

EUROPEAN WORKING GROUP

Comments on the Consultative Document of The Law Commissions on The E.E.C. Preliminary Draft Convention on the Law Applicable to Contractual and non-Contractual Obligations

Introduction

The Convention follows the latest thinking in English Law, in particular as far as Contract Law is concerned, by providing an almost unlimited choice of law and, in relation to tort, in giving the greatest degree of flexibility for choice of Law. The Group examined the various Articles and came to the conclusion that numbers 21 to 36 did not require any comment by reason of their not having any particular application to Insurance. In addition, comment was not felt to be necessary on Articles 12, 18 and 19. Agreement, without specific comment, was established with Articles 3, 6, 7, 9, 10 and 20.

Before offering its specific views on the remaining Articles the Group wish to make the specific point that the Courts of different Countries which are to try cases on the basis of the Laws of other Countries should have some form of direct access to guidance from the Courts of those Countries. This would replace the present system whereby the parties to the action have to provide their own specialist information.

Article 1

The exclusion of Insurance Contracts was accepted on the understanding that such Contracts are likely to form the subject of a separate convention.

It was hoped that the Convention Rules will be applied to conflicts between different legal systems within the United Kingdom.

The Group agreed with the Law Commissions on the question of Arbitration and if Exclusion (c) means that the arbitrator cannot apply the Convention Rules it was felt that this is unfortunate and, if it is correct, why does Exclusion (c) appear? The affect upon Insurance Companies would be considerable as the majority of English Insurance Policies include Arbitration Clauses.

Article 2

It was assumed that the lack of specification in the first sentence means that choice can be either expressed or implied.

The Second sentence should not apply if one party states that no choice of Law was made. In such a case the Court should apply the most appropriate Law.

Article 4

An examination of the French translation would indicate that the word "implied" carries rather stronger connotations in English legal usage than the word "implicit" would do. It was the view of the Group that, in the absence of an express or implied choice of Law, Contracts should be governed by the Law of the Country where its main characteristic of performance is to take place.

Article 8

The Group was in agreement with this Article provided Article 4 is changed as suggested. It was also thought that the second variant is preferable to the first.

Article 10

Although it has already been stated above that the Group agreed with the Law Commissions on this Article it was felt necessary to underline the point that a clear-cut and definite rule should be provided concerning the proper Law of the tort/delict. This point is of major consideration in the context of International Insurance Contracts.

Article 13

The Group felt unable to offer a comment on this Article because its meaning is unclear.

Article 14

On the assumption that the Group's understanding of the Article was correct it was the view of the Group that the lack of Administrative Courts in the United Kingdom will be liable to cause injustice by inhibiting United Kingdom plaintiffs in actions against some Continental public bodies as compared with the position of the citizens of the other member states. The Group was in agreement with the Law Commissions.

Article 15

The Group was in agreement with the first paragraph except that for extinguishment the parties should be able to agree to a different

law applying and also to the possibility of liability of eg personal representatives or trustees (eg distribution by a personal representative after a Section 27 advertisement if the Contract is governed by non-English Law).

The Group was not entirely clear as to the meaning of the second paragraph and therefore decided not to offer a comment. This appeared to be an example of the English translation not conveying in the English idiom the meaning of a Clause.

Articles 16 & 17

It was felt that where there is reasonable doubt as to the Law governing the claim the assignment, under any apparently appropriate Law, should be valid unless the Law which is ultimately held to govern the claim categorically precludes such an assignment.

As Insurance has been excluded from the Draft Convention the Group has not specifically considered subrogation although this is fundamental to British Insurance Concepts.

CONCLUSION

Whilst the Group has considered all the Articles in the Convention and commented upon some of them the members did not have the time to consider whether the Convention resolves all, or even the principal problems in the field of the Conflict of Laws. For instance whilst the Group approved the principle of the elimination of Forum shopping nevertheless the Convention does not provide any rules or guidelines for the award of damages such as in personal injury claims or on unforeseen losses in Contract. It was felt that such a fundamental aspect should form part of any Convention on this subject.