

REPORT OF THE SEMINAR

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

26 April 2006, 17.30-19.00

The Rt Hon Lady Justice Arden DBE

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

REPORT

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 a 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>.