous problems if the trust property is located in a non-trust state. Just saying we’ll forget about the fact that another system doesn’t know what a trust is, doesn’t work very well if the property is actually in a state that doesn’t know what a trust is and it works even worse if the property that is held on trust is immovable. One can’t side-step those problems of enforcement by just saying we’re going ignore the fact that foreign law doesn’t know the concept of a trust.

In 9(2)(b), without going through the full detail, what it’s essentially doing is saying, if you’ve left property on trust subject to Jersey law, it doesn’t matter a jot that some foreign law, such as French law, where you might have your domicile perhaps, might say that you can’t do that because you’ve got to leave, for example, half of your property to your family members. Jersey law says, couldn’t care less about that and almost is a recipe for conflict between rules of trust on the one hand, and foreign systems of succession. It’s going to create problems in practice.

Perhaps I’ll just take you, for time reasons, to the last of these provisions which I think in some ways is the most radical of all. In 9(4), think about our basic understanding of the law of foreign judgements in England, and it’s absolutely fundamental to how the system works that we don’t review them as to their substance and that essentially we check that the foreign court had jurisdiction and then we recognize it. Jersey has the equivalent to the Foreign Judgments Reciprocal Enforcement Act 1933 so in principal, it is bound to recognize judgments falling within the scope of that legislation; it has no choice. Yet you get this extraordinary provision in 9(4) which says “no foreign judgment with respect to a trust shall be enforceable to the extent that it is inconsistent with this Article, irrespective of any applicable law related to conflicts of law.” In other words, if any foreign judgment differs on the substance to what we would have reached in Jersey, then it can get lost. It will not be enforced in Jersey. It is absolute anathema to anything the academic or the traditional critic of private international law would think of as working in relation to foreign judgments and it’s almost certainly in breach of their obligations under their equivalent to this
Foreign Judgments Reciprocal Enforcement Act. That’s my principal critique, if you like.

If I turn to handout 2, there’s a very different side of the coin. This is what I call “A Practical View” and this is a policy view of exactly the same legislation and the policy is pretty crude. The policy is, we are competing frantically for business. This is a cutthroat legal market and if you leave your property to a Jersey law trust, then you want to be sure it’s safe and no nasty foreign laws are going to get to it, and in particular, if you’re French, for example, to take an example at random, please come to us – it’s a way of getting property away from your family. Just leave it in a nice Jersey law settlement and we’ll take care of it that your family members can’t get to it on your death. The policy is totally different and they’re competing for the most pragmatic rules they can possibly think of. You can see this, for example, in 9(1)(b) and 9(1)(c), the provisions on the front page that I took before. That’s why the question of transfer of property on trust is governed by the very law that you chose. It may give rise to problems of enforcement, but it side-steps the problems of *lex situs* and that’s exactly the point. You might not, in the *lex situs*, be able to leave your property in a Jersey trust, but in Jersey come to us and all will be taken care of. The ultra-pragmatic view is that you can even side-step an incapacity you have by your home law, be it perhaps your domicile or the situs, don’t worry about it – if you choose our law, we’ll take care of your trust and any incapacity you have by your home law, will magically be taken care of. This is from the perspective of trying to promote the validity of these trusts wherever and whenever it is possible to do so.

If I go over the page, we look at 9(2) again and the first provision about not taking notice of the fact that a foreign law doesn’t recognize the concept of a trust. That is precisely to attract investors who do have their property in non-trust states, or who live in non-trust states. It’s a mechanism for allowing them to create local law trusts and come and invest in Jersey. You may want to have land in a non-trust state, but it’s all okay in Jersey, you can create a trust out here. [Article] 9(2)(b) is the staple clause you find in off-shore trust legislation. It’s the “keep the family away from your trust” provision. The biggest market, in my experience, in off-shore trust centres is about finding a way for civilians, those from civil law systems, to avoid having to leave their property to their families. It’s a nice worthy aim of taking the property of their spouses and their children – how do we do that? We say if it’s a conflict between trust law and succession law, then it’s not even close. Trust law wins. Put your property into a Jersey law trust and you don’t have to worry about the fact that, or we won’t worry about the fact that the law of your domicile says that you have to leave your movable property to your children; don’t worry, your trust will still be valid. The policy is completely and utterly different.

Finally, on this example, if I go back to 9(4), the foreign judgments rule: it’s what off-shore trust legislators call the insulation clause. In other words, it’s no good granting this fantastically pragmatic party autonomy-respecting set of rules; no
good enacting these so that you know in a Jersey court you’re fine, you can do almost whatever you want, if you find that these nasty spouses and children start suing you in your home local courts and then coming to Jersey and saying, “well, we’ve got this judgment and you’ve got to recognize it”. From the practical point of view, the point of 9(4) is to complete the protection of Jersey law trusts by preventing them from attack by foreign law judgments. So, two very, very radically different interpretations of the same legislation and you can see principle and policy, if you like, could hardly contrast more markedly than that.

I’ll take you briefly to somewhere else now, to the British Virgin Islands, somewhere slightly more exotic. As I say, I didn’t feel entirely qualified to talk in detail about an academic practitioner perspective save in this respect: that my brief, I was involved in drafting this, was to put academic lawyers and the policy people from the BVI in the same room and come up with something that was as pragmatic as possible whilst being theoretically respectable. This was the attempt to marry, to get academics and practitioners to sit in the same room and see if the result would be something better than what someone might have in isolation. I’ll leave others to judge, but I’ll just point out it’s a long set of rules and you can read some of them later at your own leisure. I will just give you a few highlights of how it works.

The first thing – and I won’t read all these sections out, but I will tell you what they do – section 83(a)(7) basically was a response to us saying, as traditional academic lawyers with our textbooks, if I am transferring property to you to hold on trust, I am disposing of property and if I’m disposing of property, the only credible choice of law rule if it’s done inter vivos is the lex situs. Furthermore, you don’t want to forget the lex situs because you’re going to run into problems of enforcement, particularly if it’s immovable property, if you don’t go for the lex situs. You’re better off doing this than trying to be too audacious and the BVI went for that and their rule for if I want to transfer property to a trustee to leave on trust, was the lex situs; what an orthodox conflicts lawyer would probably think is the correct law.

The next question in subsection (a) was, we want doctrinal consistency for intangible property as well. It doesn’t seem right to us that you would have one law for immovables and tangible movables but then you’d have a different law for intangible movables. If you’re telling us you want to use the lex situs rule for tangibles, then we want to use it for intangibles, but that’s a real problem for us: we want certainty in our legislation – what on earth does the lex situs mean for intangibles and this is obviously a vexed question in private international law. The result is a more sophisticated attempt than I think has been attempted anywhere else, certainly more extensive in the first schedule, which I won’t go through now for time reasons, but you’ll find on pages 6 and 7 of this legislation a detailed attempt to say what the lex situs is for a whole load of different types of intangible property, many of which, if you look in the books, have never been attempted to be given a situs before. They include, for example, rights to non-
contractual debts, interest under a trust. As I say, I don’t have the time to go through them now, but I think it is interesting and I think it was radical, but it was demanded in the need of certainty.

The next thing, perhaps the last provision on the front page is that we identified between us, the academics and the policy men, two different types of capacity if one was creating a trust. The first question, if I want to leave property to B to hold on trust for C, I’m getting rid of my property. For reasons we’ve already said, it should be the *lex situs* for the question of can I get rid of my property at all, can I give it to a trustee. But then the legislators said, okay that’s fair enough but when we come to the specific question of as long as I can get rid of my property to B to hold on trust, does the *lex situs* have any legitimate interest in the question of whether I specifically can create the thing that is called a trust with that property as opposed to whether I can get rid of it at all? The answer we came up with was no, not really. The *lex situs* is interested in whether I can get rid of my property at all; it’s not interested in whether I can create the trust structure, if you like, with my property. The legislators took the pragmatic approach and said we’ll let the chosen law govern that second question, so the result is that the second question of capacity to create a trust specifically is governed by the chosen law, BVI law. They wanted to respect separate autonomy on that question and that’s what we went with.

A couple of other things I’ll pick out very briefly – on page 3, they had actually been looking at Dicey & Morris and found that fiduciary duties were a nightmare and Dicey opens by saying pretty much the same thing – that the law on fiduciary duties is shrouded in mystery. So their response was, we don’t want that, let’s just say for the avoidance of doubt if you’ve chosen BVI law, then any of your fiduciary duties as a trustee are governed by BVI law as well. That is a very unusual provision; you don’t find it anywhere else that I’m aware of off-shore. They then follow, pretty much section after section, 13 through to 18, are all about the thing that off-shore legislators are terrified about which is these nasty spouses and children coming an saying, why has this property been put, just before this person has mysteriously taken ill, in a BVI trust and now we’re being told we can’t have it and our local law says we can have half of it? There’s just a detailed set of rules which make sure that what we call rules of what we call forced heirship of civilian countries are locked out and you cannot come to the BVI and rely on any succession rights that you have under civilian law. There’s also a provision similar to Jersey saying that the fact that the foreign law doesn’t recognize the trust is irrelevant too.

The interesting thing and the last thing I’ll say before reaching some conclusions, if you have a look at section 19, it’s similar at first sight to Jersey but different. This is their foreign judgments clause and they say, “to the extent that it is inconsistent with the previous sections (those were the sections on forced heirship and on foreign laws not knowing the concept of a trust) it shall not be recognized.” Now that looks similarly objectionable to the Jersey law, particularly
as the BVI has similar foreign judgment rules to England and Jersey. But it’s not – it was a compromise between the academics and the policy people which was to say we won’t just refuse to recognize BVI foreign judgments when they differ to BVI law, but we will refuse to do so in the specific circumstance, and only the circumstance where a foreign court has applied forced heirship rules or has reached its judgment on the basis that they don’t know of the concept of a trust. Only in those circumstances is there a right to refuse recognition. In other circumstances where their ruling is just different, you have to recognize and there is an express statement that the grounds for this is public policy. That’s rather off-beam analysis if you like.

To just bring us back to some thoughts to bring us back together. I think that what this legislation shows is that sometimes you get more by bringing academics and practitioners to the table together than you do by academics and practitioners working in splendid isolation on private international law alone. I think this is the most graphic example I can think of where you get that and I think until recently there’s been very little or not enough common ground between the two; not an understanding of what each other can bring to the table. To end, as Adam did, on a positive note, a reason to be cheerful, there are some good things to say. There is certainly some common ground and one can look forward to more to come back to England and Wales. The feelings on the key cases that you described, Gasser, Turner, and Owusu, I think have united academia and practice like almost nothing I’ve seen certainly for a long time and I think those feelings of frustration, if you like, are very much shared on both sides of the fence. I think ironically, we have our friends at the European Union to thank with Rome I and Rome II for bringing us all together to the various roundtables and meetings and discussions that we’ve all taken part in where I, certainly for the first time, have met practitioners that I haven’t know the existence of and there has been an exchange of ideas and I like to think that there will be rather more of that in the future and as I say, if the BVI example is anything to go by, you get better results by bringing the two together and I think lastly, without sounding too obsequious, events like this do much the same thing. We have a very mixed audience of academics and practitioners and whilst I think that it’s not going to be the case in the future that the two are going to live in perfect harmony and share the same ideals, today we at least a) now know more or less who each other are, and b) we’re starting through various European initiatives to understand each other’s viewpoints on these subjects and I hope that’s at least some kind of progress.

Lord Mance:
Here, here! I think that’s a very good note on which I may have to excuse myself, but Alex, would you like to come and take over? I think have all enjoyed the three talks and I’d like to personally, before I go, just invite you to thank all three of the speakers very much indeed.
**Alex Layton:**
We'd like to express our thanks to you for chairing the discussion. Should we start with questions to Jonathan Harris?

**Discussion:**
The first discussion concerns English Courts interfering in private Jersey trusts (usually were very wealthy private clients are getting divorced) and ignoring the Hague Convention that says they should be using the law applicable to the trust in questions of variation and there are Jersey writers writing that they hope the non-recognition of judgments clause will lead the English to leave it alone and leave these to our courts.

Next, there was discussion of seemingly double standards on the part of the UK to what were called “redline issues” – saying on one hand that the UK cannot live with Article 8(3) because it gives too much discretion and on the other hand, saying we can’t live with Article 4 and the applicable rule of law in the absence of choice unless it has a displacement rule and an element of discretion to it.

Comment on possibility of advising on the efficacy of choice of law provision – but it’s difficult even now to give advice on reliability in terms of an exclusive jurisdiction clause which generates real and immediate concern on the part of commercial parties who may have been attracted to London as a dispute resolution centre. If advised that in fact their choice may be overridden, they will think about going somewhere else.

Ms. Chong thought that it might be best to try to sever the link with very English common law-based thinking and try to accept European ideas. Someone on the floor agreed that it is important to change the way we think and stop considering a concept of public private international law not only because private international law is being heavily infiltrated by public international law, but also because of public law itself, thinking particularly of antitrust law and even more, of pure criminal law. One of the most shocking things about the Euro arrest warrant was the complete ignoring of everything that had been debated when the Brussels Convention was being created. It was all regarded as completely irrelevant because no one had thought in those terms about criminal law.

Jonathan Harris agreed and said he would go further – there’s another area of law which is the relationship between private international law and the freedoms of the European market and the problem of defining the Country of Origin rule which seems to come out on the free market side on one hand while the private international lawyers are confused thinking, does this have anything to do with us or not? They should not be treated as isolated subjects when clearly they interact much more closely and should be viewed in such a way.
Subsequently, there was a discussion as to whether one might find that some principles of private international law might start to have an impact on rules like due process for access to justice, right to property, family life, and so on.

Next, a discussion about why English practitioners are so hostile to Article 8(3) and *Gasser*, *Turner* and to a lesser extent, *Owusu*: Party autonomy. An English practitioner approaches it from the perspective that a court should do what it can to ensure that parties’ chosen law and jurisdiction is. Article 8(3) is clear threat to the English practitioner as it may render the choice of law irrelevant with its discretionary element. When one gets to Article 4.2, one has already gone past the stage at which choice of law is in place. Article 4 only applies when there is no choice of law. If you switch over to jurisdiction, to *Gasser* and *Turner* in particular, the ECJ is taking away the ability of the courts to uphold the parties’ agreement. Response that problem isn’t so much the ECJ but rather the legislation itself. It is clear and the Court is applying it according to its terms. But there is another criticism that can be made of the ECJ: members of the Court are not as comfortable with private law as they are with areas of public law and there may be a special case for having a specialist tribunal at the Luxembourg level to deal with the growing area of private law that comes before the Court.

We should remember that the hostility is not simply on the part of practitioners but also on the part of the clients themselves. They want their choice of law to be upheld. Also, in *Gasser*, the Advocate General did want to uphold party autonomy and proposed a solution which seemed acceptable even within the framework of the Convention, but it was rejected.

Next, someone brought up matters of succession versus trust. Classification is the issue: trust or succession? Extreme autonomy embracing laws will apply if trust; the more protective laws, if succession. You cannot avoid these questions. This is not good and it’s clear that there’s a different understanding in England as to where the boundary is and there are acute problems of classification that need to be resolved.

**The Seminar concluded with a thank you from Gillian Triggs, Director of the British Institute of International and Comparative Law.**