

**PAPER SUBMITTED TO THE EDINBURGH MEETING
OF THE HAGUE CONFERENCE IN RELATION
TO ARTICLE 10(2) OF THE DRAFT CONVENTION**

Introduction

I propose ~~that~~, conditionally upon anti-trust law, monopolisation and price-fixing being removed from the scope of the Convention, Article 10(2) be amended to read:

Article 10(1)(b) shall not apply to the torts of conspiracy to inflict economic loss and intentional infliction of economic loss.

Alternatively, it proposes, if those subjects are not removed from the scope of the Convention, that Paragraph 10(2) be amended by the addition of the words:

“or the intentional infliction of economic loss”

at the end of the paragraph.

History

Article 10(2) was added at the May/June 1999 session. Article 10(1) and (2) presently reads as follows:-

1. A plaintiff may bring an action in tort or delict in the courts of the State:-
 - a) in which the act or omission that caused injury occurred; or
 - b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
2. Paragraph 1 b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolisation, or conspiracy to inflict economic loss.

There is no doubt that paragraph 2's original purpose was concerned with anti-trust law but it was not confined to it. A careful reading of the article (particularly bearing in mind the position of the commas) makes it clear that, although price-fixing and monopolisation are examples of the more general heading "anti-trust violations", this does not apply to the reference to conspiracy to inflict economic loss. It would have been clearer if the words "in particular price-fixing or monopolisation" had been between brackets rather than commas. The problem lay with my drafting.

Further discussion took place at the Washington meeting. Participants appear to have assumed, probably because of the interpretation in the draft official report, that paragraph 10.2 was confined to anti-trust violations and that conspiracy to inflict economic loss was only inserted as a third example of anti-trust violations. A consensus was reached that anti-trust law would be removed from the scope of the Convention and on this basis there was a general assumption that Article 10(2) should be removed. I was not present at the Washington meeting.

At the Ottawa meeting in February there was further discussion by one of the three committees about this article. I addressed the committee along the lines of this paper. As my proposal involved an amendment to the article, it was not practicable for the committee to deal with it and further consideration was deferred. At the concluding session in Ottawa I asked that the matter be placed on the agenda for Edinburgh.

The Effect of the Article

It is important to note what Article 10(2) does **not** do.

First, it does not restrict Article 10(1)(a). The relevant torts may still be sued for (as they normally would be) in the place where the defendant's act or omission occurs.

Secondly, it does not restrict Article 3, dealing with the defendant's forum. The plaintiff can still sue in the habitual residence of a defendant who is a natural person or in the statutory seat, place of incorporation, place of central administration or principal place of business of a defendant corporation.

Thirdly, it does not restrict Article 9 dealing with branches and (depending on decisions to be made) regular commercial activity within a jurisdiction. If activity by a branch within a jurisdiction (or perhaps as part of regular economic activity within a jurisdiction) causes loss of the relevant kind, the article does not inhibit action within that jurisdiction.

Fourthly, it does not give rise to any invocation of the prohibited grounds of jurisdiction (the so-called “black list”) in Article 18. None of the grounds in that article are any more likely to be involved in relation to the relevant torts than in relation to any other causes of action. If a jurisdiction does choose to have some special basis for claiming jurisdiction in cases involving economic loss of the type covered by those torts, this would lead to resulting judgments being in the “grey list” rather than the “black list”. This, in turn, has two consequences. First there is no agreement by any state to desist from permitting such actions to proceed within its borders. Secondly, any other state is free to have rules which permit or do not permit enforcement of resulting judgments in its own courts.

Fifthly I am sympathetic to argument raised in Washington that the drafting of the Convention should be clarified to make clear whether judgments obtained by a government regulatory authority on behalf of a consumer(s) is within the scope of the Convention. If it is agreed that these claims are within scope, I would revise my proposal ensure paragraph 10.2 does not hinder such claims.

What the Article does do is very limited. It withholds from plaintiffs suing for the relevant economic torts the benefit of a provision which is inappropriate to their cases.

The basic problem

The problem with which Article 10(2) is intended to deal is a specific consequence of Paragraph 10(1)(b). That consequence is that, where the sole damage inflicted by a tort is a general loss of wealth or business (as opposed to a specific loss of localised business), the place where such loss is suffered is always one's home jurisdiction (in one sense or another). One general theme in the Convention is to oblige plaintiffs to sue in the defendant's home jurisdiction unless there is some specific strong reason to the contrary (as, for example, in the case of consumer contracts, agreed fora or exclusive jurisdiction).

The primary purpose of paragraph 10(1)(b) is to protect victims of personal injury torts and property damage torts. It also applies quite well to defamation and to torts where a plaintiff suffers specific loss of the benefit of a contract with a third party. If goods manufactured in one country find their way to a consumer in another country who is injured because the goods are dangerous, it is not unreasonable that the injured person should be entitled to sue in his or her home jurisdiction on the basis that the damage from the tort occurred there. Similarly, a defamation has harmful effects where it is published and one should be able to sue for the harmful effect in that jurisdiction. This reasoning does not apply to the mere infliction of economic loss (in the absence of any more specific tort).

This rationale is capable of sensible application in relation to most business torts. If the defendant (“D”) induces a breach of a contract between the Plaintiff (“P”) and a third party (“T”), it is not unreasonable to permit P to sue where he or she has lost the benefit of the contract. The same applies to loss due to fraud.

The real concern arises not from the comparatively rare case where the plaintiff’s **sole** cause of action is conspiracy to inflict economic loss or the deliberate infliction of economic loss but the far more common case where torts of this nature are added as a “make-weight” to claims for breach of contract, inducing a third party to breach a contract or general negligence in a commercial context. In some parts of the world it is comparatively common for lawyers to add claims for conspiracy to inflict economic loss or the deliberate infliction of economic loss in such cases almost as a matter of course. If the addition of such a cause of action were to enable one to sue in an otherwise unavailable home jurisdiction, this would involve a huge addition to the white list and a huge swing away from the balance we are seeking to achieve in the Convention.

The problem is in one sense related to the distinction between immediate damage and ultimate damage. This distinction is usefully and wisely discussed in *Marinari v Lloyds Bank* [1996] CEC 14 at 20-21 where the writings on the subject are collected. The result in that case is enshrined by the adoption in paragraph 10(1)(b) of the language of Article 5(3) of Brussels

which was construed in that case as excluding the suffering of subsequent or indirect damage, particularly in one's home jurisdiction.

This purpose might be frustrated if subsequent or indirect damage were to be convertible to direct damage by merely adding a makeweight cause of action for one of the two torts referred to.

Let me give a concrete example. The plaintiff P is based in State A and the defendant D in state B. P alleges a breach of contract (for example a failure to accept goods or a failure to pay for them). There is no other relevant connection with state A. On these facts, P must sue for the breach in state B. Any loss in state A is merely subsequent or indirect. Now suppose that his lawyer adds a claim that the breach was committed with the intention of causing actual economic loss to P. The only damage from that "tort" is in state A. By making an easy make-weight claim, P has created direct damage in state A and given it white-list jurisdiction under paragraph 10(1)(b). It is this type of device which I seek to avoid.

Conclusion

If anti-trust law is to be removed from scope and if Paragraph 10(1)(b) is to be retained in its application to commercial torts, the simplest way of avoiding the consequences to which I have referred is to amend Article 10(2) in the manner I have suggested. Of course, if anti-trust law is not removed, Article

10(2) should be retained with the addition of the words “or the intentional infliction of economic loss.”

David Bennett