Electronic commerce and European Network for out-of-court settlement of consumer disputes

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1. Introduction

The creation of a single European market has not met expectations in financial services. Progress has been particularly slow in the retail insurance market, owing to a number of factors identified as barriers to harmonised functioning. The most important legal obstacles are national tax legislation and contract laws, which make it impossible for insurers to sell the same product throughout the European Economic Area. That is why insurance companies have been reluctant to sell insurance to non-residents.

E-commerce is an area that offers new opportunities also for financial services to develop across borders. Therefore it is understandable that in order to harness the benefits of e-commerce and encourage supply and demand for on-line financial services within the European Community, urgent action is called for. The European Commission is expected to bring forward a Communication/ Green Paper on financial services and e-commerce in February 2001. One key issue in this Communication/Green Paper and in the debate that it will trigger is going to be whether the existing rules on the law applicable should be amended.

2. Application of home or host country rules

It has been suggested, for example by the UK Government (Completing a Dynamic Single European Financial Services Market; HM Treasury; July 2000) and the British financial services industry, that in order to facilitate cross-border trade and make the single insurance market a reality, the rules of the insurance company's home country be applied to e-commerce also in consumer risks. This would mean that:

- The law applicable to the selling of insurance would be the law of the insurance company's home country.
- The law applicable to the contract would be the law of the insurance company's home country and not the law of the consumer's country (host country) as it most often is today.

Same rules for all distribution channels

We would like to see the issue of home or host country rule discussed on a general level and not only in the context of e-commerce. It is true that e-commerce creates a new environment in which insurance products can be

advertised, sold and delivered more effectively also on a cross-border basis, but the internet is a distribution medium among other mediums. It can be used by insurers and intermediaries as not only an alternative but also a complementary to existing channels. E-commerce does not create new obstacles to cross-border trade but it highlights the existing ones. That is why it is difficult to see that in the long term different rules and different standards of consumer protection could be applied depending on the distribution method. The law applicable to selling and the law applicable to the contract should not be dependent on the technology or the method used for the distribution of insurance products.

Harmful law competition

It seems to us that rather than removing the existing obstacles in the single insurance market, the adoption of the home country rule would create new problems. Application of the home country rule would lead to harmful law competition (cf. harmful tax competition) which would distort competition. Companies domiciled in countries where the level of consumer protection is lower than the protection ensured by the law of their competitors would have a competitive advantage. A level playing field could not be ensured between insurance companies having to comply with stringent home country law and other companies applying their own less strict legislation. The Commission's report (COM 2000; 248 final) on the implementation of Council directive 93/13/EEC on unfair terms in consumer contracts shows very well that there are differences in the level of consumer protection in the various member states.

The scenario that could be envisaged is that (e-commerce) insurance companies are domiciled in a country which has the lowest level of consumer protection. This would be contrary to the rules on the choice of law, which were introduced and adopted in the insurance directives in order to eliminate choice of law as an element of competition.

Competition in the single insurance market should be based on the products, price and service, not on the law applicable. Therefore the only feasible solution to overcome the obstacles arising from national marketing rules and contract law without distorting competition is harmonisation of insurance contract law.

Building up consumer confidence

The application of the home country rule would not build up consumer confidence either in the single insurance market or in e-commerce. In fact, the outcome could be the opposite. It would be impossible for a consumer to assess all implications arising from the application of a foreign law to his insurance policy. The problem of 18 different sets of legislation would be shifted from insurers to consumers. The consumer would not be able to make an informed decision on the basis of a mere indication on the country whose law would be the law applicable to his contract. That is why consumers would be in an even worse situation because after the adoption of the home country rule it would be impossible for consumers to understand and make meaningful comparisons between products and service providers.

One solution to this new problem could of course be more stringent disclosure requirements. In theory, companies could be obliged to provide information on the contract law of their home country, but we would not welcome this approach. It would overload consumers with additional information. The disclosure requirements should concentrate on the main features of the product itself, not on the law applicable.

In case of dispute the application of the home country rule would increase consumers' litigation costs. Consumers could not find legal advisers in their own country who

could advise on foreign insurance law in the consumer's language. In practice consumers would have to turn to law firms in the home country of the insurance company.

3. Cross-border out-of-court complaints network

Since 1999, the European Commission has been working on an effort set up to create a network between national out-of-court settlement bodies for financial services, which would be available to consumers who have bought their policies from abroad, eg in cases where a consumer is not satisfied with a foreign insurer's decision on an insurance claim. What has so far been achieved in the effort is a Memorandum of Understanding on a Cross-Border Out-of-Court Complaints Network for Financial Services written by the Internal Market DG (Financial transactions and payment systems), which is a voluntary declaration of intent between the cooperating parties. The memorandum lays down "a feasible and flexible framework for the cooperation network based on a high level of consumer protection", as the Commission has worded the idea. The network was launched on 31 January 2001. The first stage of this cooperation is considered a pilot phase during which the cooperation framework will be tested.

We fully support the creation of effective EU-wide redress systems and building up of a cooperation network for various out-of-court complaints bodies. However, before the network for financial services also works in practice and not only on paper and in formal speeches, the following issues related to jurisdiction and applicable law are essential:

- Which ombudsman scheme will be competent to deal with the complaint?
- Which law will the ombudsman apply?
- Who should pay for the translations when consumers use their own language and the resolving body speaks another?
- Is there an Ombudsman scheme/Complaints Board for insurance matters in every country?

Competent scheme to settle cross-border disputes

The Memorandum of Understanding, to which many EEA out-of-court bodies are parties, sets out from the leading principle that the out-of-court body of the insurance company's home country be competent to resolve the dispute. Within the framework of its possibilities the scheme in the consumer's home country then provides the competent scheme with information on the appropriate mandatory consumer protection rules in force in the consumer's country of residence when the competent scheme asks for this information. Also the scheme in the consumer's home country may resolve the case itself if the insurance company in question has accepted the jurisdiction of that scheme, or if the legal obligations of the nearest scheme oblige it to resolve the complaint.

As a compromise between many parties, the memorandum may be a satisfactory start for Europe-wide cooperation. Even so, we do not see the main rule, that the scheme competent to deal with a dispute is the body in the country where the supplier is established, as the best solution. That is, if the law applicable is the law of the consumer's home country. A more preferable solution in our opinion would have been that the body competent to resolve the dispute be the out-of-court body present in the country whose law would be applied. The body that applies its own legislation knows the legislation and jurisprudence and can therefore settle the dispute most efficiently. This also ensures that the principles of law, the rules of the applicable law and the codes of conduct will be complied with. Applying this

principle would also make the language problems less difficult, because the competent body would often be the nearest scheme. The body of the insurer's home country (if not the competent body) could assist the competent body in the enforcement procedure.

The Memorandum of Understanding is flexible in the sense that the parties – that is, the Ombudsman Bureaux/Complaints Boards – can agree on an alternative method of cooperation in the interest of settling the dispute more efficiently. The Nordic model of cooperation, established in the few cases that have come to insurance complaints bodies, is that the first thing to be decided is the applicable law and second comes the resolving body. Cooperation in the Nordic countries is likely to continue along the established lines.

The rules on applicable law have to be applied

Insurance is a business based on law. Therefore it is in the interest of both consumers and insurers to ensure that the principles of law are also applied and respected when disputes are solved by out-of-court settlement bodies. We do not support the principles expressed by various representatives when the EEJ-net (European Network for Out-of-Court Settlement of Consumer Disputes) was launched in Lisbon in May 2000. An idea supported and also adopted was that because the rules regarding the applicable law were so difficult and made life complicated, these rules and the law should be disregarded. It was decided that the problem of applicable law could be avoided by applying no law at all! Instead, disputes should be solved based on what is fair and reasonable. This approach does not suit the pattern crafted in insurance directives, and neither does it fit the Nordic way of thinking.

After lengthy discussions, it was agreed that the question of applicable law be included in the Memorandum as one of its main principles. In practice, however, the situation is problematic, as was pointed out earlier, because if the main principle of the memorandum is complied with, the competent body should most often apply foreign law. This may pose problems regardless of the existence of a cooperation network. In effect, it is feared that the principle may become a dead letter in practice, because decisions are likely to be made according to the legislation of the country where the competent scheme is.

Funding of cross-border settlement of disputes

The settlement of cross border disputes involves additional costs because of translation costs. These costs may amount to significant sums if the competent body to solve the dispute is not the body of the country whose legislation is applied and whose official language is the language of the contract. It is not only the correspondence on the dispute but also all the relevant legislation and jurisprudence that has to be translated. Therefore the question of meeting the cost of translations will also have to be solved in the near future. Now that we are at the pilot phase, the Commission has promised to meet translation needs at least to an extent.

Is there an out-of-court body in every EEA country?

In order to ensure that cross-border trading disputes can be solved effectively and with ease for the consumer, as the target is, we need an ombudsman scheme or a similar arrangement in all EEA countries. At this point insurers have consumer complaints bodies in all Nordic countries, Great Britain, Ireland, Belgium and the Netherlands. By contrast, Germany, France and Italy have no ombudsman schemes. Austria, instead, has tackled the question by setting up a dispute settlement body at the Austrian Insurance Association.