Travel & Aviation Quarterly

Issue 3 – Spring 2021

Table of Contents

Foreword 4

Contributors to Issue 3 5

What will change in UK equality and employment law as a result of Brexit? 8
Administrative Employment International Public Law

Mutual recognition and enforcement of insolvencies in Europe post-Brexit 11
Commercial Insolvency International

Jurisdiction and enforcement of judgments post-Brexit: considerations for travel law practitioners 16
International Personal Injury Travel & Aviation

The Effect of Brexit on UK Employment Law and Jurisdiction 21
International Employment Public Law

RTA claims and Brexit – motoring on 24
International Personal Injury Travel & Aviation

'Naw rrivederci Roma' - Choice of Law after Brexit 28
Commercial International Personal Injury Travel & Aviation

The Hague Convention on Choice of Court Agreements following Brexit. 31
Commercial International Professional Negligence

The impact of the EU-UK Trade and Cooperation Agreement on aviation 34
International Travel & Aviation

Which direction now for direct claims? 39
International Personal Injury Travel & Aviation

3 Hare Court

We have a strong reputation in personal injury and travel litigation, as well as in civil fraud, commercial litigation, employment, insolvency, international work including arbitration, financial services, professional negligence, property and construction litigation and all manner of public, administrative, and constitutional law practice, incorporating civil liberties and human rights.

Members are ranked as leading specialists in the Legal 500, Chambers & Partners and Who's Who Legal in personal injury, travel, insolvency, civil fraud, administrative and commercial law, amongst others, and we are a top tier set for 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. Members of Chambers are admitted as barristers in overseas jurisdictions and are fluent in many languages including Dutch, French, German, Hindi, Italian, Punjabi, Spanish, Swahili and Urdu.

The 3 Hare Court insolvency and commercial group, the employment team and the travel and aviation group have produced a number of articles, webinars and podcasts since the onset of the pandemic which discuss numerous different 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.

Foreword

No-one is more surprised than we that here, on time and as promised, is the 3 Hare Court Quarterly on all matters Brexit.

Chambers offers an impressive range of specialisms, from the travel and personal injury sphere with which many of our readers are familiar, to public law, commercial law, insolvency, employment and much else. We are proud to boast more than 40 individual rankings across no fewer than 15 specialist practice areas in the recent round of directories.

Brexit is a topic which affects virtually every discipline of law, so who better than we to bring you up to date on where matters stand now we have reached the end of the transition period and are strolling, fully vaccinated, into the promised sunlit uplands.

In this edition:

- **Tom Poole QC** and **Julia Lowis** consider possible changes to employment and equality law post-Brexit.
- **Christopher Loxton** covers the impact of Brexit on insolvency arrangements.
- **Asela Wijeyaratne** and **Adam Riley** provide insight into jurisdiction and enforcement for travel lawyers.
- And **Sara Ibrahim** and **Hannah Fry** address matters of jurisdiction and enforcement with focus on employment and discrimination claims.
- **Mike Nkrumah** takes us on a tour of how Brexit has impacted motor claims.
- **Daniel Black** covers choice of law post-Brexit.
- **Navjot Atwal** and **Samuel McNeil** cover choice of court under the Hague Convention 2005.
- So good it's worth repeating, we include an updated version of **Christopher Loxton's** article of how Brexit is impacting the world of aviation.
- **Katherine Deal QC** provides no answers but raises questions on the future of direct claims against insurers.

We are particularly pleased that so many members from our different practice groups have contributed to this edition, and we hope that you enjoy it.

Katherine Deal QC

Contributors to Issue 3

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 jurisdiction and issues of choice of law. 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. 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.

Tom Poole QC

Tom was appointed Queen's Counsel in March 2021. He has a broad commercial and commercial chancery practice, with particular specialisms in civil fraud, asset recovery, insolvency, international arbitration and employment.

He has particular experience of heavy High Court trial work, having acted in several lengthy commercial chancery trials, and has considerable experience working with large teams of solicitors, foreign lawyers and experts. Tom appears in both courts and before arbitral tribunals at all levels, including under a variety of rules. He has extensive experience of appellate advocacy, particularly in the Privy Council, in which he has many constitutional, human rights and public law reported cases.

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.

Sara Ibrahim

Sara's practice encompasses a mix of employment and discrimination law alongside professional negligence and commercial litigation. She is well equipped to deal with cases that raise a number of issues that span these areas such as employment claims in an educational context. She has been listed as a leading junior for professional negligence in Legal 500 since 2017.

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.

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.

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).

Julia Lowis

Julia acts in a wide range of civil, commercial and public law matters, with a particular focus on international human rights and refugee law, and in civil matters incorporating an international element. She graduated from Oxford University with a First Class degree in Law and French Law (including a Licence from Pantheon-Assas University) and then obtained an Mst with distinction in International Human Rights Law from Oxford University. Julia has appeared as junior counsel in the Privy Council and Court of Appeal, and regularly appears as sole counsel in the County Court, High Court, Upper Tribunal and First-Tier Tribunal. She is a member of the Equality and Human Rights Commission's preferred panel of counsel.

Hannah Fry

Hannah regularly acts in trials, interlocutory hearings and drafts pleadings in claims concerning travel law and the Package Travel Regulations. This includes personal injury suffered abroad, holiday sickness claims, misrepresentation claims, jurisdictional and conflict of law issues. She regularly represents various airlines in passenger claims for compensation under the EU Denied Boarding Regulations (EC Regulation 261/2004), the Montreal Convention and claims concerning discrimination.

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.

Samuel McNeil

Samuel started pupillage in October 2019 and became a tenant in October 2020. Samuel studied history at the School of Oriental and African Studies and St Antony's College, Oxford before studying the GDL and BPTC in London as a Lincoln's Inn scholar. He has an interest in all of Chambers' core practice areas. Samuel worked with several pro bono initiatives during his studies, including assisting litigants in person with the City University Company Insolvency scheme and working as a representative with the Free Representation Unit.

Adam Riley

Adam commenced pupillage in October 2020. He studied history at the University of Sheffield, graduating at the top of his year, after which he worked in social policy and the charity sector. Adam then completed the GDL and BPTC at the University of Law. During his legal studies he worked in civil liberties at Hodge, Jones and Allen LLP, in addition to volunteering with Liberty. Adam also represented numerous individuals pro bono at the First-tier (social security) Tribunal with the FRU, Z2K, and latterly as a legal advisor at the UCL Centre for Access to Justice. He also chaired the RebLaw conference 2017-18, then the largest student-led conference dedicated to public interest law.

What will change in UK equality and employment law as a result of Brexit?

For the past 40 years, EU law has shaped and, on occasion, fundamentally altered UK equality and employment rights. In 2010, the Equality Act 2010 was passed. This mirrored and implemented the four major EU Equal Treatment Directives bringing together all related UK anti-discrimination laws into a single act that was intended to promote fairness and equal opportunities for everyone in the UK.

Under the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020, until the end of the implementation period on 31 December 2020, the UK remained bound by almost all EU law, including that which is relevant to the Equality Act. In this article we examine the impact of Brexit on UK equality and employment rights, and how UK courts must interpret and apply CJEU case-law, which both pre-, and post-dates 1 January 2021.

Retained EU Law

S.2 of the Withdrawal Act provides that *"EU-derived domestic legislation"* continues to have effect in domestic law after 31 December 2020, unless and until amended. *"EU-derived domestic legislation"* is defined in s.1B(7) of the Withdrawal Act, which by reference to the European Communities Act 1972 includes legislation passed for the purpose of *"implementing any EU obligation of the United Kingdom"*. This, therefore, includes the Equality Act, which was passed to give effect to the UK's obligation to have equality legislation complying with the Framework Employment Directive.

Pre-Brexit CJEU Judgments

The Withdrawal Act makes detailed provision about the retention and status of EU law following Brexit. Ss. 5 and 6 of the Withdrawal Act in particular make provision regarding the application of the supremacy principle, and the interpretation of CJEU case law.

According to ss.5(2) and (3) of the Withdrawal Act, from 1 January 2021, insofar as the Equality Act is not amended by Parliament, then UK courts should normally continue to interpret the Equality Act in line with the relevant directives, and with CJEU decisions made before the end of 2020. This means that, ordinarily, UK courts would still be required to apply the Marleasing principle and to depart from the express wording of the Equality Act if necessary in order to comply with an EU Directive, or a CJEU decision pre-dating 1 January 2020. The exception to this is that, under s.6(5) of the Withdrawal Act, either the Supreme Court or the Court of Appeal may depart from a pre-2021 CJEU decision in the same circumstances as it would depart from its own decision. The test for this is that the Supreme Court will follow its own decisions, but will depart from its own decision "*when it appears right to do so*" (UKSC Practice Direction 3; Austin v Mayor and Burgesses of the London Borough of Southwark [2010] EWCA Civ 66 at [24]-[25]).

The freedom to depart from pre-Brexit CJEU judgments could lead to divergence with EU equality and employment laws in the future. However, this is subject to the UK's non-regression commitment in the EU-UK Trade and Cooperation Agreement 2020 not to weaken or reduce the level of employment rights in place as of 31 December 2020, in a manner affecting trade or investment.

Post-2021 EU and domestic law

Post-2021, the impact of EU law on the interpretation of the Equality Act is less clear. The relevant provisions are in s.6 of the Withdrawal Act, which provides in s.6(1) that UK courts will not be bound by CJEU decisions made after 1 January 2021, and cannot refer any matter to the CJEU from this date. However, s.6(2) goes on to state that a court or tribunal "*may have regard*" to anything done on or after 1 January 2021 by the CJEU or the EU "*so far as it is relevant to any matter before the court or tribunal.*" There is no indication as to how far judges should go when applying this provision, seemingly giving domestic courts the ability to determine what weight to attach to post-2021 CJEU decisions. Both Lord Neuberger and Lady Hale have warned that this (ironically, given the intent of Brexit), shifts a policy role from Parliament onto the courts, and have called for greater clarity on what judges should be doing in this situation.

From 1 January 2021, the British Parliament is entitled to amend the Equality Act without regard to EU law, albeit subject to the EU-UK Trade and Cooperation Agreement 2020. Under s.5(3) of the Withdrawal Act, any such amendments made to domestic law are not subject to interpretation in accordance with EU law, unless this would be consistent with the purpose of the modification.

The future

What Brexit will bring for equality and employment rights in the UK in exact terms is unknown. What we do know, is that in many cases, the UK has developed equality and employment rights that exceed the current EU minimum. Accordingly, we think it unlikely that the government will make any significant changes in the immediate future. Some changes could, however, be made in the months ahead to existing EU derived employment legislation such as the Working Time Regulations and TUPE. As to the former, now that the UK is no longer bound by the Working Time Directive, there is scope to clarify the vexed question of how to calculate holiday pay. And as to the latter, now that the

Acquired Rights Directive no longer applies, changes may be introduced to make it easier for employers to change terms and conditions of employment following a TUPE transfer.

Tom Poole QC & Julia Lowis

tompoole@3harecourt.com
julia.lowis@3harecourt.com

Mutual recognition and enforcement of insolvencies in Europe post-Brexit

31 December 2020 marked the end of the transitional period, agreed as part of the 2019 Withdrawal Agreement, in which the effect of EU membership continued to apply in and to the UK. As the 2020 EU-UK Trade and Cooperation Agreement made no provision for continued recognition of, or co-operation in, insolvency and restructuring proceedings across the EU, The Insolvency (Amendment) (EU Exit) Regulations 2019 came into force and repealed the vast majority of relevant EU law.

The EU Insolvency Regulation ('the EUIR')[1] will continue to apply to "main"[2] proceedings opened in an EU member state or the UK on or before 11pm on 31 December 2020, and any related "secondary" proceedings[3]. However, from 1 January 2021, the law of the UK and that of individual EU member states shall apply to new insolvency proceedings for the purposes of recognition and enforcement cross-border.

The Recast Brussels Regulation (No.1215/2012) also no longer applies between the UK and EU meaning the enforcement of civil judgments, including in relation to UK schemes of arrangement (which are not considered 'insolvency proceedings') as they are not – in the strict sense – insolvency proceedings and are arguably more akin to general civil proceedings.

The change brought about by Brexit represents a seismic change in the way that insolvency proceedings with cross-border assets and

[1] No.2015/848.
[2] Defined as proceedings in the courts of the state in which the debtor's main interests lie.
[3] As defined in Chapter II of Reg.2015/848.

interests between the UK and EU are dealt with. For proceedings commenced after 1 January, gone are the EUIR's provisions for automatic recognition of UK insolvency proceedings and enforcement safeguards in EU member states. Crucially, the English law moratorium preventing the commencement of new civil proceedings against a debtor will no longer be given automatic effect in EU member states meaning a greater risk of parallel proceedings.

This article sets out in outline how insolvency and restructuring proceedings are likely to be treated as between EU countries and the UK, first for officeholders seeking recognition and/or enforcement of EU proceedings in the UK, and second for officeholders seeking the same in respect of UK proceedings in EU member states.

Recognition and enforcement of EU proceedings in the UK

Perhaps bizarrely the EUIR has been retained in UK law in substantially amended form[4]; the only provisions preserved being the jurisdiction of the UK courts to open insolvency proceedings in relation to debtors who have their centre of main interests ("COMI")[5] in the UK. Of course such provisions existed in UK law absent the Retained EUIR, however, the position is confirmed post-Brexit that insolvency proceedings may still be opened in the jurisdiction where the debtor has its COMI in the UK although, as stated above, those proceedings will no longer benefit from any automatic recognition in the EU.

The principal legislation now governing insolvency issues between EU and Great Britain[6] is the Cross-Border Insolvency Regulations 2006 ('the 2006 Regs')[7], introduced by section 14 of the Insolvency Act 2000 to give effect to the Model Law adopted in 1997 by the United Nations Commission on International Trade Law ("UNCITRAL")[8].

Regulation 2 of the 2006 Regulations provides that the Model Law shall have the force of law in Great Britain in the form set out in Sch.1 and provides that in interpreting the Model Law the courts can have regard to other documents including the Guide to Enactment and Interpretation of the Model Law published by UNCITRAL.

The Model Law sets out the procedure where assistance is sought from a British court:

(a) by a foreign court or a representative in connection with foreign proceedings;
(b) by a foreign state in connection with proceedings conducted under British insolvency law;
(c) where there are concurrent British and foreign proceedings concerning the same debtor; and/or
(d) where foreign creditors or other interested persons have an interest in

[4] Pursuant to the UK Insolvency (Amendment) (EU Exit) Regulations 2019.
[5] A corporation's COMI is presumed to be its place of incorporation, unless the contrary is proven: Art.3(1), EUIR.
[6] Northern Ireland has its own, very similar, legislation in the form of the Cross-Border Insolvency Regulations (Northern Ireland) 2007/115.
[7] SI 2006/1030.
[8] UNCITRAL is a subsidiary body of the UN General Assembly responsible for helping to facilitate international trade and investment.

commencing or participating in British insolvency proceedings.[9]

Where a foreign insolvency proceeding is recognised in the UK as a "main proceeding", UK civil proceedings against the debtor are stayed and the foreign insolvency practitioner may be entrusted with the administration or realisation of all or part of the debtor's estate which is located in the UK. A variety of powers then exist under the Insolvency Act 1986 for UK courts to assist a foreign court which has jurisdiction over the main proceeding. The provisions on fraudulent and wrongful trading (ss.212-4) and the setting aside of transactions at an undervalue (s.238) can be applied against foreign parties on request from a foreign court. Foreign insolvency practitioners can also require the examination of a foreign director of an English company under s.133 and the production of documents located abroad under s.236.

One drawback for foreign debtors, however, is the English common law principle known as the "Gibbs principle"[10] which provides that only an English court may discharge debt arising under English law, even if that debt has first been discharged in a foreign insolvency proceeding. Recent judgments of the English courts have gone further to hold that the Model Law in the 2006 Regulations offers only procedural relief such that judgments entered against parties who do not submit to the foreign jurisdiction are invalid[11], and that any relief granted to foreign representatives seeking enforcement under the Model Law must first be correspondingly permitted as a matter of substantive English law[12]. This principle previously lacked significance in relation to UK–EU insolvencies due to the EUIR, which required the UK to recognise the substantive effect of EU insolvency proceedings. The application of the principle to EU proceedings undoubtedly means an increase in time and costs.

Debtors with proceedings in the Republic of Ireland[13] may be able to side-step the Gibbs principle by relying on section 426 of the Insolvency Act 1986 which provides that a UK court asked for assistance from an Irish court has the power, upon specific request from the Irish court, to apply either the relevant UK insolvency law or Irish insolvency law to matters falling within the UK court's jurisdiction. Examples of the use of section 426 powers are UK courts making administration orders over foreign companies and applying company voluntary arrangements to foreign companies (despite such a procedure not existing in the foreign jurisdiction).

[9] 2006 Regulations, Schedule 1, Chapter I, Article 1.
[10] *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* [1890] QB 399, at 399-400 (Eng.)

[11] *Rubin v Eurofinance S.A.* [2012] UKSC 46.
[12] See the first instance and Court of Appeal judgments in *Bakshiyeva (Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russion & Ors* [2018] EWHC 59 (Ch) and [2018] EWCA Civ 2802).

[13] For the purpose of section 426, the relevant countries/territories are currently: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, the Channel Islands (Jersey, Guernsey, Alderney, Sark, and Herm), Falkland Islands, Gibraltar, Hong Kong, Isle of Man, Malaysia, Montserrat, New Zealand, the Republic of Ireland, South Africa, Saint Helena, Turks and Caicos Islands, Tuvalu and the British Virgin Islands.

Recognition and enforcement of UK proceedings in the EU

The immediate impact of the loss of automatic recognition which existed under the EUIR is that UK officeholders will need to have UK proceedings recognised in individual EU member states and/or open simultaneous local insolvency proceedings in those states.

Given that only four EU member states have adopted the UNCITRAL Model Law into their domestic laws (Greece, Poland, Romania and Slovenia[14]), procedures for UK officeholders to deal with assets in the jurisdictions of other EU member states will be dependent on each country's own approach to recognition and enforcement of foreign insolvency proceedings. The disapplication of the EUIR has thus undoubtedly made it harder for UK proceedings to gain recognition in EU member states and for UK officeholders to deal with assets located within the EU.

The UK Insolvency Service published updated guidance on 24 March 2021[15] on how UK proceedings might be recognised under the national law of each EU member state. In many EU jurisdictions, such as France and Italy, recognition will likely require a lengthy judicial recognition process, involving greater risks of parallel proceedings (with increased costs) and unequal treatment of differing creditor groups.

In relation to proceedings which are not considered to be formal UK insolvency proceedings16, such schemes of arrangement under the Companies Act 2006, it is important to note that they fell outside the scope of the EUIR such that recognition and enforcement of such mechanisms in EU member states was dealt with by the Brussels Regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Brussels Regime no longer applies to schemes of arrangement from 1 January 2021 onwards so other avenues of recognition have to be taken to give effect to English schemes in EU member states. [The article by X starting at page Y of this edition of the Quarterly explores the various avenues for recognition and enforcement of civil judgments].

In *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), Zacaroli J recently held that a restructuring plan[17] in respect of the well-known airline catering company was an insolvency proceeding within the definition found in the EUIR, meaning recognition and enforcement of such plans will be subject to the local laws of the applicable EU member states in the same way as UK administration, company voluntary arrangements, and liquidations.

Conclusion

The loss of a single, uniform regime for the coordination of insolvencies between the UK and

---

[14] No other EU member state has indicated an intention to enact the Model Law at the time of writing.

[15] https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states

[16] Those being administration, company voluntary arrangements and liquidation.

[17] Introduced by the new Part 26A of the Companies Act 2006.

EU member states has undoubtedly left UK officeholders facing a panoply of different rules and regulations when seeking recognition and/or enforcement of UK proceedings in the EU. There is thus likely to be a significant period of "bedding-in" during which recognition procedures in EU members states are tested and the most effective routes determined.

Whether there will be an increase in the appointment of joint liquidators remains to be seen. It is often a useful tool in cross-border insolvency proceedings when assets are located in a number of jurisdictions, though such appointments can lead to conflicting duties based on the respective laws in each jurisdiction and therefore in the short to medium term this option appears unlikely.

Given the UK market's wealth of experience of non-EU cross-border insolvencies, practitioners are well placed to meet the challenges presented by Brexit, despite the inevitable increase in costs and parallel proceedings such changes bring.

Christopher Loxton

christopherloxton@3harecourt.com

Jurisdiction and enforcement of judgments post-Brexit: considerations for travel law practitioners

Introduction

On Christmas Eve 2020, after a long period of tense negotiations, the UK and EU agreed a post-Brexit trade deal, the Trade and Cooperation Agreement ("TCA"). Soon after the agreement was reached the provisions of the TCA were incorporated into UK law through the European Union (Future Relationship) Act, on 31 December 2020.

The TCA provided a framework for judicial cooperation in criminal matters, but unfortunately the agreement is silent in respect of cooperation regarding jurisdiction and the enforcement of judgments in civil and commercial proceedings.

This article surveys the relevant pre- and post-Brexit landscape on issues of jurisdiction and enforcement, with a focus on matters of interest to travel law practitioners.

Jurisdiction: Pre-Brexit

The most significant EU instruments / Conventions relating to jurisdiction are:

- Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) – more commonly referred to as the Recast Brussels Regulation ("Brussels Recast");

- The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007, published in the Official Journal on 21 December 2007 (L339/3) –

more commonly referred to as the Lugano Convention 2007 ("Lugano"); and

- The 2005 Hague Convention on Choice of Court Agreements, which came into force on 1 October 2015 (this is not discussed in this article but is considered in this edition of the 3 Hare Court Travel Law Quarterly by Navjot Atwal and Samuel McNeil on page 31.

Lugano governs issues of jurisdiction and enforcement of judgments between the EU Member States and the European Free Trade Association ("EFTA") (other than Liechtenstein), namely, Iceland, Switzerland and Norway.

Brussels Recast, which replaced the 2001 Brussels Regulation, prescribes the bases on which Courts in EU Member States have jurisdiction to hear disputes, and makes provision for the (largely automatic) recognition and enforcement of judgments.

Brussels Recast additionally addressed the problem of the 'Italian torpedo' – a litigation tactic wherein a party to an exclusive jurisdiction agreement was able, under the previous 2001 Regulation, to inconvenience their opponent by commencing proceedings in a court other than that specified in the agreement which would then have priority as the court 'first seised'. Lugano, however, does not contain provisions which address the 'Italian torpedo' issue.

It is worth noting that Denmark has a standalone agreement with the EU which is broadly on the same terms as Brussels Recast.

As a Member State of the EU, the UK was subject to both Brussels Recast and Lugano.

Jurisdiction: the transition period (otherwise known as the implementation period)

Article 67(1)(a) of the UK-EU Withdrawal Agreement ("WA") provides that Brussels Recast applies to legal proceedings instituted before the end of the transition period (i.e. before 31 December 2020).

The WA does not provide similar transitional provision for Lugano. The UK has passed a statutory instrument providing that Lugano will apply to proceedings begun before the end of the implementation period but, given reciprocity is integral to Lugano, the UK cannot unilaterally dictate the approach of other Convention parties.

Jurisdiction: Post-Brexit

From 11pm on 31 December 2020, which marked the end of the transition period, both Brussels Recast and Lugano ceased to apply to the UK. At the time of writing the UK's application to join Lugano has not been approved by the EU. Even if its membership is approved there will be a three-month delay before it comes into force, unless all the contracting parties agree to waive this requirement.

In England & Wales, unless the case falls within the narrowly defined ambit of the Hague Convention, jurisdiction will depend primarily on the common law rules governing whether the defendant can be served with proceedings either within the jurisdiction or (with the court's permission) outside of the jurisdiction.

The relevant common law rules are to be found at Part 6 of the CPR. To obtain permission to serve **out** of the jurisdiction it must be shown that:

- There's a "good arguable case" that the claim falls within at least one of the jurisdictional gateways at paragraph 3.1 of Practice Direction (PD) 6B, which serves to establish a connection between the claim and the jurisdiction of England and Wales;
- There's a serious issue to be tried or a reasonable prospect of succeeding on the merits of the underlying claim; and
- That England and Wales is "clearly or distinctly the appropriate forum" and the court should exercise its discretion to give permission to serve proceedings out of the jurisdiction – see the judgment of Lord Collins of Mapesbury in AK Investment CJSC v Kyrgz Mobile Tel Ltd [2011] UKPC 7.

The scope of the tort gateway for jurisdiction in CPR PD 6B was considered by the Court of Appeal in FS Cairo (Nile Plaza) LLC v Brownlie [2020] EWCA Civ 996 ("Brownlie 2). Following the obiter comments of the majority in Brownlie 1 [2017] UKSC 80, the majority of the Court of Appeal held that the gateway 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. An in-depth analysis of the Brownlie litigation featured in the Autumn edition of the 3 Hare Court Travel Law quarterly and can be found here. The judgment of the Court of Appeal in Brownlie 2 was appealed to the Supreme Court. The hearing took place on 13 – 14 January 2021, and judgment is awaited.

The following is a non-exhaustive list of relevant points which may be useful for practitioners to consider when preparing arguments on appropriate forum:

- The applicable law.
- Whether liability in dispute. If not, it is more likely that the Court will accept that England and Wales is the appropriate forum for a claimant domiciled in England and Wales – see Stylianou v Toyoshima [2013] EWHC 2188 (QB).
- Difficulties that the claimant might encounter travelling to other possible jurisdictions.
- The location of relevant witnesses.
- The local language of the other suggested forum.
- Whether reliance can be placed on video conferencing or electronic disclosure.
- The disadvantages, if any, of the foreign jurisdiction. Issues such as funding, the probity of the judicial process, difficulties for parties and witnesses and other evidential issues may be relevant.

Defendants who wish to dispute the jurisdiction of the English court must bear in mind the strict provisions for doing so as set out at CPR Part 11, in particular the time limit for making such an application 14 days after filing an acknowledgement of service (indicating an intention to dispute jurisdiction).

Enforcement: Pre-Brexit

Brussels Recast and Lugano provided the pre-Brexit framework for mutual recognition and enforcement of judgments between EU member states. Regulation (EC) No 805/2004 made provision for the European Enforcement Order ("EEO") regime for the speedy and inexpensive enforcement of uncontested money judgments across the EU.

In accordance with Article 67(2)(a) of the WA, Brussels Recast continues to apply to the enforcement of judgments given in proceedings

which began before the end of the implementation period. The position regarding Lugano enforcement provisions is unclear. It will only be possible to continue to use the EEO regime where an EEO certificate was applied for before the end of the implementation period.

Enforcement: Post-Brexit

The multilateral Brussels Recast, Lugano and EEO regimes do not apply to proceedings instituted after 31 December 2020. The UK has acceded to the Hague Convention, which generally requires any judgment granted by the Court specified in an exclusive jurisdiction clause to be recognised and enforced in other contracting states, more detail on which is provided here. Beyond this, recognition and enforcement of UK judgments are governed by the national rules of the Member State in which recognition and enforcement is sought.

Bilateral treaties between the UK and other States

Before exploring the application of national rules, it is worth noting that parties seeking to enforce a UK judgment in an EU27 state can potentially rely on bilateral treaties with specific EU member states. In particular, the UK has recently concluded a bilateral treaty with Norway.

The status of the old pre-EU bilateral enforcement treaties is, however, less certain. In brief, the Brussels Treaty 1968 (which applied to 15 member states of the EU as at 2004) was never explicitly replaced or repealed. An argument could be made, therefore, that it has been revived following the UK's departure from the EU and as a consequence the UK leaving both Brussels Recast and Lugano which had superseded the 1968 treaty. Even if this point could be argued, it would not provide a framework for enforcement in countries which joined the EU after 2004.

If it is possible to revert to Brussels 1968, then enforcement under these treaties will be subject to the Civil Jurisdiction and Judgment Act 1982 ("CJJA"). The CJJA provides a relatively cumbersome two-stage procedure for recognition and enforcement which does not require a party to issue a claim. Government guidance at the time of writing, which maintains that the relevant provisions of the 1968 Brussels Convention have been saved, is available here.

It might also be possible to rely on treaties enshrined in the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("FJ(RE)A"), which relates to bilateral treaties entered into between the UK and Austria, Belgium, France, Germany, Italy, Norway and the Netherlands (although N.B., as above, the UK and Norway have entered into an agreement to which reference should be made).

These treaties have not been repealed or replaced. As with Brussels 1968 they provide for a two-stage process to recognition and enforcement of judgments. Law Society guidance referring to the FJ(RE)(A) is available here.

A brief word on the national rules

As in the UK, many EU member states make provision in their national laws for the enforcement of foreign judgments, even in the absence of reciprocal international enforcement agreements being in place.

The disadvantage or advantage, depending on a party's standpoint, is that having to abide by the national laws of a specific State can result in parties having to navigate additional procedural hurdles, with attendant increases in time and cost

being incurred. Parties will likely have to seek advice from local experts. By way of example, in England and Wales the Courts must be presented with evidence that the judgment which a party seeks to enforce was:

- Final and conclusive;
- For an ascertainable amount of money;
- Made by a court with jurisdiction;
- Not obtained by fraud; and
- Not an afford to public policy or natural justice.

Each country will have their own national rules, some of which may be more or less onerous than those set out above.

A brief note on Arbitration

Although not commonly encountered in travel law claims, for sake of comprehensiveness it should be noted that the ready enforceability of arbitral awards under the New York Convention 1958 is unaffected by Brexit, as all EU members are contracting states in their own right.

Conclusion

It's reasonable to infer from the foregoing that future travel claims involving EU member states will be more complex post-Brexit than pre-Brexit. The potential requirement of having to navigate the applicability of pre-EU bilateral treaties, in addition to the advisability of obtaining local advice as to strategy, jurisdiction and enforcement of judgments, will increase the costs of successfully bringing or defending a claim. All of which underscores the importance of seeking specialist to ensure that claims are brought in the correct forum with the maximal chance of successfully enforcing any judgment. Finally, the increase in complexity will also afford parties opportunities to defend cross-border enforcement actions through strategic use of local procedural rules. It might be remarked that, somewhat ironically, the effect of the UK's departure from the EU will be to compel closer collaboration across borders than was previously the case.

Asela Wijeyaratne & Adam Riley

aselawijeyaratne@3harecourt.com

adamriley@3harecourt.com

The Effect of Brexit on UK Employment Law and Jurisdiction

As a substantial component of UK employment law is grounded in EU law,[18] Brexit has reshaped the landscape for both employers and employees. The transition period ended on 31 December 2020, at a time when the global COVID-19 pandemic has brought questions on the future of the workplace and the relationship between employer and employee to the forefront.[19] The question is where are we now and what are the likely implications going forward? This article examines the impact of Brexit on jurisdiction and the practical implications for employers and employees.

Jurisdiction

Where a particular employment relationship has a foreign element, a jurisdiction question may arise as to whether the claim can be brought before the UK courts. Prior to Brexit, jurisdiction was previously governed by the Brussels Recast Regulation (EU) No 1215/2012 and the Lugano Convention 2007. Pursuant to Article 67(1)(a) of the Withdrawal Agreement, the Brussels Recast Regulation applies to legal proceedings instituted before 31 December 2020 and from then, the Brussels regime will cease to apply in the UK. Although the UK has applied to accede to the Lugano Convention 2007, the permission

[18] Brexit: Employment Law, House of Commons Library Briefing Paper, 10 November 2016
[19] The future of work – is the office finished? The Economist, 12 September 2020: https://www.economist.com/leaders/2020/09/12/is-the-office-finished

of the EU is required to do so and this has not yet been provided.

What is the position post-Brexit? Issues relating to jurisdiction will now be determined under common law rules and the Hague Convention. Since the Hague Convention expressly excludes choice of law clauses in employment contracts, the common law rules will be most relevant.

Regulation 26 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479 added a new section 15C into the Civil Jurisdiction and Judgments Act 1982 (**"CIJA"**) which created a special jurisdictional regime for matters relating to individual employment contracts. This broadly replicates Articles 20 to 23 of the Brussels Recast Regulation in the domestic context with some variations. Section 15C CIJA does not aim to make provision for courts in EU member states to have jurisdiction over proceedings in employment disputes with a UK dimension.

Section 15C(2) CIJA provides that the employer may be sued by the employee in one of three places:

- The courts for the part of the UK where the employer is domiciled.
- The courts for the place in the UK where the employee *"habitually carries out the employee's work or last did so"*.
- Where the employee did not habitually work in one part of the UK or any one overseas country, in the courts for the place in the UK where the business which engaged the employee is or was situated.

Pursuant to section 15C(3) CIJA, the employer may only sue an employee domiciled in the UK in the part of the UK in which the employee is domiciled.

The COVID-19 pandemic has caused an increasing number of employees to work remotely in overseas countries, often as they may have family situated there, or it is their home nation. Also certain countries, such as Barbados, have offered a tempting one-year visa for working remotely which you can apply for online before you travel.[20]

With the shifting sands of what it means to "work from home", questions of jurisdiction, such as where the employee habitually carries out their work, will become particularly pertinent.

Case law in interpreting the Brussels Recast Regulation and the Brussels Regulation 2001 suggests that where an employee habitually carries out their work is determined by a number of factors.

In Weber v Universal Ogden Services Ltd: C-37/00 [2002] IRLR 365, the ECJ held that the relevant criterion for establishing the employee's habitual place of work was, having regard to the whole duration of employment, the place where he or she has worked the longest on the employer's business.

In Nogueira and others v Crewlink Ltd: C-168/16 [2018] I.C.R. 344, a case brought under the Brussels Regulation 2001, the ECJ held that a habitual place of work is to be identified taking into account the place (1) where the worker stated and ended his working days; (2) where the aircraft on board which he carried out his work were habitually based; (3) where he was made

[20] Coronavirus: What would working from home in Barbados really be like? BBC News, 26 July 2020: https://www.bbc.co.uk/news/world-latin-america-53385227

aware of the instructions communicated by his employer and where he organised his working day; (4) where he was contractually required to reside; (5) where an office made available by the employer was situated; and (6) which he must attend when he was unfit for work or in the event of disciplinary problems.

In each individual case involving an employment relationship with a foreign element, consideration should be given as to whether potential claims arising out of such relationship could be brought before the English courts. Consideration should be given at the outset of such relationship and regularly reviewed as the COVID-19 pandemic continues to reshape employment relationships.

Sara Ibrahim & Hannah Fry

saraibrahim@3harecourt.com

hannahfry@3harecourt.com

RTA claims and Brexit – motoring on

Unfortunately for the victims but happily for the lawyers, it is a sad fact of life that those resident in England or Wales are still going to have road traffic accidents whilst on trips to the EU. Now that the transition period has ended, what will happen to those unfortunate enough to have road traffic accidents in the EU in the future? And Brexit not only affects residents of England or Wales who are unlucky enough to be involved in accidents in the EU, but it also potentially impacts upon those involved in a domestic road traffic accident caused by a foreign driver who is insured by a foreign insurer.

Fourth directive claims

EU legislation and the interpretation of that legislation has had a significant impact in the motor insurance arena. One key protection, flowing initially from the Fourth Motor Insurance Directive, is the requirement of motor insurers to have in place claim representatives in each Member State. This allows an injured party involved in a road traffic accident in a Member State other that the one she normally resided in to pursue a claim in her 'home' Member State. This allows for the injured party to pursue the claim in her own language and according to procedures familiar to her. Of course, this also means the injured party can instruct a solicitor in their 'home' Member State, which is of particular importance when it comes to funding, for example.

In order to facilitate the right of an injured party to bring a claim in their 'home' Member State to was necessary to impose obligations on the claims representatives to respond to claims, deal with claims, settle claims and deal with any litigation arising from such claims. Those obligations are set out in the Sixth Motor Insurance Directive (Directive 2009/103/EC). The directive does not seek to confer jurisdiction on the 'home' court in question, however it does require Member States to provide a direct right of action against a motor insurer.

The end of the transition period saw the termination of the requirement for motor insurers

in the EU27 to have claims representatives in the UK who could deal with claims and accept service of proceedings. Likewise, UK motor insurers are no longer required to have claims representatives in the Member States of the EU27. Therefore, there is no longer any automatic entitlement of an English or Welsh injured party to have their claim considered by a claims representative in the UK.

It is possible that claims representatives will be retained by EU insurers to deal with claims. However the longevity of such an arrangement will surely depend on whether the UK successfully accedes to the Lugano Convention. If there is no such accession, then the retention of claims representatives to process claims made after the end of the transition period is deeply unattractive. This because the issue of jurisdiction of the courts of England and Wales will not be straightforward. The better approach in such circumstances might be to simply rely on a UK contact on an ad hoc basis to deal with administration, with overall control of the claim retained by the insurer itself.

Claims against mib

European law requires the establishment of a compensation body and the MIB, in the UK, fulfils that function. The compensation body is required to compensate a victim of a road traffic accident which occurred in an EEA state where the vehicle which caused the accident was uninsured or unidentified. There is a mechanism whereby the MIB is reimbursed. However, at the heart of the system is reciprocity.

Also, the compensation body is fixed with liability to compensate an injured party where a motor insurer has failed to appoint a claims representative as required or where the claims representative has failed to provide a reasoned reply to the claim within 3 months.

The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 provided causes of action for injured parties in each of the circumstances set out above, however the 2003 Regulations have been revoked from the end of the transition period. The Motor Vehicles (Compulsory Insurance) (Amendment etc) (EU Exit) Regulations 2019 (the Regulation) frees the MIB from the duty to satisfy such claims as the compensation body. Therefore, claims against the MIB for uninsured accidents overseas in such circumstances are not possible.

Green card claims

The Green Card system exists to facilitate cross border traffic within the states who are party to the system and to ensure that victims of road traffic accidents caused by a visiting motorist are adequately protected. The aim is to ensure a victim or injured party is not prejudiced by the fact that a visiting motorist rather than a domestic motorist was involved in their road traffic accident. Whilst the Green Card system is strongly influenced by European Union legislation, it predates the Directives by some way, and the UK's separation from the EU does not impact on the operation of the Green Card system within the UK from a claims perspective.

The Internal Regulations exist to ensure the proper functioning of the Green Card system – they set out the rules by which the system operates. Under the Internal Regulations the National Insurers' Bureau of the place where the accident occurred assumes ultimate responsibility for ensuring handling and settlement of claims occurring in their locality. In the UK, this obligation falls upon the MIB. It is that Bureau that is ultimately responsible for payments due in respect of any claim, though there is a mechanism for obtaining

reimbursement from the National Insurers' Bureau of the place where the vehicle which caused the accident is normally based.

The National Insurers' Bureau of the place where the accident occurs retains complete control of claims to ensure that the same are handled in accordance with the relevant legal and regulatory provisions applicable in the country of accident. The Bureau must do so in the best interests of the insurer who issued the Green Card or policy of insurance. The Bureau has delegated authority to settle claims amicably and to accept service of legal proceedings.

The Bureau may, pursuant to Article 4.1 of the Internal Regulations, approve a correspondent to act on behalf of an insurer in the country for which that Bureau is responsible. There is no automatic right that permits an insurer to have a correspondent of its choosing, the Bureau concerned has complete autonomy to approve or not approve a correspondent. The Bureau is empowered to determine the conditions upon which approval is granted. Although the Bureau has a wide discretion, it must have regard to national law and any regulatory provisions when considering a request for approval. For example, national law may require certain conditions as to solvency of the correspondent or might allow only a particular class of bodies to act as correspondents.

Once a correspondent is approved then the correspondent effectively discharges the Bureau's duties. Article 4.4 of the Internal Regulations provides that:

> **"The correspondent shall handle all claims in conformity with any legal or regulatory provisions applicable in the country of accident relating to liability, compensation of injured parties and compulsory motor insurance, in the name of the bureau that has approved it and on behalf of the insurer that requested its approval, arising out of accidents occurring in that country involving vehicles insured by the insurer that requested its approval"**.

It is clear from the Internal Regulations that the correspondent is subject to the same duty as the Bureau in respect of handling claims. This ensures that the introduction of correspondents does not weaken the position of victims. Article 4.5 of the Internal Regulations makes clear that the Bureau will recognise an approved correspondent **"as exclusively competent to handle and settle claims in the name of the bureau and on behalf of the insurer that requested its approval."** The Bureau will inform injured parties that this is the case and will forward notifications of claims on to the correspondent. Article 3.1 of the Internal Regulations requires the Bureau to promptly pass on notification of any claims to a correspondent. The Bureau does retain the right to **"any time and without any obligation to justify its decision, take over the handling and settlement of a claim from a correspondent"**. In short, Brexit does not affect an injured party's right to make a claim using the Green Card system. The MIB may on occasion accept service on behalf of the insurer/driver, however, it is still necessary to sue the foreign insurer and/or the foreign driver and establish the claim in the normal way.

Conclusion

The end of the transition period has brought a number of difficulties for injured parties and their advisors. The chief amongst them is that claims not presented prior to the end of the transition period are not going to benefit from being handled under the procedure first established by the Fourth Motor Insurance Directive. It might be

that if the UK accedes to the Lugano Convention then EU motor insurers take a more pragmatic approach and elect to use UK claims handlers to deal with what previously were referred to as Fourth Directive claims. It is unlikely that they will agree to be bound the strictures of the Fourth Directive procedure, however it would be helpful to claimants to have a point of contact in the UK. Likewise, EU motor insurers might better be able to manage their indemnity spend through the use of UK claims handlers who are familiar above all else with the necessary rules of procedure and evidence.

The MIB is attempting to agree reciprocal agreements with EEA states to facilitate the exchange of information that will be needed so that a claim can be made in the country where the accident has occurred. There are two discrete agreements, one related to claims made where a vehicle is insured and another that deals with claims made where the at fault vehicle is uninsured and untraced. Whilst Spain and Italy have not signed either of these agreements their Guarantee Funds have confirmed that that they will continue to compensate UK road traffic accident victims. France has yet to confirm its position. This is especially concerning because of the significant numbers of UK tourists to France in 'normal', non-Covid times.
In terms of injured parties making claims under the Green Card system there is no change. It is of note that EU motor insurers are not free to decline to have any representation in the UK to deal with claims falling under the Green Card system.

The direct right of action against a motor insurer pursuant to the European Communities (Rights against Insurers) Regulations 2002 remains intact, albeit in a slightly modified form.

Michael Nkrumah

michaelnkrumah@3harecourt.com

'Naw rrivederci Roma' - *Choice of Law after Brexit*

Readers who worked out the Italo-Scottish pun in the headline may wish to stop here for, as far as choice of law and the United Kingdom are concerned, they already know it is not goodbye, goodbye to Rome.

Rather, it is almost as you were. While other parts of the international private law edifice have changed considerably on account of Brexit (as can be read about elsewhere in these pages) Britain's choice in respect of choice of law has been one of continuity: the reason is that the Rome I and Rome II Regulations have now become part of UK domestic law (*mutatis mutandis,* we might say, had we not let go of the Latin[21]).

A new framework

The mechanism by which this has been achieved is the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (No. 834 of 2019) – 'the 2019 Exit Regulations'. So far so simple – if not exactly sonorous - and simple it generally remains. But the nature of the Withdrawal Agreement, the Trade and Cooperation Agreement, and the re-designating of the United Kingdom's choice of law framework to a basis in secondary legislation has nevertheless resulted in some limited change and created the prospect, if remote, of more considerable change coming from the bench.

[21] As put by Professors Crawford and Carruthers in *International Private Law - A Scots Perspective*

More of the same

Continuity first. The courts of the UK jurisdictions will continue to apply the rules set out in Rome I and Rome II to determine the proper law of the contract and the law governing non-contractual obligations.

For Rome I, that means the basic rule remains a contract will be governed by the law chosen by the parties, whether or not that is the law of an EU member state (articles 2 and 3(1)). Further, as the European Union has not amended the Regulation, it can be seen that Brexit does change the obligation upon courts in EU Member States to uphold the parties' choice of English law (or other law) either, consistent with the terms of that instrument.

As for Rome II, and again consistently with the remainder of that instrument, the standard position for choice of law is still that the law applicable to non-contractual obligations will be the law of the country in which the damage occurs or is likely to occur. Once again, the European Union has not made amendment and so courts in the UK's jurisdictions and in the Member States are in lock step.

Neither Regulation depends on reciprocity in respect of choice of law, and so EU Member State courts can be expected generally to continue to uphold choice of law clauses in respect of both instruments consistent with their terms. As to the rest of the applicable regime, it is almost exactly the same as if we had never left.

Limited change

Regulation 10 and Regulation 11 of the 2019 Exit Regulations are where the detailed changes are to be found for Rome I and Rome II respectively. Most of these are technical and limited (e.g. 'Community Law' becomes 'retained EU law') and are matters that arise naturally from the United Kingdom's change in status. Others are substantive, if relatively minor, exceptions which likewise derive from the UK's changed status; for example those in relation to particular type of insurance contracts (e.g. r10(7) of the 2019 Exit Regulations), and the rules concerning the concept of non-derogable mandatory provisions.

Future change? The European Union (Withdrawal) Act 2018 ('the Withdrawal Act')

Notoriously, for Brexit to mean Brexit Her Majesty's (various) exit-negotiating Governments determined upon a course whereby the Court of Justice of the European Union ('CJEU') would no longer bind domestic courts. This has been given effect in two ways.

The first relates to CJEU decisions made before 31 December 2020 ('exit day'). Here the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 have provided that the Court of Appeal[22] may depart from such CJEU authority.

The second is by the Withdrawal Act itself which provides that UK courts and tribunals are not bound by any principles laid down or any

[22] In England and Wales, and in Northern Ireland. In Scotland the power is given to the Court of Session.

decisions made by the CJEU after exit day although they may have 'regard' to them. In other words, our judges can do their own thing.

All the same, the better view is that ruptures – and certainly significant ruptures – between the interpretation of Rome I and Rome II by the court of the United Kingdom and those of the CJEU are likely to be limited. After all, as the entire panel of the Supreme Court in *Wood v Capita Insurance Services Limited*[23] put it in 2017: 'One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity…' This is an attraction English judges can be expected to continue to guard with considerable care.

However – and there is a potentially weighty however lingering in the background – the courts in England and Wales, at least, have not always happily followed where the CJEU ultimately determined they must go. In this regard, readers may in particular have in mind the *Owusu v Jackson* decision on *forum non conveniens*[24]

Of course, whether our judges will choose to strike out on a course of their own in interpreting Rome I and Rome II may seem a remote question, but the potential that they one day might will nonetheless need to be considered in litigation and, in time, may very well prove to be one of considerable importance. For now, however, the Brexit position with respect to choice of law is reassuringly Roman.

Daniel Black

danielblack@3harecourt.com

[23] [2017] UKSC 24, para [15] per Lord Hodge with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreed)

[24] (Case C-281/02) [2005] ECR I-1383

The Hague Convention on Choice of Court Agreements following Brexit.

Introduction

The Hague Convention on Choice of Court Agreements ("the Hague Convention") was concluded in June 2005. It provides a framework of rules relating to exclusive jurisdiction agreements in civil and commercial matters, particularly in respect of international commercial contracts, and the subsequent recognition and enforcement of a judgment given by a court of a contracting state designated in a choice of court agreement.

The position before Brexit

Following the deposit of the EU's instrument of approval in June 2015, the Hague Convention entered into force on 1 October 2015 in all EU member states (except Denmark, where it entered force on 1 September 2018)[25].

The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015, which came into force on 1 October 2015, made supplementary and consequential amendments to CPR 6 and the Civil Jurisdiction and Judgments Act 1982 to facilitate the entry into force of the Hague Convention in the UK by virtue of its status as a member state.

The Hague Convention was largely inapplicable between EU member states because the Recast Brussels Regulation[26] took priority on matters of jurisdiction and enforcement of judgments in civil and commercial matters.

[25] Other contracting states include Singapore, Mexico and Montenegro. The USA, China and Ukraine have signed the Convention but not ratified or acceded to it, and it therefore does not apply in those countries. A complete and updated list of signatories and ratifying states can be found at https://www.hcch.net/en/home.

[26] Regulation (EU) No 1215/2012

Brexit

As part of the Brexit process, the UK was bound by the Hague Convention during the UK-EU transition period (which ended at 11.00pm (UK time) on 31 December 2020).

In preparation for Brexit, the UK took the following steps regarding its accession to the Hague Convention with effect from the end of the transition period:

(1) The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018[27] were implemented. These contained provisions required to implement the Hague Convention in the UK following the UK's accession in its own right.

(2) On 28 September 2020, the UK deposited an instrument of accession which took effect at the end of the transition period.

(3) The Private International Law (Implementation of Agreements) Act 2020 was enacted, which (among other things) implements the Hague Convention in domestic law.

The position following Brexit

Under the Withdrawal Agreement, the Recast Brussels Regulation rules on jurisdiction as between EU member states will continue to apply in respect of the UK to proceedings which began before the end of the implementation period, but not after.

Following the end of the implementation period, the Hague Convention will therefore assume an important role with respect to jurisdiction as between the UK and the remaining EU member states in cases where parties have made an exclusive choice of court agreement.

There are a number of differences between the Recast Brussels Regulation and the Hague Convention. In particular, the Hague Convention does not apply to non-exclusive clauses.

This state of affairs has given rise to two principal areas of concern.

The first area - Asymmetric agreements

An asymmetric jurisdictional agreement (that is, a clause which does not confer the same jurisdictional rights on both parties to a contract) is commonly found in international financial agreements, where the lender is provided with a range of courts in which to sue, but the borrower is limited to the courts of a single state.

In these situations, the chosen jurisdiction is only exclusive as regards proceedings brought by one party, typically the borrower in a banking transaction.

Such clauses are controversial and there are concerns regarding their validity in some jurisdictions. There is also the question of whether asymmetric agreements fall within the

[27] SI 2018/1124

scope of the Hague Convention at all, because they do not provide an exclusive jurisdiction.

This latter point has been considered, obiter, in several recent English decisions. Recently, in Etihad Airways PJSC v Flother [2020] EWCA Civ 1707 the Court of Appeal was prepared to proceed on the basis (without deciding the point) that the Hague Convention should probably be interpreted as not applying to asymmetric clauses.

However, the point is still very much open and may well be subject to further litigation.

The second area – the effective date of entry into force for the UK

There is an ongoing debate about whether the UK being party to the Hague Convention (from 1 January 2021) provides protection in relation to exclusive jurisdiction clauses which were entered before that date but since 1 October 2015, while the UK was a party to the Hague Convention or treated as such by way of its former EU membership, or whether the Hague Convention will only assist in relation to exclusive jurisdiction clauses agreed on or after 1 January 2021.

This has created uncertainty for parties with choice of court agreements.

Conclusion

The uncertain state of affairs, in respect of the two areas of concern highlight above, means that it would be prudent for parties to contracts with exclusive jurisdiction clauses (particular those concluded between October 2015 to the end of 2020) to review their contracts so as to benefit from the UK's recent accession to the Hague Convention.

Navjot Atwal and Samuel McNeil

navjotatwal@3harecourt.com

samuelmcneil@3harecourt.com

The impact of the EU-UK Trade and Cooperation Agreement on aviation

The UK exited the EU on 31 January 2020, with the transition period in the Withdrawal Agreement ending on 31 December 2020. Whilst all EU Treaties and Directives therefore no longer apply in relation to the UK, all EU regulations continue to do so by virtue of the European Union (Withdrawal) Act 2018, to the extent that they are not modified or revoked by regulations under that Act.

On 24 December 2020, the European Commission and the UK agreed the Trade and Cooperation Agreement ('the TCA') which sets out the basis for the future EU and UK relationship in relation to trade, transport, and a number of other areas such as fishing and criminal law enforcement.
This article summarises what impact the TCA has, and is likely to have, on air transport services between the UK and the EU. A longer version of this article can be found here.

The section entitled 'Heading Two: Aviation'[28] runs to just 25 pages out of a total of 1246[29], with the largest sub-section concerning, perhaps unsurprisingly, aviation safety. The section also has an annex entitled 'Annex Avsaf-1: Airworthiness and Environment Certification'[30], running to 34 pages.

With regards to aviation, the TCA, in summary, provides for:

- the continuation of air transport services between the UK and the EU;
- the removal of direct access for UK air carriers to EU internal routes and vice-versa;

[28] Found in Part Two: Heading Two, p.221 onwards.
[29] Including all Annexes and Protocols therein.
[30] P.786 onwards.

- limitations on ownership and control of airlines designated to operate UK-EU routes;
- a framework air safety agreement for mutual recognition of certain certificates, licences, and approvals; and
- the establishment of a Specialised Committee on Air Transport which has responsibility for (a) monitoring the liberalisation of ownership and control requirements for carriers; (b) monitoring the removal of barriers that distort fair competition and opportunities; (c) drafting and adopting further aviation safety uniformity.

The TCA represents the end of over 25 years of UK participation in the EU single aviation market, the European Common Aviation Area (ECCA), with all nine freedoms that entailed for UK and EU carriers flying in and out of the two territories. UK and EU carriers are now treated as third country operators in each other's airspace and are granted under Article 3:

(a) first and second freedom rights[31] – to fly across one party's[32] territory without landing and to make stops in that party's territory for non-traffic purposes (e.g. refuelling or maintenance); and
(b) third and fourth freedom rights – to make stops in one party's territory to provide scheduled and non-scheduled air transport services between any points in its territory and any points in the other party's territory.

The TCA explicitly prohibits fifth to ninth freedom rights, in other words, the ability of UK carriers to operate services on routes which are within individual EU Member States (cabotage) or between Member States, or from a Member State to a third country, or, conversely, for EU carriers to operate services on routes which are within the UK or to third country from/to the UK. However, individual EU Member States are permitted to enter into bilateral arrangements with the UK to grant each other's respective carriers fifth freedom flights for cargo operators.

Article 4 allows for UK and EU carriers to act either as marketing carrier or operating carrier in codeshare or blocked space arrangements with the other party's carriers, or with third country carriers which have the necessary rights to participate in such arrangements (i.e. the required permissions, certificates, and licences to operate in one party's territory).

In relation to the ownership and control of carriers, Article 6 requires:

(1) An EU carrier to have a principal place of business in the EU, hold an EASA Operating Licence (OL) and Air Operator Certificate (AOC), and be majority owned and effectively controlled by EU or European Free Trade Association (EFTA) nationals.
(2) An UK carrier to have a principal place of business in the UK, hold an EASA OL and AOC at the end of the Brexit transition period, and be majority owned and

[31] Such terms are not found in the TCA itself but are commonly established rights in international law (following the Chicago Convention 1944) and in EU law.

[32] References to 'a party' and 'Parties' in this article is to the EU and UK respectively and both together.

effectively controlled by UK and/or EU or EFTA nationals.

(3) Any UK carriers not holding an EASA OL and AOC at the end of the Brexit transition period, to have a principal place of business in the UK, hold a CAA OL and AOC, and be majority owned and effectively controlled by UK nationals.

Article 8 makes provision for the EU or UK to take action against a carrier of the other party if that carrier fails to meet the operating conditions applicable to them; such action including the revocation or suspension of operating licences. However, the Article also sets out specified notification, consultation, and dispute resolution requirements if one party takes remedial action against the carrier of another, culminating in the potential for the parties to enter into arbitration proceedings if a dispute persists (the procedure for which is set out in Part Six of the TCA)[33].

Article 9 sets out the EU and the UK's agreement for the newly-formed Specialised Committee on Air Transport (hereafter 'the Specialised Committee') to examine options for reciprocal liberalisation of ownership and control within 12 months of the TCA coming into force (on 1 January 2021), and thereafter at any time following a request to do so from one of the parties.

Article 11 obliges the EU and UK to each eliminate all forms of discrimination which would adversely affect the fair and equal opportunity of each party's carriers to compete in exercising their rights to provide air transport services. Again, if a dispute arises between the parties, the same notification, consultation, and dispute resolution requirements as set out in Article 8 will apply (including the potential for arbitration).

Article 12 sets out the parties' agreement to cooperate in removing obstacles to 'doing business' for their air carriers where such obstacles "*may hamper commercial operations, distort competition or affect equal opportunities to compete*", with progress to be monitored by the Specialised Committee.

Air transport between the EU and UK is also subject to the TCA's general level playing field requirements[34] for open and fair competition which, in the field of air transport, is likely to mirror in practice the principles and measures set out in Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding fair competition in international air transport.

Article 13 permits each party's carriers to establish offices and facilities in the territory of the other party as is necessary to provide air transport services "*without restrictions or discrimination*", subject to safety and security regulations, and the availability of space if located at an airport. Where employment authorisations are required for personnel at such offices, the parties agree to process applications for such authorisations expeditiously, "*subject to the relevant laws and regulations*".

Article 13 also places limitation on the operating rights of air carriers using leased aircraft, only

[33] Page 383 onwards.

[34] Set out in the TCA's Preamble and Title XI of Part Two: Trade, Transport, Fisheries and other arrangements.

allowing wet leasing with crew from a carrier(s) of the other party, or a foreign carrier(s), if justified on the basis of exceptional needs, seasonal capacity needs, or operational difficulties of the lessee and the lease does not exceed the duration strictly necessary to fulfil those needs or difficulties.

Article 15 obliges the parties to each only impose user charges on the other's carriers for the use of air navigation and air traffic control that are cost-related, non-discriminatory, and no less favourable than the most favourable terms available to the other's carriers. Any other user charges must be "*just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users*".

Article 18 provides for mutual recognition of certificates of airworthiness, certificates of competency, and licences issued or validated by the EU or UK's competent authorities, provided that they were issued or validated pursuant to and in conformity with the relevant international standards established under the Chicago Convention. If either party considers that minimum safety standards are not being met, either as a result of consultations or ramp inspections (both processes being set out in Article 18), the concerned party can refuse, revoke, suspend, impose conditions on or limit its operating authorisations or technical permissions, or the operations of the other party's air carriers. Article 18 lays out the same notification, consultation, and dispute resolution requirements as set out in Articles 8 and 11 (including arbitration provisions).

A separate section of the TCA, Title II: Aviation Safety, provides a mechanism by which the parties may cooperate on a number of subjects related to aviation safety, including airworthiness, environmental, design, and MRO certificates; personnel licensing and training; air traffic management and air navigation services; and any other areas subject to the Annexes of the Chicago Convention. Such cooperation is to be established by way of annexes adopted by the Specialised Committee, covering each subject in detail.

Article 19 sets out that the EU and UK shall provide each other, upon request, with all necessary assistance to address any threats to the security of civil aviation (including aircraft seizure and endangerment of aircraft, passengers, crew, airports and air navigation facilities), and to endeavour to cooperate on aviation security matters to the highest extent (including exchanging information on threats and risks, sharing of best practices, and cooperating on the technical development and recognition of aviation security standards).

Article 20 gives rise to obligations on the parties, their competent authorities and air navigation service providers, to co-operate to "*enhance the safe and efficient functioning of air traffic*" in Europe, including through data and performance information exchange and the modernisation of air traffic management programmes.

Article 24 stipulates that the whole section ('Title') concerning aviation may be suspended in accordance with Article INST.24 [Temporary remedies] or terminated in accordance with Article 25. In either case, specific notice periods are provided for. If the whole of the TCA is terminated (in accordance with Article FINPROV.8 [Termination]) the whole of the aviation section will continue to apply until the end of the IATA traffic season in progress on the date

Part Three of the TCA, which deals with law enforcement and judicial co-operation in criminal matters, contains an entire Title (Title III) on transfer and processing of passenger name

record (PNR) data, regulating the basis on which EU carriers may transmit PNR data to the UK competent authorities[35], and how those UK authorities must handle that data. The obligations are not reciprocal, i.e. Title III does not set out how UK carriers may transmit PNR data to EU competent authorities, and how those EU authorities must handle that data.

Conclusion

In light of the TCA, Brexit represents a new, albeit familiar legal and regulatory environment for the UK's aviation industry. With the retention of the vast majority of EU law, and the UK's continued participation in other international treaties (such as the Chicago and Montreal Conventions), many aspects of UK aviation and travel law will look virtually identical to that of EU law, at least in the short to medium term.

The TCA makes clear that any regulatory divergence that the UK might wish to pursue will come at a substantial cost in losing access rights to the EU market. If divergence in aviation safety standards and requirements does take place, operators will be forced to adopt dual-compliance models in order to maintain full market access across both jurisdictions.

It is clear that Brexit imbues the CAA with substantially more regulatory responsibilities that when the UK was part of the EU. Whether the organisation can rise to the challenge will depend to a large degree on more funding and resources being made available to it.

What impact the Specialised Committee on Air Transport will have – in its role in the potential liberalisation of carrier ownership and control requirements, the removal of barriers to fair competition and opportunities, and the crafting of greater aviation safety uniformity – remains to be seen.

From a lawyer's perspective, the two most significant changes Brexit represents are:

(1) that the UK is no longer obligated to adhere to EU law (including CJEU judgments) made after 31 December 2020[36]; and
(2) that the TCA creates no rights for individuals or corporate entities, and therefore no provision of the agreement can be enforced by anyone save the UK and EU authorities themselves[37]. The time when UK claimants could enforce their rights under EU law before domestic courts and/or the CJEU will become just a memory. Only time will tell as to whether a body of jurisprudence will develop in EU-UK arbitration proceedings which lawyers can draw on[38].

Christopher Loxton

christopherloxton@3harecourt.com

[35] The identities of the authorities are not actually spelt out in the TCA.
[36] Though UK courts should "have regard to" future CJEU decisions: s.6(2), European Union (Withdrawal) Act 2018.
[37] Article COMPROV.16: Private rights.
[38] Rulings and decisions being made publicly available by the parties: Article INST.29(5).

Which direction now for direct claims?

Our older readers may remember 13 December 2007, the day the European Court of Justice (as it was then known) delivered judgment in FBTO Schadeverzekeringen NV v Jack Odenbreit (Case C-463/06). Although met by European neighbours largely with a Gallic shrug, as saying nothing they did not already know, it might fairly be said to be the single largest contributor to the explosion of the travel law industry in this country over the last 13 years. There was no longer any room for discussion – an English claimant injured elsewhere in the EU could bring her claim in England as long as she could find an insurer directly liable to her for the accident. Courtesy of the Fourth and Fifth Motor Directives, that was the case for every road accident. Although a rare beast in English law, many European jurisdictions also provided for a direct right of action against a liability insurer in a wider range of cases. Lawyers eagerly leapt on this new avenue – particularly in those heady pre-Rome II days where the victim could argue for assessment of her damages on the generally more generous English principles. Hooray, we thought, isn't this marvellous. The industry flourished. Careers were made. Foreign insurers quailed. Then came Brexit...

Whereas the provisions of the Brussels jurisdiction regime in relation to consumer contracts and employment contracts have been expressly retained without the need to seek permission from the Court to serve out of the jurisdiction (see CPR 6.33 in its most recent iteration), those in matters relating to insurance have not. Accordingly, if a claimant wishes to pursue an insurer directly, it will be necessary to seek permission in advance of service. This means following the well-trodden route of CPR 6.37 and accompanying practice direction.

"(1) An application for permission under rule 6.36 must set out –

(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;

(b) that the claimant believes that the claim has a reasonable prospect of success; and

(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.

(2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant

a real issue which it is reasonable for the court to try.

(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim…" (emphasis added)

Grounds

These are often referred to as the gateways, and one of them has to be identified before the insurer can be brought in. They are not mutually exclusive (unlike the European position where something is in tort if it is not in contract).

One possibility is para 3.1(3) of the Practice Direction:

"A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

So if the claimant is able to bring the claim against the other party to a consumer contract, for example, this might give a gateway to pursuing the other party's insurer. There are sometimes good reasons for wanting both to be sued in the same forum: maybe the insurance policy is capped at a level beneath the proper value of the claim; maybe the insurer has an argument to avoid cover and the wrongdoer has assets worth pursuing; maybe the wrongdoer has limited assets and the only realistic source of compensation is an insurance policy. As long as the claimant is able to establish a proper basis for pursuing the wrongdoer as the anchor (namely, a real issue which it is reasonable for the court to try), this may be an available gateway.

Thought should be given in advance, however, as to the possible costs consequences for a claimant pursuing two defendants in order to get at one (the insurer), particularly in the light of Cartwright v Venduct [2018] EWCA Civ 1654.

Other possibilities include the contractual gateway and the tort gateway (the latter considered in the article by Asela Wijeyaratne and Adam Riley elsewhere in this edition). English law does not take a wholly consistent approach to characterising a direct right of action. In Maher & Maher v Groupama [2010] 1 WLR 1564 Moore-Bick LJ regarded the establishment of a direct right to be a matter determined by the law of the contract (a view from which he stepped back in Hoteles Piñero Canarias SL v Keefe [2015] EWCA Civ 598). In numerous other case it has been regarded as 'quasi-contractual', and therefore a claim in contract to which the contractual gateway can apply (subject to questions as to whether the foreign law relied on gives a victim a right to enforce the insurance contract as opposed to an independent right of recovery). Accordingly courts have in the past analysed Finnish law, Spanish law or Turkish law, for example, and considered in each case whether the direct right relied on is effectively one to enforce the contract (Through Transport Mutual Insurance Association (Eurasia) Limited v New India Assurance Association Company Limited [2004] EWCA Civ 1598, The London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State (many, many related hearings, one of which at [2013] EWHC 3188 (Comm), The Yusuf Cepnioglu [2016] EWCA Civ 386). In such a case it may be subject to any constraints of the policy such as the requirement to arbitrate or the existence of a 'pay to be paid' clause on the basis that if you seek to enforce a contractual right, you have to accept

that the claim should be handled in terms as required by that contract on which your claim depends.

This is an unlikely gateway to assist in most overseas personal injury claims because it is open where the contract was made here, is governed by English law, contains an English jurisdiction clause, or the breach was committed here. The likelihood of the foreign insurers' policy being governed by English law or being made in England is slim. It happens, of course – not for nothing is Lloyds of London recognised worldwide.

What about the tort gateway, relying on the damage sustained by the English victim within the jurisdiction? Whilst we await the outcome of the latest (and maybe even the last?) instalment of the Brownlie saga, is it actually going to matter? Both Wink v Croatio Osiguranje DD [2013] EWHC 1118 (QB) and Stylianou v Toyoshima and Suncorp Metway Insurance Limited [2013] EWHC 2188 (QB) seems to have proceeded on an acceptance (at least where the direct claim was coupled to a claim against the tortfeasor) that the tort gateway could be prayed in aid against a foreign insurer by the victim of a tort, irrespective of whether her cause of action was properly to be regarded as a claim in tort. The Rome II Regulation (now retained law) expressly provides that a victim can bring a direct claim if either the law of the insurance contract or the law of the non-contractual obligation allow for it (see article 18). As confirmed by the CJEU in Prueller-Frey v Brodnig (Case C-240/14), article 18 is not a conflicts of law rule (despite appearing in a Regulation addressing conflicts of law). It merely makes it possible to maintain a direct claim where one of the laws (of the contract or of the tort) provides for the possibility. Presumably this only applies to whether a direct claim can be maintained, without seeking to resolve every issue that might arise under a direct right of action by the law selected by the claimant. Certainly it is imprecisely drafted if it is intended to harmonise wholesale national rules relating to civil liability in this area.

But the availability of a direct claim under the law of the non-contractual obligation does not make the claim a claim in tort for the purposes of the jurisdictional gateway, particularly given the need to ensure consistency across all applications determined under CPR 6.37 (or does it?) Dickinson considered in 2007 that the entry into force of Rome II removed the need to characterise the claim or issue, although the Court of Appeal (possibly) took a different approach in the Yusuf Cepnioglu (a direct claim against an insurer arising out of the grounding of a cargo vessel and loss of cargo off Mykonos in 2014, long after the entry into force of Rome II).

Will English courts close the door on a claimant fitting her direct claim through the tort gateway (depending on Brownlie) on the basis that the claim is properly to be regarded in English law as contractual? How far does article 18 assist in jurisdictional terms? Someone is going to have to find out...

Forum

Many of us thought for a long time that the English courts would probably take a tolerably lenient approach to forum to allow claimants to continue to bring those claims against insurers they have enjoyed for the last 13 years. I (now) think that is wishful thinking. Particularly in the light of the comments of several of the JSC in the first Brownlie appeal to the Supreme Court, I would not be at all surprised to see a little battening down of the hatches, now forum conveniens is once more an available tool for limiting the reach of the English courts where EU-domiciled insurers are concerned.

The first step is going to be to work out what is actually in dispute – in VTB Capital plc v Nutritek

[2013] 2 AC 337 the emphasis was on what remained to be decided in the English forum, see paragraphs 36, 192 and 193. So that could prompt a defendant insurer to admit nothing pre-action in order to maintain the argument (in some cases, the illusion) that more remains in dispute than is actually the case.

A two-stage approach is often then appropriate.

(1) Can the defendant "*not only demonstrate that England is not the appropriate forum, but also establish that another identified jurisdiction is clearly and distinctly more appropriate*"; and
(2) If so, can the claimant show that there are, nonetheless, special circumstances that exist by reason of which the trial should nevertheless take place in England and Wales? (Harty v Sabre International [2011] EWHC 852 (QB)).

Determination of the appropriate forum is case-specific, and it would be unwise to assume that all (or no) direct claims will be able to make good an argument that England is 'the' proper place in which to bring the claim. Even the factors often held to be relevant can go both ways. In one case, the modest value may tend in favour of allowing the claim to proceed here, particularly if much of the evidence has already been obtained here; in another the high value/severity of the injuries may suggest that it is convenient to try the claim where the victim lives, as in Stylianou. Availability of documents and witnesses may be regarded as more or less neutral, particularly in a remote post-Covid world, or may be regarded as conclusively tending towards the overseas court particularly if liability is in dispute. Choice of law may be regarded by some judges as determinative, especially if a claimant needs to undergo a medico-legal examination by a 'foreign' doctor; others may be more sanguine given the increasing familiarity English courts have in assessing personal injury compensation by reference to foreign principles. The availability of funding for a claim overseas may be relevant in some cases; the occasionally high levels of English costs may be regarded as tilting in favour of the overseas jurisdiction in others, having regard to the administration of justice. And how about enforcement, in our post-Brexit times, now that the UK is a third party state – some judges may regard difficulty in enforcing an English judgment as a factor in favour of the claim proceeding in that foreign jurisdiction; others may regard it as a factor suggesting the foreign jurisdiction is an unreliable source of justice.

And since forum conveniens is always a matter of the Court's discretion, it will be very difficult to appeal.

So the door is neither wide open nor closed shut on direct claims against insurers. Which is excellent news in these otherwise dark times – litigation awaits!

Katherine Deal QC

katherinedealqc@3harecourt.com

Temple
London EC4Y 7BJ

Telephone: +44 (0)20 7415 7800
Email: clerks@3harecourt.com
DX: 212: London – Chancery Lane

www.3harecourt.com