

House of Commons Select Committee on European Scrutiny and the Conflict of Laws

The House of Commons Select Committee on European Scrutiny has produced its thirty-seventh report. It includes discussion of the

- **Draft Regulation on the law applicable to contractual obligations (Rome I),**
- **Commission Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition,** and the
- **Draft Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.**

The section on the Draft Regulation on the law applicable to contractual obligations (Rome I) contains an interesting, if out-of-date, appraisal of the Rome I Proposal by Parliamentary Under-Secretary of State at the Department for Constitutional Affairs (Baroness Ashton of Upholland) in a letter dated 20th July 2006. The Under-Secretary of State's objections to Rome I follow the usual pattern, the legislative bones of contention include: Article 1 (scope); Article 3 (freedom of choice); Article 4 (applicable law in the absence of choice); Article 5 (consumer contracts); Article 7 (agency); Article 8(3) (application of the mandatory rules of third countries); Article 13 (voluntary assignment and contractual subrogation) and Article 21 (States with more than one legal system).

Article 8(3) (application of the mandatory rules of third countries) is, of course, cited by the Under-Secretary of State as "the greatest single reason behind the [UK] Government's decision not to opt-in under our Protocol". The Select Committee agreed with the Under-Secretary's evaluation, stating:

We welcome the Government's decision not to opt into this proposal. We also agree with the Government that notwithstanding this decision the United Kingdom should try to participate constructively in the framing of the proposed legal instrument. We ask the Minister to keep us informed as negotiations

continue.

With its deletion in both the JURI report (to which the Under-Secretary alludes in her letter), and the Finnish Presidency text produced on the basis of meetings in the Committee of Civil Law (we do not believe the Finnish Presidency Rome I text is publicly available yet), a partial thawing of the attitude towards Rome I *may* be on the horizon in the UK executive.

In response to the Commission Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, Government Minister Harriet Harman "cautiously" states:

*This is an area of very considerable technical complexity, and the differences in the law relating to matrimonial property differs significantly among the various Member States. **The relatively high-level questions raised in the Green Paper do not obviously reflect this concern.** The Government will consider how best to respond to the Green Paper and will keep the Scrutiny Committees informed.*

The Scrutiny Committee's equally cautious response:

We ask the Minister to explain under what legal base, if any, the Commission may bring forward future legislative measures pertaining to the applicable law regimes governing trans-national matrimonial property proceedings. We also ask the Minister for further information as and when the Government's position on the specific questions raised by the Commission crystallises, and in any event, before the Government formally replies to the Commission.

The Draft Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters also receives a mixed welcome, with the Parliamentary Under-Secretary of State raising concerns about the applicable law under the Draft Regulation:

A number of other Member States have rules which allow foreign law to apply to family proceedings. However, family courts in the UK are not accustomed to applying foreign law. The Government's approach is that such provisions are

not obviously necessary here and that the law of the forum should continue to apply.

"The Government is concerned that to apply the law of a foreign jurisdiction in the UK could involve considerable practical difficulties, cause delay and increase costs, because it may be necessary to call expert evidence as to the foreign law. It is Government policy that the costs to parties should be reasonable. The Government is not at this point wholly persuaded that there are such problems with the lex fori principle to justify departure from that principle.

The response by the Scrutiny Committee is fairly negative as well:

...we share the Government's reservations about the practical difficulties involved in the application of a foreign law in matrimonial proceedings. We ask the Ministers if the Government's thinking in this respect has changed and, if not, if the Government nevertheless intends to opt into this proposal under Title IV.

...we are concerned in particular about the added complexity and additional costs of litigation likely to flow from applying foreign law not only in the courts of England and Wales but also in Scotland and Northern Ireland.

Finally, we note that legal problems associated with "international marriages" are not restricted to marriages between spouses of EU nationalities. We therefore ask the Minister if the Government agrees that the Hague Conference on Private International Law would more appropriately deal with this issue.

All comments welcome.