CITY OF LONDON LAW SOCIETY

FINANCIAL LAW COMMITTEE

Hague Conference on Private International Law: Feasibility study on the choice of law in international contracts

Comments on UK's draft response to Part I of Questionnaire

The City of London Law Society (CLLS) represents approximately 12,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to Government consultations on issues of importance to its members through its 17 specialist committees. The CLLS Financial Law Committee, made up of solicitors who are expert in their field, welcomes the opportunity to comment on the UK's draft response to the Hague Conference questionnaire in relation to choice of law in international contracts. We have sought to provide brief comments, but would be happy to expand on these if it would be helpful.

Overall comments

Before commenting on specific aspects of the draft response, we wish to make clear our overall position on the proposal for a new instrument concerning the choice of law in international contracts. We do not see any merit whatsoever in seeking to adopt such an instrument, whether for business to business, consumer or employment contracts.

The importance of clear and effective choice of law rules for international business contracts is difficult to overstate. Businesses need to be confident that their choice of law will be respected by the forum in which any disputes relating to the contract are to be resolved, and that any departure from the principle of party autonomy is both justified (for example by the aim of consumer protection) and predictable. This is particularly important for the financial markets.

As stated in the draft response to the questionnaire, the 1980 Rome Convention contains the current rules for determining which country's law should be applied by the courts of all EU member states, including the United Kingdom, when resolving contractual disputes. What the draft response does not mention, however, is that proposals are underway to replace the Rome Convention with the Rome I Regulation. Although the UK has to date opted out, and therefore will not automatically be bound by the Regulation once finalised, it is envisaged that the UK may decide to opt in to the Regulation once it is finalised and adopted.

The choice of law rules contained in both the Rome Convention and the proposed Rome I Regulation are of universal application, in that they apply whenever the courts of a Convention (or Regulation) state are seised of a contractual dispute, save where the subject matter of the contract is excluded from their scope. The Regulation will apply to at least 25 Member States as regards choice of law, as between themselves and in dealing with third countries. The UK and Denmark if they remain outside the regulation would continue to apply the very similar Convention rules. As recognised at paragraph 31 of the Report prepared by the Permanent Bureau dated March 2007, this

would give rise to serious difficulties if any of the Convention (or Regulation) states were to become party to a future Hague Convention on choice of law in international contracts. Either the rules in both instruments would have to be the same, or the issue of which instrument should be applied by the relevant courts in any given circumstances would have to be decided. It is not easy to see how that issue could be resolved.

It may be argued that there would be some benefit to a new instrument in relation to states which are not currently bound by the Convention (and will not be bound by the Regulation). In practical terms, however, so long as jurisdiction agreements are given proper effect, parties can ensure that the choice of law rules set out in the Convention (or Regulation) are applied, rather than any other choice of law rules, by agreeing that disputes be submitted to the courts of a Convention (or Regulation) state. Rather than supporting any initiative for a choice of law instrument, therefore, it would be much more productive for the UK to press for ratification of the 2005 Convention on Choice of Court Agreements.

The above does of course leave open the possibility of a future Hague Convention which mirrored the provisions of the proposed Rome I Regulation, or that the text of the Regulation could in due course be revised to reflect any such agreed future instrument. However, particularly in the light of the difficulties experienced to date in negotiating with other EU Member States to formulate an acceptable text for the Rome I Regulation, we see no reason to expect that a more acceptable result could be reached in the wider international context. If anything, such negotiations would be likely to lead to a less satisfactory instrument, leading to greater difficulties and uncertainties for business.

From the UK's perspective, there is simply no value in adopting a further instrument in this area, even for business to business contracts, and we do not consider that time should be wasted in pursuing this further.

Comments on specific aspects of draft response:

Question 1: Does the law in your State provide in general for party autonomy, with possible public policy exceptions, as to the choice of law for international contracts?

We do not agree with the sweeping statement that in respect of specific commercial matters excluded from the scope of the Convention, the position is governed by the common law which generally envisages the application of the principle of party autonomy. For example, conflict of laws issues relating to bills of exchange and promissory notes are largely governed by the Bills of Exchange Act 1882.

We are surprised that the draft response to this question does not mention the proposed Rome I Regulation, since it is envisaged that it will ultimately replace the Rome Convention (though, from the UK's perspective, that is subject to a decision being taken to opt back in). See our general comments above.

Question 3: In your State, are certain subject matters excepted from party autonomy as to the choice of law for international contracts?

We believe it is an over-simplification to say that mandatory rules refer to national provisions designed to protect weaker parties or broader significant socio-economic considerations, though it is correct to say that many of the rules which are given overriding effect in this manner are rules designed to protect such aims. Other examples that might be given of areas in which there are mandatory rules of this sort include securities laws, environmental laws and tax laws.

Question 4: Approximately what is the proportion of international contracts entered into in your State that include a choice of law provision?

We would suggest responding "more than half", since the question asks about international contracts generally. If limited to international contracts where the parties are legally advised, we would say "virtually all" include a choice of law provision.

Question 5: Are you of the view that a legally binding norm such as an international treaty or domestic law (which could be based on a Model Law) is or would be useful to assist, in relation to international contract,

(a) parties with their choice of law;

(b) judicial authorities in resolving disputes regarding the applicable law; and

(c) arbitral tribunals in resolving disputes regarding the applicable law?

We do not agree that a legally-binding norm would be of use either to parties or to judicial authorities, even if limited to commercial (i.e. business to business) contracts. The UK currently has a legally-binding norm in the form of the Rome Convention, brought into English law by the Contracts (Applicable Law) Act 1990, and there are proposals for a new legally-binding norm in the form of the Rome I Regulation. Any attempt to reopen these issues to seek agreement in the wider international context is likely to result in further difficulties and uncertainties for UK business. See our general comments above.

With regard to arbitral tribunals, we agree with the draft response to question 5(c).

Question 6: Are you of the view that a non-binding instrument such as a set of Legal Principles or Guide to Good Practice is or would be useful to assist, in relation to international contracts,

(a) parties with their choice of law;

(b) judicial authorities in resolving disputes regarding the applicable law; and

(c) arbitral tribunals in resolving disputes regarding the applicable law?

Although it is not entirely clear from the draft response, our understanding is that the UK proposes to answer "No" to the question whether a non-binding instrument such as a set of Legal Principles or Guide to Good Practice would assist parties or judicial authorities. If so, we agree with that response. A non-binding instrument would be entirely pointless in the context of choice of laws, particularly given the existence of legally-binding rules which govern choice of law in contractual disputes before the courts of all EU Member States.

Question 7: Other comments:

Paragraph 35 of the March 2007 Report states that in April 2006 Member States requested the Permanent Bureau to prepare three different feasibility studies on a variety of topics. We understand that, apart from the study currently under discussion, these comprised:

(i) a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject; and

(ii) a feasibility study on the development of a new instrument for cross-border co-operation concerning the treatment of foreign law.

Although these do not fall directly within the Financial Law Committee's area of interest, we take the view that either of these studies is likely to be a better use of resources than pursuing further work in relation to the choice of law project.

Financial Law Committee of the City of London Law Society
21 September 2007

The members of the Committee's working party comprise:

Dorothy Livingston – Herbert Smith LLP (Chairman)
Andrew Dickinson – Clifford Chance LLP
Tolek Petch – Slaughter and May
Maura McIntosh – Herbert Smith LLP (Rapporteur)

Contributions to this response have also been received from Simon Hall of Freshfields Bruckhaus Deringer.