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RESPONSE OF THE FMLC TO A CONSULTATION BY THE EUROPEAN COMMISSION ON THE INSURANCE PROVISIONS OF A PROPOSED ROME "I" INSTRUMENT

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RESPONSE OF THE FMLC TO A CONSULTATION BY THE EUROPEAN COMMISSION ON THE INSURANCE PROVISIONS OF A PROPOSED ROME "I" INSTRUMENT

Introduction

1. The FMLC has reviewed the European Commission's February 2005 Discussion Paper outlining a proposal for a Rome I instrument which, it is proposed, will incorporate a version of the 1980 Rome Convention, expanded to include certain provisions of private international law which are currently set out in the Life and Non-Life Insurance Directives (collectively, "the Insurance Directives").[1]

2. **Broadly, the FMLC approves of the Commission's plan to move the relevant private international law rules out of the Insurance Directives and into the proposed Rome I Regulation. The FMLC firmly believes this will improve transparency, make the rules more accessible and contribute to certainty overall in the field of direct insurance.** In particular it should end the distinction between EU risks and non-EU risks, which exists in the context of the European rules of private international law in the field of insurance.[2] The existing distinction is unnecessary and adds an element of complexity to the provision of insurance and with dispute resolution in this field. In particular, the current law does not explicitly resolve the question of which private international law regime is to apply in a situation where a risk is situated both within and outside the EU.

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[1] Specifically, the Second Non-Life Directive of June 1988 (88/357/EEC, see Article 7); the Third Non-Life Directive of June 1992 (92/49/EEC) (and related Motor Insurance Directives); as well as the three Life Insurance Directives consolidated and revised by the Life Insurance Directive of November 2002 (2002/83/EC, see Article 32). These provisions are now implemented in the UK by Regulations by the Financial Services and Markets Act 2000 (Law Applicable to contracts of Insurance) Regulations 2001. [The EU adopted on 17th October 2005 a Directive on reinsurance, but this does not contain any conflict of laws provisions].

[2] Different private international law regimes apply to EU (the Insurance Directives) and non-EU (the Rome Convention) risks. In some Member States a further unhelpful distinction may be drawn, in legislation implementing the Directives, between EU risks covered by insurers established in the EU and EU risks covered by insurers established outside the EU. (However, no such distinction is drawn in the UK.) Such a distinction could be resolved by applying the ordinary rules of the Rome Convention to EU risks as well as to non-EU risks – the FMLC's preferred solution – because the Rome Convention applies to contracts irrespective of the parties' place of establishment.

Moreover, there is no obvious provision for contracts which cover two or more risks, at least one of which is situated in a Member State and at least one of which is not.[3]

3. The conclusion reached by the Committee was that the optimal result would be to apply the ordinary Rome Convention rules (which currently, in the case of direct insurance, only apply to contracts covering non-EU risks) to all insurance contracts, but excluding insurance contracts from the operation of the Article 5 provisions on the mandatory laws of the consumer's "home" Member State (as does the Max Planck draft put forward by the Commission, see below). If the party autonomy principle set out in Article 3(1) of the Rome Convention is not thought to offer sufficient protection to the consumer, the FMLC believes that the new Regulation should distinguish between consumer and business-to-business contracts and should transpose the existing rules from the Insurance Directives into the Regulation for consumer contracts but not for business-to-business contracts.

4. A single restrictive choice of law rule for consumer contracts, as provided by the Insurance Directives in relation to "mass risks", is preferable to the awkward and uncertain combination of two applicable laws under the Rome Convention in cases where the parties choose a system other than the consumers "home" law and the mandatory rules of the consumer's "home" law are also applied under Article 5. This familiar Rome Convention scenario is to be avoided where possible on the grounds that it suffers from a lack of transparency and legal certainty. It is not transparent because only one of the applicable systems of law (if any) will appear on the face of the contract. It is not certain because the parties may not be able to

[3] Dicey & Morris on *The Conflict of Laws* states that "There is no obvious answer to this question" at 33-126.

tell in advance whether or not the circumstances listed in Article 5(2) apply to them.[4]

5. The Committee is aware that a similar difficulty as to transparency (i.e. of dual applicable laws) arises under Article 3(3) of the Rome Convention, providing for the application of the mandatory rules of a country with which all the elements of the case are connected and would ideally prefer this Article to be disapplied (at least in the case of business-to-business insurance contracts). However, this problem exists already under the Non-Life Insurance Directives[5] and would continue to exist in respect of non-life business if the conflicts approach of the Directives were transposed directly into the proposed Rome I Instrument. Moreover, Article 3(3) is likely to present less of a problem overall than Article 5 because it can only arise where all the elements of the case, including the location of the parties themselves, point to one jurisdiction only. The application of mandatory provisions of the "local" law in this situation may have a greater chance of according with the parties' expectations, despite the contrary choice of law clause in their contract.

6. Generally, apart from the split between EU and non-EU risks, the Committee is not aware of any strong criticism of the practical operation of the existing rules of the Directives and the Rome Convention in the insurance field and therefore sees no reason for any substantial amendment of those rules so far as they apply to insurance.

7. However, the Commission is currently inviting views on the merits of replacing the existing rules, on the basis of the revised version set out in its Discussion Paper. The proposed revisions are substantial and track suggestions made by the

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[4] For example, there may be some doubt or argument as to whether the consumer had taken all the steps necessary for the conclusion of the contract in one place or whether information about a product amounts to "advertising".

[5] See Article 7.1(g) of the Second Non-Life Directive.

Max Planck Institute in its Comments on an earlier Commission Green Paper. These revisions are discussed in the paragraphs below.[6]

The Max Planck Draft

8. An amendment to the Rome Convention proposed by the Max Planck Institute and put forward for discussion purposes in the Commission's Discussion Paper is the insertion of a new Article 6 in the revised Rome I Instrument, setting out the conflicts of law rules relating to insurance contracts as follows:

Article 6 (revised)

1. The law applicable to the insurance contract shall be the law of the country in which the policy holder has his habitual residence or central administration at the time of the conclusion of the contract.
2. The parties to the contract of insurance may choose
   a. the law of the country in which the risk or part of it is situated in accordance with the internal law of the forum;
   b. in case of an insurance contract limited to events occurring in a given State, the law of that State;
   c. in life insurance contracts, the law of a country in which the policy holder is a national;
   d. in travel or holiday insurance of a duration of six months or less, the law of the country where the policy holder took out the policy.
3. The law applicable to a compulsory insurance contract is the law of the country which imposes the obligation to take out insurance.
4. The rules set out in paragraphs 1 and 2 of this Article do not apply to re-insurance and to large risks as defined in Council Directives 73/293/EEC as amended by Council Directives 88/357/EEC and 90/618/EEC, as they may be amended.

9. This proposal, covering "mass risks" (not "large risks"), is quite restrictive in that it allows parties to an insurance contract to disapply the default choice of law, i.e. the law of policy holder's central administration or residence, only in favour of the country in which the risk is situated (the "*situs*" of the risk), with few exceptions.

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[6] This paper focuses on the special provisions relating to insurance contracts and does not comment on provisions in the Discussion Paper relating to the general provisions of the proposed Rome I Instrument.

10. It is also proposed to disapply Article 5 of the Rome Convention, which provides additional choice of law protection for consumers in consumer contracts, in the new instrument by virtue of a new Article 5(2). It is not clear whether Articles 3 and 4 governing choice of law and applicable law in the absence of choice would be entirely displaced.

The Current Law

11. The existing European private international law rules[7] relating to insurance are divided between the (unrevised) Rome Convention – which applies to risks situated outside the territories of EU Member States ("non-EU risks")[8] – and the Insurance Directives, which apply to risks situated inside Member States ("EU risks").[9]

12. In the case of non-EU risks, the present rule is that an insurance contract is governed by the law chosen by the parties themselves, provided that such choice is expressed or demonstrated with reasonable certainty.[10] To the extent that the law has not been chosen by the parties, the contract is governed by the law of the

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[7] In the UK, the common law choice of law rules will apply to determine the law applicable to an insurance contract covering a risk situated outside the territories of a Member State if the contract was entered into on or before April 1, 1991. Where, the risk is situated in a Member State, the common law will apply to determine the governing law in relation to a non-life insurance contract entered into before July 1, 1990 and to a life insurance contract entered into before May 20, 1993. Special rules apply in the UK to contracts of insurance entered into by a friendly society.

[8] Article 1(3) of the Rome Convention provides that the rules of the Convention "do not apply to contracts of insurance which cover risks situated in the territories of the Member States". Contracts of re-insurance covering EU risks, however, are within the scope of the Convention since Article 1(4) provides that the exclusion in Article 1(3) does not apply to such contracts.

[9] Article 1(3) of the Rome Convention provides that, in order to determine whether a risk is situated within the EU Member States or not, a court must apply its own internal law. (In the UK rules are laid down for this purpose in the legislation implementing the insurance directives and an amendment to the Contracts (Applicable Law) Act 1990 provides that these provisions are the relevant internal law for the purposes of Article 1(3).) However, this reference to the "internal law of the forum", which also appears in the Max Planck draft, is unfortunate to the extent that the parties are unable to identify the forum in which disputes may arise when any choice of law provision is agreed.

[10] Rome Convention, Article 3(1). Note that a choice of law which is not an "express" may nevertheless be "inferred".

country with which it is most closely connected.[11] It will almost certainly be presumed that the contract is most closely connected with the country in which the insurer's principal place of business is situated, or the place of business through which the insurer is to perform the contract.[12] However, if it appears from all the circumstances of the case that the contract is most closely connected with another country, the law of that country will apply.[13] At present, an insurance contract covering non-EU risks may be a consumer contract for the purposes of Article 5 of the Rome Convention.

13. In the case of EU risks covered by a non-life insurance policy, the present rule differs according to whether the risk is "a large risk" or not. In the case of "large risks", the rule is that the parties have virtually unlimited freedom to choose the applicable law of the insurance contract.[14] For example, they may choose the law of a country whether or not it is a Member State. If there is no express choice, or the inferred choice is not demonstrated with sufficient certainty, the contract will be governed by the law of the country with which it is most closely connected. It will be presumed that a contract is most closely connected with the Member State where the risk is situated.

14. In the case of non-life EU "mass risks", however, the parties' freedom of choice is more circumscribed:

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[11] Rome Convention, Article 4(1). In these circumstances the applicable law is sometimes known as the "imputed" choice.

[12] This is almost certainly the result achieved by Article 4(2) of the Rome Convention since the characteristic performance of an insurance contract must be that of the insurer. For a fuller discussion, see Dicey & Morris para 33-131.

[13] Rome Convention, Article 4(5). Two common situations in which this disapplication of the Article 4(2) presumption might be appropriate are: i) where a policy is sold by a branch office but authorised only by the insurer's head office (in which case the law of the country in which the branch is situated might be disapplied in favour of the country where the head office is situated); and ii) where the contract is effected through a broker with authority to bind the insurer (in which case the law of the country in which the insurer is situated might be disapplied in favour of the law of the country in which the broker is situated).

[14] Subject only to the rules that: i) the parties' choice shall not, where all the elements of the situation are connected to one Member State only, prejudice the application of the mandatory laws of that state

1. Where the policy holder has his habitual residence or central administration within the territory of the Member State where the risk is situated, the applicable law is the law of that Member State. However, where the general private international law rules of that Member State so allow, the parties may choose the law of another country.

2. Where the policy holder does not have his habitual residence or central administration within the territory of the Member State where the risk is situated, the parties may choose to apply either: i) the law of the Member State where the risk is situated, or ii) the law of the country in which the policy holder has his habitual residence or central administration.

3. Where the policy holder carries on a business and the contract covers two or more risks relating to his business which are situated in different Member States, the parties may choose to apply i) the laws of any of those Member States and ii) the law of the country in which the policy holder has his habitual residence or central administration.

4. Where the Member States referred to in the rules in paragraphs 2 and 3 above grant greater freedom of choice under their general rules of private international law than is provided for by those rules themselves, the parties may take advantage of that freedom.

5. Notwithstanding paragraphs 1-3 above, when the risks covered by the contract are limited to events occurring in a Member State other than the Member State where the risk is situated, the parties may choose the law of the former State.

6. If there is no express choice, or the inferred choice is not demonstrated with sufficient certainty, the contract will be governed by the law of the country with which it is most closely connected amongst those listed in paragraphs 1-

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(Article 7(1)(g) of the Second Non-Life Insurance Directive); and ii) their choice shall not restrict the application of the mandatory rules of the forum (Article 7(2) of the Second Non-Life Insurance Directive).

5 above. It will be presumed that a contract is most closely connected with the Member State where the risk is situated.

15. In the case of EU risks covered by a life insurance policy, the present rule differs according to whether the policy holder is an individual or an establishment (e.g. an employer company).[15] In the case of an individual habitually resident in a Member State, the contract of insurance will be governed by the law of the Member State in which the individual had his habitual residence at the contract date. However, where the general private international law rules of that system of law so allow, the parties may choose the law of another country. In addition, the parties may choose the law of the Member State of which the individual is a national (if that is different from the Member State in which he is habitually resident at the contract date).[16]

16. In the case of EU risks covered by a life insurance policy with a legal person, the contract will be governed by the law of the Member State in which the establishment of the policy holder is situated. Again, where the general private international law rules of that system of law so allow, the parties may choose the law of another country.

Proposed Changes

17. The Max Planck Draft effects a number of changes to the existing law relating to direct insurance covering mass risks:

    1. Absent an express choice of law by the parties, non-EU risks would be governed by the law of the policy holder's location, as opposed to the law of the insurer's location as they are currently presumed to be.

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15 Life Insurance Directive 2002/83/EC Article 32(1) (by virtue of the different meanings ascribed to the phrase "Member State of the commitment" by Article 1(g) of the same Directive).

16 See Directive 2002/83/EC, Article 32(1) and (2).

2. In the case of both EU and non-EU risks covered by non-life insurance contracts, there would be further restrictions on the scope of the parties' choice where the policy holder is located in the *situs* of the risk.

3. In the case of both EU and non-EU risks covered by non-life insurance contracts, parties would lose the right to take advantage of any generous conflicts rules offered by the legal system of the *situs* of the risk where the policy holder is not located in the *situs* of the risk.

4. In relation to non-life insurance contracts covering EU risks, there would no longer be an imputed choice of law rule providing that the contract is governed, in the absence of an express – or inferred – choice of law, by the system with which the contract is most closely connected. Instead, the contract will be governed by the law of the policy holder's location.

5. In relation to life insurance contracts covering both EU and non-EU risks, where the policyholder is a legal person, there would be further restriction on the scope of the parties' freedom of choice.

These points are elaborated further in paragraphs 19 to 37 below.

18. The Committee notes that, according to the Commission's February Discussion Paper, Article 5 of the Rome Convention, which provides additional choice of law protection for consumers in consumer contracts, will be disapplied from contracts of insurance in the new instrument by virtue of Article 5(2). (Unfortunately, this does not appear to be mentioned in the Commission's March 2005 summary paper for the European Insurance and Occupational Pensions Committee.)

Absent an express choice of law by the parties, non-EU risks would be governed by the law of the policy holder's location, as opposed to the law of the insurer's location as they currently are.

19. Post-1991 insurance contracts covering non-EU risks are currently, under the existing Rome Convention rules, governed by the law of the insurer's place of business in the absence of an express choice of law by the parties (and subject to the application of Article 5 to consumer contracts). This is because the Convention provides that, to the extent that the law applicable to the insurance contract has not been chosen by the parties, the contract will be governed by the law of the country with which it is most closely connected. According to Article 4(2), it is presumed that a contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has – in the case of a body corporate – its central administration. Since an insurance contract will of necessity be entered into in the course of the insurer's business, the presumption will apply so that the most closely connected law will initially be presumed to be the law of the country in which the principal place of business of the insurer is situated.[17]

20. Pre-1991 insurance contracts covering non-EU risks are also governed by the insurer's place of business in the absence of an express choice of law by the parties as a result of the operation of the pre-Rome Convention common law rules.

21. Under the Max Planck Draft, in contrast, new contracts covering non-EU risks will, in the absence of an express choice of law clause, normally be governed by the law of the country in which the policy holder has his habitual residence or central administration by virtue of the proposed Article 6(1).

22. The FMLC considers that existing Rome Convention rules (with the exception of Article 5) are preferable to the proposed draft, particularly in the context of business-to-business insurance contracts. There are good reasons for the existing approach, which reflects the preceding common law rules. The scope of the parties' freedom of choice is maximised. In the absence of an express choice, the

[17] The Giuliano-Lagarde Report suggests that the characteristic performance of an insurance contract is the provision of insurance cover (at p.20).

law of the country in which the principal place of business of the insurer is situated almost certainly applies, thus ensuring that all policies issued by one insurer will be governed by the same system of law. This is a sensible outcome since the contract is often concluded on the insurer's standard terms, which should receive uniform interpretation regardless of the policy holder's place of business (or residence, in the case of the retail market). The current approach is consistent with the realities of the situation: the insurer's head office normally takes the final decision on each proposal and arguably, therefore, the contract is most closely connected with the jurisdiction in which that office is situated.

23. The FMLC also believes that the existing Rome Convention rules should be extended to EU risks, thus avoiding the unhelpful distinction between EU and non-EU risks.

In the case of both EU and non-EU risks covered by non-life insurance contracts, there would be further restrictions on the scope of the parties' choice where the policy holder is located in the situs of the risk.

In the case of both EU and non-EU risks covered by non-life insurance contracts, parties would lose the right to take advantage of any generous conflicts rules offered by the legal system of the situs of the risk where the policy holder is not located in the situs of the risk.

24. Choice of law clauses in post-1991 insurance contracts covering non-EU risks are respected, under the existing Rome Convention rules (subject to Article 5), by virtue of Article 3(1).

25. A similar result is achieved in pre-1991 insurance contracts covering non-EU risks under the common law.

26. Choice of law clauses in non-life insurance contracts covering EU risks are respected under the Second Non-Life Insurance Directive in so far as the contract is a policy covering "*large* risks", by virtue of Article 7(1)(f). However, freedom of choice is more restricted in relation to "*mass* risks". Where the risk is situated *in the same Member State* as that in which the policy holder has his central

administration or habitual residence, the parties may, under Article 7(1)(a), only choose the law of another country if the law of the Member State concerned (i.e. the Member State that is both the *situs* of the risk and the policy holder's "home" Member State) permits them to do so. Freedom to choose appears to be more limited still in cases where the policy holder does not have his habitual residence or central administration in the Member State where the risk is situated. In these circumstances the parties may choose, under Article 7(1)(b), *either* the law of the Member State where the risk is situated *or* the law of the country in which the policy holder has his habitual residence or central administration. However, under Article 7(1)(d), if the law of the Member State where the risk is situated grants greater freedom of choice of the applicable law, the parties may take advantage of that freedom. In practice there is, then, likely to be a much wider freedom for the parties to choose the applicable law than at first appears, whether the case falls within Article 7(1)(a) or (b), because the private international law of the Member State representing the *situs* of the risk may comprise the generally permissive rules of the Rome Convention. (In addition, when the risks covered by the contract are limited to events occurring in one Member State other than the Member State where the risk is situated, the parties may always choose the law of that State under Article 7(1)(e).)

27. The draft revised Article 6 does not apply to "large risks" or reinsurance contracts by virtue of revised Article 6(4). So there should be no loss of freedom in relation to these contracts. However, under the revised Article 6 the default rule is that the applicable law would be the law of the country in which the policyholder has its central administration or habitual residence. The parties may only choose another country's system of law if it is: 1) the *situs* of the risk; the Member State to which cover extends if cover is limited to events occurring in one State; and in the case of travel insurance of less than 6 months' duration, the country in which the

policy was taken out.[18] These choices are very limited compared to the general freedom that is allowed, in practice, under the existing rules.

28. In the FMLC's view, the loss of freedom of choice that would result from adopting the Max Planck Draft in respect of mass risks would be unfortunate. Although there may be arguments for the protection of individuals by preventing the insurer seeking a choice of law which is unconnected to the individual himself, the same cannot be said for business-to-business insurance policies. (In fact, the FMLC would prefer to see the parties' freedom of choice expanded beyond that offered by the Insurance Directives, at least in respect of business-to-business insurance contracts, by bringing insurance contracts within the general rules of the Rome Convention.)

In relation to non-life insurance contracts covering EU risks there will no longer be an imputed choice of law rule providing that the contract is governed, in the absence of an express – or inferred – choice of law, by the system with which the contract is most closely connected. Instead, the contract will be governed by the law of the policy holder's location.

29. Article 3(1) of the Rome Convention, which currently governs contracts of insurance relating to non-EU risks, provides that the parties' choice of law will be respected but only if it is demonstrated with reasonable certainty. In the absence of such a choice the contract will be governed by the law of the country with which it is most closely connected. As we have seen, by virtue of Article 4(2), a contract is rebuttably presumed to be most closely connected with the Member State in which the party who is to effect the characteristic performance (i.e. the insurer) has its central administration.[19]

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[18] And in the case of life insurance – not discussed here – the parties may choose the country of which the individual policy holder is a national.

[19] However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which its principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

30. Article 7(1)(h) of the Second Non-Life Insurance Directive provides, apparently in relation to "large risks" and "mass risks" that any choice made by the parties in accordance with the provisions of Article 7(1)(a) to (f) must be expressed or demonstrated (as the "inferred choice") with reasonable certainty. If it is not so expressed or demonstrated, the contract is governed by the law of the country (from amongst those listed in Article 7(1)(a) to (f)) with which it is most closely connected. A contract is rebuttably presumed to be most closely connected with the Member State where the risk is situated.

31. Under the revised Article 6 proposed by the Max Planck Institute, where the parties' choice is not expressed or inferred,[20] the law of the country in which the policy holder has his habitual residence or central administration would apply in relation to "mass risks" by virtue of the rule in Article 6(1). For large risks, Articles 3(1) and 4(2) of the Rome Convention would apparently apply.

32. In the FMLC's view, for mass risks the loss of the court's power to impute that choice of law would be regrettable. The existing approach is a practical and flexible one, recognising the individual reality of each case. The presumption under Article 7(1)(h) of the Second Non-Life Insurance Directive, namely that the contract is most closely connected with the Member State of the risk, seems to provide a satisfactory solution in most cases, particularly those dealing with mass risks. The Max Planck approach, on the other hand, focuses exclusively on the policy holder's location, potentially at the expense of the most closely-connected – and intuitively most appropriate – choice of law.

33. The departure from the general trends reflected in the rebuttable presumptions is also undesirable. We have already suggested that there are good reasons why a contract should be governed by the law of the insurer's location under the presumption in Article 4(2) of the Rome Convention.[21] There are also clear

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[20] NB it is not entirely clear whether Article 6(2) is intended to allow the court to infer a choice.

[21] See paragraph 22 above.

reasons why a contract might be governed by the law of the place where the risk is situated. In fact, under Article 2(d) of the Second Non-Life Insurance Directive, the *situs* of the risk in cases not relating to land, motor vehicles or travel, is presumed to be the country in which the policy holder has its central administration or habitual residence. Thus, in many cases the Max Planck rule in the revised Article 6(1) and the existing default rule, when it is coupled with the presumption in favour of the *situs*, will lead to the same result. However, in those cases where the Max Planck rule departs from the existing presumption it is likely to lead to unfortunate results, particularly in relation to land (where the *situs* of the risk is the same as that of the property) and motor vehicles (where the *situs* of the risk is the State of registration). There are very obvious reasons why building and contents and motor insurance should be governed by the law of the place where the property is located or registered, rather than that of the policy holder's central administration or residence. Moreover, in the particular case of comprehensive motor insurance a single contract incorporates both (a) compulsory third party cover and (b) cover for the risk of damage to the owner's vehicle (which is not compulsory). Under the rigid approach of the Max Planck proposals it is theoretically possible for two different laws to apply to this single contract, namely: the law of the state which imposes the obligation to take out the compulsory third party cover (under revised Article 6(3)); and the law of the policy holder's residence applicable to the optional cover (under revised Article 6(1)). This could lead to a confusing and unsatisfactory result.

In relation to life insurance contracts covering both non-EU and EU risks, where the policyholder is a legal person, there would be further restriction on the scope of the parties' freedom of choice.

34. The rules of the Rome Convention which apply to non-EU risks do not distinguish between life and non-life insurance contracts. (Life insurance contracts with an individual, however, are likely to be consumer contracts to which Article 5 applies.) Therefore, life insurance contracts with a legal person will be governed by the same rules as those discussed above in relation to non-life

insurance business. The parties' express choice of law will be respected under Article 3(1).

35. In the case of direct life insurance contracts governing EU risks,[22] where the policyholder is a legal person, the contract will be governed by the law of the Member State in which the establishment of the policy holder is situated.[23] However, where the general private international law rules of that system of law so allow, the parties may choose the law of another country. In practice there is a probably a wide freedom for the parties' to choose the applicable law because the private international law of the Member State representing the *situs* of the commitment should comprise the generally permissive rules of the Rome Convention.

36. Under the Max Planck draft, there are no special rules for life insurance contracts with a legal person (and the exclusion for large risks will not apply to such contracts). The law applicable to the insurance contract is the law of the country in which the policyholder has its central administration. This represents a regrettable loss of the parties' freedom of choice and it is hard to see why such stringent restrictions are necessary in business-to-business contracts. Moreover, the reference to the policyholder's "central administration" is an unfortunate departure from the Life Insurance Directives' sensible and clear rule that the law of the policyholder's place of *establishment* should apply. Where a body corporate purchases a policy through a branch or agency, there does not seem to be any good reason to disapply the law of the place where that branch or agency is situated in favour of the place of the company's central administration.

37. In the FMLC's view business-to-business contracts for life insurance should be governed by the ordinary rules of the Rome Convention, including the party autonomy principle in Article 3(1).

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22 Where a life insurance contract pre-dates the 1993 UK implementation of the Second Directive on Life Assurance, the preceding common law rules will apply.

23 This is the combined effect of Article 32(1) and Article 1(g) of Directive 2002/83/EC.

Additional Comments

38. The FMLC notes and approves of the exemption for large risks in Article 6(4). There is no reason why parties, usually businesses, should not have complete freedom of choice in relation to insurance contracts for "large ticket" items. In these circumstances, it is almost certain that both parties will seek independent legal advice, which will enable them to negotiate a choice of law clause from a fully-informed perspective.

39. The drafting of the revised Article 6(3) does not make sense in the case of global insurance contracts providing for, say, employee liability insurance covering employees in offices worldwide. Where an employer is required to take out compulsory employee liability insurance in several Member States, he may do so with one carrier, under one contract. In this case there is no single "law of the country which imposes the obligation to take out insurance" and therefore no identifiable applicable law.[24]

Conclusion

40. Broadly, the FMLC approves of the Commission's plan to move the relevant private international law rules out of the Insurance Directives and into the proposed Rome I Regulation. The FMLC believes this will improve transparency and will make the rules more accessible and will contribute to certainty overall. In particular it should improve the current regime by ending the distinction between EU risks and non-EU risks.

41. The conclusion reached by the Committee was that the optimal result would be to apply the ordinary Rome Convention rules (which currently only apply to insurance contracts covering non-EU risks) to insurance contracts, but excluding insurance contracts from the operation of the Article 5 provisions on the mandatory laws of the consumer's "home" Member State (as does the Max

[24] This recommendation picks up the general sense of Article 8 of the Second Non-Life Insurance Directive. However, in that Directive provision is made for a compulsory insurance contract covering risks in more than one Member State to be treated as several contracts each relating to only one Member State (known as "severing" the contract). (This is the combined effect of Article 8(4)(a) and Article 7(2).)

Planck draft put forward by the Commission, see below). If the party autonomy principle set out in Article 3(1) of the Rome Convention is not thought to offer sufficient protection to the consumer, the FMLC believes that the new Regulation should distinguish between consumer and business-to-business contracts and should transpose the existing rules from the Insurance Directives into the Regulation for consumer contracts but not for business-to-business contracts.

42. The Committee believes that the current Max Planck Draft for a revised Article 6 in the proposed Rome I instrument would result in a serious reduction in party autonomy and would accordingly be an unsatisfactory text.

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[25] Clive Maxwell abstained from discussions surrounding FMLC Issue 113 and involvement in the preparation of this paper in recognition of his prior official responsibilities.