PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Thirteenth Delegated Legislation Committee

DRAFT LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS AND NON-CONTRACTUAL OBLIGATIONS (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019

Wednesday 13 March 2019

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not later than

Sunday 17 March 2019

The Committee consisted of the following Members:

Chair: Ian Austin

† Efford, Clive *(Eltham)* (Lab)
† Foxcroft, Vicky *(Lewisham, Deptford)* (Lab)
† Frazer, Lucy *(Parliamentary Under-Secretary of State for Justice)*
† Hair, Kirstene *(Angus)* (Con)
† Jenkyns, Andrea *(Morley and Outwood)* (Con)
† Lopez, Julia *(Hornchurch and Upminster)* (Con)
† Menzies, Mark *(Fylde)* (Con)
† Milling, Amanda *(Cannock Chase)* (Con)
Nandy, Lisa *(Wigan)* (Lab)
† Newlands, Gavin *(Paisley and Renfrewshire North)* (SNP)
† Percy, Andrew *(Brigg and Goole)* (Con)
† Pow, Rebecca *(Taunton Deane)* (Con)
† Qureshi, Yasmin *(Bolton South East)* (Lab)
† Reynolds, Emma *(Wolverhampton North East)* (Lab)
† Sheerman, Mr Barry *(Huddersfield)* (Lab/Co-op)
† Smith, Royston *(Southampton, Itchen)* (Con)
† Stevens, Jo *(Cardiff Central)* (Lab)

Claire Cozens, *Committee Clerk*

† attended the Committee

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Wednesday 13 March 2019

[IAN AUSTIN *in the Chair*]

Draft Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019

2.30 pm

The Parliamentary Under-Secretary of State for Justice (Lucy Frazer): I beg to move,

That the Committee has considered the draft Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

It is a pleasure to serve under your chairmanship, Mr Austin.

The draft statutory instrument forms part of the Government's ongoing work to ensure functioning domestic laws on civil judicial co-operation in the event that the UK leaves the European Union without a deal. The instrument relates to EU rules that determine which country's laws apply when citizens have cross-border obligations, such as when they are buying or selling goods.

The rules apply to contractual and non-contractual matters. An example of a cross-border contractual matter is a contract for the sale of goods by a company in France to a company in England. An example of a non-contractual matter is a duty of care owed by an accountant practising in Germany to a client company based in Scotland not to give negligent advice that causes financial loss. The rules—the Rome conventions—are to do with what country's laws apply in any particular case.

Mr Barry Sheerman (Huddersfield) (Lab/Co-op): I ask the Minister this because I hope to learn, but is she saying that the rules are "who sues who for what"? If there is a contractual obligation and something goes wrong, who sues who and under whose law—is that what they are about?

Lucy Frazer: I am always happy to help Members learn about such very technical legal matters. The rules cover which country's laws apply to a case, so not who sues who, but if people sue each other, whether they will be sued under English law, French law and so on. Countries all have different laws that apply in different circumstances. The question is which law applies.

Mr Sheerman: Pushing the Minister a little further, what will be different from now? We are in the European Union, so under whose law do we sue now? Is it European law? Will that be replaced by two different domestic ones?

Lucy Frazer: May I develop my submission? I am explaining what we are dealing with—the question of whose laws apply—and am coming to what happens at the moment. I will then let the Committee know how the system will apply in future—in essence, it will be very similar.

The rules that determine the question of whose laws apply are an important part of the EU's civil judicial co-operative framework. They ensure legal certainty, which underpins trade and commerce between member states and the rest of the world.

As I said, I will set out the existing laws, what they do and what will happen in future. The EU applicable laws are set out in two main instruments, Rome I and Rome II. Rome I regulates contractual obligations and applies to contracts formed on or after 17 December 2009. It is the current law in all EU member states other than Denmark, which has opted out of the regulation. Rome I was preceded by the 1980 Rome convention on the law applicable to contractual obligations. That is a treaty to which the UK and a number of now EU member states are still contracting parties. It will continue to apply to any contracts entered into between April 1991 and 16 December 2009 that might still be in force today. It still applies to all contracts entered into by Denmark.

The Rome II regulation applies to non-contractual obligations. It commenced on 11 January 2009 and, like Rome I, it is the law in all EU member states other than Denmark. I will refer to all those together as the Rome rules.

In each case, the Rome rules start from the premise that the parties, subject to certain limitations, are entitled to choose the law that will apply to their contractual and non-contractual obligations. They operate so that, provided the requirements of the rules are complied with, that choice of law is valid, will be respected by the courts of a participating EU member state and will be applied to determine any dispute.

Mr Sheerman: The Minister is being very generous. I have a big exporting constituency, especially of textiles and fashion. Businesses in my constituency do a lot of work across Europe. When a contract is made in future between, say, an Italian firm and a British firm, will that contract say: "If anything goes wrong, we agree to abide by Italian law," or, "by British law"? Will that be decided at the contractual stage?

Lucy Frazer: Yes. Parties enter into written contracts, which can be standard contracts or, if the companies are quite knowledgeable, they often have terms and conditions. As part of that agreement, the companies will often decide which law will apply in the event of a dispute. The Rome conventions determine that courts across the EU will respect that determination. Even if, for example, the case is heard in France, they might respect the contract law chosen by the parties.

Sometimes parties do not choose a law. In those instances, the Rome rules lay down a set of default rules to enable parties and courts to determine which country's laws will apply—so there are both general and specific default rules. For contractual matters, the general default rule in Rome I is that the applicable law should be the law of the country with which the contract is most closely connected. For non-contractual matters under Rome II, it is the law of the country in which the damage occurred. Special rules apply to particular types of contractual and non-contractual matters.

Mr Sheerman: As Mr Austin knows, I am not very bright. I am trying to find out for my exporting firms in Huddersfield what the real difference will be. What will they notice in terms of their ability to trade and to have legal agreements? What is the difference between now and what is coming?

Lucy Frazer: I will come on to that. I am just trying to set out the existing framework. At the moment, the Rome regulations apply to contracts where parties have or have not determined. I will come on to what we will do when—if—we leave on 29 March. I dispute that the hon. Gentleman is not very intelligent, because he is showing a significant amount of intelligence—and interest, which is most important.

Mr Sheerman: I was saying only what the Chair thinks.

The Chair: That is not what I think at all. You were a distinguished academic before you came here—a professor, I think.

Mr Sheerman: In a former life.

Andrew Percy (Brigg and Goole) (Con): Just get on with it. I have been here ages.

Mr Sheerman: I was waiting—

Lucy Frazer: With bated breath. The answer is that we are retaining the regulations as a matter of UK law, so very little will change for the hon. Gentleman's constituents as a result.

There are some specific rules that relate to insurance contracts, consumer contracts and employment contracts. Rome rules do not, for the most part, rely on reciprocity. Any Members who have sat on previous Committees regarding justice matters will have seen that we have taken the approach that where we rely on reciprocity, we are revoking those instruments, but the Rome rules do not rely on reciprocity. Participating EU member state courts must apply the applicable laws determined by the rules, irrespective of whether that law is the law of an EU member state or of a non-EU country.

The statutory instrument implements the Government's no-deal policy on the Rome rules, which is to retain them as domestic law post exit. That will ensure that UK citizens, businesses and consumers continue to have clear and workable rules regarding which laws apply to cross-border situations in which they may find themselves. When the UK leaves the EU, Rome I and Rome II will be retained as domestic law under the provisions of the European Union (Withdrawal) Act 2018. However, amendments are required to ensure that they, and the relevant domestic legislation that originally implemented them, will work effectively once the UK ceases to be a member state.

The amendments will not, for the most part, lead to any differences between how the Rome rules are applied by courts in the UK and courts in EU member states post exit. However, due to the way the EU rules are constructed, the EU may treat UK cases slightly differently in some instances; that is, where Rome I and Rome II refer specifically to member states or the European Community. We have had to amend those references in the retained version of the rules so that they continue to include the UK, which will not be the case for the rules as applied by national courts in the EU after exit day.

Mr Sheerman: I know that the hon. Member for Brigg and Goole is impatient to get away, but these are important issues. I come to these Committees to exercise parliamentary scrutiny over these SIs. Perhaps no one in Brigg and Goole is an exporter, and the people there are not worried about the very complex area that we are discussing, but I am trying to press the Minister and give this SI proper scrutiny so that I can go back to my constituency and say, "The Minister said to me that this is a nice little change through the SI. It will not change your life at all, and you can be happy that there will be no barriers to exporting to Italy or any other part of the European Union."

Lucy Frazer: To clarify, we are retaining the rules. The only question we are asking today is what law will be applied to various contracts, and the answer is that there will be very limited change in that area. Other matters might affect the hon. Gentleman's constituents who export goods, but the specific matter that we are discussing is what law will be applied if they have a dispute about the purchase or sale of their goods. In that case, our laws will be similar going forward.

As I have mentioned, our position in relation to the Rome convention, which predates Rome I and Rome II, is different. The UK's status as a contracting party to that convention will terminate as a matter of international law once the UK has left the EU, and it will no longer be binding on the UK. The approach taken in this statutory instrument is that the substantive rules of the convention, which continue to apply only to contracts entered into between 1 April 1991 and 16 December 2009, are retained. However, the statutory instrument also removes the provisions dealing with the ability of the UK courts under the 1980 Rome convention to refer questions of interpretation to the Court of Justice of the European Union.

We have done an impact assessment, which I am sorry to say is not yet published. That assessment has concluded that the impact on businesses, charities, voluntary bodies and the public sector will be negligible. The amendments to retained EU law and domestic legislation in this instrument merely correct EU-related deficiencies, so that Rome I, Rome II, and—for the purposes of certain old contracts—the Rome convention rules will continue to apply in the UK as domestic law post exit, largely as they do now.

Jo Stevens (Cardiff Central) (Lab): Can the Minister tell us why the impact assessment has not yet been published?

Lucy Frazer: I apologise; it was intended to have been published, and we thought that it was going to be. It was news to me this morning that it had not yet been published, and I apologise for that, but it will be published. As I mentioned, the effects are minimal.

Jo Stevens: Does the Minister know when that impact assessment will be published?

Lucy Frazer: We think it will be published today. If the hon. Lady or any other Members have any questions after that impact assessment is published, we will be happy to answer them.

Turning to consultation in respect of this measure, the Government's policy approach has a large measure of support from both the Law Society and the Bar Council, as well as Committees in this place and in the other place.

Mr Sheerman: What the Minister just said is reassuring, but has she consulted the people who really are responsible for international trade, such as the Confederation of British Industry or the Engineering Employers' Federation? The raison d'être of those organisations is to have good, frictionless trade across Europe.

Lucy Frazer: The hon. Gentleman makes a very important point. We at the Ministry of Justice recognise that we deal with laws, which are there to serve consumers, private individuals, members of the public and businesses. We have set up a Brexit Law Committee, which includes members of the Law Society, the Bar Council and the judiciary. There are also representatives of the City and a number of other members who represent businesses. They are part of the committee, and we have consulted them and discussed all the statutory instruments that we are putting forward to the House. My officials engage heavily with members of the committee. I have met them and discussed a number of matters, and the Lord Chancellor has met them as well.

These are matters to which we have not determined our approach single-handedly; we have discussed them broadly. We have also discussed them with the devolved Administrations. We published our approach to this SI very early on in the process—in March 2018—and we had very positive feedback. We might have tweaked a few things following the feedback we received, but the SI and our approach to it have been around for some time and have received favourable comments.

Clive Efford (Eltham) (Lab): I am grateful for the answer that the Minister gave to my hon. Friend the Member for Huddersfield. Could she just enlighten me? Paragraph 10.1 of the explanatory memorandum states:

"This instrument has not been the subject of consultation."

Could the Minister explain what that means?

Lucy Frazer: Yes, I am very happy to explain that. Like all our SIs, it has not been subject to formal consultation; we have informally consulted widely. As I said, this SI has been around for some time. We at the Ministry of Justice have taken the approach that we must be guided by experts. I have held a number of roundtable discussions on various matters, and my officials have engaged widely with the sector.

Clive Efford: I am sorry to pursue the point, but the draft instrument was published only on 8 March 2018. Is the Minister sure that there has been sufficient time for a response to that? There does not seem to be much detail on what has come back from the consultation or the period that was allowed for comments on this instrument.

Lucy Frazer: I beg to differ. The SI was published a year ago. We have engaged actively with the sector and we have had comments back. The instrument has been in the Library, so hon. Members could have seen it. We deposited a draft in the Library on 8 March 2018. If hon. Members had any concerns, we have had a year in which to hear them. A small number of comments were received in response to the SI's publication, focusing on those areas where the retained version of the rules in the UK will diverge from the rules applied in EU member states. The comments we received, and the follow-up conversations that were held with relevant stakeholders, have been taken into account in the drafting of this instrument.

Our basic approach to retaining the Rome rules was also discussed with members of the legal profession in the context of the overall approach to a no-deal exit from the EU, as outlined in the civil judicial co-operation technical notice that we published on 13 September 2018. No concerns about the Government's approach were raised at that stage.

Mr Sheerman: The Minister, as ever, is charming and helpful, but I get suspicious when a Minister says, "Well, this has been around for a long time." It might have been gathering dust in the Library or somewhere in her Department. The people who will be affected by these changes should have been consulted proactively, which is why I asked whether we could have a list of people whom she has talked to—the chambers of commerce, the Institute of Directors and particularly small business organisations. How much has the Minister talked to them? We are discovering from Minister after Minister—on SI after SI—that crucial people such as chief executives of airlines, or the chairmen and chief executives of shipping companies, were not consulted. It is about proactive, proper consultation with the people who will be affected. I am always suspicious when the Minister says, "We have had an awful lot of lawyers around the table." I am not ashamed to say that I have a daughter who is a lawyer; we all have skeletons in our cupboards. The fact of the matter is that I do not trust things that have been consulted on but only on a lawyer-to-lawyer basis.

Lucy Frazer: I am grateful to the hon. Gentleman for taking this process seriously, and I welcome the scrutiny. First, as I mentioned, this statutory instrument offers very little change. He may have sat in a number of Committees where significant changes are made and it is appropriate to take on board criticism and feedback. We must do that for this statutory instrument, but it will not have the consequences that he fears. As I highlighted, the impact of this SI is extremely limited.

Secondly, I dispute the position that lawyers are not of any worth to the consultation. I say that not because I am a lawyer or because the hon. Member for Bolton South East is a lawyer. I have spoken to lawyers who practise in Brussels, and I have held roundtables with lawyers in this country and those representing the industry. The interest of the lawyers is to serve their clients, and I reassure the hon. Gentleman that, in those discussions, they feed back to us what their clients want. I assure him that on the Brexit Law Committee we have various representatives from law firms, the Law Society and the City.

I hope I have answered the hon. Gentleman's question. I will bring the matter to a close, although I am happy to take any further interventions from anyone else if they would like to participate in the debate.

Mr Sheerman: Will the Minister give way?

Lucy Frazer: I will take one last intervention from the hon. Gentleman.

Mr Sheerman: The Minister is very kind. Could we have a list, not of lawyers representing real people but of the hard-working, wealth-creating large, small and medium companies in this country that she has consulted on the impact? It is not good enough for her to say, "It might not be important." This legislation looks pretty damned important to me.

Lucy Frazer: If I have suggested at any stage in the debate that the statutory instrument is not important, I retract that suggestion, but I do not believe I have said that. This is an extremely important matter. As someone who has practised law, I think it is incredibly important to determine and have clarity about which laws govern our contracts, as well which courts determine them. I would like certainty for business; after all, it is business that lawyers serve. At the Ministry of Justice we serve consumers and professionals. I am happy to take the hon. Gentleman's request away with me.

If no other Member would like to raise any further points, I commend this statutory instrument to the Committee.

2.53 pm

Yasmin Qureshi (Bolton South East) (Lab): I reassure my hon. Friend the Member for Huddersfield, in the light of his questions to the Minister, that I have had the chance to go through this statutory instrument as a barrister and shadow Justice Minister, and that we have consulted the Law Society and the Bar Council. My hon. Friend has put his views about lawyers on the record, but I take no offence.

I do not wish my hon. Friend to think that somehow we are succumbing to what the Government want us to do. We have been doing our homework and have scrutinised this statutory instrument. My hon. Friend may be aware of the legal concepts of public international law, which is treaty based, and private international law, which is also known as conflicts of law. Conflicts of law are general provisions that set out the laws to be applied in the event of a dispute, such as a dispute over a transaction that has taken place, a custody dispute or any kind of dispute between people from two different jurisdictions.

Let me give an example of countries outside the EU, because these regulations will apply after we have left the European Union. The current position is that if the matter is a private, personal or family law issue, such as custody or divorce, the accepted norm is that the domestic domicile laws of the individuals will apply. If the issue is to do with business, the laws that apply could be to do with where the business took place or where the companies are based. There are already set rules determining different types of conflicts of law that arise outside the European Union.

The benefit of being part of the European Union was that we did not have to have any of these arguments about which law applied to which situation, or about how to get a judgment given in one country executed in another; these arguments do happen when countries are outside the European Union. Just as with goods and services, the European Union gave a seamless transfer of rights and contracts.

All the issues that my hon. Friend the Member for Huddersfield outlined are clear. When we are part of the European Union, the process is seamless. However, if and when we come out—depending on what happens—we will need to deal with such problems. The purpose of this statutory instrument is to address that lacuna—the gap that will be left if we leave without a deal.

As the Minister said, Rome I and Rome II regulations are the two basic treaties that currently cover this statutory instrument. If we leave the EU, Rome I and Rome II will not operate and that would cause all sorts of chaos.

Mr Sheerman: My hon. Friend is confusing me a bit. I am having an Alice in Wonderland moment. As far as I can see, the Minister and the shadow Minister are saying that this is such a little change that it does not really matter. Why are we here? Why are the Government producing this SI and why, once again, does the person representing the Opposition seem to be agreeing? A very small number of these Committees ever divide. I do not know what the purpose of having an Opposition is, if we are always going to agree with the ministerial position. The Back Benchers have to pick up the cudgels. I do not want this to be described as discrimination; to get the balance right, I do not like lawyers or accountants.

The Chair: Let us get back to the subject of the SI, if we can.

Yasmin Qureshi: I am grateful to my hon. Friend, but what I am saying—and what the Minister was also saying—is that there are issues that need to be addressed. The statutory instrument will address the gaps that will be left if we leave without a deal. Let me provide some examples, which I hope will reassure my hon. Friend that this statutory instrument is needed. If we Brexit without a deal, we need to have these provisions in place.

The Rome I and Rome II regulations set out the rules by which the law is to be applied to a case with a cross-border dimension. For example, the parties to a contract can choose to apply English law to the dispute, even though the case would be heard in France, and the French court must apply the English law to the dispute. Under Rome I, if the parties agree on English and Welsh law—or any other—as the governing law of the contract, this has to be respected by the courts of the EU member states. Given that it applies to third countries and there is no need for reciprocity, recognition of the choice of English laws should not be affected, as long as Rome I remains unchanged.

Rome I states that consumer contracts will be governed by the law of the country where the consumer lives if the business operates or undertakes marketing in the consumer's country. As many consumers undertake cross-border transactions, Rome I will ensure that any dispute undertaken can be dealt with using the laws with which they are familiar. That is why it is important to keep Rome I, which is one of the things that this statutory instrument will do.

Rome II outlines rules for determining which law governs non-contractual obligations, for example in relation to a tort, where the general rule is that the national

[Yasmin Qureshi]

court must apply the law of the country in which damage was done. There is no need to secure reciprocity or mutuality of the arrangements, because the Rome II rules apply automatically to third countries, and the courts of European Union member states will continue to apply English and Welsh law when the rules dictate so.

In essence, the draft regulations are giving effect to the two Rome convention treaties. They are needed, so the Labour party will not press the Committee to a Division or oppose the introduction of the statutory instrument. It is required.

3.1 pm

Gavin Newlands (Paisley and Renfrewshire North) (SNP): It is a pleasure to see you in the Chair, Mr Austin. I start by declaring my pride in not being a lawyer, lest I draw the ire of the hon. Member for Huddersfield. This is another no-deal Committee to allow for the Government's catastrophic Brexit but, given that we are so far behind in the number of statutory instruments that we need to pass before Brexit, I suspect that the civil servants will be making a small prayer tomorrow for at least a small extension to article 50, to allow for some of those SIs.

The Justice Secretary in the Scottish Government and the Justice Committee of the Scottish Parliament have both indicated their assent to the draft regulations, so I will not break concord by seeking to divide the Committee. I will detain it no longer.

3.2 pm

Lucy Frazer: I will make just two short points. First, I thank Opposition Members for their constructive approach. If we do leave the EU without a deal, it is helpful to ensure that our statutes work, and I am grateful for their efforts to ensure that. Secondly, by way of clarification, I reiterate what I think I said during the thrust and course of my submission—

Mr Sheerman: Will the Minister give way?

Lucy Frazer: I will finish my point, if I may. It is important to ensure that we have statutes that work and that businesses have certainty. The draft regulations are part of that package. They are an important SI and I am pleased to commend them to the Committee.

Question put.

The Committee divided: Ayes 9, Noes 1.

Division No. 1]

AYES

Frazer, Lucy
Hair, Kirstene
Jenkyns, Andrea
Lopez, Julia
Menzies, Mark
Milling, Amanda
Percy, Andrew
Pow, Rebecca
Smith, Royston

NOES

Sheerman, Mr Barry

Question accordingly agreed to.

Resolved,

That the Committee has considered the draft Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

3.5 pm

Committee rose.