

Common pitfalls in cross border personal injury claims

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Starting at 10.30

Introduction

- Position before and after Brexit
- Choice of law
- Jurisdiction
- Enforcement
- Service
- Potential difficulties and areas of uncertainty
- How the changes will work in practice

Brexit transition period

- UK withdrew from EU at 23:00 on 31.01.20
- Little changed because the EU (Withdrawal Agreement) Act 2020 created a transition / implementation period during which most EU law continued. This expired at 23:00 on 31.12.20.
- For proceedings instituted after 31.12.20:
 - Which rules will govern applicable law?
 - Which rules will govern jurisdiction and enforcement?

Choice of Law – Pre-Brexit

- Rome I (Regulation (EC) No 593/2008) governs choice of law for contractual obligations.
- Rome II (Regulation (EC) No 864/2007) deals with choice of law for non-contractual obligations (for our purposes, tort).
- Both continued to apply until the end of the transition period (Article 66 of the Withdrawal Agreement).

Choice of Laws – Post Brexit

- Rome I and Rome II incorporated into UK domestic law
- See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834).

General Rules Under Rome II

- Applicable law is “*the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*” (art.4(1)).
- Distinguish “*occurrence of damage*” from “*event giving rise to damage*” and from “*indirect consequences.*”
- In fatal accident claim, the damage occurs where the accident leading to death occurs, not where the dependants suffer their loss of dependency: *Lazar v Allianz SpA* (C-350/14).

General Rules Under Rome II

- Where claimant and defendant “*both have their habitual residence in the same country*”, that country’s law applies (art.4(2)).
- It “*is a question of fact: has the residence of a particular person in a particular place acquired the necessary degree of stability*”
Re LC (Children) [2014] UKSC 1.
- For example, see *Winrow v Hemphill* [2014] EWHC 3164 (QB).

General Rules Under Rome II

- Where the tort is “*manifestly more closely connected*” with another country, that country’s law applies (art. 4(3)).
- “*Manifestly,*” is likely to mean exceptionally
- Again, see *Winrow v Hemphill*. But compare *Marshall v MIB* [2015] EWHC 3421 (QB) (upheld at [2017] EWCA Civ 17).
- The tort, not an issue in the tort.
- Consider relevant facts at date of decision, i.e. consider consequences.

Article 15: Scope Of Applicable Law

- Once applicable law is selected, which issues does it govern?
- Article 15 defines matters which courts must treat as governed by applicable law, including liability, contributory negligence, assessment of damages, and vicarious liability, and limitation.
- The applicable law does not govern evidence or procedure, which are for the law of the forum (art.1(3)). Limitation and service are not a procedural matters (*Pandya v Intersalonika* [2020] EWCA 273 (QB)).

The Future?

- Rome I and Rome II incorporated as ‘retained EU Law’ – s.6 EUWA 2018
- Decisions of CJEU made after 31.12.20 will no longer be binding on the UK Courts although they can have regard to them s6(1)
- Supreme Court can depart from CJEU decisions s6(4)
- Retained EU Law can be amended s6(7)
- Legislative divergence?
- Differences of interpretation?

Jurisdiction and Enforcement :

Pre 31.12.20

- Brussels I Recast (Regulation (EU) No 1215/2012) (chiefly where D domiciled in EU member state)
- Lugano Convention 2007 (parties are EU, Denmark, Iceland, Norway, Switzerland, so chiefly where D domiciled in Iceland, Norway or Switzerland).
- Common law rules (most other cases)
- Travel conventions: Montreal, Athens, Berne.

Jurisdiction and Enforcement – Post Transition

- Brussels I Recast and Lugano ceased to apply at 23:00 on 31.12.20: The Civil Jurisdiction and Judgment (Amendment) (EU Exit) Regulations 2019 (SI 2019/479).
- Transitional provisions: if English court ‘seised’ and case not concluded before 31.12.20, “*the relevant instruments ... continue to have effect in relation to questions of jurisdiction, or recognition or enforcement ... as if those instruments had not been revoked.*” (reg 92).
- Court ‘seised’ when document issuing proceedings is lodged (issue of claim form) as long as it is then duly served (reg.95). Essentially same concept as in Brussels I Recast.

Jurisdiction and Enforcement – Post Transition – Lugano?

- UK has been party to Lugano via its EU membership not as an individual contracting party.
- On 08.04.20, the UK made an application to become a party to Lugano in its own right pursuant to art.72(1).
- Accession requires unanimous consent of all existing parties, who should endeavour to give consent within a year: art.72(3).
- At present, indications of approval from Switzerland, Norway, Iceland but nothing from EU.
- If UK then invited, it deposits instrument of accession and subject to further objections UK becomes party three months later.
- **Currently UK not a party**

If Lugano, what are rules?

- Text of Lugano 2007 follows Brussels I (Regulation (EC) No 44/2001) very closely. So it is a Brussels generation behind Brussels I Recast.
- For personal injury litigators, it has the benefit that most of the significant rules would still be similar or at least broadly familiar: domicile, additional defendants, third parties, special rules relating to insurance (including the *Odenbreit* rules), special rules relating to consumer and employment contracts.
- Plus the benefit of simplified enforcement procedures, though not so simplified as in Brussels I Recast.

Jurisdiction

Current position

- If no other provisions in place, then other than cases governed by transport conventions, largely thrown back on common law rules found in Practice Direction B to CPR 6.
- 6b Para 3.1 contains general rules: domicile of D, additional Ds and third parties who are necessary or proper parties

Jurisdictional gateway

- Most significant for personal injury are common law rules for jurisdiction in tort, governed by PD6B, para.3.1(9).

*“(9) A claim is made in tort where –
(a) damage was sustained, or will be sustained, within the jurisdiction; or
(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.”*

Damage within the jurisdiction

- *FS Cairo (Nile Plaza) LLC v Brownlie*
[2020] EWCA Civ 996
- Court of Appeal finds consequential loss sufficient to establish jurisdiction
- Does not preclude forum non conveniens argument even if jurisdiction established
- Appeal heard by Supreme Court in January 2021 and awaiting Judgment

Common law rules – forum non conveniens

- A significant difference under common law rules is that there is a discretion to decline jurisdiction in favour of courts of another country if the other country is the more appropriate forum: *Spiliada* [1987] AC 460.
- Unlike under Brussels and Lugano rules where once jurisdiction established it cannot (ordinarily) be declined by the court.

FBTO Schadeverzekeringen NV v Jack Odenbreit Case C463/06

- Previously an injured person with a claim against an insurer could bring the claim in their own national court provided there was a direct right of action or if the law relating to the insurance contract provided one
- Now instead will have to establish a jurisdictional gateway under CPR 6B
- UK residents injured by untraced or uninsured drivers abroad can no longer use the MIB

Enforcement Current Position

- Fall back on common law rules
- CPR 74
 - Must be for a definite sum
 - Be final
 - Not have been issued in respect of taxes, penalties or multiple damages awards
 - *Adams v Cape Injuries plc* (1990 Ch 433).

Service

- Permission will not be required for claims issued under Brussels I before 31.12.20 (CPR(Amendment)(EU Exit) Regulations 2019 reg.18(3A))
- NB Lugano loophole – may have to seek permission re claims in Iceland, Norway or Switzerland issued but not served before 31.12.20.
- For those issued after 31.12.20:
- Contractual agreement?
- Hague Convention 2005 exclusive jurisdiction agreement?
- Otherwise permission required under CPR 6.36
 - Is there a good arguable case that the claim falls within one or more of the heads of jurisdiction under para 3.1 PD6B?
 - Is there a serious issue to be tried on the merits of the claim?
 - In all the circumstances, is England clearly or distinctly the appropriate forum for trial of the dispute?

Alternative service?

- CPR 6.15 and CPR 6.27
- Obtain foreign law evidence on the CPR 6.40 restriction (not prohibited by local law)
- CPR 6.16 application – dispensing with service retrospectively (used very sparingly)

Law society guidance

- The Law Society has published guidance on the enforcement of foreign judgments after the end of the transition period:
- <https://www.lawsociety.org.uk/topics/brexit/end-of-transition-period-guidance-enforcement-of-foreign-judgments?s=09>

What happens next? EU Guidance

- On 27.8.20 the EU published a revised notice as to how conflict of laws/jurisdiction issues would be determined post-Brexit. It makes no mention of Lugano and envisages UK being party to the Hague Convention on choice of court only (irrelevant to personal injury claims).
- https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/civil_justice_en.pdf

What happens next? UK Guidance

- Find the UK government guidance note here:
- <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals?s=09>
- It also envisages UK not being party to

Problems in practice - Service

- If the claim form 'lodged' but not issued before 1.1.21 will Brussels I apply?
- Claim form is issued by 31.12.20 but not served : will Brussels I Recast still apply?

Problems in practice – Service

- Proceedings have been incorrectly served / issued pre 2021. How is this now rectified?
- Is limitation an issue?
- NB local law – a potential escape route? (Rights of action, limitation etc.)

Problems in practice - Jurisdiction

- Remember to tick the correct box on the Acknowledgement of Service and file an application within 14 days after filing
- CPR 11(4) and (5)
- Failure to do so means you have accepted jurisdiction to try the claim
- You may circumnavigate this by application under Part 23 and withdrawing or setting the acknowledgment aside but this is tricky – see PD 10 paras 5.4 and 5.5

Problems in practice - Jurisdiction

- You have an English domiciled claimant who is injured in an RTA in Spain. What hurdles do you face?
 - No direct action against the insurer as per *Odenbreit*
 - Instead must establish jurisdictional gateway CPR 6
 - Forum non conveniens
 - What if it is a hit and run?
 - Can you enforce a judgment?

Problems in practice - Enforcement

- For proceedings commenced before the end of the transition period which result in Judgment, can you enforce this in another EU jurisdiction?
- What about for proceedings which have not yet been instituted?