4. EUROPEAN INSURANCE LAW

Robert Merkin, Bracton Professor of Law, University of Exeter: Director of Research and Training, Radcliffes & Co

1. Completing the EC Internal Insurance Market

Introduction

The fundamental aim of the European Communities from the outset was a single market for goods and services, to be achieved by the removal of all national rules capable of operating as a barrier to free flow. In the services sector - notably insurance - the high degree of regulation within member states, in particular the demand for authorisation, meant that this was never going to be easy. As far as insurance is concerned, the original conception appears to have been a single regulatory structure coupled with a unified code of substantive law. The latter has it would seem, now been abandoned in favour of the principle that an assured is entitled to receive the benefit of his domestic law irrespective of the domicile of the insurer. Progress towards the former, based on the notion of home country control, is gathering pace.

The steps towards a single market for insurance

The single market for services has two guiding principles. The first is freedom of establishment, ie the right of a provider of services established in one member state to become established in any other member state. The second is free movement of services, ie the right of a provider of services established in one member state to provide services in any other member state. These freedoms, coupled with the principle that a provider of services should be regulated only by his home state and not by the host states, will be achieved in the insurance market in three stages and by three different generations of directives.

The First Generation directives (life and general insurance being dealt with separately in 1979 and 1973 respectively), which have been implemented into English law and form a part of the Insurance Companies Act 1982, were concerned with freedom of establishment. Their effect was to allow an insurer established in one member state to establish in any other member state. However, if this occurred, the host state was entitled to impose upon the insurer its full regulatory structure. All that was achieved, therefore, was a smoother passage to application for authorisation.

Whatever the European Commission may have had in mind for the Second Generation Directives was pre-empted by a series of decisions by the European Court of

Justice in 1986, arising under the Co-Insurance Directive. The *Insurance Cases* pointed the way towards removal of barriers to establishment, by holding that an insurer established and authorised in member state A is entitled to provide services in member state B without having to be established there. However, the Court restricted further developments towards the free movement of services by adding that an insurer authorised and established in member state A and wishing to provide services in member state B could have an authorisation requirement imposed upon it by member state B if consumer protection so required.

The Second Generation Directives were, as a result of these rulings, unable to move straight to home country control. The European Commission, exercising a good deal of ingenuity, nevertheless managed to go as far as the *Insurance Cases* permitted. The Second Non-Life Directive of 1988 eased the requirement for full establishment in each member state, replacing it with a right to trade via a permanent representative. Further, this Directive removed the right of member states to demand authorisation in the case of large risks (commercial risks) while giving them the discretion to retain authorisation for mass risks (consumer risks). The UK implemented this Directive with effect from July 1990 by amendments to the Insurance Companies Act 1982, and chose not to take up the option conferring the right to demand authorisation from mass risks. As a result, an insurer authorised and established in any EC member state may sell insurance in the UK without UK authorisation, and subject only to control from the home state. UK companies wishing to sell mass risks insurance elsewhere in the EC do, however, continue to face an authorisation requirement from them.

The Second Generation Life Directive was adopted by the EC in 1990 and has yet to be implemented in the UK. The DTI issued a Consultation Paper in 1991 proposing how this should be done. As with non-life insurance, the need to seek authorisation from any host member state is removed where the assured does not need protection. This situation is deemed to arise where the assured within the host state has 'sought the commitment' by approaching, directly or through a broker, an insurer in another member state. Such an assured can be insured without host state authorisation. In other cases, however, host state authorisation can, at the host's option, be required. The 1991 Consultation Paper proposes to remove the authorization requirement in all cases.

It should be added that both Second Generation Directives contain choice of law rules to be applied where the insurer and the assured are located in different member states. The general principle is that the assured is to receive the benefit of his home law if he so wishes: contracting out is permitted only on the basis that the assured continues to receive the benefit of mandatory laws. Given that the Unfair Contract Terms Act

1977 does not apply to insurance, it would seem that the UK has no mandatory laws for the protection of assureds. However, a further proposal from the European Commission published in 1991, for an EC-wide Unfair Contract Terms Directive, will have the effect of outlawing unfair exclusions in insurance contracts.

The Third Generation Framework Directives for both life and non-life insurance are in their final form and it is anticipated that they will be adopted shortly. The proposals remove the restrictions contained in the Second Generation Directives and move to full home country control. When implemented, the proposed directives will permit an insurer authorised and established in one member state to establish in any other member state and, irrespective of such establishment, to sell insurance in any other member state from any establishment without host country control. The insurer's EC-wide operations will be regulated by its home state, with the host states having only residual powers of reporting and, ultimately, unilateral action.

2. Motor Insurance

Developments in compulsory cover

In order to put the most recent developments in motor insurance into context, it is necessary to trace briefly developments since 1972.

The First Motor Insurance Directive, adopted in 1972, provided that motor policies issued in one member state were to offer compulsory liability cover in all EC member states. The Second Motor Insurance Directive, adoped in 1985, extended the range of compulsory cover from death and personal injury to property damage up to £250,000. This directive further introduced a shift away from the English notion that a policy covers a driver rather than the car: under the Second Motor Directive, an insurer was to be liable to a third party whether or not the driver of the vehicle was the assured or a person authorised by the assured. All of this is now contained in the Road Traffic Act 1988.

The Third Motor Insurance Directive, adopted in 1990 but yet to be implemented in the UK, completes the compulsory insurance structure. Much of it now forms a part of the Road Traffic Act 1988 (eg. compulsory insurance for passengers, and statutory duties to provide insurance details following an accident), but some minor amendments to UK law will be required: the Motor Insurers Bureau agreements will have to be modified so as to provide that an unsatisfied judgment is to be met without delay; and the Road Traffic Act 1988 will be required to state that a single insurance premium not only covers the entire EC but confers upon the assured either the law of

his home state or the law of the state in which his liability was incurred, whichever is more generous to him.

A single market for motor insurance

Motor insurance has been a notable exclusion from the three actual and proposed Non-Life Directives, on the basis that the national equivalents of the UK's Motor Insurers Bureau, including the MIB itself, made no provision for the inclusion of insurers located in other member states. The Free Movement of Motor Insurance Services Directive of 1990, which is to be implemented by 1992, extends the general regime to motor insurance. An insurer in member state A who wishes to sell compulsory policies in member state B, must join the host's equivalent of the MIB and must further establish a permanent presence in each host, that person being authorised to negotiate and settle claims.

3. Competition Policy

Article 85(1) of the Treaty of Rome, which applies to the vast majority of restrictive agreements governing both goods and services, has been applied to co-operation agreements between insurers on no less than four occasions. The flow of cases has prompted the European Commission to lay down guidelines as to exactly what agreements are permitted between insurers. A Regulation adopted in 1991 authorises the Commission to draft and operate a Block Exemption from Article 85(1) in respect of agreements between insurers. This has yet to appear, but the Regulation sets out parameters for the permitted scope of the Block Exemption. Insurers will be allowed to agree on, in particular:

the establishment of common tariffs based on shared claims experience;
the establishment of common policy conditions;
co-insurance arrangements;
pooled procedures for claims settlement;
joint testing of security devices;
registers of aggravated risks.

4. Choice of Law

English lawyers, long used to the concept of the proper law of contracts, are now coming to grips with the fact that this doctrione now has a residual existence only. With effect from 1st April 1991 the Contracts (Applicable Law) Act 1990 incorporates into English law the choice of law rules in the Rome Convention 1980, agreed

to by the member states of the EC. The choice of law rules affecting insurance and reinsurance agreements can be tabulated as follows:

(a) Non-life policies where the risk is located *within* the EC (as defined by the Insurance Companies Act 1982) are excluded from the Rome Convention and are subject to the choice of law rules contained in the Second Non-Life Directive. This has been implemented as Schedule 3A to the Insurance Companies Act 1982.

(b) Life policies where the risk is located *within* the EC are excluded from the Rome Convention. When the Second Life Directive is implemented, the choice of law rules contained in that Directive will be applicable. Pending such implementation, the common law proper law doctrine remains effective.,

(c) Non-life policies where the risk is located *outside* the EC are governed by the choice of law rules in the Rome Convention. The Convention lays down differing principles for consumer contracts and commercial contracts.

(d) Life policies where the risk is located *outside* the EC are governed by the choice of law rules in the Rome Convention. The Convention lays down differing principles for consumer contracts and commercial contracts.

(e) All reinsurance agreements are governed by the Rome Convention choice of law rules.

The present author has commented on the Rome Convention elsewhere. Suffice it to say for present purposes that it is presently unclear whether, in the absence of an express choice of law clause, the Rome Convention confirms English principles or whether it makes a complete break with them. On one view, the Convention rules, in the absence of a choice of law clause, will point towards the law of the domicile of the insurer's or reinsurer's head office, although even if this is right it is uncertain whether this principle is applicable where the entire agreement is administered by brokers or where the parties have chosen to settle disputes by arbitration. Pending resolution of these issues, the universal adoption of choice of law clauses is strongly recommended.

5. Jurisdiction

The Brussels Convention 1968, which became a part of English law at the beginning of 1987 with the implementation of the Civil Jurisdiction and Judgments Act 1982,

appears to be spawning litigation at a faster rate than almost any other provision of EC law. The general principles governing jurisdiction contained in the Brussels Convention are well known. First, the general rule is that a person may be sued only in the place of his domicile. Secondly, there are a number of exceptions to the general rule, under which the plaintiff has a choice of additional jurisdictions in which to bring his action. A company, for example, may have more than one domicile. Further, in the case of insurance, there are a variety of special rules which give the assured a wide choice as to where his action is to be brought. The prospect of the courts of more than one member state having jurisdiction over a particular dispute gives rise to the third general principle, namely, that in such a case, the courts 'first seised' of the action have *exclusive* jurisdiction (article 21).

A number of recent cases have shed light upon the operation of the jurisdiction rules of the Brussels Convention. The following are perhaps the most important.

Dresser v. Falcongate, The Duke of Yare (1991) *The Times*, 8th August. It was here held by the Court of Appeal, overruling on this point *Kloeckner v. Gatoil* (1990) 1 Lloyd's Rep 177, that an English court is not seised of an action until the writ is served upon the defendant: the previous view had been that the English court was seised when the writ was issued. The Court of Appeal stressed the clerical and mechanical nature of the issue of a writ. However, the main issue left open by this case is, assuming that leave for service of the writ outside the jurisdiction is required under Order 11 of the Rules of the Supreme Court, whether the English court is seised when it gives leave or when the writ is actually served. The former view was preferred in *Kloeckner*, and the Court of Appeal appeared not unsympathetic in *The Duke of Yare*. The matter is of great significance.

Re Harrods (Buenos Aires) (1991) 4 All ER 334. The Court of Appeal here ruled, overruling on this point *Berisford v. New Hampshire* (1990) 2 All ER 321, that if an English court obtains jurisdiction over a dispute by virtue of the rules of the Brussels Convention, and a non-EC court subsequently acquires jurisdiction, the English court is entitled to stay its own proceedings on *forum non conveniens* grounds. The exclusive jurisdiction conferred by the Brussels Convention upon a court first seised operates to remove the power of stay only where the subsequent court is in another EC member state.

Overseas Union v. New Hampshire Insurance (1991) *The Times*, 19th July. This ruling by the European Court of Justice, following a reference from England, has the effect of extending the Brussels Convention to a plaintiff not domiciled in any EC member state. A full report of the ruling is awaited, but it seems to go further still and

to hold that any conflict of jurisdiction between courts in the EC is to be resolved by the Brussels Convention rules even if neither party is domiciled in the EC.

Marc Rich v. Societa Impianti, "The Atlantic Emperor "(1991) *The Times*, 20th September. The European Court of Justice, on a reference from the Court of Appeal, here considered the exclusion of arbitration agreements from the Brussels Convention. The Court was faced with the situation in which party A, in the face of an arbitration clause in the agreement between the parties, commenced judicial proceedings in Italy and asserted that the arbitration clause was void. Party B then applied to the High Court for the appointment of an arbitrator for A under the Arbitration Act 1950. The question was whether the High Court was entitled to appoint an arbitrator despite the fact that the Italian court was first seised of the action. The European Court of Justice ruled that the exclusion of arbitration agreements from the Brussels Convention meant that the High Court had jurisdiction to appoint an arbitrator even though that meant that it had to make a ruling on the validity of the arbitration clause. In such a case, the first seised rule has no application.

Kurtz v. Stella (1991) *The Times*, 4th October. Article 17 of the Brussels Convention provides that if the parties enter into a jurisdiction agreement, the chosen court has *exclusive* jurisdiction. The High Court was here required to consider the effect of Article 17 on a non-exclusive jurisdiction clause. It was held that Article17 did not have the effect of converting the non-exclusive clause into an exclusive clause, but rather operated as an agreement to confer additional jurisdiction where none previously existed: the effect of Article 17 was that if an action was first brought in the nominated forum, the court had exclusive jurisdiction.

* This is an updated version of a talk delivered at the BILA Annual Conference in September 1991.