ECONOMIC COMMISSION FOR EUROPE

MEETING OF THE PARTIES TO THE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES

CONFERENCE OF THE PARTIES TO THE CONVENTION ON THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS

Intergovernmental Working Group on Civil Liability

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UNECE Civil Liability Protocol – Non discrimination clauses – UK views

Submitted by the delegation of the United Kingdom

1. The UK has registered its concern at a number of the previous discussions of the working group about the proposals made for provisions on non discrimination, as set out in square brackets in Article 8(3) and 15(2) of the current text of the Protocol.

2. The UK hopes that the following analysis will clarify what its objections are to such provisions.

Article 8 (3)

3. We have concerns that the policy behind these proposals would be unduly favourable to claimants. Those claimants would in any event be entitled to the benefits of this agreement, in particular its rules on strict liability, whereas these benefits would not necessarily be available to claimants falling outside the scope of this agreement. Although a claimant falling outside the Protocol may in some ways be better off under national law, in some ways s/he might be worse off, eg. in having to prove negligence in circumstances where the strict liability rules of the Protocol would apply. In this way the effect of the proposals on non discrimination would be to circumvent the package represented by the Protocol, with the aim of ensuring that the claimant always has the best deal.

4. Both of the proposals to amend this provision would create a significant and unacceptable degree of uncertainty, and this in turn would encourage legal argument between the parties, thereby increasing their costs and making more difficult the early settlement of disputes.

5. This uncertainty arises from the complex two-stage process which this proposal would entail: first, it would be necessary to identify the applicable law in the usual way in accordance with the appropriate rules on conflicts of laws; and secondly, it would then be necessary (a) to consider all aspects of this law against the law which hypothetically that court would apply to claimants who suffer damage in the country where the accident occurred, (b) set aside such aspects of the former law as would be less favourable to the claimant than the latter law and then (c) apply the corresponding aspects of that law.

6. The complexity of this two-stage process would impose an unreasonable burden on national courts and would create difficulties of interpretation which would not ultimately be in the interests of either claimants or defendants.

7. An alternative proposed test would require an assessment of the generally applicable law as against the law which hypothetically would be applied to "claimants who are nationals of the Party where the claim is made"; under UK rules on conflict of laws the nationality of a party is only one potentially relevant factor in determining the applicable law and accordingly it would not be clear under our law what the hypothetically applicable law should be.

8. Both the proposed amendments refer to remedies; under UK rules issues of quantum, or measure of damages, are dealt with under the law of the forum, whereas issues as to which heads of damage are available fall under the general rules on applicable law; the simple reference to "remedies" makes no such distinction and this could cause confusion in practice.

Article 15 (2)

9. In allowing a claimant a unilateral choice of law, this proposal would be unduly favourable to him on the basis that it should not be assumed that he will necessarily be in an economically weaker position than the defendant.

10. Such an inflexible solution would also be inconsistent with UK law which seeks to find a fair balance between the interests of the parties and to enable our courts to identify an applicable law which in the broader interests of justice is appropriate for the resolution of the dispute in question; so, for example, the law of the defendant's habitual residence, one of the choices which it is proposed should be available to a claimant, may on the facts of the case have no sufficient connection with the dispute.

11. It would be unsatisfactory in that it would cover not only substantive law, but also procedural law, which under the UK system is governed by the law of the forum for the good reason it would often be difficult and inappropriate for courts to

apply the procedural law of another country outside the broader legal context in which that law was intended to operate.

General

12. In addition to these concerns, we note that negotiations are likely to commence this year for an EC Regulation unifying choice of law rules in the EC Member States in respect of non-contractual obligations ("Rome II"), including particular claims in tort. These negotiations are likely to take two years or so to complete, followed by the adoption of the instrument. It seems unlikely that the outcome of that process will be consistent with the Protocol, which will cause practical difficulties for EC Member States in the future.