

The Temporal Scope of Rome II – Latest Developments

By Daniel Clarke, April 2010

Regulation (EC) 864/2007, or ‘Rome II’, the EU regulation which governs the law applicable to non-contractual obligations, has been around for some time. One would not have expected its date of effective entry into force to be a matter of controversy. However, as many practitioners will be aware, it is.

Rome II makes significant changes to the pre-existing English rules on applicable law. Further, rules on liability, quantum and limitation differ widely as between jurisdictions. There are, therefore, many cases involving events occurring since 20 August 2007 (including many claims already issued) where it will be crucial to determine whether Rome II applies. This uncertainty can make it extremely difficult for lawyers in this field to advise litigants satisfactorily about their prospects on liability or quantum.

The issue

Rome II has 2 provisions dealing with commencement. Article 31 provides that it “shall apply to events giving rise to damage which occur after its entry into force”. Article 32 provides that it “shall apply from 11 January 2009”. On any view, there is some ambiguity in these provisions. There are essentially 3 standpoints on their effect.

The first is that, in cases heard after 11 January 2009, Rome II applies to events occurring after 20 August 2007. This is on the basis that EU law distinguishes between “date of application” (governed by Article 32) – meaning the date after which courts must apply it - and “date of coming into force” of a regulation (governed by Article 31). Article 254 of the EC Treaty provides that regulations “come into force” on the date specified in them or, in default, on the 20th day following their publication - here 20 August 2007.

The second (and this writer's preference) is that Rome II applies only to events occurring after 11 January 2009. This is on the basis that the first solution cannot have been what was intended since it could lead to absurd results. In a claim where the events took place after 20 August 2007, the

applicable law could potentially change overnight on 11 January 2009 in the middle of proceedings. The law governing liability might change turning the case from a winner to a loser overnight, or *vice-versa*. Quantum might be greatly increased or reduced. While the regulations were imperfectly drafted, the default rules were not intended to apply.

The third view is that Rome II applies only to cases where proceedings were issued after 11 January 2009. This also avoids the absurdities set out above, although it is perhaps difficult to see how the Regulation's wording can be said to turn on when proceedings are issued.

Commentators are divided. Notably, the editors of *Dicey & Morris* originally espoused the third view, but in the latest edition support the first. There is as yet no binding decision on the point, although there are 2 non-binding ones.

2 non-binding decisions

In *Bonsall v Cattolica Assicurazioni* (Claim No.9WC00060), a decision of the Winchester County Court in January 2010, it was taken as a preliminary issue. The claim concerned a common factual scenario. The claimant was involved in a coach accident on 6 June 2008 in Italy. He brought proceedings on 9 January 2009 in an *Odenbreit* claim against insurer of the driver of the coach. Liability was admitted.

It was common ground that Italian law governed liability. The dispute was as to which law governed quantification of damages. The claimant contended that Rome II did not apply (advancing the second, alternatively the third views set out above). Hence while Italian law governed which heads of loss were recoverable, English law governed quantification because it was a procedural matter to be governed by the law of the forum (following *Harding v Wealands*). The defendant contended that Rome II applied, under which Italian law as applicable law governed all aspects of quantum (*Harding v Wealands* having been swept away by Rome II).

In a shortly reasoned judgment the Court found for the defendant and determined that Rome II did apply, effectively adopting the first view set out above. The Court accepted this interpretation could lead to absurd results. But it did not consider that these points could overcome the wording of Articles 31 and 32 where different terms (“application” and “entry into force”) were used and where there was no reference to issue of proceedings. It added that it was not aware of any decided cases where such anomalies had occurred.

The issue was also considered in a decision of the highest German court, the Federal Court (Xa ZR 19/08), dated 9 July 2009, which, while not binding is clearly of some persuasive value. This was a claim brought on behalf of a registered association seeking an injunction to prevent an airline established in Latvia using a particular clause in its standards terms and conditions towards consumers. Without providing any reasoning, the Court simply adopted the position that Rome II applied to events occurring after 11 January 2009, i.e. the second view set out above.

The ECJ reference

However, it appears that a definitive, Europe-wide, resolution may be on its way. On 23 April 2010 in *Jelfs v AXA France IARD SA* (Claim No.9AF00019) – another relatively low value road traffic accident - the Lambeth County Court has made a reference to the ECJ. There are a number of other cases issued in the High Court where the issue was set to be determined in the coming months. It appears that, following the reference to the ECJ in *Jelfs*, these cases may end up being stayed at least in part pending the ECJ's judgment. The race to the higher English courts on the point has been effectively stopped in its tracks.

What litigants and their advisers require in this area is certainty by means of a determinative resolution. The reference to the ECJ is to be welcomed in that regard. It remains to be seen of course whether the parties to that reference will resolve their differences before a final decision. However, while the ECJ decision is awaited, uncertainty will continue to reign.

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