

International Finance, Party Autonomy and Public Interest

LSE Law and Financial Markets Project Workshop


18 May 2017, 2pm - 5pm

Moot Court Room, 7th floor, New Academic Building,
54 Lincoln's Inn Fields, London WC2A 3LJ

Chair: Professor Sir Roy Goode (Oxford)
Organiser: Dr Philipp Paech (LSE)

To register your attendance, please visit the Eventbrite listing [here](#)





The rules governing financial markets are subject to the tensions emerging between a plethora of private and public interests. Modern economies provide for party autonomy as the more efficient concept to govern the market. Hence, in principle, private interest and contractual freedom are the rules' organising principles. However, various public interests limit contractual freedom and party autonomy. They may come as mandatory rules that apply in insolvency proceedings, or as restrictions to the choice of law and of court, or they may present themselves in the form of regulation. This workshop seeks to clarify the areas of the law governing the financial market that are subject to party autonomy or mandatory rules, respectively, pointing in particular to areas where a clear-cut answer cannot be given.

The workshop will allow time for discussion with participants.

Programme

Chair: Professor Sir Roy Goode (Oxford)

Insolvency Policy: A victim of Party Autonomy, Territorialism and Regulation in the Financial Market?

Philipp Paech (LSE)

Philipp Paech sheds light on the limited influence legislators and regulators have on insolvency policy in international financial markets. Credit risk is the linchpin of risk management in finance and of financial supervision. The law governing potential future insolvency proceedings opened in respect of a financial market participant has an enormous influence on the level of credit risk taken by all its counterparties. However, in finance, where the existence of foreign branches and cross-border services is the rule, this principle is heavily distorted. The multiplicity of potential fora, unclear limits on party autonomy as well as tensions between the universal and territorial views on insolvency leave market participants and their supervisors with significant legal uncertainty as to the enforceability of their arrangements, and hence regarding the risk they are running.

Party Autonomy and Regulation: Public Interests in Private International Law

Stéphanie Francq (Louvain-la-Neuve)

Stéphanie Francq explores the relation between party autonomy and regulation. The position of these two concepts in the intellectual landscape of law and of conflict of laws in particular is unclear. There may be interaction, exclusion, confrontation or collaboration between them, and the sense and purpose in their relationship is largely unexplored so far. Financial markets and the legal discourse around them reproduce these complex figures of interaction: on the one hand, the market is highly regulated and on the other hand, as far as conflict of laws is concerned, there is a strong discourse in favour of party autonomy and thus the ability to elect the applicable law or even the elaboration of private "regulation". A more general investigation of the relationship between party autonomy and regulation might thus help to critically assess discourses surrounding financial markets and law.

Legal Certainty, Proportionality and Pragmatism: EU Overriding Mandatory Laws in International Arbitration

Jan Kleinheisterkamp (LSE)

Jan Kleinheisterkamp analyses the operation of overriding or internationally mandatory rules of the European Union in the context of international commercial arbitration. The broader context of this paper comprises the dynamics between private and public mechanisms for enhancing legal certainty relating to international commercial transactions. Both courts and arbitral tribunals face serious difficulties when trying balancing party autonomy and public interests where parties are allowed to take their disputes to arbitration and thus engage in regulatory arbitrage at the most advanced level. The crucial question is how the efficiency of arbitration can be maintained without compromising the effectiveness of national market regulations especially in the EU context. This requires both conceptual and practical rethinking of the current practices.

Arbitration: A solution for Parties' Brexit Worries?

Matthias Lehmann (Bonn)

Matthias Lehmann analyses whether arbitration lends itself as a mechanism to mend fractions in the regulation of finance. Once the UK has left the EU, British banks and others financial intermediaries will be considered as third-country firms when offering their services to clients on the continent and can no longer avail themselves of 'passporting' rights. They will be able to continue to have access to the Single Market provided the UK regulation passes the 'equivalence' test with EU law. Yet even if this threshold is met, there will be strings attached to the status as a third-country firm. Besides special information duties, EU law imposes on non-EU firms an obligation to offer to their European clients a forum in the EU, which can be either judicial or arbitral. This contribution explains why it is preferable to offer arbitration and how this can be practically done.

Speakers

Stéphanie Francq is a Professor of Law at the Law School of the University of Louvain (UCLouvain) where she teaches conflict of laws (with a focus on contracts, commercial relations, and torts) and European law (with a focus on internal market and regulation issues). She holds the Chair for European Law at the UCLouvain and leads research projects on EU approaches to normative diversity and normative competition. She was the Director of the Charles De Visscher Centre for International and European Law prior to becoming Vice-Dean for International Affairs. She holds a PhD (UCLouvain) and an LL.M. (Berkeley), has taught at Cornell, Paris I and II, the European University Institute, Paris X and Koç University (Istanbul) and visited at the Max Planck Institute in Hamburg and Duke Law School. She is an elected member of the International Academy of Comparative Law since 2013.

Roy Goode, CBE, QC, LL B 1954, LL D (Lond) 1976, DCL (Oxon) 2006, FBA, 1988, FRSA 1990, Barrister (IT) 1988, QC 1990, Hon Bencher, Inner Temple 1992- , (Solr 1955-88); Hon. DSc Econ (Lond) 1996; Hon. LLD (University of East Anglia) 2003; Hon LLD (College of Law) 2011. Distinguished Friend of Oxford 2011. Distinguished Senior Fellow, School of Advanced Study, 2011 - . Honorary President of Centre for Commercial Law Studies, Queen Mary, University of London. Knighted for services to academic law 2000. Emeritus Professor of Law and Emeritus Fellow of St. John's College 1998- .

Jan Kleinheisterkamp is Associate Professor at the Law Department of LSE, where his teaching and research focus on international commercial contracts and arbitration, conflict of laws, comparative law and international investment law. Prior to joining LSE, he was an assistant professor at the HEC School of Management, Paris, and a research fellow at the Max Planck Institute of Comparative and Private International Law, Hamburg. Besides his academic work, he regularly acts as an arbitrator in commercial disputes.

Matthias Lehmann is a full professor and director of the Institute for Private International and Comparative Law at the University of Bonn in Germany. He holds doctoral degrees by the University of Jena and Columbia University as well as a Habilitation by the University of Bayreuth. His main interest lies in international and comparative aspects of banking and financial law. He has published extensively on the subject in German, English, French and Spanish. Matthias is a member of the European Banking Institute (EBI).

Philipp Paech joined LSE in 2010 as an Assistant Professor of Financial Law and Financial Regulation. He is the Director of the LSE's Law and Financial Markets Project and a fellow and Visiting Professor at the Institute for Law and Finance in Frankfurt. Before joining LSE, Philipp spent many years at the heart of international legal and regulatory reform of the financial sector, working from 2007-2010 for the European Commission's directorate for financial services in Brussels and from 2002-2006 for UNIDROIT in Rome. Philipp holds a doctorate from the University of Bonn and obtained the Diploma of EU Studies from the University of Toulouse. He is a qualified lawyer admitted to the Bar of Frankfurt.