3
HARE COURT

Travel & Aviation Quarterly

Issue 1 - Autumn 2020

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3 Hare Court Travel and Aviation Team

Members of our Travel and Aviation team are ranked as leading travel law and aviation specialists in the Legal 500 and Chambers & Partners.

We are ranked in the Legal 500 as a Tier 1 set for Travel law (including jurisdictional issues) and a top tier set for Aviation, and by Chambers and Partners as a Band 1 set in Travel.

We provide specialist advice and representation at all stages of the litigation process, including pre-action, drafting pleadings, skeleton arguments and schedules, undertaking ADR, and providing advocacy at interlocutory hearings, trials and inquests – from fast track cases to the most substantial and complex claims, from major commercial disputes to catastrophic and fatal accidents.

Claims in which we are involved frequently have a cross-border element; whether arising from an overseas accident or contractual dispute or involving foreign parties. We are uniquely placed to assist with such matters, where there are implications for the duty and standard of care, where jurisdiction and the choice of law are in issue and where direct actions are brought against overseas defendants or insurers.

The 3 Hare Court insolvency and commercial group and the travel and aviation group have both produced a number of articles, webinars and podcasts since the onset of the pandemic which discuss these and other issues in detail. For further information please view our website or contact Leanne Howes, our Marketing Manager, (LeanneHowes@3harecourt.com or 020 7415 7800) for further information.

Our Travel and Aviation Members

Simon Davenport QC 1987/2009

Katherine Deal QC 1997/2019

Pierre Janusz 1979

Dan Saxby 2000

James Hawkins 2003

Helen Pugh 2008

Benjamin Channer 2008

Christopher Loxton 2009

Chloe Shuffrey 2014

Thomas Horton 2015

Daniel Goldblatt 2017

Daniel Black 2015

Howard Stevens QC 1990/2012

Andrew Young 1977

Rupert Butler 1988

Navjot Atwal 2002

Richard Campbell 2007

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Julia Lowis 2013

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Emily Moore 2016

Philip Judd 2017

Hannah Fry 2018

Foreword

10 years ago the eruption of the Eyjafjallajökull volcano closed northern European and transatlantic airspace, causing disruption to the industry not seen since the aftermath of 9/11. One year ago, few would have believed that disruption would pale into insignificance compared to the havoc wreaked on the travel industry by the Covid-19 pandemic.

At the time of the last global pandemic in 1918, aviation was in its infancy. Such has been the pace of change that the current outbreak has meant the almost complete, if hopefully temporary, collapse of international travel, now a linchpin of the global economy.

Whilst there has been welcomed signs of early recovery for the aviation and travel industries, a long road undoubtedly lies ahead in returning to pre-Covid activity levels.

As if a global pandemic was not enough, the long running drama of Brexit continues to play out. The stakes in the negotiations of the future relationship between the EU-27 and the UK have been significantly raised in recent times. Great uncertainty lies immediately ahead as the end of the transition period draws near.

Happily, the travel and aviation team at 3 Hare Court are here to assist, and in this, our first edition of our Travel & Aviation Law Quarterly:

- Asela Wijeyaratne examines the Court of Appeal's recent decision in the long-running saga of *Brownlie v FS Cairo*, and what it means for the tort gateway for jurisdiction;
- Helen Pugh and Navjot Atwal evaluates what the new Corporate Insolvency and Governance Act 2020 means for the aviation sector;
- Natasha Jackson considers options for creditors in the context of airline insolvencies;
- Christopher Loxton looks at air travel in the time of COVID-19; and examines the changing concept of "accident" in the Montreal Convention in the light of recent case law;
- Michael Nkrumah analyses what the latest Brexit skirmishes mean for travel law; and summarises the Court of Appeal's recent decision in *Roberts v SSAFA and MoD*;
- Pierre Janusz considers a recent High Court decision on the territorial scope of European jurisdiction provisions;
- Richard Campbell examines the High Court's decision in *Scales v MIB*;
- Daniel Black considers the implications for tour operators defending gastric illness claims of the decision in *Griffiths v TUI*; and
- Katherine Deal QC considers the evolution of arguments on interest in claims governed by foreign law.

We hope you enjoy this edition.

Katherine Deal QC, Christopher Loxton and Michael Nkrumah
Co-editors

Contributors to Issue 1

Katherine Deal QC

Katherine Deal QC is renowned for her expertise in travel and aviation law. She has acted in many of the leading cases on jurisdiction (at all levels up to and including the Supreme Court and Court of Justice of the European Union), and is widely regarded as a specialist on Rome II and issues of choice of law, including how to present foreign law claims in the English court. Most of her claims involve injuries of maximum severity or death. She also undertakes work concerning package travel, and is currently instructed in a reference to the CJEU concerning the statutory defences, as well as in the claim arising out of the Tunisia terrorist attack, amongst many others. Her aviation practice is largely focussed on personal injury claims but she has in addition considered questions of judicial review arising out of ATOL renewals during the COVID-19 pandemic and has advised start up operators in respect of ATOL requirements. She is currently acting for an airline in a Privy Council appeal arising from the theft of one of its aircraft from an airport in The Bahamas, with issues of ICAO regulations and airport security. She advises regularly on issues of insurance in aviation contexts, particularly those with cross-border elements. As a civil recorder, she has had to decide flight delay claims on numerous occasions, and has a particular interest in the 'extraordinary circumstances' defence. She is a firm believer in the advantages of alternative dispute resolution and has settled claims running into many millions of pounds over the last year alone.

Pierre Janusz

Pierre is recognised as a leading junior in personal injury claims, where he regularly deals with catastrophic injury and high value fatal accident cases as well as clinical negligence matters.

He has substantial experience of handling cases with an international element, with expertise in matters involving jurisdiction and applicable law issues, both generally and in relation to accidents abroad.

Navjot Atwal

Navjot is regularly instructed on behalf of all the major tour operators, air, and cruise lines in respect of accidents abroad. He advises on jurisdictional questions, foreign law, and local standards, upon package travel claims and upon liability under the Athens and Montreal conventions. Many of his cases have been reported in the national press.

Richard Campbell

Richard is regularly instructed to advise and appear in matters pertaining to personal injury and travel claims.

Richard undertakes a wide variety of personal injury work, including employers, occupiers and public liability cases and advises on matters of liability and quantum.

Richard is also regularly instructed in accident and illness claims, being brought under the Package Travel and Regulations as well as the Athens (ships/cruises) and Montreal (air carriage) Conventions.

Helen Pugh

From early on in her practice Helen regularly acted for the major international and budget airlines in a range of matters including fatal accident and Montreal claims, EC Regulation claims and other contract of carriage disputes. In recent years Helen's practice has developed a commercial and insolvency focus with an emphasis on commercial contract disputes, agency and supplier disputes, jurisdictional/conflict of laws challenges and a range of creditor enforcement actions.

Asela Wijeyaratne

Asela has extensive experience in claims arising out of overseas accidents and illness and is ranked in Chambers & Partners and Legal 500 as a leading junior in the field of Travel Litigation. He is regularly instructed in respect of claims under the Package Travel Regulations, including advising as to the applicability of the Regulations (1992 and 2018), dynamic packaging, incidents which occur in the course of excursions and evidence as to standards of care abroad.

Christopher Loxton

Christopher undertakes court, drafting and advisory work in a wide variety of matters relating to aviation and travel law, including: Insurance disputes. Hull damage claims, carriage by air disputes involving EU regulations, Warsaw and Montreal Conventions, and associated passenger, cargo, baggage, delay and denied boarding claims. Personal injury, fatality, and discrimination claims. Regulatory and compliance issues. Package Holiday (including holiday sickness) claims, Regulation (EU) 1177/2010 claims. International carriage by road and sea claims, including under Athens Convention and the Convention on the Contract for the International Carriage of Goods by Road (CMR).

Natasha Jackson

Natasha is regularly instructed in matters raising jurisdictional and conflict of law issues, particularly in relation to insurance jurisdiction. She is experienced in claims under the Athens and Montreal Conventions and the Package Travel Regulations and regularly represents major tour operators and insurer clients.

Michael Nkrumah

Michael has represented both claimants and defendants in travel litigation on all three tracks, from the small claims track to the multi-track. He has gained significant experience in dealing with road traffic accidents occurring in Europe, including in claims for hire / loss of use and fatal accidents. In addition, he has experience of dealing with package tour claims, holiday sickness claims and public liability claims.

Daniel Black

Daniel frequently acts in personal injury cases for both Defendants and Claimants in respect of claims arising here and abroad, often appearing at trial against significantly more experienced counsel. His court work additionally includes EU Denied Boarding Regulations (EC Regulation 261/2004) and Montreal Convention matters. His advisory practice has recently focussed on misrepresentation disputes, as well as jurisdictional and other conflict of laws issues.

Air travel in the time of Covid-19

The impact of the Covid-19 pandemic on global air travel has been unprecedented. The UN agency, the International Civil Aviation Organization (ICAO), estimates that for the first quarter of 2020, there has been a reduction of 612 million passengers compared with 2019, with domestic and international air traffic expected to decrease by 50 percent for 2020 as a whole as compared to 2019 figures. The global trade body, the International Air Transport Association (IATA), estimates US $419 billion worth of lost revenue for airlines in 2020, representing roughly a 50% reduction in revenues when compared with 2019.

In the UK, the world's third largest aviation market, the National Air Traffic Service (NATS) estimated air traffic in April was down by almost 90% compared with figures for the same period last year with similar figures for other Western European countries.

There are, however, tentative signs that in the UK and other European countries the number of new infections is declining and the rate of infection – the so-called "R" number – is stabilising or reducing.

Based on daily traffic patterns from Eurocontrol, there are also early sign of recovery for the industry. From a low of less than 2,500 daily flights in Europe in mid-April to just over 16,000 daily flights in early to mid-August, though the latter figure still represents over a 50% reduction on flights in the same period in 2019.

In an effort to protect public health, whilst reviving domestic and international air travel, a myriad of legislation and guidance has been issued by UK authorities and international bodies in recent months, with airlines and airport operators scrambling to comply in order to attract passengers back to the skies.

This article outlines the principle legal requirements thrown up by the global epidemic in the context of air travel and highlight liability issues for airlines and other industry operators. Given the shifting nature of the pandemic this article provides a limited snapshot of a situation that is liable to change as much going forward as it has in the last five months.

New Legislation governing travel in and out of the UK

The restriction contained in the Health Protection (Coronavirus, Restrictions) (England) Regulations

2020[1], which permitted people resident in England to only leave their place of residence with a '*reasonable excuse*', was removed from 4th July 2020. There are therefore now no restrictions on travelling abroad *per se*, however, specific requirements exist for entry into the UK, particularly if travelling from certain countries, most recently France and the Netherlands for example.

On 3rd June 2020, HM Government laid before the UK Parliament two statutory instruments applicable in England:

- The Health Protection (Coronavirus, International Travel) (England) Regulations 2020; and
- The Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) Regulations 2020.

The devolved UK administrations each introduced similar statutory instruments, with all instruments having come into force on 8th June. There are, however, a few, significant differences between the English legislation and its counterparts in Scotland, Wales, and Northern Ireland, and therefore readers in devolved areas other than England are advised to consult the relevant statutory instruments as the summary below only pertains to the English legislation.

The International Travel Regs

The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 ("the International Travel Regs") contain two principle requirements:

(1) For travellers into England to provide information including contact details and details of their intended onward travel; and
(2) For travellers to self-isolate for a period of 14 days following their arrival in England.

All persons arriving in England from outside "the common travel area", defined as anywhere else in the UK and the Republic of Ireland, are required to provide information on a "Passenger Locator Form" (PLF) on arrival. The information required on the PLF includes one's name, home address, date of birth, sex, phone number, email address, travel document number and substantial details concerning the person's journey set out in paragraph 2 of Schedule 2 of the instrument. Adults have responsibility for completing a PLF for each accompanying child.

A person must also complete a PLF if they arrive in England from within the common travel area but have come from outside the common travel area within 14 days of their arrival in England.

The footnote to the definition of a PLF in regulation 2 makes clear the form is published in digital/electronic form only, however, it is understood PLFs can be completed in hard copy at UK airports in the event that the form was not completed online prior to travel. Travellers are encouraged to complete PLFs on the gov.uk website prior to their arrival in the UK (not more than 48 hours in advance).

A person is not required to complete a PLF if they fit into one or more of 12 categories of persons set out in paragraph 1 of Schedule 2 which broadly cover persons who work for foreign governments or international organisations; are Crown servants or government contractors carrying out '*essential government work related to the United Kingdom border*'; or are Crown servants, government contractors, or military personnel from designated foreign countries, carrying out work '*necessary to the delivery of essential defence activities*' within the 14 days from arrival in England.

As mentioned, the second requirement found in the English International Travel Regs is for persons to self-isolate for 14 days from their date of arrival (unless they depart England sooner), if they have:

[1] Regulation 6(1).

(1) arrived in England from outside the common travel area; or
(2) have arrived in England from within the common travel area but have come from outside the common travel area within 14 days of their arrival in England: or
(3) have arrived from a "non-exempt country or territory" which is a country or territory not listed in Schedule A1.

The Health Information Regs

Regulation 3 of the Health Protection (Coronavirus, Public Health Information for Passengers Travelling to England) Regulations 2020 ("the Health Information Regs") requires air, sea and rail operators to ensure that passengers who arrive in England from outside the common travel area on such services, other than during an exemption period (determined in accordance with regulation 5), have been provided with certain public health information in the required manner (set out in regulation 4), on three separate occasions:

(a) where prior to departure a booking was made for the passenger to travel on the relevant service, before the booking was made;
(b) where prior to departure the passenger was checked in to travel on the relevant service, at the time of check-in; and
(c) while the passenger was on board the vessel, aircraft or train.

Breach of Regulation 3 is a criminal offence punishable on summary conviction by a fine.

Regulation 4 states that for the purposes of the information requirement in regulation 3, the Secretary of State for Transport may from time to time specify, by placing a statement on the gov.uk website:

(a) the information about coronavirus, coronavirus disease and related duties and public health guidance (including, in particular, duties and guidance applying to passengers arriving in England) to be provided under regulation 3(1); and
(b) the manner in which that information is to be provided for the purposes of that regulation.

On 5th June 2020, the Secretary of State published a statement under regulation 4 on www.gov.uk. Operators are urged to read the statement in full as it sets out what they must publish to passengers at the booking stage, at check-in, and whilst on board the vessel, aircraft or train.

Regulation 6 requires operators to keep records and to provide authorised persons with copies of those records and 'other information about how they are complying with the requirement to provide information to passengers'. Authorised persons are the Secretary of State for Transport (for maritime operators), the CAA (for air operators) and the Office of Rail and Road (for rail operators). Breach of regulation 6 is also a criminal offence punishable on summary conviction by a fine.

Both the International Travel Regs (in all devolved forms) and the Health Information Regs contain statutory review mechanisms which call for a review every 28 days.

Guidance for travel in and out of the UK

The UK Department for Transport (DfT) released aviation-specific guidance on 11 June, *Coronavirus (COVID-19): safer aviation guidance for operators,* which has been regularly updated since. In summary, the guidance sets out:

(1) The need for operators to produce specific workplace risk assessments in the light of Covid-19.

(2) Factors to determine who should work in the workplace, who can work from home, and who should be socially isolating.

(3) Social distancing, PPE, and personal hygiene measures for workers and passengers. The guidance sets out the law in England with regards to face masks/coverings, not the differing positions of the devolved administrations.

(4) Workforce planning to ensure social distancing and other infection control measures are adhered to amongst workers.

(5) Queues and protecting passenger flows to maintain social distancing and other infection control measures for passengers. The guidance emphasises the importance of good communication with passengers.

(6) Biosecurity measures at all stages of passengers' journeys: from travelling to the airport, through to arrival and departure at the airport, to being on the aircraft, to finally departing the airport.

The aviation-specific guidance also makes reference to the DfT's national transport operator guidance which additionally covers:

(1) Emergency incidents. The guidance advises that plans for emergency procedures should be reviewed and updated (a) to ensure social distancing is maintained where possible and (b) to include what to do if someone develops symptoms of Covid-19 in a transport setting. This is a comparatively short section and will need to be considered in greater detail by individual operators, especially airlines intending to offer long haul flights.

(2) Cleaning. Operators are encouraged to conduct reviews on the workplace environment and of their cleaning procedures before increasing capacity or re-opening. The guidance then provides a check-list for the cleaning of public and private spaces and for the maintenance of hygiene standards.

(3) Ventilation. The guidance encourages operators to increase ventilation and air flow and sets out measures to be taken to achieve this.

(4) Communications and training. The guidance emphasises the importance of keeping workers and passengers informed of the latest coronavirus related safety procedures.

Other vital guidelines for airlines, airports, and other air transport operators to observe is the European Aviation Safety Agency's COVID-19 Aviation Health Safety Protocol, ICAO's guidance from its Council Aviation Recovery Taskforce (CART) entitled Take-off: Guidance for Air Travel through the COVID-19 Public Health Crisis, and IATA's online resource centre, COVID-19: Resources for Airlines & Air Transport Professionals, though the contents of the various guides overlap considerably.

At the time of writing, the CAA has not released its own comprehensive guidance for air operators in light of the coronavirus pandemic and therefore operators are advised to follow the aforementioned UK Government guidance and EASA's COVID-19 Aviation Health Safety Protocol as bare minimums to ensure regulatory compliance.

Liability considerations

In addition to minimising risks to public health, airlines and other air operators are likely to follow the totality of the guidance cited earlier in this article. Whilst causation will be a tricky proposition for anyone seeking to lay blame at an air operator's door should they contract Covid-19, the risk to corporate reputations is self-evident. Poor biosecurity measures – such as lack of social distancing, masks, or hygiene product provision – at airports or on-board aircraft is likely to attract significant social media attention by disgruntled customers.

It is apparent that many European airlines and airports are taking a proactive approach to the challenge with the introduction of mandatory online check-ins, automated check-ins and bag-drop procedures at the airport, the provision of PPE including complimentary face masks at airports and onboard aircraft, and the simplification of in-flight refreshments. This is all to be welcomed and encouraged, though crucial factors will be consistency and appropriate contingency planning when certain protective measures are not possible to implement.

Any pre-flight health declarations airlines themselves require passengers to provide will of course have to be compatible with airlines' data protection obligations set out in the Data Protection Act 2018 and the GDPR.

In terms of EU legislation, Regulation (EC) No.261/2004 has remained unaltered despite the airline industry's request for its suspension or amendment given the uncompromising requirement in article 8 to reimburse passengers the full costs of their tickets within seven days of a cancelled flight. Many airlines have continued to struggle meeting their refund obligations and it remains to be seen whether regulatory or group litigation action will be taken in response; certainly, both has been threatened within the UK and more widely across Europe.

Whilst the global pandemic is likely to constitute an extraordinary circumstance in most scenarios, and therefore defence to a claim for compensation under article 7 of the Regulation, the rights to re-routing and care in article 9 remain unaffected and therefore airlines will have to revise contingency planning for the provision of refreshments, hotel accommodation, and transport to include appropriate infection control measures when experiencing cancellations, long delays or mid-air diverts.

Conclusion

Operators will have to ensure they are clear with passengers, regulators, trade bodies, and the legal profession about what is operationally feasible to achieve adequately to reduce the public health risk of air travel, whilst meeting the demand for it. That said, the safe return to high-volume domestic and international air travel can only be achieved with the co-ordinated and consistent adoption of infection control measures.

It will be interesting to see whether testing at airports or other ideas such as "bio passports" or health visas, become more widely adopted as an alternative to self-quarantine measures which are clearly having a hugely detrimental impact on the travel industry; or whether more localised quarantine restrictions are put in place, given that many parts of Spain and France, for example, appear to have far lower rates of infection that much of the UK.

On a note of caution optimism, given its ever-vigilant focus on safety, the aviation industry is one that is well-placed to lead the charge in adapting to a world profoundly changed by Covid-19.

An earlier version of this article appeared in issue 7892 (26 June 2020) of the New Law Journal.

CHRISTOPHER LOXTON

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BREXIT: Where are we now?

It is hard to believe that over 4 years have passed since the incoming PM Theresa May uttered those fateful words – "Brexit means Brexit and we are going to make a success of it". Two General Elections later and we have finally left the EU. With Brexit coming back into the headlines it seems the right time for travel lawyers to look at where we are now and what lies ahead. If Brexit means Brexit, what does Brexit actually mean for us?

Currently we are within the oft-mentioned transition period. Essentially the UK is treated as if it continues to be a Member State until 31 December 2020. The transition period is not intended to be infinite, indeed the time for agreeing to extend the same has passed, thus an extension is very unlikely, if not impossible.

In travel law there are often two major questions to consider: one, in which jurisdiction can the claim be brought, and, two, what law will apply to the claim. Other questions arising at a later stage once judgment has been obtained regarding enforcement against a foreign party will no doubt be considered at the outset as part and parcel of deciding where to sue.

In cases involving an EU-domiciled defendant, the first question is resolved by reference to the recast Brussels Regulation 1215/2012. The Withdrawal Agreement operates to allow the UK to participate in the Lugano Convention until the end of transition period. Therefore, jurisdiction involving a defendant domiciled in one of the EFTA states (save Liechtenstein) will be resolved in accordance with the Lugano Convention. During the transition period, the recast Regulation continues to govern jurisdiction in respect of EU domiciled defendants (and indeed those domiciled in the UK being sued in Member States). That Regulation applies to all "proceedings instituted before the end of the transition period" (article 61(1) refers). When proceedings are "instituted", or, in other words, started, in the absence of a definition in the Withdrawal Agreement, is a matter to be determined by procedural law, and according to CPR 7.2(1) that is when the court issues the claim form at the claimant's request. It is the long-held position that a court is seised of an action when the claim form is issued (*Canada Trust v Stolzenberg* (No.2) [2002] 1 A.C. 1 refers). Also, the lis pendens rules will continue to apply in respect of proceedings issued after the transition period if those proceedings are parallel proceedings or related actions to an action commenced before the transition period ended or between the same parties

The Civil Jurisdiction and Judgments Act (Amendment) (EU) Regulations 2019, whilst revoking the Brussels instruments (including the Lugano Convention), provides that the court will be deemed to be seised at the time the claim form is lodged at court providing that the claimant takes the necessary steps to serve the claim form. Thus, the possibility comes of arguing that lodging the claim form is enough to secure the benefit of the recast Regulation.

Recognition and enforcement of judgments is also governed by the recast Regulation. It will continue to apply to judgments given in proceedings instituted before the end of the transition period even where judgment is given after the transition period has ended (article 67(2)(a) refers). The EU has recently confirmed this in a Notice to Stakeholders. Post-transition, judgment recognition and enforcement will depend on national rules. For example, to try and obtain recognition and enforcement of an English judgment in France the claimant will need to follow the relevant French rules. It is worth noting that there is the possibility of relying on treaties relating to judgment recognition and enforcement between the UK and some of the EU-27. These are old treaties, but they might just become important again.

After transition, the UK will no longer use the recast Brussels Regulation or the related Brussels instruments to determine jurisdiction in respect of EU domiciled defendants. The focus will be on national rules. In England and Wales, the default position will be that which exists at common law. This is far less predictable than the system of jurisdiction that flows from the Brussels instruments and is much more burdensome. It is very unlikely that the UK and the EU-27 will enter into a new standalone treaty to govern issues of jurisdiction, recognition and enforcement of judgments in respect of disputes arising in civil and commercial matters. This is perhaps supported by the fact that the UK has sought to accede to the Lugano Convention. The agreement of the EFTA states, that are party to the Lugano Convention, to the UK's accession would seem assured, however it is highly questionable whether the EU and Denmark (who has separate arrangements with the EU on matters of jurisdiction, recognition and enforcement in respect of disputes arising in civil and commercial matters) would be agreeable, and indeed currently they are objecting. Whilst accession to the Lugano Convention would not be a perfect solution it would at least ensure that direct right claims against insurers (Odenbreit claims) could still be brought on the same terms as now.

Contractual claims continue to be governed by the Rome I Regulation whilst we are in transition and will apply to contracts "concluded before the end of the transition period" (article 66(a) refers). So, if a contract is entered into for the rent of a holiday home in Limerick during the transition period, the law which governs the contract will be designated by the Rome I Regulation.

Tort claims continue to be governed by the Rome II Regulation during the transition period. Where the "event giving rise to damage occurred before the end of the transition period" then the Rome II Regulation applies to determine choice of law (article 66(b) refers). For accident claims, Rome II Regulation will apply only if the accident occurs within the transition period. It is convenient to note that the UK will continue to apply the Rome instruments to issues of choice of law post-transition in the glorious post-Brexit world. They will continue to apply to disputes involving any defendants no matter where they are domiciled in the event that there is a choice of law issue in proceedings before the courts in this jurisdiction.

Service of legal proceedings and documents will also be affected. Whilst in transition it is possible to serve using the Service Regulation. However, the Service Regulation can only be used in respect of documents "received for the purposes of service before the end of the transition period" (article 68(a) refers). The term "received" relates to the receipt of a request for service by the relevant authority. It is important to note that Regulation 18(5) of The Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 states that that where CPR 6.41(2) has been complied with by exit day but the documents have not been forwarded to the Senior Master, the request will be treated as one pursuant to either CPR 6.42(1) or (2).

In terms of cases where service is not possible before the expiry of the transition period, permission to serve out of the jurisdiction will be necessary as matters stand. The Civil Procedure Rules 1998 (Amendment)

(EU Exit) Regulations 2019 makes this clear – CPR 6.33(1) is to be omitted. Therefore, service before the transition period is advisable, where possible. It is important to keep in mind that these Regulations were prepared when a "no deal" was thought likely, thus it might be that they will be amended to provide transitional arrangements that are consistent with the Withdrawal Agreement.

CPR 6.40(3)(c) does allow for service to be effected in accordance with a method allowed by the country in which service is to be effected. Thus, the loss of the Service Regulation is not fatal to effecting service. Further, there remains the possibility of using the Hague Service Convention to some extent. An early view of what options are likely to be available for service post-transition is essential for both claimants and defendants if service can't be effected pre-transition – claimants need to get it right, defendants need to quickly work out if there is a point on service to take.

At present in RTA cases where the accident occurs outside the UK but within a Member State it is possible to effect service on the UK claims representative for the insurer in question. This is because of the decision of the CJEU in *Spedition Welter GmbH* v Avanssur *SA* C-306/12 where it was held that Article 21.5 of the Sixth Motor Insurance Directive must be interpreted as meaning claims representatives have sufficient authority to be served with legal proceedings. However, once the transition period is over, absent any agreement between the UK and the EU, there will be no requirement for insurers from the EU-27 to have claims representatives in the UK, nor will UK insurers be required to have claims representatives in each of the Member States of the EU-27. There is no such agreement at present. Therefore, the benefit of serving the claims representative will be lost. This is a point that should not be overlooked given that it often provides a simple solution to service in RTA cases

Of course, where solicitors within the jurisdiction have been nominated then there will be no issue with serving (although it may well be that this is insufficient to amount to a submission to the jurisdiction). Solicitors in other EEA states will be able to be served with proceedings where they have been nominated pre-transition (see Regulation 18 of The Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019).

Claims against the MIB pursuant to the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 will not be possible if proceedings are not started before the end of the transition period. The Motor Vehicles (Compulsory Insurance) (Amendment etc.) (EU Exit) Regulations 2019 makes this clear. It ensures that the MIB do not have to meet visiting victims' claims (better known as Fourth Directive claims) in circumstances where the MIB would not be able to seek reimbursement from their foreign counterparts. Also, it removes the obligation on the MIB to deal with visiting victims' claims in place of an appointed claims representative by the insurer in question.

Conclusion

Perhaps the only thing certain about Brexit and how it will affect travel law is that it is uncertain! However, both claimants and defendants will need to look carefully at issues relating to jurisdiction as well as judgment recognition and enforcement. Service is another consideration (if the foregoing matters were not enough to think about!). Issuing and ideally serving before the expiration of the transition period is advisable where a claimant wants to be sure that the English and Welsh courts have jurisdiction, particularly in cases where liability is contested. Defendants would be advised to mark correspondence on new claims "without prejudice to any jurisdictional challenge" and to use the same qualification when nominating solicitors in the jurisdiction to accept service of proceedings. This will potentially keep alive any jurisdictional objection that might follow from the application of the common law rules (in the event that proceedings are not instituted prior to the end of the transition period).

There is going to be no change in respect of choice of law rules which the English and Welsh courts will apply – they will continue to apply the Rome Instruments to such matters, which parliament has proposed to suitably modify to reflect the UK's new sovereign status. This is perhaps as close to certainty as one can get in travel law terms when considering the impact of Brexit.

Finally, not just a point for travel lawyers, but perhaps also for those dealing with domestic RTA litigation. The well known The European Communities (Rights against Insurers) Regulations 2002 will not apply post-transition in their current form. Presently to have a cause of action under the 2002 Regulations it is

necessary to prove that a claimant is an "entitled party" which means someone living in an EU Member State or the EEA. The difficulty post-transition is obvious. However, The Motor Vehicles (Compulsory Insurance and Rights Against Insurers) (Amendment) (EU Exit) Regulations 2020 deals with this issue by extending the direct right of action against a motor insurer to residents of the UK and Gibraltar. It is of note that it remains the case that the accident must have occurred in the UK and the offending vehicle must be normally based in the UK for the 2002 Regulations to apply and give rise to a cause of action.

Exciting times, high drama and most importantly, litigation are assured!

MICHAEL NKRUMAH

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Brownlie FS Cairo (Brownlie No. 2): "A Corollary of the Global Economy in many aspects of life" or "A recipe for litigation"?

On 29 July 2020, judgment was handed down in the latest round of argument in the long-running dispute arising out of the car accident in Cairo in January 2010 in which Sir Ian Brownlie QC and his daughter were killed, and his widow and grandchildren injured. In *FS Cairo (Nile Plaza) LLC v Brownlie* [2020] EWCA Civ 996, the Court of Appeal (by a majority) followed the obiter opinions of the majority of the Supreme Court in Brownlie No. 1 [2017] UKSC 80 in finding that the tort gateway for jurisdiction in CPR PD 6B was sufficiently wide to admit any claim where the claimant had sustained 'significant damage' in England and Wales, subject to the forum non conveniens discretion.

The Claimant (Respondent to the appeal), Lady Christine Brownlie, is the widow of Sir Ian Brownlie QC. In January 2010 they were on holiday in Egypt with their daughter, son-in-law and two grandchildren, staying at the Four Seasons Hotel Cairo. In advance of the holiday, Lady Brownlie had booked over the telephone, with the hotel's concierge, a guided excursion to Fayoum, in a chauffeur-driven car. During the journey, the vehicle left the road and crashed. Sir Ian and his daughter were tragically killed, Lady Brownlie and the two grandchildren were seriously injured.

The Defendant ("FS Cairo") was an emanation of the Four Seasons chain of hotels. Proceedings had initially been incorrectly pursued against Four Seasons Holdings Inc ("FS Holdings"), a holdings company incorporated in Canada. Difficulties in identifying the correct defendant had been caused by what Lord Sumption in the Supreme Court described as "the diffuse character of the Four Seasons hotel chain, and the complex and undisclosed contractual arrangements governing the relationship between the individual hotels and the Four Seasons group" .

The tort gateway

In December 2017, the Supreme Court gave judgment in Brownlie No.1. As there was no viable claim against FS Holdings, everything said on the issue of jurisdiction was necessarily obiter.

The question in both appeals was whether Lady Brownlie's claims in tort satisfied the requirements of CPR PD 6B para 3.1(9)(a) – were they claims made in tort where "damage was sustained… within the jurisdiction"? In *Brownlie No. 2*, Underhill LJ neatly described the issue in the following terms:

"It seems to me that the real question is whether it is appropriate to have a gateway so wide that it would admit any claim in tort where the claimant had suffered significant damage of any kind within England and Wales, and thus to leave it to the discretion formerly known as forum non conveniens to restrict what would otherwise be an exorbitant exercise of jurisdiction."

In the Supreme Court, Lady Hale, in the majority with Lord Clarke and Lord Wilson, adopted "the ordinary and natural meaning" of the word "damage", finding that it includes all the detriment which is suffered by a claimant as a result of the tort. It was therefore sufficient if "some significant damage" had been sustained in the jurisdiction. In Lady Hale's opinion, there was room for a more muscular use of the Court's discretion to prevent forum-shopping.

Lord Sumption, in the minority with Lord Hughes, adopted a narrower definition of damage, finding that it was limited to "the direct damage, i.e. the physical injury or death" and not "the indirect damage, i.e. the pecuniary expenditure or loss resulting". In Lord Sumption's opinion, Lady Hale's interpretation, "would confer on the English courts what amounts to a universal jurisdiction to entertain claims by English residents for the more serious personal injuries suffered anywhere in the world. Yet that would be far too wide to be consistent with principle".

Lady Brownlie therefore re-formulated her claim to bring it against FS Cairo, and Nicol J allowed the substitution in a judgment reported at [2019] EWHC 2533 (QB). He granted permission to serve the revised claim out of the jurisdiction, holding that there was a good arguable case that the claims in tort, for personal injury, as a dependent of her late husband and on behalf of his estate, passed through the jurisdictional gateway in para.3.1(9)(a); and that there was also a good arguable case that the contract claim was within para.3.1(6)(a) on the basis that the contract for the excursion was made in England. In respect of her tort claims, Lady Brownlie was entitled to rely on the presumption that, in the absence of evidence of foreign law, the court would apply English law. She had a good arguable case on the merits and England was the proper forum.

FS Cairo continued the skirmish in the Court of Appeal, and in *Brownlie No. 2*, Underhill and McCombe LJJ considered that the opinion of the majority in the Supreme Court should be followed. McCombe LJ added that, "[O]ne need not be fearful of arguments raised in terrorem against supposedly exorbitant jurisdiction", given that there was a residual forum non conveniens discretion. Nicol J had decided the question of forum conveniens in favour of the English forum at first instance, and FS Cairo had been refused permission to appeal this evaluation (just as it had Nicol J's judgment on the contract point). It was noted that as a corollary of the global economy in many aspects of life, "there is certainly nothing remarkable in the Egyptian arm of the multinational organisation to which this defendant belongs, and which looks for customers from all over the world, being the potential subject of litigation in a country other than that of its incorporation" .

In the minority in the Court of Appeal, Arnold LJ preferred the narrower interpretation. An important note of caution and warning was expressed as to the majority's preference for the use of the residual discretion as "the safety valve":

"In my view however, it is important not to place too much weight on this factor. Save in clear-cut cases,

disputes as to the appropriate forum are expensive and uncertain. They are expensive because of the need for evidence and argument as to the connections between the dispute and the respective fora, and they are uncertain because they depend upon judicial evaluation. It would therefore be unsatisfactory to adopt an interpretation of gateway 9a which is so broad that most of the work in identifying cases in which foreign defendants should be brought before an English court is left to be done by forum conveniens. That would be a recipe for litigation."

Presumption that foreign law was the same as English law

Lady Brownlie's pleaded case was first put pursuant to the familiar provisions of the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. Following Brownlie No. 1, the claim was re-pleaded to remove references to these Acts. Although the substance of the claims remained unaltered, they were now said to be "pursuant to Egyptian law".

Although some expert evidence of Egyptian law had been obtained by the parties, the Court of Appeal's judgment did not discuss the principles of Egyptian law which would apply to the direct claims made by Lady Brownlie against FS Cairo in tort or the claim in contract. The question on appeal was whether, in the circumstances, there was a good arguable case on direct liability in tort and contractual liability.

Lady Brownlie relied in the Court of Appeal on 'the default rule', that in the absence of satisfactory evidence of foreign law, the court will apply English law (or rather, the presumption that the foreign law mirrors English law where relevant to the claim) The issue before the Court concerned the circumstances in which it is incumbent on a claimant to plead and prove the substance of foreign law.

Underhill LJ, with whom McCombe LJ agreed, gave the following guidance on the approach to be taken where (as in this case), the default rule applied:

"177. I take first the position where the claimant's position is that their claim is governed by English law, even if they appreciate that the defendant will argue otherwise. In such a case they will simply plead their case without preference to foreign law, and the burden will be on the defendant to plead that foreign law applies and the relevant content of that law…"

178. I turn to the position where the claimant accepts that foreign law – say, Ruritanian law – applies but does not wish to rely on its actual content and is willing to rely on the default rule. In my view it is obvious that in this case also… they cannot be obliged to plead from the start the relevant content or Ruritanian law. If it were otherwise there would be no scope for the application of the default rule…. It follows that the claimant in this situation can and should simply plead their case as if English law applied. (I would add that in my view it would nevertheless be good practice in such a case for the claimant to plead that they accept that Ruritanian law applies, while making it clear that in reliance on the default rule they do not intend to plead its content…).

179. If in such a case the defendant wishes to rely substantively on Ruritanian law, then the ordinary principles of pleading – see CPR 16.5(2) – require them to plead in their defence (a) that Ruritanian law applies… and (b) its relevant content; and the claimant would plead any contrary case by way of reply (or perhaps, if that were more convenient, by way of amendment to their particulars)."

Comment

In endorsing the broad interpretation of 'damage' drawn by the majority in Supreme Court, the Court of Appeal in *Brownlie No. 2* has affirmed that the gateway is potentially broad enough to include any claim in tort, where the claimant has suffered significant damage of any kind within England and Wales. Nevertheless, as Arnold LJ warned, the intended use of the residual discretion as a robust and muscular tool to prevent inappropriate forum-shopping will result in a degree of uncertainty, adding potentially another layer of significant expense where contested hearings are involved.

It remains to be seen whether FS Cairo will seek to pursue a fresh appeal to the Supreme Court on the scope of the tort gateway. As the Supreme Court will on any such appeal be differently constituted, there is potential scope for a departure from Brownlie No. 1.

McCombe LJ commented in *Brownlie No. 2* that "I would assume that the impending departure of the UK from the Brussels regime has prompted a careful review within government, with appropriate consultation, about the principles which should govern the assumption of jurisdiction by the courts of this country not only over defendants situated in the EU but over foreign defendants" . It is to be hoped that this is not an assumption too far.

Although unanimity could not be found on this issue, the guidance on the practical application on the "default rule" and the circumstances in which it is incumbent on a claimant to plead and prove the substance of foreign law is to be welcomed.

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Claims in the context of airline insolvency

Airlines were struggling to survive under the pressure of costs, fuel prices and competition before the COVID-19 pandemic. There is no doubt that the reduction in global air travel as a result of the pandemic has hit the industry hard. A number of air carriers have already entered into insolvency procedures and we can expect a turbulent flightpath and further crash-landings ahead.

Whilst the reduction in revenue from travel is having an unprecedented impact on the airline industry, it is also impacting litigants unable to bring claims against airlines subject to insolvency proceedings, or who are unlikely to recover if attempting to do so. This article looks at alternative routes for prospective claimants faced with an insolvent airline (or other travel supplier) and the issues of jurisdiction and applicable law that might arise.

Impact of insolvency on bringing a claim

Where an airline is in liquidation in this jurisdiction, s.130 of the Insolvency Act 1986 precludes the commencement of legal proceedings against the company without the leave of the Court. Similarly, s.43 Schedule B1 of the Insolvency Act 1986 automatically imposes a moratorium on the commencement of legal proceedings against a company in administration without the consent of the administrators or permission of the court. The recent Corporate Insolvency and Governance Act 2020 introduced further, free-standing moratorium provisions against creditor again.

So, while it is not impossible to bring a claim under these circumstances, there are statutory obstacles to pursuing an action against the airline directly. Moreover, even if a claim could be pursued against the insolvent airline, this will rarely be the most promising or efficient approach to achieving damages for a client.

Chargebacks

A simple avenue to explore in seeking a refund on monies spent on one's debit or credit card is to reclaim the money back from the card provider, though each card scheme (Mastercard, Visa and Amex) rules has its own rules.

A chargeback claim will not be permitted where goods or services were provided and the cardholder chose not to received them or the cardholder could not access the goods or services, for example because of travel restrictions or medical symptoms.

Section 75 claims

If a credit card is used, and the cost of the goods or services are between £100 and £30,000, a consumer may be entitled to pursue the card issuer directing for

any breach of contract and/or misrepresentation claim s/he had against the trader pursuant to section 75 of the Consumer Credit Act 1974.

Find the insurer

The Third Parties (Rights against Insurers) Act 2010 ("the 2010 Act") permits a claimant to bring a claim directly against the liability insurer of an insolvent party, without first establishing the fact and amount of the insured's liability, provided the insured is a 'relevant person' under the Act, the insured has liability to the claimant, and the insured has insurance in respect of that liability.

Following the collapse of the self-insured Thomas Cook in 2019, practitioners may be concerned that a would-be airline defendant might not have had an insurance policy in place to claim against. However, insurance in respect of liability for passengers is compulsory for airlines under Article 50 of the Montreal Convention. For EU Member States (including the UK until the expiry of the Brexit transition period), Article 7 of Regulation 2407/92 requires air carriers to be insured to cover liability in the case of accident, and Article 6 of Regulation 785/2004 (as amended by Reg. 285/2010) sets out the specific requirements in terms of insured amounts.

Ascertaining the relevant insurer will therefore be an important early step to any potential claim against an airline. If the insolvency proceedings are taking place in the UK, this information can be obtained through looking up the airline on Companies House.

Does the Montreal Convention apply to a claim against the insurer?

The Montreal Convention 1999 establishes airline liability in cases involving the death or injury of passengers on international flights between signatory states, as well as cases of delay, damage or loss of luggage. It is given the force of law in the UK by the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002 and the Carriage by Air Act 1961.

Importantly, the Montreal Convention provides for a regime of exclusive jurisdiction in respect of all claims against air carriers concerning the international carriage of passengers, baggage, and cargo for reward. As such, claimants may not pursue any alternative claim against an airline, for example under statute or in tort, where the Convention applies. This is all well and good where there is an airline to sue, however the impact of insolvency may mean this is not a viable option.

Since the Montreal Convention provides exclusive jurisdiction if a claim is within its scope, it is arguable that a direct action against an insurer (provided for by national law under the 2010 Act) cannot be brought. If this were to be the case, a claimant would be required to bring any action against the carrier under the Montreal Convention.

An alternative, and it is submitted, better, analysis is that a claim against the insurer under the 2010 Act is a separate cause of action to establish the insurer's liability to cover the airline's liability to the claimant. The action against the insurer is therefore outside the scope of the Montreal Convention as it does not operate to determine the question of the airline's liability.

In *Prüller-Frey v (1) Norbert Brodnig (2) Axa Versicherung AG* (C-240/14), the CJEU was asked to decide the applicable law for a claim brought by a person injured in an aviation accident against the pilot and his insurer. Ultimately, the Court was not required to decide this point against the insurer given its determination that the Convention did not apply to the pilot or the free-of-charge, domestic flight, however, Advocate General Szpunar in his Opinion at [66] to [70]

considered that a claim against an insurer would not fall within the Convention's scope.

Defences available to the insurer

It should be borne in mind that an insurer is entitled to rely upon any defence that their insolvent insured would have had against the claimant, including arguments of limitation and contributory negligence. Furthermore, the insurer can rely upon any policy defences or limits on cover (including breaches of conditions precedent, deductibles and self-insured retentions) it would have had in a claim brought against it by the insolvent insured.

Even in the event of a successfully pining liability on an insurer; the 2010 Act allows an insurer to apply any set-off which it would have against its insured to its third party liability, e.g. unpaid premiums or deductibles. If these exceed the value of the claim and costs, a claimant think twice about pursuing the insurer.

Issues of jurisdiction and applicable law

The cause of action under the 2010 Act will usually be relatively straight-forward where the claim is against a domestic airline under insolvency proceedings in this jurisdiction. However, the claim may become more complex if the action would have been against a foreign airline with an insurer out of the jurisdiction.

Section 18 of the 2010 Act provides that the application of the Act does not depend upon where the liability was incurred, the place of residence or domicile of any of the parties, the governing law of the insurance contract or the place where sums due under the insurance contract are payable. *Colinvaux's Law of Insurance* (11th ed.) considers this to be a "*straightforward rule, which is that if the insolvency procedure is one conducted under the law of one of the constituent parts of the UK, then the Act will apply*" [22-046].

But would the 2010 Act ground jurisdiction where English law does not apply? The High Court was confronted with issues as to the jurisdiction and applicable law of a French insurance policy with an exclusive jurisdiction and law clause in an action pursued under the 2010 Act in *BAE Systems Pension Funds Trustees Ltd v Bowmer & Kirkland* [2017] EWHC 2082 (TCC). The Court determined that the 2010 Act could not traverse a valid French jurisdiction clause governing the contract between the insured and the insurer, though such a clause did not preclude a claim being brought in England for a declaration that the insured was liable to the claimant.

Practitioners will want to carefully consider the applicable law of the insurance contract under Rome I and the effect of the applicable law on the terms of cover before bringing any claim. Thought should also be given to the Jurisdiction Regulation (Regulation (EC) No 44/2001 of 22 December 2000), and to the jurisdictional rules in CPR PD 6B (for an insurer not domiciled in the EU). Relying on the 2010 Act alone is not likely to suffice.

The English County Court has held in *Jones v Assurances Generales de France (AGF)* [2010] C.L.Y. 2408 and *Thwaites v Aviva Assurances* [2010] Lloyd's Rep. I.R. 667; [2011] C.L.Y. 471 that when considering whether the Jurisdiction Regulation applied to allow an injury claimant to pursue proceedings in England directly against the responsible party's foreign insurer, the applicable national law to be considered was the law governing the insurance contract.

Summary

The inevitable increase in insolvencies amongst airlines and other travel suppliers should not prevent claimants from recovering losses for tort and breach of contract claims, though practitioners will be wise to think carefully and strategically when navigating alternative recovery flightpaths.

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The Corporate Insolvency and Governance Act 2020 – Relief for the aviation sector?

The Corporate Insolvency and Governance Act 2020 ("the Act") is an amalgam of short-term relief measures to ease the pressure on financially distressed businesses as a result of the COVID-19 pandemic and permanent reforms which have been accelerated. In both cases the reforms are of relevance to the aviation sector.

The immediate concern is to ease the considerable financial pressure felt by the aviation sector as a result of global COVID-19 lockdown measures. Yet the reforms brought in by the Act also provide new opportunities for many in the aviation market to restructure to meet the many long-term challenges.

Here is a brief summary of the key reforms:

Temporary measure (1): Amendment of wrongful trading laws

This headline-catching reform relieves directors of their personal liability to compensate the insolvent company for wrongfully trading during the period 1 March 2020 and 30 September 2020 (with scope for the Government to extend this period). In practical terms this reform is aimed at giving directors of companies which are likely to be able to trade out of the red the confidence to do so.

In reality this temporary reform of the wrongful trading law is limited and does not give carte blanche to a director to trade on during insolvency during this period. Overlapping provisions of company law still apply which can impose personal liability on directors for continuing to trade whilst insolvent. The key amongst these is the so-called 'creditor's interests duty', preserved by section 172(3) of the Companies Act 2006, which requires a director to act in the interests of the general creditors of the company if she realises that the company is insolvent.

Directors will also be liable to repay any preference payments or transactions at an undervalue if the company subsequently goes into an insolvency process. Distressed aviation companies still need to be cautious about selectively paying suppliers and would be wise to take advice before prioritising creditors.

Temporary measure (2): suspension of certain enforcement measures

Creditors are prevented from relying on the non-payment of statutory demands as a grounds for winding-up a company in respect of demands served between 1 March and 30 September 2020. In addition, creditors are prevented from presenting a petition for the winding up of a company on the basis of its inability to pay its debts unless the petitioner has reasonable grounds for believing that COVID-19 has not had a financial effect on the company or that the ground for winding up would have applied even if the pandemic had not had a financial effect on the company.

In reality, it is likely that businesses in the aviation sector would be able to mount a compelling argument that any inability to pay its debts has been aggravated or caused by COVID-19 and equally likely that the courts would be sympathetic to that argument. Perhaps more importantly, the increased difficulty in taking enforcement steps is likely to mean that creditors are more likely to engage with restructuring efforts.

Whilst the temporal scope of the reform may be extended beyond 30 September, the general indications seem to be that the Government wants to return businesses to normal as soon as possible and that any extension may have its opponents. Businesses considering a restructuring would be well-advised to take steps immediately whilst creditor action has been suppressed.

Permanent measure (1): Restructuring plan

Already utilised by Virgin Atlantic (see [2020] EWHC 2191 (Ch)) in the airline's efforts to recapitalise and restructure debt, the restructuring provisions in the new Part 26A of the Companies Act 2006 are likely to be a significant tool in the rescue toolkit for larger businesses who are overleveraged or struggling in the short-term to pay debts as they fall due but are otherwise viable.

The two conditions for a company to put forward a restructuring plan is that it "has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern", and the plan has been proposed by the company and any class of creditors or members with the purpose to "eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties' the company is experiencing".

The restructuring plan is procedurally similar to the widely-admired scheme of arrangement under section 895 of the Companies Act 2006. The most notable difference is that there is no requirement for every class of voters to meet the voting threshold. Whereas a scheme of arrangement requires each class of creditors to approve the scheme, under the new restructuring plan there is scope for drag-along or a so-called 'cross-class cram down', whereby the objections of a dissenting class of creditors can be overridden subject to certain protections. This therefore limits the ability of ransom or 'hold-out' creditors to block a viable restructuring plan which has the support of the majority of creditors.

The main protections for the dragged-along class are that (a) at least one adversely affected class must vote in favour of the scheme and (b) the court must be satisfied that no member of the dissenting class(es) would be any worse off under the alternative to the plan (e.g. an insolvent administration or liquidation).

Unlike CVAs, the new restructuring plan provisions can be used to restructure secured or unsecured debt.

In *Re Virgin Atlantic Airways Ltd*, Trower J was satisfied that if the proposed restructuring plan was not sanctioned the airline would likely enter into administration in mid-September 2020 with a view to winding up the business and selling such assets as would be able to be realised. In the first case to reach the courts on the new restructuring plan, the judge also held that the court's jurisdiction and approach at a convening hearing, and the court's approach to class constitution would mirror that under Part 26 of the Companies Act 2006 which governed schemes of arrangement. Permission was also given for the convening meetings to be held virtually.

At the subsequent sanction hearing, [2020] EWHC 2376 (Ch), Snowden J approved Virgin Atlantic's restructuring plan on the bases that the statutory requirements of Part 26A had been met, the representation and voting requirements for the meetings had been complied with, the plan was fair, contained no substantive 'blots' or defects, and was likely to prove effective in overseas jurisdictions. Notwithstanding the cross-class cram-down provisions, and the judge's concern that three of the four classes of creditors had been included in order to activate the cross-class cram-down if necessary, the Virgin Atlantic plan had in fact been approved at the convening meeting by all four classes of creditors.

The Corporate Insolvency and Governance Bill had originally proposed that the new restructuring plan would not apply to 'aircraft-related interests' within the meaning of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912) which would have deprived companies in financial distress with aircraft assets of a valuable tool to restructure. Thankfully this proposal was removed from the Bill so these types of liabilities can also now be the subject of a restructuring plan.

Permanent measure (2): Free-standing moratorium

Most companies will now have the option of entering a moratorium (providing protection against creditor action), for an initial term of 20 days which can be extended, provided that the company is unable to, or likely to become unable to, pay its debts and there is a likelihood of rescuing the company as a going concern. It will therefore be a useful tool for companies aiming to agree a CVA, solvent sale, scheme of arrangement, restructuring plan or other consensual settlement with creditors. The directors remain in control of the company but the moratorium process, including the continued satisfaction of the criteria for entering a moratorium, will be overseen by a 'monitor' (an insolvency practitioner).

For reputational reasons, the free-standing moratorium may not be attractive, save in cases of last resort. The reputational damage may be mitigated if the outline of a rescue package or new restructuring plan accompanies the moratorium, with the detail or formal approval to be worked out under the protection of the moratorium. Thus far there has been little use of the moratorium in any sector but going forward, aviation businesses are likely to find this a very useful tool if a publicised restructure becomes likely.

Permanent measure (3): Ipso facto clauses

The reforms prohibit the operation of ipso facto clauses, namely termination clauses in supply of goods and services contracts which are automatically triggered upon an insolvency or formal restructuring. Under the prohibition, suppliers will also be prevented from terminating in reliance upon historical breaches (e.g. non-payment of invoices) once a company enters an insolvency or restructuring process. In practice this means suppliers will no longer be able to hold financially distressed customers hostage as a condition of continuing to supply.

So-called 'essential suppliers' (utility providers and the like) are in any event prohibited from relying on ipso facto clauses, but the reforms aim to now prohibit such clauses in most supply of goods and services contracts. Certain categories of supplier contracts are exempt, e.g. certain financial services contracts. In addition, the prohibition can be avoided in individual cases by consent or if a court determines that the affected supplier would suffer particular hardship if unable to terminate the contract.

The operation of ipso facto clauses often made it impossible to rescue a company as a going concern

through a restructuring or insolvency process as entering that process would terminate that company's supply contracts. Such clauses pose an obvious risk to the utility of the new free-standing moratorium which aims to rescue companies as a going concern yet would likely trigger the termination of the company's valuable supply contracts.

The prohibition is therefore undoubtedly a welcome step for those distressed businesses heavily dependent upon supply contracts. One anticipates that airlines such as Virgin Atlantic may be amongst the beneficiaries. However, for aviation industry suppliers who may now struggle to terminate contracts with defaulting customers, the step is likely to be less welcome.

All in all, the Act should provide some welcome relief to the aviation and travel industries. Whilst the rights of some creditors have been curbed, the priority in the current epidemiological and economic climate is unsurprisingly on increasing rescue options for viable businesses.

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Slips on snow and coffee spills – divergent meanings of 'accident' under the Montreal Convention?

This article explores the extent to which two important recent cases on the meaning of "accident" under Article 17 of the Montreal Convention 1999 introduce new and contradictory definitions.

The Montreal Convention, more fully known as the "Convention for the Unification of Certain Rules for International Carriage by Air"[2], provides the exclusive framework for liability in relation to international air carriage of passengers, baggage and cargo for reward.

Article 17(1) of the Montreal Convention provides as follows:

> *'The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'*

Slips on snow

In *Labbadia v Alitalia* [2019] EWHC 2103, Margaret Obi (sitting as a Deputy High Court Judge), was asked to considered whether a passenger falling on aircraft stairs amounted to an "accident" under the Montreal Convention in circumstances where the stairs had no canopy and had not been cleared of snow.

The claimant had been a passenger aboard Alitalia's flight from London to Milan on 5 February 2015. The aircraft landed in poor weather conditions. As the claimant disembarked the aircraft on a set of mobile stairs, he slipped and suffered injuries to his right shoulder and pelvis for which he claimed damages.

The judge found that there had been a combination of rain and snow at the airport that morning and that it was still snowing when the claimant exited the aircraft.

[2] Implemented in the jurisdiction of England and Wales by The Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002 and section 1 and schedule 1(b) of the Carriage by Air Act 1961 (as amended).

She additionally found that the aircraft stairs were covered with snow at the time of the claimant's disembarkation and it was these conditions which caused him to slip and fall.

The judge took as her starting point the well-known and widely accepted interpretation of "accident" by the US Supreme Court judgment *in Air France v Saks* [1985][3] as *'an unexpected or unusual event or happening that is external to the passenger'*.

Applying the US Supreme Court's interpretation, whilst giving the word "accident" its *'natural but flexible and purposive meaning in its context'*[4], the judge considered that the essential components of the term could be determined by answering the following questions:

(i) *Was there an event*[5]*?*
(ii) *If so, was the event unusual, unexpected, or untoward from the claimant's perspective?*
(iii) *Was the event external to the claimant?*

The judge quickly answered the first question in the affirmative, holding that there was a clear chain of causation from the presence of snow on the aircraft steps to the claimant slipping on those steps and sustaining injury.

The framing of the second question was not without its problems with its emphasis on an event being unexpected or untoward from *the claimant's* perspective and its addition of the word '*untoward*'. The imputation of an apparently subjective element to the article 17(1) test comes from the following passage[6] of Lord Scott of Foscote in *re Deep Vein Thrombosis Group Litigation* [2006] 1 AC 495 (HL):

> *'…it is important to bear in mind that the "unintended and unexpected" quality of the happening in question must mean "unintended and unexpected" from the viewpoint of the victim of the accident. It cannot be to the point that the happening was not unintended or unexpected by the perpetrator of it or by the person sought to be made responsible for its consequences. It is the injured passenger who must suffer the "accident" and it is from his perspective that the quality of the happening must be considered.'*

Whilst the other Law Lords (Lord Walker, Lord Steyn and Lord Mance) expressed explicit agreement with the totality of Lord Scott's judgment, none explicitly or implicitly referred to the apparent requirement for an event to be unexpected or untoward from *a claimant's perspective*. Lady Hale, for her part, summarised her that view *'that this appeal should be dismissed and for essentially the same reasons'*[7] as those given by her judicial colleagues.

[3] 470 U.S. 392, 405 (U.S. 1985, US SC); followed in *re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495.
[4] Para.38.
[5] The US Supreme Court used the word '*happening*' in addition to the word '*event*', though whether this is simply of semantic interest is perhaps a moot point. It is certainly hard to envisage an occurrence that is a happening and not an event, and vice versa.
[6] Para.14.
[7] Para.49.

In terms of cases that post-date *re Deep Vein Thrombosis Group Litigation*, in *Barclay v British Airways* [2009] 1 Lloyd's Rep 297 (CA), the Court of Appeal upheld a recorder's decision that a claimant who had suffered an injury to her right knee when she slipped on a plastic strip embedded in the floor of the aircraft as an intrinsic and wholly unexceptionable part of that aircraft had not suffered an accident within the meaning of article 17(1). The Court of Appeal gave no apparent weight to perspective. Instead, Laws LJ (giving the only substantive judgment) held that it was not '*a distinct event, not being any part of the usual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the passenger*'[8].

In *Ford v Malaysian Airline Systems Berhad* [2013] EWCA Civ 1163, the Court of Appeal did specifically quoted from and adopt Lord Scott's passage[9], however, the Court ultimately concluded that an injection administered by a doctor on board a flight to a fellow passenger (the claimant) was not "unusual" for the purposes of article 17(1) as there was no evidence the administration of the injection was done in an abnormal way, and the fact that it was administered in mid-flight rather than elsewhere did not provide the '*necessary "unusual" characteristics*'[10]. No regard was actually paid to whether the claimant herself regarded what had happened to her as unexpected or unusual or would have in the circumstances; Aikens LJ's determination was solely an objective one.

In none of seminal cases before the US Supreme Court on the meaning of 'accident', in particular *Air France v Saks* (1985) 470 US 392 (US SC) *and Husain v Olympic Airways* (2004) 540 US 644 (US SC), has that Court specifically required a plaintiff's views to be considered on whether an event or happening is unusual or unexpected.

It is therefore with a note of caution that one approaches Judge Obi's framing of the second question. Whilst a claimant's subjective view may, or even must, *inform* the court's objective determination of whether an event/happening is *an unexpected or unusual event, it cannot be determinative*.

In answering the second question, the judge held that, based on presented meteorological data, there was nothing unexpected or unusual about adverse weather in Milan during the month of February. However, the use of aircraft stairs without a canopy, as occurred in this case, *was* found to be unusual and unexpected because it was the carrier's evidence that canopies were used '*where possible*' in bad weather and, in accordance with the airport's operating manual policy, prior to authorising passengers to disembark, the stairs should have been cleared of accumulating snow or ice (considerations which seems to veer perhaps uncomfortably close to questions of negligence, which have no place in the Convention regime). Given the absence of a canopy, and the mechanism of injury, the use of uncovered stairs at the point of disembarkation in the snowy conditions, was not part of the '*normal operation of the aircraft*'[11]. It is perhaps strange that the judge did not explicitly conclude that these '*combination of acts and omissions*'[12] meant the event was therefore unusual and was external to the claimant, though this is undoubtedly implied from the tenor of the judgment.

Whilst giving no specific reasoning, in answer to the third question the judge held that the event was external to the claimant, presumably because the claimant's slip was not caused by his own '*internal reaction to the usual, normal, and expected operation of the aircraft*' (applying the words of O'Connor J in *Air France v Saks*).

The judge then dismissed the carrier's argument that the claimant had been contributory negligent under article 20 of the Montreal Convention in that his injury had been caused or contributed to by his own failure to immediately reach for the steps' handrail. She

[8] Para.35.
[9] At para.22 per Aikens LJ.
[10] Para.28.
[11] Para.41.
[12] *Ibid.*

found that the claimant had done nothing other than descend the stairs on the instruction of the carrier and therefore no finding of contributory negligence was made.

Coffee spills

In *GN v ZU* (C-532/18), the Court of Justice of the European Union was requested, for the very first time, to define the outlines of the concept of 'accident' within the meaning of Article 17(1) of the Montreal Convention.

The Court was asked to decide this issue as the EU itself is a signatory to the Montreal Convention and the international treaty forms part of EU law through Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2).

The claimant, a six-year-old girl, was scalded by a hot cup of coffee which had slipped off a tray table "for reasons unknown" during a flight from Majorca to Vienna. A claim for compensation of c.€8,500 was filed against the administrator of an insolvent airline, Niki Luftfahrt.

The court-appointed administrator denied liability, asserting that there had been no accident within the meaning of article 17(1), since no '*sudden and unexplained event*' had led to the coffee cup being tipped over and no '*hazard typically associated with aviation*' had occurred which, it was submitted, was a necessary condition to be satisfied.

On appeal on a point of law, the Oberster Gerichtshof (the Austrian Supreme Court), decided to stay proceedings and to refer the following question to the CJEU for a preliminary ruling:

> *'Where a cup of hot coffee, which is placed on the tray table attached to the seat in front of a person on an aircraft in flight, for unknown reasons slides and tips over, causing a passenger to suffer scalding, does this constitute an "accident" triggering a carrier's liability within the meaning of Article 17(1) of the [Montreal Convention]?'*

In a thorough and detailed Opinion, Advocate General Saugmandsgaard Øe explored the potential literal, teleological, and contextual interpretations of the meaning of 'accident' article 17(1), examining predominantly US, German, and French case law on the topic, before concluding that the answer to the question referred should be that article 17(1):

> *'… must be interpreted as meaning that any event that has caused the death or bodily injury of a passenger and that occurred on board the aircraft, or in the course of the operations of embarking or disembarking, which is sudden or unusual and has an origin external to the person of the passenger concerned, is an "accident" capable of rendering the air carrier liable, without it being necessary to examine whether the event is attributable to a hazard typically associated with aviation or is directly connected with aviation.'*

The CJEU itself paid no regard in its judgment to the case law from any State Parties, or to the part of the AG's Opinion, apparently declining to reinforce the widely-accepted definition of accident as a sudden or unusual event that is external to the passenger concerned. Instead the Court held that the term should be given its '*ordinary meaning… in its context, in the light of the object and purpose of that convention*'[13], which was that of '*an unforeseen, harmful and involuntary event*'[14].

The Court roundly rejected[15] the arguments advanced on behalf of the airline administrator that a carrier's liability was subject to the condition that the cause of the accident need originate from a hazard typically associated with aviation. The Court therefore ruled that the definition of "accident" in article 17(1) covered '*all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation*'[16].

Comment

At first glance the CJEU's dismissal of the airline administrator's arguments are unsurprising. In *Morris v KLM Royal Dutch Airlines* [2002] QB 100, for example, the Court of Appeal[17] rejected any suggestion '*that an "accident" had, in some respect, to be related to or be a characteristic of air travel*'[18]. The ruling therefore confirms the commonly accepted position that an accident need not be attributable to an aviation-associated hazard.

As mentioned, what *is* surprising is the absence of any reference to case law from State Parties to the Montreal Convention when considering the definition of "accident". The House of Lords[19] and US Supreme Court[20] have consistently emphasised the importance of the international comity principle that a multinational treaty must be interpreted not as if it were a domestic instrument, but so as to accord with the shared expectations of the contracting State Parties, hence the need to consider how other State Parties' courts have interpreted the Convention's provisions.

The CJEU's definition of accident as being '*an unforeseen, harmful and involuntary event*' leaves absent the requirement of externality emphasised by the US and UK definition (which is similar to most French and German definitions) of '*an unexpected or unusual event or happening that is external to the passenger*'. If, for example, the cause of the spillage had been the passenger herself – due for example to some neurological condition – this would not have likely amounted to an accident under most Western and common law jurisdictions.

The use of the word '*involuntary*' by the CJEU is also problematic when, for example, the US Supreme Court in *Air France v Saks* cited with approval[21] lower courts' findings that terrorism[22] and hijacking[23] were accidents within the meaning of article 17 of the Warsaw Convention[24]; and in *Morris v KLM Royal Dutch Airlines* [2002] QB 100, the Court of Appeal held that an accident had occurred in circumstances

[13] Para.34.
[14] Para.35.
[15] Paras.41 and 42.
[16] Para.43.
[17] The appeal before the House of Lords did not concern whether the facts of the case amounted to an accident, only whether the appellant had suffered '*bodily injury*' within the meaning of article 17(1).
[18] Para.22, per Lord Phillips of Worth Matravers MR
[19] *re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 AC 495, para.55; *Morris v KLM Royal Dutch Airlines* [2002] AC 628, para.7.
[20] *Zicherman v Korean Airlines Co Ltd* (1996) 516 US 217 at 230.
[21] At 405 per O'Connor J.
[22] For example *Evangelinos v Trans World Airlines, Inc.*, 550 F. 2d 152 (CA3 1977); and *Day v. Trans World Airlines, Inc.*, 528 F. 2d 31 (CA2 1975).
[23] For example *Krystal v British Overseas Airways Corp.*, 403 F. Supp. 1322 (CD Cal. 1975).
[24] The Montreal Convention's predecessor treaty containing an almost identical provision to that of article 17(1).

where a passenger was indecently assaulted during a flight by a fellow passenger who was unknown to her[25].

Whilst the UK is obligated to follow EU law during the Brexit transition period, there may be reluctance thereafter for the judiciary to follow the CJEU's rulings where they contradict establish Supreme Court authority.

Ultimately *GN v ZU* may simply turn on its own facts and have little wider impact. In Advocate General Saugmandsgaard Øe's Opinion, it was recorded that the claimant's father, who was sitting next to her on the aircraft, had received from a flight attendant the cup of hot coffee without a lid which is not industry practice for legacy carriers and Western European low-cost carriers. The Opinion also noted that the Austrian court at first instance could not, for whatever reason, determine whether the cup had tipped over because of a defect in the tray table, because of aircraft vibration or some other reason. Whether other courts would be so equivocal in future remains to be seen.

Returning to the decision in *Labbadia v Alitalia*, carriers will no doubt have welcomed the High Court's decision that the sustaining of injury from the presence of hazardous weather is an "accident" *per se*. What the judgment emphasises is the importance of having regard, and adhering to, industry safety standards and protocols, both at an international and local level. Whether the outcome would have been different if the local airport operating manual had not required the stairs to be free from snow is open to debate. The decision appears to import a fault-based approach whereby carriers are only liable if an accident is caused by a state of affairs that falls below the standard reasonably expected of a carrier. Such a proposition is likely to be tested in the future.

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[25] A similar decision having been reached by the Second Circuit of the United States Court of Appeals in *Wallace v Korean Air* (2000) 27 Avi 17,864.

Roberts v (1) Soldiers, Sailors, Airmen and Families Association, (2) Ministry of Defence and (3) Allegemeines Krankenhaus Viersen Gmbh

The claim pursued by the claimant arose out of his birth in June 2000. He suffered brain damage at birth, said to be as a result of negligence on the part of the attending midwife. The claimant was born at the Viersen General Hospital in Germany. The midwife was employed by SSAFA and the doctors involved in the birth were employed by the owners of the hospital, AKV.

The claimant brought his claim against SSAFA and the MOD. In turn, SSAFA and MOD issued a Part 20 claim for contribution against AKV. The contribution claim was brought pursuant to the Civil Liability (Contribution) Act 1978 and would only be effective in the event that the claimant succeeded in establishing liability against either or both SSAFA and the MOD.

The proper law (or applicable law, in modern parlance) of the contribution claim was German law. If German law applied to the issue of contribution, then there would be a significant issue for SSAFA and the MOD as a claim for contribution would be time barred. However, the argument advanced by SSAFA and the MOD was that the Civil Liability (Contribution) Act 1978 had extraterritorial effect, and the liability to contribute arose under the Act, thus there was no issue as to limitation. Reliance was placed on the decision of Chadwick J (as he then was) in the case of *Arab Monetary Fund v Hashim* [1994] 7 WLUK 410. In that case Chadwick J held that if B and C were each persons against whom liability had been established in an action brought against them in an English court, applying the appropriate law in accordance with English private international law rules, then the Act conferred on B a right of contribution against C to which the court had to give effect.

Soole J in [2019] EWHC 1104 (QB) accepted the reasoning of Chadwick J and followed the same, thus finding for SSAFA and the MOD and AKV appealed.

The Court of the Appeal in [2020] EWCA Civ 926 held that, having regard to the language of the Act, and in particular section 7(3), the provisions of the Act were intended to apply irrespective of the choice of law designated by the rules of private international law. Section 7(3) makes clear that the right to contribution under s.1 superseded any right, other than an express contractual right, to recover contribution. The Court of Appeal considered that it was hard to see why that supersession should not include provisions of foreign law.

As long as the liability of each tortfeasor can be established in an English court, even if the liability is to be assessed by reference to a foreign law, then the Act is engaged and accordingly applies to give rise to a claim for contribution. The key question is, can the court give judgment against both tortfeasors? If that question can be answered in the affirmative, the Act applies.

In reaching their conclusions the Court of Appeal approved the decision in Arab Monetary Fund v Hashim. Regard was had to the purpose of the Act, which was said to be to simplify and standardise contribution claims irrespective of how or why the common liabilities to the person suffering damage accrued. Emphasis was placed on section 1(6) which stipulated that liability could be established on the basis of foreign law. It was held that the natural interpretation of the language of the Act was consistent with purpose of the Act, namely, to simplify and standardise contribution claims.

Comment

Given that the cause of action in this case accrued before the Rome II Regulation came into force the decision might be considered to be of mere historical interest and only relevant to a very limited number of cases. This is because Article 20 of Rome II deals with the position in respect of claims of "[m]ultiple liability", like contribution claims. The wording of the Article might be considered strange to English tort lawyers given the reference to "creditor" and "debtor[s]". However, the effect of the Article seems plain, where two defendants have a common liability to a claimant then if one or other satisfies that liability in whole or part, the applicable law that determines whether any contribution claim exists, and to what extent it does so, will be the applicable law which applies between the defendant who makes payment and the claimant.

Article 20 does appear to suggest, indeed state, that it does not bite until a defendant has started to meet the claimant's claim. The contrary argument is that Article 20 can be applied by analogy so it can be applied without any payment being made. The difficulty with this contention, in my view, is that where the respective claims against the defendants are governed by separate laws it is not possible to determine which law governs the right to contribution because there is no payment to mark out which of the defendants' 'law' takes priority. The better view, and likely correct view, is that Article 20 is of no application until a payment is made.

So, a claim pursuant to s.1 of the 1978 Act is likely to be still possible in cases where one of the defendants in a multiple party claim has failed to satisfy the claimant's claim in whole or part. The argument is that the provisions of the Act are mandatory overriding provisions and thus continue to have application notwithstanding the fact that the Rome II Regulation applies to the particular claim, Article 16 refers. This decision gives considerable credence to this argument.

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Territorial scope of jurisdiction – Hutchinson v Mapfre and Ice Mountain

For the victim of an accident which has occurred abroad it is always preferable to sue a defendant in the claimant's own domestic court rather than having to pursue a claim at long distance in a foreign country, probably having to contend with a foreign language and procedures which are unfamiliar.

In the all too frequent situation of the potential defendant not being domiciled in England and Wales this will usually mean having to find a basis for the English court having jurisdiction over the defendant in relation to the matter. One of the most beneficial effects of the Brussels regime[26] for jurisdiction and recognition of judgments for such a claimant domiciled in England and Wales is that, if they wish to sue a defendant domiciled in a Regulation or Convention state they can sue them as of right in an English or Welsh court (that is to say with no need to obtain the permission of the court to serve proceedings outside the jurisdiction) if the defendant is the liability insurer of the person responsible (and there is a direct right of action for a victim against an insurer under a relevant system of law) or they can say that they are claiming as a consumer.

These two types of claim are exceptions to the general rule under the Brussels regime that a defendant is to be sued only in the courts of the state of its domicile. The former arises as a result of the interpretation which the CJEU put on the special jurisdiction provisions governing matters relating to insurance in the case of *Odenbreit* v. *FBTO Schadeverzekeringen NV* (C-463/06)[27] (specifically what are now Articles 11 and 13 of Regulation (EU) No. 1215/2012 ("the Regulation") and the latter arises from the special jurisdiction regime under the Regulation concerning consumer matters.

In her judgment in the recent case of *Hutchinson* v. *Mapfre Espana Compania de Seguros y Reaseguros S.A. and Ice Mountain S.L.* [2020] EWHC 178 (QB), Andrews J rejected attempts by defendants to restrict

26 This term covers both the regime at present enacted by Regulation (EU) No. 1215/2012, applying to EU Member States, and that created by the revised Lugano Convention, applying to Switzerland, Iceland and Norway. For present purposes the relevant provisions are *mutatis mutandis* in identical terms.

27 [2008] 2 All E.R. (Comm) 733

the scope of these beneficial jurisdictional bases for claimants, in the case of the attempt to limit the scope of the *Odenbreit* jurisdiction departing from and criticising a County Court decision in 2015 which has been the subject of some doubt as to its correctness, namely *Williams* v. *Mapfre Empressa Compania de Seguros y Reaseguros S.A.* One of the defendants also asked unsuccessfully for a stay of the proceedings on the basis of the *lis alibi pendens* provisions in the Regulation (Articles 29 and 30), but this article is confined to the strictly jurisdictional points raised.

The claim arose out of an accident which occurred on 3rd June 2016 in the Ocean Beach Club ("the Club"), a club in Ibiza frequented by mainly young British holidaymakers which is owned by the Second Defendant, Ice Mountain Ibiza S.L. ("Ice Mountain"). The Claimant, Mr Hutchinson, was found floating in the Club's swimming pool having suffered injuries which have rendered him tetraplegic. He commenced proceedings against Ice Mountain and its liability insurers, Mapfre Espana Compania de Seguros y Reaseguros S.A. ("Mapfre"). The claim against Ice Mountain is pleaded in contract, tort and breach of statutory duties under Spanish law, and for the claim against Mapfre Mr Hutchinson relies on a provision of Spanish law (Article 76 of the Spanish Insurance Contracts Act 50/1980 ("Article 76")) which allows an injured party to bring a claim directly against the liability of the person who is primarily liable, thereby engaging the *Odenbreit* basis of jurisdiction. So far as the claim against Ice Mountain is concerned, Mr Hutchinson contended that the English court has jurisdiction over it in relation to the contractual claim because he was a consumer and that in relation to the claim in tort and breach of statutory duty jurisdiction exists because by virtue of Article 13(3) of the Regulation he can join Ice Mountain as an additional defendant to a claim brought against its insurer.

The claim against Mapfre

As this is the part of the decision which concerns an issue which has greater general relevance it will be addressed first. Mapfre challenged the applicability of the *Odenbreit* basis of jurisdiction by arguing that Mr Hutchinson could not satisfy the requirement of showing that he had a direct right of action against it.

It was not disputed that Article 76 generally provides a victim with a direct right of action against a liability insurer, but it was said that the terms of the policy were such that Ice Mountain was not entitled to an indemnity in relation to Mr Hutchinson's action. If the action was not within the scope of the policy it followed, so the argument went on, that the insurer could not be directly liable for a claim in relation to which it had not agreed to provide an indemnity. This argument would be sound if for example the policy was an employer's liability policy and the claim, as here, is a public liability claim. However, the term relied on by Mapfre for saying that the claim was outside the scope of the indemnity was one relating to the territorial scope of the cover provided. It read:

> *"This policy will only cover claims submitted within Spanish jurisdiction for events which have taken place in Spain leading to liability or other obligations imposed in accordance with legal provisions in force within the territory of Spain."*

It was therefore not in dispute that, had Mr Hutchinson brought his action in Spain, the policy would have provided Ice Mountain with an indemnity against it. It was his entirely understandable decision to sue in England which was said to mean that he could not sue Mapfre directly (and thereby not only lose his basis of jurisdiction against it, but also expose him to the possibility of not making a full recovery against Ice Mountain in his English action because it would not have insurance cover in relation to his claim). It is believed that this clause was specifically devised for the purpose of enabling Mapfre to challenge jurisdiction when it was sued in courts outside Spain as not only did it prefer to be sued in its own courts in Spain (in exactly the same way as claimants prefer to sue in their own courts) but it was also unhappy about the costs consequences of being sued in England in particular where costs awarded against defendants can be very much higher than is the case in Spain.

Mr Hutchinson's answer to Mapfre's argument was twofold. First, he said that the territorial scope clause

was as a matter of European law ineffective to prevent the exercise of his right under the *Odenbreit* principle to bring a claim in the courts of his state of domicile. Secondly, he said that the clause was one which as a matter of Spanish law was ineffective to remove or restrict his direct right of action because Article 76 provides that:

> *"the direct action is immune from any exceptions that the insurer may have against the insured."*

(A) European law

So far as the argument based on European law was concerned, the starting point was Article 15(3) of the Regulation which provides that the provisions of the Section dealing with matters relating to insurance can only be departed from by an agreement:

> *"…concluded between a policyholder and an insurer, both of whom are at time of conclusion of the contract domiciled or habitually resident in the same member state, and which has the effect of conferring jurisdiction on the courts of that state..."*

It was not disputed that this Article would allow Mapfre to include an effective exclusive jurisdiction clause in favour of the courts of Spain, but the issues were (i) whether such a clause, even if effective between an insurer and its insured, was effective as against a third party; and (ii) if such a clause would be ineffective as against a third party, was the clause relied on by Mapfre in this case in substance no different from such an exclusive jurisdiction clause. In the light of the CJEU decision in *Assens Havn* v. *Navigators Management Ltd* (C-368/16)[28] the answer to the first of these issues was clear. In that case it was held that exclusive jurisdiction clauses valid as between insurer and insured under Article 15(3) of the Regulation did not restrict the right of the victim to rely on the general provisions regarding jurisdiction in matters relating to insurance because to extend the effect of the clause in that way would compromise the objective of those provisions which was to protect the economically and legally weaker party. With regard to the second of these issues, Andrews J decided, correctly it is respectfully considered, that even though the clause was not a traditional exclusive jurisdiction clause (as Mapfre pointed out), its substantive effect so far as Mr Hutchinson was concerned was to force him to sue in Spain, thereby depriving him of the right to sue in England, with the result that the objective of protecting the economically and legally weaker party would also be defeated. She regarded the clause as a thinly disguised attempt to avoid the consequences of the *Assens Havn* decision, with the effect of his rights being rendered nugatory. The substantive effect was the same as an exclusive jurisdiction clause and Mapfre could not achieve by the back door that which it could not achieve by the front door.

Mapfre had sought to rely on the earlier decision of HHJ Halbert in the Chester County Court of *Williams* v. *Mapfre* referred to above in which the same clause was under scrutiny, but this was given fairly short shrift. As pointed out by Andrews J, the judge had decided the case on the basis of the expert evidence of Spanish law and had concluded that the clause was one limiting the scope of cover and not an exemption clause, and therefore not an "exception" from which the direct action was "immune" under the part of Article 76 cited above. Andrews J also observed that he seemed to have determined the issues as a matter of Spanish law rather than EU law, and this is certainly correct in the sense that he did not consider that if the clause was valid under Spanish law it might be overridden by EU law. Judge Halbert's focus was very much on the

28 [2018] QB 463

expert evidence of Spanish law which was adduced before him. He had cited to him the passage in the Schlosser Report which specifically says that jurisdiction clauses in insurance contracts cannot affect the direct action rights of an injured party[29], and (although it is not apparent from the judgment) the submission was made to him that if an insurer could not oust the *Odenbreit* jurisdiction by means of an exclusive jurisdiction clause, EU law would not allow it to do so indirectly by means of Mapfre's territorial scope clause. This submission (in essence the same one which was accepted by Andrews J) did not find favour with him because he considered that if the clause was valid under Spanish law (which he found on the expert evidence to be the case) EU law would not override it.

(B) Spanish law

Here the agreed question was whether the clause was one which defined or delimited the risk under the policy or was one which restricted the right of the insured after the risk had arisen. If the former, the clause would be effective as a matter of Spanish law to mean that Mr Hutchinson would not have a direct right of action against Mapfre, but if the latter it would be an "exception" from which the direct action would be "immune", so he would have a direct right of action. The question fell to be decided according to the expert evidence of Spanish law presented by the parties.

It is to be noted that the Spanish law experts did not give oral evidence and were therefore not cross-examined. In accordance with recent authorities[30] Andrews J directed herself that the burden of establishing that the court has jurisdiction is on a claimant and that when deciding if a claimant has satisfied the burden of showing a good arguable case that a jurisdictional gateway exists it is necessary to have regard to the following principles:

(i) there must be a plausible evidential basis for the relevant jurisdictional gateway;
(ii) if there is an issue of fact, the court must take a view if can reliably do so;
(iii) if no reliable assessment can be made, there is a good arguable case for the application of the gateway if there is plausible (albeit contested) evidence for it.

One of Mapfre's experts cited a decision of the Court of Appeal in the Balearic Islands which held that a "territorial clause" which it was thought was possibly the same as the one in Mr Hutchinson's case was a risk defining clause, but Andrews J noted that that part of the decision was *obiter* and decided that it could not be relied on as a definitive ruling on the point. In short she preferred the evidence of Mr Hutchinson's expert. She considered that the risk-defining provisions of a liability policy would delineate the nature and scope of the underlying liability of the insured to third parties against which the indemnity was to be granted, and that was found in the clauses headed "object of insurance" and "scope of the insurance". Supported by the expert for Mr Hutchinson, she felt there was a difference in nature between the requirements that the event take place in Spain and give rise to liability under Spanish law on the one hand, and the requirement that the claim be brought in Spain on the other. The claim in court could be brought only after the accident giving rise to liability had occurred and had nothing to do with the nature of the insured's liability or the circumstances giving rise to liability. Therefore his right to an indemnity was being restricted by something occurring after the event giving rise to liability in just the same way as would be the case if the policy required that the claim must be brought within six months of the accident.

29 Paragraph 148

30 *Brownlie* v. *Four Seasons Holdings* [2017] UKSC 80; *Goldman Sachs* v. *Novo Banco* [2018] UKSC 3; *Kaefer* v. *AMS Drilling* [2019]I EWCA Civ 10

It is worth noting that even though she found that the claimant's expert had the better of the argument, which might lead one to expect her to say that she was deciding the matter under principle (ii) above, she in fact went on to say that because there were respectable arguments to be aired on both sides and the court was unable to reach a definitive conclusion without oral evidence and cross-examination "Suffice it to say that there is a plausible evidential basis for the court to assume jurisdiction over Mapfre under Article 13(2) of Recast Brussels I", so it would appear that principle (iii) came into play.

The claim against Ice Mountain

As stated above the claim against Ice Mountain was pleaded in breach of contract, tort and breach of statutory duty under Spanish law. It is only in relation to the claim in contract that the consumer basis of jurisdiction is relevant; for the other claims it was accepted that Mr Hutchinson needed to find another exception to the general rule that Ice Mountain is to be sued only in the Member State where it is domiciled, i.e. Spain.

(A) The consumer claim

One of the requirements for the consumer basis of jurisdiction to apply is that the commercial or professional party to the contract:

> *"…pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State, or to several states including that Member State, and the contract falls within the scope of such activities" (Article 17(1)(c))*

Although the Club has a website in English which targets British holidaymakers and Mr Hutchinson had been there previously, on this occasion he had purchased a ticket for the Club as a result of being handed a flyer while he was in Ibiza. The Club sought to argue that the consumer provisions did not apply for two reasons. First that they did not apply because he had bought his ticket independently of the Club's direction of its activities to the UK and secondly that immediately prior to the accident he had been seen in an area to which his ticket did not permit access (the "VIP" area). Andrews J held that the first ground had to fail because of the CJEU decision in *Emrek* v. *Sabranovic* (C-218/12) [2014] IL Pr. 39, which held that there was no requirement for there to be a causal link between the direction of activities to a claimant's Member State and the contract which was concluded. Although Ice Mountain sought to distinguish *Emrek* on the facts, Andrews J said that the principles laid down by the case were clear; requiring proof of a causal connection would undermine the protection which it was intended to give to consumers and might deter consumers from brining claims before their own courts. With regard to the second argument, it was found to be hopeless because the accident itself happened in the swimming pool, to which his ticket allowed him access. For the existence of the contractual duty to take reasonable care with regard to the use by its customers of the swimming pool it could not matter which side they were standing on before entering the water.

Accordingly, the court had jurisdiction for the contractual claim.

(b) The claim in tort and breach of statutory duty

Mr Hutchinson's argument here was that Article 13(3) of the Regulation permits Ice Mountain to be joined to a claim which is being brought against Mapfre because it says:

> *"If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."*

Although in *Keefe* v. *Hoteles Piñero Canarias S.L.* [2015] EWCA Civ 598; [2016] 1 WLR 905 the Court of Appeal decided that this provision did allow the joinder Mr Hutchinson was contending for, Andrews J accepted that there was uncertainty as to whether the Court of Appeal had been correct, because on appeal to the Supreme Court a reference to the CJEU had been made on this point. That case had settled after the European Commission had submitted its written observations so there had never been a ruling from the CJEU. The issue was however now the subject of a further reference in the case of *Cole IVI Madrid S.L.*[31], and in those circumstances Andrews J decided to stay the tort and breach of statutory duty claims pending the decision of the CJEU in *Cole*.

Ice Mountain asked the Judge to make a separate reference because it considered that the questions referred in *Cole* did not expressly cover an additional argument which it would wish to advance. The questions referred in *Cole* were (i) whether the jurisdiction to join an assured only applied to a "matter relating to insurance" and (ii) if so, what that phrase encompassed. The Judge said that Ice Mountain wished to argue that joinder under Article 13(3) was limited to joinder at the behest of the policy holder/insured. It is not clear whether this description of the additional argument is correct because she went on to say that she would not make a reference because it was an argument which had been rejected by Moore-Bick LJ in *Maher* v. *Groupama Est* [2009] EWCA Civ 1191; [2010] 1 WLR 1564 for reasons she found compelling, but the argument in *Maher* had not been concerned with joinder at the behest of a policyholder/insured. It had been an argument that a claimant could not use what is now Article 13(3) to join an insured as an additional defendant to an action he had brought against an insurer under the Odenbreit jurisdiction. So far as the reasons given by Moore-Bick LJ being compelling are concerned, it is worth noting that in its written observations in *Keefe*, which were to the effect that the decision of the Court of Appeal was wrong, the European Commission said that "By its first question[32], the referring court wishes to know in essence whether, where a claimant has seised a court of a Member State pursuant to Article [13(2)] in conjunction with Article [11(1)(b)] of [the Regulation], Article [13(3)] of the same Regulation, allows the claimant to join to those proceedings the insured person, and if so in what circumstances." This is the same question as was raised in *Maher* and would also appear to be the additional argument which Ice Mountain wished to run. The Commission's recommended answer to the first referred question was:

> *"Article [13(3)] of [the Regulation] does not allow an injured party to join the insured/policyholder as a party to a direct action brought against the insurer pursuant to Article [13(2)] of that Regulation."*

The reasons it gave for that answer were in substance the same as those advanced by the Defendant in *Maher*. There may accordingly be some doubt as to whether the enthusiasm Andrews J had for the reasoning of Moore-Bick LJ was well founded and whether she was right not to make a duplicate reference.

It is understood that there will be no appeal from the decision of Andrews J because the parties have since reached a settlement in relation to the claim; and the reference in *Cole* has been withdrawn for the same reason. However the point is due to be considered again by the High Court at the beginning of November 2020 in another matter (*Butt & others v D'Amato & others*) and it may well be that the point is

31 Claim No. E90BM277, Lawtel Document No. AC5008635 ; [2019] 9 WLUK 373

32 Which was *" Is it a requirement of Article [13(3)] that the injured person's claim against the policy holder/insured involves a matter relating to insurance in the sense that it raises a question about the validity or effect of the policy?"* , i.e. very much the same as the first referred question in *Cole*.

finally able to be determined by the CJEU, even if that decision ends up of little relevance to English claimants in a post-Brexit world.

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Scales v MIB [2020]

The decision of the High Court (Cavanagh J.) in *Scales v MIB* [2020] EWHC 1747 (QB) has recently provided useful insights into the assessment of damages under Spanish law and how these Spanish law principles might interplay with the court's decision over the suitable costs order.

The claimant, Mr Scales, suffered multiple severe injuries when he was hit by an uninsured driver whilst cycling in Spain and therefore applied to the MIB for compensation under the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 who in turn would stand in for the Consorcio de Compensacion de Seguros ("CCS") or the Spanish Guarantee Fund. The CCS would then reimburse the MIB accordingly.

The Court was required to apply Spanish law in the assessment of Mr Scale's damages following the Supreme Court decision in *Moreno v MIB* [2016] UKSC 52 which concluded that, under the 2003 Regulations, a claimant was entitled to receive the same compensation that he or she would have received from the CCS, in other words, following an assessment under the foreign law.

In this assessment, there were 3 core issues of note:

1. How flexible was the old Baremo (the tariff system used for damages assessments in Spain) in terms of the categories of loss that could be awarded?
2. When was the appropriate "consolidation date" (i.e. the date on which the claimant's injuries had stabilised or plateaued), and should 'points' for various sequelae be awarded?
3. Was it appropriate to award penalty interest?

In relation to the first issue, Cavanagh J was clear that he did not consider that there was flexibility with the old Baremo (which applied in this accident but was subsequently revised in from 1st January 2016) and that the wording was clear and should be applied strictly. As such, the claimant's suggestion that there should be flexibility in the Baremo's application to make awards outside of the heads specifically stated to ensure the principle of full compensation was maintained (restitutio in integrum) was rejected, and in turn the majority of the claimant's claim (including care costs) was dismissed. As Cavanagh J stated, '*the legislative structure consisted of a number of detailed and specific rules which provided for compensation for particular types of general damage or expenditure. It would make no sense for the legislation to have provided these specific rules, if the Courts had a free rein to ignore them and a wide discretion to award damages by reference to what was perceived as being fair, or what amounted to restitutio in integrum*' [63]. He considered that this conclusion was supported by the legislative structure and purpose of the Baremo at the relevant time and whilst this might be regarded as unfair, there was however scope for a court to 'bump up' the award of general damages for permanent injuries to take account of costs that were not otherwise recoverable.

The issues of the relevant consolidation date and sequelae points were more problematic. A Spanish court would have the benefit of a Forensic Medical Examiner to advise the judge of his/her view of the Consolidation Date and, as Cavanagh J states *'in practice, the Judge would almost certainly accept it'* [87]. Unfortunately, the court in Scales only had reports from Spanish legal experts and medical reports from experts who did not address the Consolidation issue and to whom the concept would have been unfamiliar. The difficulty was not lost on the Judge who indicated he would do his best. This highlights the potential benefit of instructing foreign medico-legal experts who would be better placed to comment and assist on issues arising from, for example, a points scheme, notwithstanding the approach of the Court of Appeal in *Wall v Mutuelle de Poitiers* [2014] EWCA Civ 138.

Finally, in relation to penalty interest, the Judge made clear that the existence of a right to claim interest as a head of loss was a substantive matter to be determined by the foreign law, the *lex causae*, but that in any case whether or not such a substantive right existed, the English court had a discretionary power to decide whether to award interest and to determine the amount of interest. The Judge indicated that whether it was substantive or on a discretionary basis he would *'exercise my discretion in accordance with what I understand would have happened if these proceedings had taken place in Spain'* [257].

Spanish law does include a penalty rate of interest on the full amount of damages if a defendant has failed to pay damages to the RTA victim within a certain period of time of being presented with a claim for damages by such victim. However, penalty interest will not apply where there is a justified delay or the delay in payment is not attributable to the defendant. The Spanish law experts in the case agreed that the exception had to be interpreted restrictively *'and the mere fact that the defendant insurer or national Guarantee Fund has decided to defend the claim, and thinks that it may have a good defence, does not mean that* [the exception] *applies'* [273].

The Judge concluded that the defendant must pay Mr Scales interest at the penalty rate stating *'the fact that the Defendant in this case is the MIB, which may not be as familiar with Spanish legal principles as the CCS or a Spanish insurer would have been, is not a reason to decline to apply Article 20 in the normal way. The MIB must be treated in the same way as the CCS would have been treated if these proceedings had taken place in Spain'* [279]. The delay in paying compensation was not justifiable under the rules and therefore the penalty interest had to apply.

There was a separate costs hearing that followed this assessment hearing with the MIB submitting that an issue-based costs order should be made pertaining to the costs of the care-related expert evidence (as the claimant had been unsuccessful with those heads of loss) and further that, as the defendant had already had penalty interest awarded against it, applying the usual Part 36 consequences would be unjust.

In [2020] EWHC 1749 (QB), Cavanagh J rejected the call for an issue-based costs order stating: *'…that, on any analysis, Mr Scales has won this case, and I do not consider that it would be just or appropriate to make an issue-based award, either in relation to the period before 1 April 2020 or the period after that date. The expert evidence from Spanish law experts and from care experts would, in any event, have been necessary even if Mr Scales had not advanced the arguments upon which he was unsuccessful'*[14].

Further, the court rejected the suggestion that the application of the Part 36 consequences would be unjust. Cavanagh J concluded by stating *'I do not accept that it would be unjust. The penalty interest in Spanish law deals with something different from Part 36 . Spanish penalty interest is payable, in a case such as this, if the Guarantee Fund fails to pay compensation within three months of being notified of the claim. In contrast, the Part 36 consequences in this case follow because the MIB did not accept the Part 36 offer made by Mr Scales on 11 March 2020. It follows that there is no injustice in the MIB being liable both to Spanish penalty interest and to the consequences of Mr Scales "beating" the Part 36 offer'*[21].

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Griffiths v TUI UK Limited [2020] EWHC 2268 (QB): Can you still see the Wood for the trees?

The recent appeal in *Griffiths v TUI UK Limited* [2020] EWHC 2268 (QB) raised a fundamental question: what is the proper approach of the Court towards expert evidence which is 'uncontroverted'? Its context was a package travel, gastric illness claim, where causation was – as so often – the crucial issue.

The point of departure is definitional. By 'uncontroverted' Spencer J explained (at paragraph 10) that the expert's report, that of the ubiquitous Professor Pennington, was:

> *'[U]ncontroverted in the sense that the Defendant did not call any evidence to challenge or undermine the factual basis for Professor Pennington's report, for example by calling witnesses of fact or putting in documentary evidence; nor was there any successful attempt by the Defendant to undermine the factual basis for the report through cross-examination of the Claimant and his wife, nor by cross-examination of Professor Pennington. In this sense, and unusually, the evidence of Professor Pennington was truly "uncontroverted".'*

In other words, there was before the Court an expert report with which the Defendant did not agree but which lay effectively unchallenged in evidence. The Defendant had (unusually) had permission to obtain its own reports but not done so, had failed also to call the Professor for cross-examination preferring to take points on the adequacy of the evidence in submissions at the fast track trial. As to its contents, the report said of Mr Griffiths that it was food or drink consumed at the hotel at which he was staying was the cause of his illness.

The judge at trial, HHJ Truman, accepted the Claimant's evidence as true and accurate. However, she did not accept the effect of the report:

> *'…Counsel for the defendant was unhappy about a number of matters within the report. The Professor thought it unlikely that the claimant had been simultaneously infected with Giardia, adenovirus and rotavirus. That on the face of it would appear to suggest that the claimant had been infected on at least two separate occasions. The claimant's history of being ill, recovering somewhat and then being ill again, might also suggest two separate infections, and indeed the report says that the possibility of there being two separate infections cannot be ruled out. Nothing further is then said about that. There is no explanation*

as to why the meal eaten on 7 August might not be at fault for the possible second illness and why the conclusion is that the claimant acquired his illness following the consumption of contaminated food or fluid from the hotel.

Further, counsel points to the lack of reasoning between setting out the incubation periods (one to fourteen days for Giardia, average seven), the claimant falling ill after two and then nine days after arrival at the hotel, and then saying that the illness is due to the hotel, with again nothing to say why this is so. The report makes no specific mention of the food the claimant ate at the airport before reaching the hotel (which falls within the incubation periods given), nor what he ate in the local town, and why those potential sources should be discounted. Counsel notes that, despite the Professor being asked to comment on possible breaches in health and hygiene procedures and having been provided with the hotel's documentation on their procedures etc, nowhere is any breach, causative or otherwise, actually listed and no comments on any perceived breaches were made. Counsel submits that the court might consider that this lack of comment is because the Professor found no breaches. I also note that whilst the Professor says that a viral cause is much less likely than a bacterial one due to the fact that the claimant did not suffer from vomiting, that doesn't explain how it was that adenovirus and rotavirus were found in the claimant. If they had no effect, or could otherwise be discounted, I would have expected the report to say in more detail why that was so, in the same way that it provided a reasoned explanation for why the claimant was not likely to be suffering from amoebic dysentery. The fact that viral infections more usually cause vomiting on the face of it means that sometimes you can have a viral infection without vomiting. Further, whilst a viral cause is apparently less likely than a bacterial one due to the lack of vomiting, I'm not clear how this fits in with the fact that only parasites and viruses were isolated in the sample, not bacteria, and the pathogens which were found were known to cause stomach upsets.

The defence had set out a number of non-food related methods of transmission for the claimant's illness from the identified pathogens. The report does not say why any of those should be discounted in this particular case. Similarly the report does not say why the possible routes for infection listed in the Particulars of Claim (air conditioning, leakage from a baby's nappy in the swimming pool etc) are less likely to be applicable, or, if they might be relevant, what the breaches were in the health and hygiene procedures which led to the Claimant falling ill…'

Practitioners will, of course, see the influence of the Court of Appeal's decision in *Wood v TUI* [2017] EWCA Civ 11 at work in HHJ Truman's reasoning. Specifically, the Judge plainly placed considerable store on the report's inability to exclude other potential causes of the illness. Whilst strictly *obiter*, that dictum has assumed a controlling power over the law in these claims. In the event, that the report (the only one before the Judge dealing with the issue of causation) could not answer that issue satisfactorily led the Judge not to accept Professor Pennington's conclusions on causation, and so Mr Griffiths lost.

On appeal, the Claimant argued that where expert evidence is uncontroverted it should be accepted by the Court in all circumstances, save for the exceptional. Spencer J agreed:

'I take the view that a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare ipse dixit, for example if Professor Pennington had produced a one sentence report which simply stated: "In my opinion, on the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel…However, what the court is not entitled to do, where an expert report is uncontroverted, is subject the report to the same kind of analysis and critique as if it was

> *evaluating a controverted or contested report, where it had to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence. Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all…'*

The implications are profound. So long as an expert's report is compliant with Part 35 of the Civil Procedure Rules and is not, in its nature, mere assertion, then the Court must accept it. In the words of Spencer J:

> *'It may be that, had the Defendant served controverting evidence, Professor Pennington would have expanded upon his reasoning, for example in a meeting of experts, and such reasoning would have found its way into a joint statement. As it turned out, that step never became necessary because the evidence of Professor Pennington stood alone. Nor did the Defendant seek to challenge the reasoning that might have lain behind Professor Pennington's conclusions by calling for him to be cross-examined, as it had every right to do. In those circumstances, the court must assume that there is some reasoning which lies behind the conclusion which has been reached and summarised, and that this reasoning is not challenged.'*

At time of writing TUI may yet appeal. It also remains to be seen what approach defendants will take in similar cases, many of which are pending. There was nothing unusual about TUI's approach to the trial here – it and other tour operators will more often than not take the same approach of obtaining no evidence but criticising the claimant's expert at trial. However, given the nature of the Fast Track, where gastric claims generally run, defendants may not get permission to obtain their own reports, or to call an expert along for cross examination (and claimant firms are most unlikely to agree to joint instruction in advance). We shall have to wait and see. For now, the Court of Appeal's decision in *Wood* stands, but the forest has a new and rather prominent tree.

Howard Stevens QC appeared on appeal for TUI.

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Nothing of interest?

Interest on damages is often something of an afterthought when one is quantifying a claim. Rates in England and Wales have been so low for so long that interest on special damages generally adds very little, even (or especially) in big money claims where a defendant may have made substantial interim payments in advance of trial against special damages. But in claims governed by a foreign law, it may be worth paying a little more attention.

Back when Rome II was just a Eurocrat's dream, older readers will remember the ongoing struggle to identify matters of substance (governed by the foreign law) and matter of procedure (governed by English law). This struggle led eventually to the House of Lords' judgment in *Harding v Wealands* [2007] 2 A.C. 1; [2006] UKHL 32 confirming that quantification of damages was a matter of procedure, thereby leading to several years of pain for foreign insurers.

In 2009 French insurers were the first to run an appeal featuring the issue of interest in *Maher v Groupama Grand Est* [2009] EWCA Civ 1191. Under French law, pre-judgment interest was a rare beast, and Groupama wanted to be able to take the same restrictive approach when sued in England. Moore-Bick LJ analysed the case law and concluded that, whether there was a right under the foreign law to claim interest or not:

> *"…the court has available to it the remedy created by section 35A of the [Senior Courts Act 1981]. Having said that, the factors to be taken into account in the exercise of the court's discretion may well include any relevant provisions of French law relating to the recovery of interest. To that extent I agree with the judge that both English and French law are relevant to the award of interest."*

Thus for a few years, French insurers routinely argued that the non-availability under French law was the main factor relevant to the discretion, before meeting in the middle in settlement discussions in the time-honoured way.

In *Hyde v Sara Assicurazioni* [2014] EWHC 2881 (QB), a case arising out of an accident in 2004, the claimant was limited to damages under Italian law not exceeding the policy limit. Did this limit include interest? HHJ Moloney QC said it did not – interest was a matter of procedure determined by English law. Where, as was the evidence of Italian law, the foreign law imposed a strict test for the application of interest above the policy limit which was arguably not met, that

would not prevent the English court from awarding interest, but might well be a factor relevant to the exercise of its discretion.

Then came Rome II, with "*the existence, nature and the assessment of damage*" now governed by the foreign law under article 15(c). Does that or does that not include interest? Or is interest better regarded as a remedy claimed under the same article; or is it still a matter of procedure governed by the law of the forum under article 1.3?

In 2016 in *XP v Compensa* [2016] EWHC 1728 (QB) Whipple J was asked to decide the date from which date interest should run under the applicable Polish law. Although it seems that the rates themselves were not in issue (Whipple J describing them with remarkable restraint as "relatively high"), the insurers did suggest that English interest should apply on the basis that interest was procedural, and cited *Maher* in support. Whipple J dismissed the insurers' entreaties on the basis that this would be inconsistent with the Court's role in arriving "*at a figure for damages which equates to that which would have been awarded by a Polish court if this case had been heard in Poland this*."

Interestingly, this appears to contradict somewhat the approach of the Court of Appeal in *Wall v Mutuelle de Poitiers* [2014] EWCA Civ 138, when Longmore LJ expressly dismissed that this was the aim under Rome II, holding at paragraph 15 of the judgment:

> *"In these circumstances it is indeed inevitable that the same facts tried in different countries may result in different outcomes and I am unable to accept Mr Browne's starting point that the English court must strive to reach the same result as a French court would, let alone his finishing point that evidence must be given to the English court in the form of a French-style expert report."*

Be that as it may, Whipple J in *XP v Compensa* determined that she did not need to decide the point about substance or procedure. If Polish law governed interest, the claimant got Polish interest rates; if it was a matter of discretion for the Court applying s.35A of the Senior Courts Act, that discretion would encompass taking into account the relevant provisions of foreign law relating to recovery of interests, including rates. So the claimant got Polish rates, adding £84,910 to the claim as against a little over £160,000 in general and special damages[33], a decision that must have stuck in the throat of the claimant in *Syred v PZU* [2016] EWHC 254 (QB), who just a couple of months previously had opted for no evidence or argument on Polish rates.

By this time, experienced travel lawyers were starting to become aware of the potential differences between English rates and foreign principles, and the need for evidence. So, whilst French courts ordinarily do not award pre-judgment interest, lawyers realised the potential to argue that if the provision of the Civil Code addressing interest is discretionary, pre-judgment interest is accordingly not prohibited. Greek law offers the tantalising prospect of 9.25% per annum from service. And Spanish law, so miserly so often on awards to the badly injured, could give a basis for fantastic awards of interest, sometimes even higher than the award of damages, thanks to a provision of the Insurance Contract Act allowing 20% per annum once the 2nd anniversary has passed on the entire award in certain circumstances. A claimant who limits herself to claiming 0.25% per annum on special damages from the date of the accident could be significantly undervaluing the claim; a defendant who concedes any interest on past loss could be offering too much.

[33] See paragraph 242 of the judgment.

Recently in *Scales v Motor Insurers' Bureau* [2020] EWHC 1747 (QB), the MIB as guarantee fund had to compensate the claimant pursuant to Spanish law when he was injured by an uninsured driver in Spain. There were numerous arguments about the application of Spanish law to the case, most of which the claimant lost. However, perhaps by way of expiation, Cavanagh J accepted that the appropriate interest rate was indeed the swingeing penalty interest rates provided for in Spain. The MIB had not made a payment as it should have done within 3 months of the letter of claim, and the first interim payment was not made until 21 months after the letter of claim. A dispute about liability or even about quantum was not enough, he found, to justify a failure to make a payment. The Claimant ended up with an extra €180,000 in interest, as against the pennies that 0.25% per annum would have netted him under English law, and thereby beat his own Part 36 offer and got indemnity costs and extra damages and interest as well.

The arguments on application of foreign law have evolved and deepened over the past decade as parties duck and weave to try to uphold or avoid the differing facets of foreign law the courts must apply. Interest has been largely noticeable by its omission. That is changing. Is the application of a penalty rate – expressly designed to further domestic interests in limiting litigation and encouraging early settlement against a background of the rigid Spanish Baremo tables, truly appropriate for a different forum? Is there an analogy to be drawn between high penalty interest rates and, for example, procedural rules that limit a successful claimant's right to costs – are they both, perhaps, an intrinsic part and parcel of the domestic process? Should the rate chosen reflect domestic economic factors of the foreign forum if the award is going to be spent in England? Is an insurer rightly to be penalised for not making early offers if a claimant has made it plain from the outset s/he is looking for damages well in excess of what the insurer knows it would be required to pay in its own domestic court? Since Rome II will continue to apply in England and Wales even after the end of the transition period, these are not arguments which will fall away soon. Interest just got interesting.

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