



Explanatory Report to the European Convention on Foreign Money Liabilities

Paris, 11.XII.1967

I. The European Convention on Foreign Money Liabilities was prepared within the framework of the Council of Europe by a committee of governmental experts which carried out its duties under the supervision of the European Committee on Legal Co-operation (CCJ). The Convention was opened for signature by member States of the Council of Europe on 11th December 1967.

II. The text of the explanatory Report of the Committee of Experts on Foreign Money Liabilities is presented here as amended and completed by the European Committee on Legal Co-operation.

General considerations

1. The Committee of Ministers of the Council of Europe decided in 1965 to set up a Committee of Experts on Foreign Money Liabilities. It was instructed to study the draft Convention on the Payment of foreign Money Liabilities prepared by the Committee on Monetary Law of the International Law Association and to examine the advisability of adopting within the Council of Europe a similar Convention. As the Committee of Experts agreed on the advisability of such action, the Committee of Ministers thereafter charged the Committee of Experts with the preparation of a draft Convention relating to payment of liabilities in foreign money.

2. The rules proposed by the Committee have three principal objects:

(a) They confer upon the debtor the right to pay in local money a sum due in a currency other than that of the place of payment.

(b) They allow the creditor to recover damages in case of delay in payment if, during the period of such delay, the currency to which the creditor is entitled depreciates in relation to the currency of the place of payment.

(c) They enable the creditor to claim in proceedings the money to which he is entitled so as to avoid the risk of a loss which may result from conversion into the currency of the country of the forum.

In certain countries these problems have been solved by legislation. In other countries they have up to now been solved by judicial practice. Often the two systems have led to identical or very similar results, although they differ in numerous points of detail. The Committee concluded that in these circumstances it would be a matter of some importance to reinforce and extend the harmonisation of the law applicable in this field.

3. For this purpose the Committee of Experts adopted:

(a) a Convention containing the undertakings of the Contracting Parties to bring their respective laws into conformity with the proposed rules, and providing for certain exceptions to such undertakings, as well as some clarifications of the said rules ;

(b) an Annex containing the proposed rules.

4. The Annex does not contain a uniform law, but a series of rules to be reflected in the national legal systems in so far as such rules are not yet in force. The Contracting Parties may modify the wording to adapt it to their respective legal systems.

5. Subject to two provisions in the Annex (Articles 1 and 9) which contain precise rules on the subject, it is a matter for the Contracting Parties to decide on the one hand whether and to what extent the provisions of the Annex shall have the character of mandatory law and on the other hand whether and to what extent they must be applied or interpreted in the light of usages.

6. Similarly, the Committee of Experts arrived at the conclusion that it would not be opportune to propose rules relating to private international law. The Contracting Parties are therefore entitled to adopt the solution which seems to them most appropriate.

7. The Committee of Experts was of the opinion that the Convention must not prejudice the right of Contracting Parties to take measures regarding exchange control. According to certain experts, this point was already covered by paragraph 3 of Article 1 of the Convention. Others, however, insisted that a special provision on the matter be included in the Convention. Although the Committee of Experts gave effect to this request by inserting such a provision in Article 4, it must not be concluded therefrom that this Committee was convinced of the need for such a provision.

The same applies as regards the right of Contracting Parties to prohibit, in certain cases, the conclusion of contracts and the payment in foreign money.

The Swiss expert declared that the provisions of Article 4 of the Convention are likely to be unacceptable to his Government and will make it problematical whether Switzerland will be able to sign the Convention.

"Her Majesty's Government are sympathetic towards attempts to bring European laws into harmony, and in principle would like to see a Convention on Monetary Law for this purpose. They have, however, found that the present draft Convention is based on ideas which, having regard to business and legal opinion in the United Kingdom, they would not be able to accept. In these circumstances, while sending this message of interest and sympathy, they feel that they could not properly participate in the detailed examination and drafting work of the Expert Committee. "

Commentary on the provisions of the Convention

Article 1

9. Paragraph 1 imposes the duty upon Contracting Parties to ensure that their respective legal systems will conform with the rules set forth in the Annex to the Convention. This principle, indicated in paragraph 4 of the General Considerations, means that the rules prevailing in the national laws of the Contracting Parties must lead to the result envisaged. Each country will decide for itself the manner in which this result will be achieved, and is not bound by the wording of the rules. No formal steps are required if and in so far as the legal system of a Contracting Party is in conformity with the rules in the Annex.

10. The provisions of the Annex deal only with special problems concerning liabilities in foreign money. With regard to general concepts of law such as "proceedings", "place of payment", "judgment", or *force majeure* their sense has to be interpreted with reference to the law of each Contracting Party.

On the other hand the Committee of Experts considers it advisable to specify that the term "depreciation" as employed in the Convention and Annex does not have a technical meaning. It refers to all cases where the value of a currency diminishes in relation to the value of another currency even if one of these currencies is re-valued in relation to the other.

11. According to paragraphs 2 and 3 the Annex is applicable to all liabilities under which a sum of money is due, irrespective of their nature and origin. However, it is open to the Contracting Parties to exclude the application of the rules in the Annex to specific matters, for example, bankruptcy or similar proceedings, the distribution of a fund insufficient for the discharge of the totality of liabilities, or obligations arising under family law.

Article 2

12. Reference is made to the comment on Article 4 of the Annex.

Article 3

13. Reference is made to the comment on Article 5 of the Annex.

Article 4

14. As to this article, see paragraph 7 of the General Considerations.

Article 5

15. This article makes it clear that the present Convention will not affect the obligations arising from other Treaties and is, in particular, without prejudice to the Geneva Conventions of 1930 and 1931, governing Bills of Exchange and Cheques. The same may be the case with regard to the draft Convention concerning the Uniform Law on the International Sale of Goods, in particular Article 82 of this law in its relation to Article 4 of the Annex.

Article 6

16. Some experts declared that it was doubtful whether Articles 4 and 6 of the Annex could be applied in their countries to non-contractual liabilities. In their view this point was taken care of by Article 1, paragraph 3 of the Convention. The Committee of Experts did not agree with this interpretation and decided to give Contracting Parties the possibility of making an express reservation. It cannot be considered that the exclusion of non-contractual liabilities in general would fall within the discretion provided for in Article 1, paragraph 3, according to which it is open to the Contracting Parties to exclude the application of the rules in the Annex, but only in specific matters.

In the opinion of the same experts, with which the large majority of the Committee agreed, bonds and other similar liabilities, which in certain countries are considered to arise from a unilateral act, are not covered by the term "non-contractual liabilities" in the sense of Article 6 of the Convention.

Article 7

17. Official texts are those adopted by States in pursuance of the present Convention whether already in force or adopted at a later date. The case law, constituted by judgments, in the countries in which it has the force of law, is not to be considered as an official text. The texts must be transmitted in the national languages, which need not be translated.

Articles 8 to 12

18. These articles are in conformity with the model final clauses approved by the Committee of Ministers.

Commentary on the provisions of the Annex

Article 1 of the Annex

19. The law of most countries corresponds with this provision. It clearly follows from the formulation that the rule is not mandatory and that it may be displaced even by an implied intention or by usage. This is frequently so in case of international commercial transactions.

Paragraph 2 of this article contains a safeguarding clause for the benefit of the creditor.

Article 2 of the Annex

20. The possibility of the debtor's objecting against the creditor his inability to procure the currency due in order to liquidate his debt would be inadmissible. This article therefore gives the creditor, in certain specified cases the right to require payment in the currency of the place of payment.

This provision applies equally if there is an effective payment clause. Where the debtor is unable to obtain the currency in which payment is due, the question arises as to whether, instead of requiring payment in local currency, the creditor might claim payment in local currency as a precautionary measure in order to protect himself against the debtor subsequently becoming insolvent. It was pointed out that this right of the creditor, like all other precautionary measures, lies outside the scope of the Convention. In the case in question, Article 2 does not cover all the possible remedies available to the creditor but does give him a right to require payment in local currency. If the creditor makes use of this right, such payment shall be considered as constituting full settlement.

Article 3 of the Annex

21. Article 3 stipulates that where the debtor makes settlement in currency of the place of payment, the rate of exchange shall be calculated at the date on which payment is made and not at the date of maturity.

22. Two hypotheses may be envisaged : either the currency of the place of payment has depreciated since the date of maturity in relation to the currency due, in which case the creditor receives more in cash and suffers no prejudice, or the currency in which the sum is due has depreciated in relation to the currency of the place of payment and the creditor receives less in currency of the place of payment than he would have received, had the exchange rate been calculated at the date of maturity. To avoid this, an additional clause has been included in Article 4 (see commentaries to this article).

Article 4 of the Annex

23. This article establishes the principle that the debtor who fails to pay at the proper time is liable to make good the prejudice which the creditor may suffer as a result of depreciation, however slight, of the money of account in relation to the money of the place of payment, which occurs after the proper date for payment.

Such prejudice shall be rectified by the payment of an additional amount equivalent to the difference between the rate of exchange at the date of maturity and at the date of payment.

24. The article refers to the date of maturity. There are, however, a number of countries whose law provides that the default only occurs when the debtor finds himself "*en demeure*". As the provision of this Article is not intended to interfere with the general structure of the law of the Contracting Parties, it has been provided in Article 2 of the Convention that each such Party shall have the right to substitute the date from which the debtor finds himself "*en demeure*" for the date of maturity. In this case the obligation to pay the additional amount does not become valid before the debtor is "*en demeure*". It is possible for a Contracting State eventually to combine both systems.

25. Paragraph 1 makes it clear that the prejudice corresponding to the depreciation is presumed to have been suffered by the creditor, but paragraph 2 allows the debtor to be exonerated wholly or partly from liability by proving any of the facts there referred to.

26. According to paragraph 3, the provisions in paragraph 1 do not deprive the creditor of any other remedy he may invoke - for instance, the right to rescind a contract.

27. It is a matter for the Contracting Parties to decide upon the effects of a depreciation other than that mentioned in the Annex, for instance, of a depreciation of the money to which the creditor is entitled, in relation to the money of the country in which the creditor resides.

Article 5 of the Annex

28. This article deals with legal proceedings for the recovery of foreign currency obligations. It provides that the creditor may claim either the currency to which he is entitled or its equivalent in the currency of the forum at the rate of exchange at the date of the actual payment. Article 3 of the Convention, allows the Contracting Party to exclude one of these two possibilities. In different ways the two systems arrive at the same result with regard to the protection of the creditor. It corresponds in fact to a practice which the courts in many member States have established.

29. It applies, as the text makes clear, whenever the currency to which the creditor is entitled, whether that in which the liability is expressed or under Article 2 of the Annex the currency of the place of payment, differs from that of the forum.

30. The Committee estimated that Article 1 of the Annex continues to apply after the institution of proceedings. Whether Article 1 also, continues to apply after judgment is a question which must be decided in accordance with the respective national legislative system.

31. The Swiss expert draws attention to the difficulty which could arise in Switzerland in connection with the unification of procedural rules, since in Switzerland these fall within the jurisdiction of the Cantons.

Article 6 of the Annex

32. This article deals with the case of a depreciation of the currency due in relation to that of the place of payment occurring during proceedings. It stipulates that the parties preserve in this case the rights under Article 4 of the Annex.

Article 7 of the Annex

33. This article deals with the case of a depreciation of the currency of a judgment in relation to that of the forum occurring after the judgment. It stipulates that in this case, the creditor is entitled to an additional amount and provides that it has to be calculated in a manner analogous to that provided for in Article 4 of the Annex.

Article 8 of the Annex

34. This article provides that when the Annex speaks of the place of payment it means, not the place where payment is in fact made, but the place where payment is to be made.

Article 9 of the Annex

35. If the parties have determined the rate of exchange expressly or impliedly their intention will prevail ; where no such intention can be ascertained the rate to be employed shall be such as permits the creditor to procure the amount due to him immediately; in principle this will be at the place and date of payment. In any case usages will have to be taken into account.

36. This article was considered sufficiently flexible to make it unnecessary to deal specifically with cases in which there is no regular market for the currency in question at the place of payment.

37. The provision does not give any answer to the question, in what place the creditor can obtain the amount due without delay. This is not to be considered as an oversight. The Committee of Experts has in fact found that this question should not be expressly regulated in the Annex on account of the difficulties involved in arriving at a definition of this place and in particular taking into consideration that the variations of the rate at different places within the same country will be practically insignificant.