CHOICE OF LAW, CONTRACTS AND THE EC's 1980 ROME CONVENTION

A RE-EVALUATION IN THE 21ST CENTURY

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I. INTRODUCTION

Until recently, the common law governed the United Kingdom's choice of law rules on contractual obligations.[1] Today, the rules are substantially found in the European Community's 1980 Convention on the Law Applicable to Contractual Obligations (the Convention), as enacted by the 1990 Contracts (Applicable Law) Act (UK).[2]

In the debate on the third reading of the Contracts (Applicable Law) Bill (UK), Lord Wilberforce stated:[3]

> I regard this Bill as unfortunate and unnecessary. It brings into English law the effect of a European Convention in an area that in English law is perfectly satisfactory, has been controlled by the judges and is now to be set into the cement of statutory legislation.

On the contrary, Lord Mackay of Clashfern LC in the same debate stated:[4]

> [T]his Bill will preserve the principles of our complex rules for contract, and the convention will create a harmonious set of such rules throughout the European Community; in other words, the other member states which ratify the convention will have the

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[1] See generally Collins L and ors (eds), Dicey and Morris: The Conflict of Laws (2000, 13th ed, Sweet & Maxwell, London) chapter 32; Plender R, European Contracts Convention (2001, 2nd ed, Sweet & Maxwell, London).

[2] The United Kingdom acceded to the Convention and to the First and Second Protocols on its interpretation by the European Court of Justice on 29 November 1996: Cm 5613, United Kingdom Treaty Series No 40 (2002). The United Kingdom ratified the Convention on 26 November 2000, which entered into force for the United Kingdom on 1 January 2001: ibid.

[3] House of Lords Debates, 24 April 1990, volume 518, column 438.

[4] Ibid.

> benefit of the same principles as those which the courts of this country have worked out...over the years.

These contrasting viewpoints greeted the coming into force of the Convention on 1 April 1991.[5] The focus of this article is to discover, in hindsight, if the sceptics[6] were correct in observing that many lawyers and traders would remember with sadness and resignation that fateful day when an era of English common law came to an end.

In examining the Convention's provisions, resort to choice of law rules in international contracts arises in two main contexts.[7] First, it is relevant to dispute resolution where all interested parties have to consider the principles to predict how the court seized of the dispute would deal with it. Secondly, it is relevant to conflict avoidance and contracts on the avoidance of litigation where the impact of the law has to be assessed in advance, be it domestic or private international law.

In an ideal world, all parties to a contract with private international law implications would find the rules on choice of law governing their contract satisfactory. When this is not the case, they would require satisfactory rules to interpret their contract based on clarity, uniformity, effectiveness, commercial convenience and the protection of the weaker party.[8] In the European Community, it is impossible to envisage a genuine internal market (with free movement of goods, persons, services and capital) enjoying a law enforcement regime common to all in which all persons may assert their rights not only in their home state but also in other member states of the organisation. If every member state is able to apply its own rules on private international law or apply a common set of rules differently, there will be no uniformity and great inconvenience. Recognising the problems,

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[5] Young, "The Contracts (Applicable Law) Act 1990" [1991] Lloyds Maritime and Commercial Law Quarterly 320.

[6] See Mann, "The proper law of the contract – An obituary" (1991) 107 Law Quarterly Review 353.

[7] Morse, "The EEC Convention on the Law Applicable to Contractual Obligations" (1982) 2 Yearbook of European Law 107.

[8] It has been argued that the justification for the new uniform law is this: the greater the predictability of choice of law rules, legal uncertainty will be a lesser impediment to the free movement of persons, goods and services throughout the member states: Briggs A, The Conflict of Laws (2002, Clarendon Law Series, Oxford University Press, New York) 147.

states agreed on the drafting of the Convention seeking solutions. However, this does not preclude the question today on whether the Convention satisfies those demands and expectations.

II. SCOPE OF THE CONVENTION[9]

(a) General Position

Title One of the Convention deals with its scope. Article 1 provides that the rules of the Convention shall apply to contractual obligations in any situation involving a choice between the laws of different legal systems.[10] This raises two questions on (a) the meaning of "contractual obligations" and (b) when this choice arises.

Under Article 8(1), the issue on whether a relationship is contractual is dependant on a "valid contract" as determined by the Convention. This becomes problematic when one party classifies an obligation as contractual and the other classifies it as tortious. The problem could have been avoided if the European Court of Justice had properly defined the meaning of contractual obligation but so far its guidance on this matter has not been particularly illuminating.[11] Further, there is uncertainty on whether the meaning of "contract" in new Council Regulation (EC) 44/2001[12] on special jurisdiction over defendants in civil or commercial matters may be relied upon to resolve the ambiguity.[13] Until the problem is resolved, there is in practice no uniform and effective choice of law rules for contractual obligations in the European Community.

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[9] In this section, only Titles One and Two of the Convention will be discussed. Title Three provides the procedural provisions on revision or amendment for example.

[10] Article 2 provides that "[a]ny law specified by this Convention shall be applied whether or not it is the law of a Contracting State".

[11] See Collier JG, Conflict of Laws (2001, 2nd ed, Cambridge University Press, Cambridge) 192.

[12] This European Commission Council Regulation came into force on 1 March 2002.

[13] A defining characteristic of a contractual obligation is its acceptance by the contractual parties freely. The second aspect of the definition requires that the obligation be assumed in relation to another who can be identified, so that if the defendant is unaware who the other party is, the relationship is not contractual: Briggs A, The Conflict of Laws (2002, Clarendon Law Series, Oxford University Press, New York) 151.

Under Article 1(1), the provisions of the Convention are invoked in "any situation involving a choice between the laws of different countries". This raises the question on when a situation is deemed to arise. On one hand, if a contract in all its constituent elements is connected with a particular state, no question of "choice" will arise. On the other, shifting from this base raises a question because it is unclear how slight the shift should be before the Convention may be invoked. In any event, what is clear is that the Convention may allow the law of a non European Community state to be applied.[14]

(b) Excluded Transactions

Article 1(2) provides a number of exceptions that exclude certain contractual matters from the scope of the Convention. Some of the more significant exceptions relate to the capacity of natural persons, wills and succession, evidence and procedure, insurance and agency, family law, company law and the law of trusts, for example. Included in this list are "obligations arising from bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such instruments arise out of their negotiable character". However, in this respect the Convention is particularly lacking in two areas.

First, it does not define "negotiability" and "negotiable character",[15] which opens the door to divergent definitions in a crucial area of international trade.[16] Secondly, arbitration contracts have been

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[14] There are moves to convert the Green Paper into an EC instrument: see Commission of the European Communities, Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization, Brussels, COM (2002) 654 final, 14 January 2003 (Green Paper) at 10; Europa, "Commission launches consultation on the law applicable to contractual obligations ('Rome I')", 2004 at <http://europa.eu.int/comm/justice_home/news/intro/wai/news_160103_2_en.htm> (visited March 2004).

[15] The law of the forum decides such questions according to the 1980 Giuliano Lagarde Report on the Convention on the Law Applicable to Contractual Obligations (Giuliano Lagarde Report): Journal officiel n C282 du 31/10/1980 at 11; Rome-convention.org, "Text of the Giuliano Lagarde Report" at <www.rome-convention.org/instruments/i_rep_lagarde_en.htm> (visited March 2004).

[16] Cheshire PM and ors, Cheshire and North Private International Law (1999, 13th ed, Butterworths, London) 547.

excluded under Article 1(2)(d), existing international conventions are inadequate on this matter, and states parties to those conventions have not acceded to them uniformly.[17] Therefore, unless there is a Protocol to the Convention addressing these issues, the European Community has only been partially successful in achieving uniformity in the law governing contractual obligations.

III. SUBSTANTIVE PROVISIONS

Title Two on uniform choice of law rules is the heart of the Convention. State party autonomy is embodied in Article 3(1) that provides parties with freedom to choose the applicable law either expressly or in such a way as may be demonstrated with reasonable certainty from the terms of the contract or the circumstances of the case. However, if neither exists, Article 4(1) applies and the law will come from the state where the contract has closest connection.[18] This is broadly similar to the approach under common law.

The codification of this freedom should be applauded because the freedom is an almost indispensable precondition to the achievement of orderliness and predictability essential to any business transaction. However, the last sentence of Article 3(1) provides for explicit or implicit *depecage*[19] that has been considered as highly unusual and most inconvenient in relation to dispute resolution.[20] In fact, the common law has been reluctant to permit two laws to govern separate parts of the contract, no doubt to avoid the possibility of untidiness and irreconcilability arising.[21]

Article 3(2) gives the parties the power to alter the previously chosen law or to choose one if they fail to do so at the time of contracting.

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[17] Morse, "The EEC Convention on the law applicable to contractual obligations" (1982) 2 Yearbook of European Law 107, 115.

[18] It is quite likely that the choice of the term "country" in the Convention makes little difference.

[19] Namely, the circumstance whereby the contract can be divided up and its different parts subjected to different laws.

[20] Collier JF, Conflict of Laws (2001, 2nd ed, Cambridge University Press, Cambridge) 196.

[21] Briggs A, The Conflict of Laws (2002, Clarendon Law Series, Oxford University Press, New York) 161. Common law has also denied the validity of a contract deferring the actual choice of law to a future date: ibid.

However, it is unclear which law determines whether a purported variation is effective or conforms to conditions that the parties may have imposed on the exercise of this choice,[22] which is also subject to the limitation that the subsequent choice must not adversely affect third party rights. Although this position has been questioned mainly on conceptual grounds its adoption has substantial practical advantages.[23] In particular, it increases commercial convenience in cases where the new choice is resorted to because of difficulties in the application of the original governing law or because the identity of the original applicable law is uncertain. It dispenses with the rigidity of the common law, which provides that once a proper law is determined it is unchangeable.[24] Even if it is desirable that states parties are given the power to change the proper law, other difficulties may arise and dilute the clarity of Article 3(2). For example, what happens if the original applicable law invalidates the contract while the newly chosen law validates it, or *vice versa?*

Article 3(3) provides that where all the other elements relevant to a situation at the time of the choice are connected to one state only, a choice of law by the parties to a contract cannot prejudice the application of the rules of a state that cannot be contractually derogated from, since those rules are mandatory in nature. This provision may be justified as it promotes consistency regardless of choice of forum within the European Community.[25] However, it does not prevent a claimant from seeking a forum elsewhere and sometimes it may not be obvious what "elements" are "relevant to the situation". Further, the rules of that forum may be difficult to ascertain and apply.

It is true that the parties to a contract may either expressly or impliedly submit themselves to a particular system of law,[26] but if this is absent the applicable law is that by reference to which the contract is made, or to which the transaction has the closest and most real connection.[27]

[22] Ibid.
[23] Morse, "The EEC Convention on the Law Applicable to Contractual Obligations" (1982) 2 Yearbook of European Law 107, 120.
[24] Armar Shipping [1981] 1 All England Reports 498.
[25] Young, "The Contracts (Applicable Law) Act 1990" [1991] Lloyds Maritime and Commercial Law Quarterly.
[26] Compagnie d'Armement Maritime [1971] Appeal Cases 572, 587 per Lord Morris.
[27] It is not clear how the degrees of connection will be assessed because it is difficult to estimate the legal weight to be given to a particular factor.

Under English law there is probably no requirement that an implied choice must be demonstrated with "reasonable certainty".[28] In practice, the courts have often gone to great lengths to find an implied choice in an attempt to give the contract business efficacy. This tends to result in the implied choice/closest connection distinction being merged into a single presumed intention test.[29]

The "reasonable certainty" requirement enshrined in Article 3(1) may be used to prevent attempts to deduce an implied choice from minor indications, the presence of which cannot really be attributed to a real but unexpected choice.[30] Further clarification is therefore needed in relation to when an implied choice may be shown with reasonable certainty. Suggestions for improvement include: (a) the procurement of the jurisdiction of the European Court of Justice to interpret contractual terms to decrease the more obvious uncertainties; (b) aligning the texts of the Convention that now appear in various languages; (c) requiring European Community instruments affecting contract law to provide more precise information on the definition; and (d) indicating the minimum requirements for tacit choice to exist.[31]

In relation to Article 4, the second sentence of paragraph 4(1) refers to *depecage* in certain circumstances. This raises difficult questions. For example, although the courts are encouraged to exercise discretion to sever as little as possible, there are no guidelines on how and when they may do so, which makes the judicial process more complex.[32] The provision diverges from the general practice of states parties by adopting presumptions in Article 4(2)-(4) on finding the law. Yet, none of the presumptions is conclusive. For example, according to Article 4(5), the presumptions are to be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another state, in which case resort is reverted back to Article 4(1).

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[28] The Assunzione [1954] 1 All England Reports 278.
[29] Ibid 289, 292 per Singleton LJ.
[30] Jaffey, "The English proper law doctrine and the EEC Convention" (1984) 33 International and Comparative Law Quarterly 531; Williams, "The EEC Convention on the law applicable to contractual obligations" (1986) 35 International and Comparative Law Quarterly 1.
[31] Green Paper 24.
[32] Morse, "The EEC Convention on the law applicable to contractual obligations" (1982) 2 Yearbook of European Law 107, 126.

Article 4(2) sets out the "general" presumption for localising the contract and this has two parts. First, the performance that is characteristic of the contract has to be determined. Secondly, after this occurs the law of the habitual residence of the party who determines this is applied. Therefore, "characteristic performance" is a subsidiary connecting factor, the determination of which leads to the discovery of the governing law. The use of this subsidiary connecting factor has been one of the most controversial features of the Convention.

The Convention does not indicate what is considered to be characteristic performance; however, the Giuliano-Lagarde Report states that it is usually the performance for which payment is due.[33] Nevertheless, things are not as simple as they appear to be. Besides the difficulty in applying the concept to contracts not involving the payment of money, an air of unreality surrounds this analysis. In a loan contract for example, can it really be said with any confidence that the provision of the loan and not its repayment constitutes the centre of gravity and the socio-economic function of the transaction?[34]

Even where characteristic performance is discoverable, it is not the place of performance that determines the prevailing law. Instead, reference is to the "personal law" of the characteristic performer.[35] This is not only inappropriate in the context of commercial contracts[36] but is quite often hard to ascertain.[37] Unless a presumption is easy to apply it will not produce the certainty required for determining the objective applicable law. Unfortunately, the combined effect of the two limbs in Article 4(2) results in a complex presumption involving considerable

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[33] The treaty provides that it can be relied on while it is being interpreted: Giuliano Lagarde Report 20.

[34] Cheshire PM and ors, Cheshire and North Private International Law (1999, 13th ed, Butterworths, London) 570.

[35] It is the law of the habitual residence of the characteristic performer or, in the case of a body corporate or unincorporated association, the law of the place of central administration. Where the contract is entered into in the course of trade or the profession of the party who is to provide the characteristic performance, the governing law is presumed to be that of the party's principal place of business.

[36] Collins, "Contractual obligations —The EEC Preliminary Draft Convention on Private International Law" (1976) 25 International and Comparative Law Quarterly 35, 45-46.

[37] McClean JD, Morris: The Conflict of Laws (2000, 5th ed, Sweet & Maxwell, London) 23.

definitional problems.[38] For this reason, the courts quite often deems the presumption inapplicable and instead prefer to decide after carefully considering the facts of each case according to Article 4(5).[39]

There are "special" presumptions for certain contracts that are more conducive to certainty or uniformity. For example, where the subject is a right in or a right to use immovable property, the law will be according to the *lex situs* in Article 4(3). In the carriage of goods, the applicable law is deemed to be that of the carrier's place of business where it is also either the place of loading, the place of discharge, or the principal place of business of the consignor under Article 4(4).

In a Green Paper presented to the European Commission early 2003, certain issues were addressed including those raised in Article 4, the proposed conversion of the Convention into a Community instrument (from being an international treaty), and the modernisation of the Convention.[40] The Green Paper also recommended that Article 4 be reviewed and clarified.[41]

(a) Protection of the Weaker Party

The principle of freedom of choice, a principle that allows the parties to choose the law governing their relationship, was recently balanced by another fundamental principle, namely, on the "protection of the weaker party". Article 5 of the Convention provides that in contracts for the supply of goods and services, consumers (the weaker parties) are protected by the mandatory rules of the state in which they have habitual residence, on condition the supplier had originally approached

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[38] Kaye P, The New Private International Law of Contract of the European Community (1993, Ashgate Publishing Group, Aldershot) 453; compare Lando, "The EEC Convention on the law applicable to contractual obligations" [1987] Common Market Law Report 159, 201.

[39] When searching for the applicable law in such circumstances, the treaty has the effect of using three steps. However, it is sufficient if only one step addresses the question posed in Article 4(1).

[40] In this respect a proposed solution was to simply delete Article 4(1) to emphasise the exceptional character of Article 4(5) or to amend it: Europa, "Commission launches consultation on the law applicable to contractual obligations ('Rome I')", 2004 at <http://europa.eu.int/comm/justice_home/news/intro/wai/news_160103_2_en.htm> (visited March 2004).

[41] Ibid.

them in that state. Article 5(2) describes how the consumer is addressed and acts before the rules would apply. Article 6(2) provides that employees (the weaker parties) on individual employment contracts are protected by the mandatory rules of the state in which they habitually perform their work. If this is not the case and performance is in any number of states, the law of the state where the employer's business is located will apply.

In spite of the above, the Convention has limited success because:

1. the Convention becomes unsatisfactory when its provisions afford the weaker party a lesser protection than that afforded by a law that the parties had chosen;[42]
2. it is often difficult for the court in one state to determine which rules of foreign law are mandatory;[43]
3. the artisan, small farmer, fisherman, and non-professional party who are not consumers are not given the protection found in Article 5; and
4. the weaker "professional", who is party to a lease of immovable property, a life or injury insurance policy, or other agreements tainted with *dirigisme,* is not given a similar protection.

Article 7 is another provision that is supposed to protect the weaker party in the above examples but as it currently stands it does not effectively remedy the deficiency.[44] Similar to the concept of "characteristic performance" in Article 4, Article 7 had created anxiety amongst the states parties when the Convention was negotiated because it introduced two cases where mandatory rules would apply.

First, under Article 7(1) effect may be given to the mandatory rules of a state that is closely connected to the case[45] even though the rules are not the law of the forum, the chosen proper law, or the law of the place of "main" performance. The application of such rules is discretionary,

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[42] Morse, "Consumer contracts, employment contracts and the Rome Convention" (1992) 41 International and Comparative Law Quarterly 1, 8.

[43] The arguments against the *depecage* of a contract also apply to the isolated application of mandatory rules or rules expressing a fundamental policy.

[44] Lando, "The EEC Convention on the law applicable to contractual obligations" [1987] Common Market Law Reports 159, 184-185.

[45] This is the main factor that distinguishes Article 7(1) from Article 3(3).

and in deciding whether to apply them the court has to consider their nature, purpose and consequences of their application or non-application. Secondly, Article 7(2), which is more passive, merely preserves the forum's ability to apply its own rules irrespective of what the applicable law is.

Therefore, generally, Article 7 introduces an unwelcome uncertainty into the choice of law rules of the Convention.[46] Its notion of "a close connection" is imprecise and the courts are not well equipped to balance the interests of states whose domestic laws may also be mandatory and/or relevant.[47] The possibility of having to prove an entire range of potentially applicable laws may also make the judicial process more complex and costly.[48] As a result, any future instrument dealing with this area should emphasise more the difference in scope between Articles 5 and 7 to avoid confusion. Article 5 concerns an "objectively" applicable law (in the circumstances that it defines) whose mandatory protective provisions (as defined by national law) should be complied with. Since this does not appear to conflict with the application of mandatory rules under Article 7 outside of the state's territorial juris-diction, these two provisions provide complementary protection in certain applicable circumstances.

In *Arblade and Ors,* the European Court of Justice defined "mandatory rules" under Article 7 as:[49]

> national provisions compliance with which has been deemed so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.

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[46] This prompted the United Kingdom, Germany, Ireland and Luxembourg to opt out of this provision.

[47] Morse, "The EEC Convention on the law applicable to contractual obligations" (1982) 2 Yearbook of European Law 107, 147.

[48] Kaczorowska A, Q & A Series – Conflict of Laws (2000, 2nd ed, Cavendish Publishing, London) 186.

[49] See European Court of Justice, Cases C-369/96 and C-374/96, judgments delivered on 23 November 1999; see Green Paper 34.

Moreover, following *Ingmar GB Ltd,*[50] it appears that Article 7 does not extend to mandatory provisions when the aim is to solely protect private interests, and not the state's economic, political or social order.

Article 9 provides the applicable law on the formal validity of contracts. This provision appeared before the widespread practice of contracting by using the Internet (e-mail). In fact, such use of the Internet has affected fundamental contractual principles including the principles governing offer and acceptance. This raises questions on where the contract is concluded and how the parties will determine this. One solution is to apply a subsidiary rule if the place where the contractual intention was expressed cannot be determined.

Another solution is to add another limb to Article 9 that produces three alternative laws to choose from: (a) the law of the habitual residence of the author of the statement intending to contract; (b) the law governing the substance of the contract; and (c) the law of the place of conclusion. This could apply to all contracts concluded by whatever means. Further, the suggested solution of the 1982 Swiss Draft on Private International Law[51] is an alternative law directed at the protection of the weaker party, which excludes without qualification the parties' choice of law in consumer contracts and restricts their choice of law in employment contracts.

A variety of other matters are dealt with under Title Two, including the range of issues governed by: (a) the proper law (Article 10); (b) the law applicable to assignments (Article 12), subrogation (Article 13), burden of proof (Article 14), and exclusion of the doctrine of *renvoi*[52] (Article 15); and (c) the residual power to refuse to apply a rule of a system of

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[50] European Court of Justice, C-381/98, judgment delivered on 9 November2000.

[51] Lando, "The EEC Convention on the law applicable to contractual obligations" [1987] Common Market Law Reports 159, 184-185; Umbricht, "Switzerland's Federal Code on Private International Law (CPIL)", 18 December 1987 at <www.umbricht.ch/pdf/SwissPIL.pdf> (visited March 2004).

[52] If adopted, the renvoi doctrine requires the court of one state (A), after it has decided that the law of another state (B) governs the matter, to apply the domestic law of B. This extends to all of B's domestic laws including private international law. However, B's laws may refer the matter back to the use of A's laws or apply the law of a third state (C). The precise outcome in such a situation depends on which variant of renvoi the court adopts.

law the Convention has prescribed, if to do so would be manifestly contrary to public policy (Article 16).

Some of the above issues deserve more comment. For example, the European Commission advocates the inclusion of a general clause to guarantee the application of a general standard amongst its member states. It also advocates that Article on consumer contracts be modernised. If this is accepted, the rules on sectoral instruments may even be repealed as superfluous. Further, according to Article 8, the validity of a contract is to be determined by the law of the contract as though the contract were valid. However, parties may also rely on the law of their habitual residence to establish their lack of consent, thus solving the problem caused if silence is deemed to constitute acceptance in the seller's state but not the consumer's.

There is extensive commentary on sectoral instruments forming part of secondary European Community legislation and on their inclusion of isolated rules on conflict of laws governing the scope of the territorial application of community law impacting on the applicable law. Under the Convention, the general effect of Article 20 and general principles of law is felt in two instances: (a) special rules governing specific matters derogating from Convention rules of general scope; and (b) sectoral rules strengthening the need to protect weaker parties.

However, the proliferation of sectoral instruments has been a source of concern. Some believe that sectoral instruments harm the current consistency existing in the body of conflict rules applicable in the European Community. They argue that the rules impacting on the applicable law in Directives on consumer protection use a mechanism different from conflict of law rules, and the rules include formulas that vary from one instrument to another, however slight.[53] Further, when Directives designed to have multiparty application at European Union level are implemented at the domestic level, the original effect or intended meaning may become diluted during this process.[54]

Finally, the Convention does not affect existing international treaties that member states are or may become party to under Article 21. This

[53] Green Paper 17.

[54] For discussion see the European Commission, Newsroom at <http://europa.eu.int/comm/justice_home/news/intro/wai/news_160103_2_en.htm> (visited March 2004).

Article provides the opportunity to acquire more satisfactory uniform choice of law rules in other areas of private international law.[55]

IV. CONCLUDING COMMENTS

The above discussion shows that there is truth in the observations of both Lord Mackay of Clashfern LC and Lord Wilberforce quoted at the start of this article. In the European Community today, the existence of the Convention means that a lawyer should be able to find the relevant law in relatively short and succinct legislation, and dispense with the tortuous investigation of conflicting case law. Contrary to predictions, the Convention has not economically harmed the member states.[56] Nevertheless, as an instrument it has been disappointing to the extent that after years of preparation, problem areas continue to exist affecting its effectiveness and the clarity of certain provisions.

There have been many initiatives to address the problems under the Convention and to update it to ensure relevancy. The following are examples of the initiatives.

First, the European Commission Communication of 2 July 2001 had discussed the future of European contract law and the need to change the approach to substantive law.[57] Secondly, there is the Green Paper. It is a great source of information on the Convention and on the proposals for reform,[58] some of which have been referred to above. Thirdly, there is a project to create an online database on the judicial implementation of the Convention in states parties, the work of the Directorate General, Justice and Home Affairs of the European Commission. Fourthly, this body had earlier organised a hearing on electronic commerce and private international law on 4-5 November 1999 when Regulation (EC)

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[55] Williams, "The EEC Convention on the Law Applicable to Contractual Obligations" (1986) 35 International and Comparative Law Quarterly 1, 6.

[56] Mann, "The proper law of the Contract – An obituary" (1991) 107 Law Quarterly Review 353, 355.

[57] Green Paper 12.

[58] For a viewpoint in support see Bar Council of England and Wales, Position Paper on the Conversion of the Rome Convention 1980 ('Rome I' – law applicable to contractual obligations) into a Community Instrument and its modernization, 12 September 2003 at <http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/bar_council_england_wales_en.pdf> (visited March 2004).

No 44/2000 (Brussels I) was being prepared.[59] Fifthly, the European Commission had financed "Grotius Civil 2000", a project conducted in conjunction with the Academy of European Law in Trier.[60] Finally, the project of the European Group for Private International Law (GEDIP) has focused on improvements and amendments to the Convention.[61]

At the European Community level, there are moves to convert the Convention from an international treaty into a Community instrument. This has resulted in the oft-asked question on when conversion will occur.[62] Conversion has many advantages especially in increasing consistency in Community legislation on private international law based on Article 61(c) of the Convention. It will also confer jurisdiction on the European Court of Justice, the ideal forum to interpret the treaty and in particular improve the standardisation of conflict of laws rules in the new member states[63] of the European Union.[64] In a Joint Declaration, the member states have stated that they are ready to examine the possibility of conferring jurisdiction on that court in certain matters.[65]

In spite of the above initiatives, the Convention is still surrounded by controversy. For example, there is current debate on the kind of future instrument to adopt – a regulation or directive? Another debate concerns the extent of regulation. For example, should it be limited to sectoral directives or should harmonisation cover the entire spectrum of private international law obligations? If the latter is the aim, the more appropriate instrument is a regulation since it is directly applicable and avoids the uncertainties that tend to follow the transposal of a directive,

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[59] Green Paper 12.
[60] Ibid.
[61] See generally European Group for Private International, "Minutes of the meetings" (transl), 22 July 2003 at <www.drt.ucl.ac.be/gedip> (visited March 2004).
[62] See Green Paper Chapter 2 at 13-16.
[63] For example, membership will increase by 10 to 25 in May 2004: Burghardt, "EU enlargement and the transatlantic relationship", Address to the Executives' Club, Chicago, 11 March 2004 at <www.eurunion.org/News/speeches/2004/040311gb.htm> (visited March 2004).
[64] Article 61(c) of the 1999 Treaty of Amsterdam (amending the 1957 Treaty establishing the European Community Treaty) may be used as the legal basis for this process.
[65] See European Communities, Official Journal of the Communities 27, 26 January 1998 at 34.

including the discretion given to states on the manner and timing of its implementation. In addition, although two Protocols have supplemented the Convention, they are not yet in force.[66] Consequently, as to what will eventuate in this area of law, only time can tell.

[66] The two Protocols are: (a) First Protocol on the Interpretation of the 1980 Convention by the Court of Justice (consolidated version)/1980 Rome Convention, Official Journal C 027, 26 November 1998 at 47-51; and (b) Second Protocol on the Interpretation of the 1980 Convention by the Court of Justice (consolidated version), 1980 Rome Convention, ibid at 52-53. For the texts of both Protocols see <hwww.rome-convention.org/instruments/i_prot_1_en.htm> (visited March 2004).