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Reportage

To opt in, or not to opt in, that is the question

After a number of years of deliberation, the EU has agreed on a set of rules of private international law governing the law applicable to contracts – the Rome I Regulation. Well, not the entire EU, as we will see.

A first reading agreement on the text was struck between the European Parliament and the Council of Ministers towards the end of 2007. The text should be formally adopted and published in the Official Journal, possibly in March. After the Regulation enters into force, a further eighteen months will elapse before it will actually be applied and contracts concluded after that date will be subject to the new rules.

Strictly speaking, however, not all of the EU has signed up to this Regulation. Under special provisions of the EU Treaties, Denmark is not party to such civil law measures. In addition, the UK and Ireland have the choice whether to be covered. After the proposal was published in 2005, Ireland indicated that it would take part, whereas the UK did not. Fears were expressed in the UK, particularly in the City, about elements of the proposal. For instance, provisions on the application of foreign mandatory rules were highlighted as a potential danger given that English law is so frequently chosen by parties to regulate international contracts.

While formally excluded, the UK participated informally in negotiations in the hope that it could influence the final outcome. Now, the UK has yet again the choice to opt in to the measure and the UK's Ministry of Justice is set to launch consultations over the coming months to ask stakeholders their views on whether it should take the plunge. It would be fair to say that the Government's hope is to sign up to the Regulation, provided public opinion and impact assessments back this up. In other words, has the text been changed sufficiently to make it palatable to the UK?

At first glance, it would appear so. The provisions allowing parties the freedom to choose the applicable law in a contract and those provisions that determine the applicable law in the absence of such an express choice mirror in substance much of the existing Rome Convention. While the Commission's proposal initially allowed no party autonomy in relation to consumer contracts, the text does allow parties some scope to opt out of the applicable law rules. It is hoped that this could help to facilitate cross-border or on-line business, which would have otherwise had to apply the consumer's home state law. The text does, however, mirror confusing provisions from other instruments. In particular, in determining whether the consumer's home law applies, regard is to be given to whether the business directed its activities to that country or not - a concept from the Brussels I Regulation that has never been clarified sufficiently.

On the key issue of foreign mandatory rules, the text also seems to be an improvement on the Commission's proposal. The scope of the text has been narrowed considerably. It now simply allows a court to apply the mandatory rules of the foreign jurisdiction in which the contract is being performed insofar as such rules render the contract unlawful. This would ensure that parties could not choose the law of another jurisdiction in order to agree and perform a contract that would otherwise be unlawful. Of course, a number of other specific rules are of interest to particular sectors: those covering financial services; insurance; voluntary assignment; transport; and employment contracts.

At the end of the day, a balanced assessment will have to be made between the costs and benefits of signing up to the Regulation and the costs and benefits of creating a legally ambiguous relationship with other EU jurisdictions by continuing to apply the Rome Convention.



WEBLINKS

- **[European Parliament resolution on the proposal for a Regulation on the law applicable to contractual obligations \(Rome I\)](#)**

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Professional Practice

MONEY LAUNDERING

Belgian bars claim victory after Constitutional Court ruling

On 23 January the Belgian Constitutional Court issued its judgment in the case relating to the implementation of the second Money Laundering Directive in Belgium. The case centred on a challenge to the implementing law focusing on specific grounds relating to defending the rights of lawyers as regards professional secrecy and

their relationship with clients. The arguments put forward by the Belgian bars included that the legislation implementing the second Money Laundering Directive was incompatible with the basic fundamental right to a fair trial as set down in Article 6 of the European Convention on Human Rights. On 13 July 2005, the Belgian Cour d'Arbitrage made a preliminary reference to the European Court of Justice (ECJ) to ask whether the Directive, in including reporting obligations on lawyers, has violated the right to a fair trial. The ECJ handed down its ruling in June of last year. The bar associations reported that the Constitutional Court largely followed their arguments and considerably reduced the scope of money laundering reporting obligations as regards lawyers. This case has been billed as a triumph for client confidentiality and respect for the core values of the legal profession.



WEBLINKS

- **Directive 2001/97 on prevention of the use of the financial system for the purpose of money laundering**

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WILLS AND SUCCESSION

ECJ judgment on execution of wills

Following a challenge by the European Commission against Germany for a breach of the sixth VAT Directive, the European Court of Justice (ECJ) has ruled on the question of the place of taxation of the services of an executor of a will. The case concerns executors who are supplying services in one Member State, when the executor's customer is based in another Member State or outside of the EU. German legislation provided that VAT on services should be applied at the place of the trader's business, unless it fell into certain specific categories, which included the services of lawyers and tax advisors, but not the services of an executor. The Commission had argued before the ECJ that the execution of a will should be seen as comparable to a service offered almost invariably by lawyers and VAT should therefore be applied at the place where the customer carried out his business. The ECJ, however, did not accept that an executor is necessarily providing services comparable to a lawyer, reaching the conclusion that an executor acts neutrally in relation to the beneficiary of a will. The Court therefore concluded that Germany was not in breach of the sixth VAT Directive.



WEBLINKS

- **Judgment in Commission v Germany (C-401/06)**

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EUROPEAN TRANSPARENCY INITIATIVE

Parliament report on lobbying

Alexander Stubb MEP presented his report on lobbying activities to the European Parliament's Constitutional Affairs Committee on 24 January, as a response to the European Commission's European Transparency Initiative. A workshop on "lobbying the European Union" took place in October 2007 and this report builds on the conclusions drawn there. The report highlights that interest representatives - including lawyers - do play

an essential role in the democratic system and are an important source of information for MEPs. Emphasising how transparency in the European Institutions is essential for legitimacy and trust, the rapporteur stresses that transparency is needed both in the work of the Institutions themselves and in the way in which lobbyists work. The idea of a "legislative footprint", which would allow for a list of organisations who lobbied on a particular proposal to be published, was set out in the report. The Commission consultation on a Code of Conduct closes on 15 February and the Commission aims to have its register up and running in Spring 2008. Those who register would have to make public disclosures as to the financial aspects of any lobbying activity and the clients or interests represented.



WEBLINKS

- **Draft report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions**
- **The European Transparency Initiative**
- **European Commission - Consultation on a Code of Conduct for Interest Representatives**
- **Law Society of England and Wales' website on lobbying**

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Opening of the Legal Year in Brussels

The Law Society of England and Wales was represented at the opening of the legal year ("Rentrée") of the French-speaking order of the Brussels Bar by Deputy-Vice President Bob Heslett last month. Mr Heslett met a number of bar leaders from Europe and beyond and took the opportunity to meet with Brussels-based solicitors.



WEBLINKS

- **Website of the French-speaking order of the Brussels Bar**

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European Presidents' Conference in Vienna

Richard Henderson, President of the Law Society of Scotland, Donald Eakin, President of the Law Society of Northern Ireland and Andrew Holroyd, President of the Law Society of England and Wales, ensured strong UK participation in the European Presidents' Conference held in Vienna from 31 January to 2 February. The conference offered an excellent opportunity for networking and was the forum for debate on key issues such as access to justice in Europe.

- [European Presidents' Conference website](#)

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House of Lords hears Law Societies' views on EU justice

The House of Lords Select Committee on the European Union is in the final stages of conducting an inquiry into the impact of the Treaty of Lisbon. The Sub-Committee E (Law and Institutions) received evidence from the Law Society of Scotland on the freedom, security and justice aspects of the new Treaty and, when in Brussels last month, heard evidence from the Law Society of England and Wales. Jane Golding, representing the EU Committee, and her colleague from Crosby Houpden and Aps, Scott Crosby, were joined by Julia Bateman of the Brussels Office to give evidence to the Committee. The evidence session focused on the impact of the new EU legal framework on the UK.

- [Minutes of evidence taken before the House of Lords Select Committee](#)

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Guide to the Treaty of Lisbon: MPs host Law Society of England and Wales

Following the signature of the Treaty of Lisbon in December, a European Union (Amendment) Bill has been introduced in the House of Commons. The Bill is intended to enable the UK to ratify the Treaty. The Law Society of England and Wales has published a Guide to the Treaty of Lisbon in order to provide the solicitors' profession with an overview of the new legal and political framework in Europe. In addition, the Guide has been presented to the Westminster Parliament in order to allow the Law Society to participate in the ratification debate and to assist the scrutiny process in a non-partisan way. The Guide was launched at an event hosted by Michael Connarty MP, Chair of the House of Commons European Scrutiny Committee, on 29 January.

- [Law Society Guide to the Treaty of Lisbon](#)

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CONSUMER LAW

Parliamentary break-through on consumer credit

The European Parliament finally achieved an agreement on consumer credit in January, after six years of debate and months of intense negotiation with the Council of Ministers and the European Commission. The Parliament approved the provisions, which will apply to loans taken out by consumers between €200 and €75,000. They ensure that consumers are provided with enough information prior to and on conclusion of the contract to allow them to make informed decisions and allow a consumer 14 days to withdraw from the credit agreement without having to give reasons. Prior to agreement, the main sticking point had been the issue of compensation and whether consumers would have to pay a penalty to banks in the event of early repayment. In an attempt to balance the interests of the banks and the consumer, it was resolved that compensation would be payable for early repayment, but the level of compensation would be limited and national authorities would be allowed to ban compensation being paid for repayments made below a certain threshold. The text will be formally adopted and published in the Official Journal in the coming months.



WEBLINKS

- [European Parliament resolution on the proposal for a directive on credit agreements for consumers](#)

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CRIMINAL LAW

Slovenia prioritises judgments *in absentia*

The Slovenian Presidency of the EU introduced a new proposal in January on the mutual recognition and enforcement of judgments *in absentia*. Supported by six other Member States, including the UK, Germany and France, the proposal outlines protective measures intended to safeguard an individual's rights when a judgment is entered against them in another Member State in their absence. The proposal requires certain criteria to be met by the issuing state. An individual must be summoned to attend the hearing and notified within five days of a decision being made against them. The right to request a re-trial is also ensured. The measures will apply to cross-border cases only and are intended to modify existing legislation in this area, most controversially, the European Arrest Warrant and the proposal on custodial sentences. The move was met with a mixed reaction from MEPs, some of whom welcomed the proposal and others who questioned the need to legislate on this subject and raised concerns that a new proposal would complicate and interfere with existing legislation in this area. It remains to be seen whether the Slovenes will achieve the agreement they have set out for during their six-month term.



WEBLINKS

- [Proposal for a Framework Decision on the mutual recognition and enforcement of judgments *in absentia*](#)

PUBLIC PROCUREMENT

New rights to challenge public contracts

On 20 December the EU's new rules setting out the remedies available in relation to the award of public contracts were published in the Official Journal. Member States have until 20 December next year to bring their domestic legislation into line. The Directive provides for a 10 or 15-day standstill provision between the award decision and the conclusion of the contract, depending on the method of communication. This is intended to give unsuccessful tender applicants the opportunity to challenge the award decision, based on information that has to be sent to them. It also stipulates that in relation to direct awards, where there has been no tender procedure, a 10-day standstill period should apply and there should be publicity of the award. Indeed, if such standstill periods are not respected, the Directive now provides that the contract in question can be found to be "ineffective" – a concept that national law will have to clarify. Other options remain to punish breaches of the rules, including fines or reductions in the duration of the contract.



WEBLINKS

- [Directive 2007/66 on improving the effectiveness of review procedures concerning the award of public contracts](#)

TAX

Council agrees on VAT package

Following four years of negotiations, the Economic and Financial Affairs Council finally agreed a new package of VAT reforms last December. The aim of the negotiations was to agree legislation that will simplify the rules on VAT, allowing VAT on services to accrue in the Member State where business-to-business services are received. The package, consisting of two draft directives and a draft regulation, aims to prevent distortion of competition that might arise in situations where two Member States have different rates of VAT. As well as introducing a "one-stop shop" procedure for service providers to complete all VAT registrations and declarations at a single point, the package will also remove some of the competitive advantages enjoyed by cross-border service providers who choose to situate themselves in Member States with lower VAT rates. The whole package of legislation is scheduled to come into force by 1 January 2010. A longer implementation period will apply to telecoms, broadcasting and electronic services.



WEBLINKS

- [Council Political Agreement on the VAT package \(Directive on place of supply of services, Directive for VAT refund, Regulation on administrative cooperation\)](#)

CONTRACT LAW

Draft Common Frame of Reference launched

The draft Common Frame of Reference (CFR) on European Contract Law was launched in the European Parliament on 21 January. The delivery of the long-awaited text marks the culmination of over 25 years of research, aimed at providing a uniform and coherent set of rules which will govern contract law in the future. The draft CFR is an academic text providing the basis on which the EU could produce the final CFR. It is foreseen that the final text will take the form of a "tool-kit", or handbook, to which EU legislators will be able to refer when drafting future legislation in the area of contract law. The draft text therefore represents merely the starting point of what is likely to be a long political debate before the CFR can be finalised. A debate, which will no doubt throw up issues such as the level of harmonisation of aspects of contract law and seek to balance the competing interests of Member States - not least the interests of the UK, which will be keen to protect its own common law system.



WEBLINKS

- [European Commission webpage on the Common Frame of Reference](#)

COMPANY LAW

Transparency of institutional investors

Moves to reform the law applying to institutional investors in European companies are beginning to gather pace. Following the publication in 2002 of a European Commission paper on the modernisation of company law, discussions have been on-going on opening up to greater scrutiny the role of those institutions making investments. On 22 January the European Parliament's Legal Affairs Committee discussed a working document produced on institutional investors. The Committee identified several key questions to be answered, including whether any legislation is actually required in this area and whether it is appropriate to require investors to disclose private financial information. The Legal Affairs Committee will hold a hearing on this subject in February, aiming to produce a resolution for adoption at the plenary session of the Parliament by September at the latest.

A copy of the working document is available from the Brussels Office.



Viewpoint

Scottish Parliament Inquiry into the transposition of directives

The European and External Relations Committee is one of the 15 committees of the Scottish Parliament. Its remit is wide and includes considering and reporting on proposals for EU legislation and their subsequent implementation into Scottish law. The Committee has a key role in mainstreaming the scrutiny of European issues by the parliamentary committees. In particular, the Committee facilitates consideration of European issues through an annual consultation on the European Commission's legislative and work programme.

Current priorities for the Committee include the Lisbon Treaty, the EU budget review and the implementation of the Services Directive. The Committee is also building on the work begun by Jim Wallace MSP during the previous parliamentary session on the scrutiny of European legislation. This report highlighted a number of issues which the Committee identified as requiring further investigation, including differential implementation and the freedom to "tailor Scottish solutions to Scottish problems" as well as the need for greater transparency and collaboration during the transposition process, including early and ongoing engagement with stakeholders.

The Committee issued a call for evidence on 2 November 2007 and has received written submissions from a range of organisations including the Scottish Environmental and Protection Agency, Scottish Water and Scottish Natural Heritage. Over the last few months the Committee has also conducted oral evidence sessions with bodies such as the EU institutions, the Law Society of Scotland, the Confederation of British Industry, the Scottish Trades Union Congress and Scottish Environment LINK. Although it is not possible to pre-empt the findings of report, a number of key themes are emerging from the oral and written evidence.

The Inquiry is looking at the effectiveness of the transposition process within Scotland including the role of the Scottish Government and its relations with the UK Government and the scrutiny role of the Scottish Parliament. For example, currently there is no obligation on the Scottish Government formally to inform the Scottish Parliament of any new EU obligation which concerns devolved matters and which it will be the responsibility of the devolved administrations to implement. Nor is it required formally to consult the Scottish Parliament if it elects to use section 57(1) of the Scotland Act which enables Westminster to implement EU obligations in a devolved area on a UK-wide basis.

The Committee is also trying to gauge the extent to which the Scottish Government engages with stakeholders during the transposition process and the timing of this engagement. Stakeholders have advised that, in some cases, they have only been consulted late in the transposition process, where the possibility to influence the implementing legislation is limited.

Witnesses have made a number of proposals for improving the transposition process including the introduction of transposition memoranda in which the Scottish Government sets out its plans for: transposition; the development of durable social partnerships, which could be utilised during the transposition process; early consideration of the purpose of the directive and what could be achieved in Scotland; and clear, accessible and timely information and guidance on the implications of directives impacting on Scotland.

The Minister for Europe, External Affairs and Culture is due to give evidence to the Committee on 11 March 2008, with the report expected towards the end of April 2008.



- [Scottish Parliament European and External Relations Committee Report on an inquiry into the scrutiny of European legislation](#)
- [Scottish Parliament European and External Relations Committee Inquiry into the transposition of EU directives](#)

Biography



Malcolm Chisholm MSP is the Convener of the Scottish Parliament's European and External Relations Committee.

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- [Regulation 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters \(service of documents\)](#)
- [Council Decision on the signing, on behalf of the Community, of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters](#)
- [Council Directive 2007/74 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries](#)

About us

The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society of Scotland joined the office and in 2000, the Law Society of Northern Ireland joined. The office follows a wide range of EU issues which affect both how solicitors operate in practice and the advice which they give to their clients. For further details on any aspect of our work or for general enquiries, please contact us: brussels@lawsociety.org.uk

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