GOVERNMENT LOANS

Comment by

PROFESSOR ROBERT BAXT
and
PROFESSOR MICHAEL PRYLES

Monash University

I am only going to speak for a few moments. As I indicated at the start, Enid Campbell, who was to comment on Philip Wood's paper, has the flu. Last night and this morning, Professor Michael Pryles, who is a colleague of ours at Monash and whose main claim to fame is in the area of Conflict of Law, did spend some time with me looking at Philip Wood's paper. We have put together some comments which we hope will be of at least some interest, and perhaps maybe Philip or others might wish to comment on these remarks.

As Philip Wood mentioned when he was talking about the question of state immunity, the Australian Law Reform Commission has in fact prepared a very interesting and comprehensive paper, under the chairmanship of James Crawford, on this topic, and there is a Draft Bill appended to that particular report which might be worth looking at for those of you who are interested in that particular topic.

Mr Wood raises the issue of an optional choice of law and refers to the Amar case, as raising or proposing some answers to this particular problem.

Michael Pryles suggested that there may be some cases which are perhaps more positive or favourable, in the sense that they will give some clearer answers. He discusses these in Pryles and Iwasaki, "Dispute Resolution in Australia/Japan Transactions", which was published by The Law Book Company in 1983.

Professor Iwasaki, who will be visiting Australia again later this year, has done a considerable amount of work on dispute resolution (not necessarily relating to banking matters). I would commend that particular work and certainly this particular topic to you in relation to it. It deals with a situation vis-a-vis Japan of course, and these comments may be more specific to that particular area.

Indeed Pryles suggests, moving to the topic of a choice of law, that whilst the English law tends to adopt the centre of gravity approach in dealing with this particular matter, it does not give

much weight to the fact that one of the contracting parties may be a government. But this may not be the approach in some countries. For example, in Japan, the fact that one of the contractors is a government or a government agency, leads almost invariably to the conclusion that the proper law is the law of that particular state. He and Iwasaki discuss this particular point in their book "Dispute Resolution in Australia/Japan Transactions".

In his paper, Philip Wood raises the problem of a creditor contracting under the laws of a debtor state and therefore taking the risk of changes in that law.

Michael Pryles says that in the context of Japanese contracts, you will find (at least that is his experience) that the parties stipulate that the laws of the chosen legal systems should be applied as at the date of the contract. They take a more formalistic approach to it. Perhaps the problems that might arise in the situation that Philip Wood raises might not be so difficult.