After the Romans: Private International Law Post Brexit

Written by Michael McParland, QC, 39 Essex Chambers, London

On 10 December 2018 the Ministry of Justice published a draft statutory instrument with the pithy title of "*The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2018*". This indicates the current intended changes to retained EU private international law of obligations post Brexit.

These draft 2018 regulations are made in the exercise of the powers conferred by section 8(1) of, and paragraph 21(b) of Schedule 7 to, the European Union (Withdrawal) Act 2018 in order to "*address failures of retained EU law to operate effectively and other deficiencies… arising from the withdrawal of the UK from the European Union*". It is intended they will come into force on exit day.

Part 2 contains amendments to existing primary legislation in the UK. These include amendments to the Contracts (Applicable Law) Act 1990, the UK statute that implemented the 1980 Rome Convention on the law applicable to contractual obligations. The Explanatory Memorandum now declares that "*the United Kingdom will no longer be a contracting party* [to the Rome Convention]*after exit day*". This is modestly surprising, given that the Rome Convention was not actually part of the Community *acquis*in the first place (see **Michael McParland, "*The Rome I Regulation on the Law Applicable to Contractual Obligations*",** para. 1.99). But the current desire to disentangle the UK entirely from any vestiges of things European appears to be overwhelming. Consequently, the draft 2018 regulations convert the most of the rules found into the Rome Convention into UK domestic law, and declare that they will continue to apply them to contracts entered into between 1st April 1991 and 16th December 2009 in the same way as they have done since the arrival of the Rome I Regulation. Further amendments are also made to the Prescription and Limitation (Scotland) Act 1973 and the Private International (Miscellaneous Provisions) Act 1995, the pre-Rome II statute which contains the UK's rules on choice of law in tort and delict.

Part 3 deals with amendments to secondary legislation which had been originally created to deal with the coming into force of the Rome I and Rome II Regulations.

Part 4 is entitled "*Amendment of retained EU Law*", this new legal category that will see EU law as at the date of the UK's departure from the EU transposed into domestic law. Part 4 deals with the proposed substantive amendments to the enacted text of both the Rome I and Rome II Regulation which are considered necessary or appropriate to take account of the UK ceasing to be an EU Member State. The full impact of the changes will have to be considered in detail against the original texts, but some brief comments can be made.

Some changes are mere housekeeping. For example, in the "universal application" provisions found in Article 2 (Rome I) and Article 3 (Rome II) which declares that "any law specified by this Regulation shall be applied whether or not it is the law of a Member State", are to be amended with reference to "a Member State" being replaced with "*the United Kingdom or a part of the United Kingdom*".

Others involve updating references to rules found in Directives to their current equivalent sin UK domestic law. So, for example, Article 4(1)(h) of the Rome I Regulation currently provides for the applicable law in the absence of choice for:

> *(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.*

The draft regulations will now replace the reference to "by Article 4(1), point (17) of Directive 2004/39/EC" with "… *in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001"* which as a footnote notes is S.I.2001/544, though the relevant Schedule 2 was substituted by S.I. 2006/3384 and this itself was subsequently amended by the Financial Services and Market Act 2000 (Regulated Activities) (Amendment) S.I. 2017/488 (which took effect from 1 April 2017 and which includes a whole raft of definitional changes).

Other changes deal with the fact that exit day will formally cut the UK's version of

these Regulations off from any future changes made by the EU legislator to either of those Regulations.

Part 4 of the Regulation also revokes Regulation EC No. 662/2009 which established the procedure for the negotiation and conclusion of agreements between EU Member States and third countries on the law applicable to contractual and non-contractual obligations (see ***McParland***, para. 2.100).

Potentially more interesting changes are made to the Rome II Regulation, especially in relation to Article 6(3)(b) (unfair competition and acts restricting free competition), and Article 8 (infringement of intellectual property rights).

The changes to the Rome I Regulation and their implications will feature in the second edition to my book on the subject which I am currently working on.

The Ministry of Justice's web-site can be accessed here.