FORUM OF INSURANCE LAWYERS

Informing Progress - Shaping the Future

FOIL UPDATE December 2020

Update – Brexit and cross-border claims

Following the success of the roundtable event on this topic hosted by the FOIL Motor and EU Sector Focus Team, we are continuing with a project to keep FOIL members as up to date as possible in this potentially fast-moving area of law. 1 Chancery Lane have now provided two further guides, the first by **Conor Kennedy.**

IN BRIEF

Two related articles look at the current position with cross-border claims from 11.00 p.m. on 31 December and EU proposals for a reformed Motor Insurance Directive

Brexit Briefing 22 November 2020

Another Brexit deadline is looming. We may feel like we've seen and heard it all before. Retune to 29 March last year; then dial forwards to 12 April; adjust again to 31 October; tweak the focus a final time to 31 January 2020. At each point it was the same question – deal or no deal – and the same metaphor invariably followed – the cliff-edge. From a civil claims' perspective, at each juncture there was a raft of new proceedings with cross-border issues being lodged in advance of the deadlines, with claimants and their legal representatives keen to avail themselves of any protection and legal certainty which the cases might inherit by virtue of being issued while the UK was still a Member State. Every time - first with extensions and then, finally, with the securing of the Withdrawal Agreement - hindsight proved such an approach to have been unnecessary: the precipice on each occasion was avoided.

We are now faced with a fresh deadline – 11pm on 31 December 2020 – with the same noises being made. Veteran litigators still licking their wounds from all the various satellite issues they have had to deal with in the past 21 months from cases in various stages of preparedness being

lodged before deadlines one, two, three and four are now wearily dusting off their Defences and preparing to go once more unto the breach.

In all the sound and fury of the negotiations, a litigator could be forgiven for thinking this plot looks familiar: we are currently in the suspense-building phase where it looks for all the world as if things will go one way, only for that expectation to be turned on its head in a grand denouement and a deal secured. Why would claimants' representatives expose clients to all the risks of premature issue if ultimately 1 January 2021 is another moment of "wolf" being called with nothing lupine in sight? Setting aside whether Aesop's famous fable is intended to have a moral for the villagers – should we always be ready to believe in the possibility of the threat? – there are two reasons why the threatened danger is superlatively real in this instance: first, even if a deal is secured, it is not going to cover most civil judicial cooperation; second, even if it did, the cliff-edge has already been driven over - you might not have seen it in the press but 30th September 2020 was the date of precipitation (more below).

To put it in unequivocal terms – no matter what happens between the UK and EU in the next few weeks, no matter whether a deal is reached or not, the UK Courts will not enjoy the benefit of a large part of the European framework for civil judicial cooperation on 1 January 2021.

This writing was on the wall from as late as Autumn 2017 when the EU clocked up their first success of process, by splitting the UK Article 50 withdrawal negotiations into distinct phases. Their position was that the UK and EU future relationship could and would not be fleshed out simultaneously with the terms of the so-called divorce. This meant that when it came to spring/summer 2018 and the negotiating teams were dealing with what eventually became Part 3 of the Withdrawal Agreement, when the UK officials proposed that the text should variously designate the green pastures of a new order of cooperation rather than winding down to nothing, the EU could blithely say that this was a question for the future relationship and not for the divorce; legal certainty required that the Withdrawal Agreement was premised on the assumption of zero cooperation in the future. In a trice, a whole raft of potential negotiating capital was lost.

The UK had to keep its own aspirations away from the board rooms of the Berlaymont, and was confined to setting them out in the Government's Chequers White Paper of July 2018 – remember that? In that paper, the UK tactic was to point at all the areas where the EU already worked with Third Countries in various spheres; in the area of civil judicial cooperation the UK highlighted the Lugano Convention. Amazingly to think now, the push in that paper was <u>not only</u> to participate in Lugano but also to go further and negotiate a <u>new</u> bilateral agreement to cover the subsequent developments in EU law since Lugano (i.e. Brussels I recast). Even setting aside the difficulties domestically the then Prime Minister had with trying to convince her own cabinet of the Chequers proposals, it was clear on the EU side that civil judicial cooperation was seen as a single market issue and cherry picking or preserving the 'exact same benefits' was a big no. By the time it came to putting together the final draft of the political declaration in November 2018, the original 350-word UK proposal on civil judicial cooperation was agreed at 16 words: "*The Parties will explore options for judicial cooperation in matrimonial, parental responsibility and other related matters*" – i.e. family only. From then on, judicial cooperation in non-family civil matters has not been on the floor of the negotiating chambers: they are simply not talking about it at the Frost-Barnier level.

The 'deal' being discussed now, and which is currently being stalled by level playing field issues and (as ever) fish, is therefore not coming to the rescue of civil litigators fearing now to gaze at the spectre of January 2021.

What does that ghost look like? Well, some words of comfort. Rome I and Rome II on applicable law in contractual and non-contractual disputes are part of the 'snapshot' of EU law which is being incorporated into domestic law at the conclusion of the transition period at the turn of the year, by

virtue of the European Union (Withdrawal) Act 2018. On 29 March 2019, the Government laid before Parliament the facilitating statutory instrument, The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, intended to correct various deficiencies in the retained EU law in this area. The UK can implement these laws unilaterally, despite exiting the EU regulatory framework, and indeed in spite of withdrawing from the Rome Convention, as it is ultimately a matter for the UK what law their courts apply. In fact, there will continue to be reciprocity in any event as EU Member States who continue to be bound by the EU Regulations as a matter of EU law would still apply English, Scottish or Northern Irish law in matters on which the Rome provisions bite in their own courts (as the Rome Regulations require EU Member States to apply the law of Third Countries in relevant disputes).

Second, the UK will have the benefit of the Hague Convention 2005 on Choice of Court Agreements. The 2005 Convention came into force on 1 October 2015, with the EU being a party on behalf of all its Member States (except, as ever, Denmark who are a party in their own right). During the transition period, the UK has maintained an odd status of being covered by the 2005 Convention without being in the EU, but that of course will come to an end on 31 December of this year. The UK originally deposited a notice of accession back in January of 2019 (in case of 'no deal') which was retracted on a deal being secured. A new notice of accession was deposited in September of this year, in time for the UK to join the Convention in its own right from 1 January 2021. The 2005 Convention provides rules for jurisdiction and on recognition and enforcement of foreign judgments, but ultimately is no substitute for the Brussels regime. In particular, Article 2 of the Convention sets out various 'Exclusions from Scope' which importantly include "*the carriage of passengers and goods*", *"claims for personal injury*", *"anti-trust (competition) matters*", and "*tort or delict claims for damage to tangible property that do not arise from a contractual relationship*".

As far as domestic implementation is concerned, the Private International Law (Implementation of Agreements) Bill, which is currently going through the 'ping pong' phase between the Houses of Parliament, will provide the necessary statutory basis for the provisions of the Convention to apply. There is some contention at the moment between the Houses relating to the scope of secondary powers for future International Agreements not mentioned on the face of the Act, but provided the Bill does not fall, the provisions relating to Hague 2005 are unaffected.

There is an interesting point of dispute re Hague 2005 which remains between the EU and the UK and no doubt will find itself the subject of litigation in the coming months or years. The EU's view, set out in a preparedness notice on 27 August of this year, is that when the UK formally accedes to Hague 2005 in 2021 in its own right, the Treaty will apply from that date onwards and will not apply retrospectively to choice of court clauses in contracts between 2015 and 2021 which only applied in the UK by virtue of the EU regime; the UK's view is the converse and that such contracts will be covered. This is a space to watch.

What then about jurisdiction and enforcement issues for cases covered not covered by Hague 2005? Well, there is a further Convention in the Hague suite, the Hague Judgments Convention 2019. This Convention importantly will cover matters such as personal injury expressly excluded from the earlier iteration, the aim being to create a system not unlike the New York Convention in terms of enforceability and predictability of arbitral awards. If the UK and the EU were both to sign up to the Convention (which neither has yet done), this would then cover off a sizeable piece of civil judicial cooperation. This could be several years down the line.

The remaining sizeable piece is of course the Brussels regime. Unlike the Rome Regulations, the Brussels provisions are necessarily reciprocal and the UK would not be able to secure in EU Member States the enforcement of its courts' judgments, nor would it be able to prevent parallel and

potentially conflicting proceedings being brought in a Member State where its own courts were seised of the matter.

What are the UK's options here? Well, the UK as a non-EEA country was never going to have the benefit of the EU Regulations themselves, but the next-best-thing to the Brussels regime is its international Convention precursor – the Lugano Convention which reflects the position prior to Brussels I recast (without for instance the *lis alibi pendens* provisions which neutralise the so-called 'Italian torpedo' tactic). As above, the UK has made no secret of its desire to join Lugano, but the key difference between this convention and the Hague suite is that approval is needed by the existing parties, one of whom is the EU. And the EU have not (yet) agreed to the UK's accession. Even if they were to give such agreement, then the Convention will still not apply immediately, as there is a three-month lead in period to being in force. For a seamless transition from Brussels to Lugano, the accession needed to be confirmed by 30th September of this year and that boat has sailed.

The UK Government official line is still that it remains confident of a deal on accession to Lugano, even if it means there is a short gap between the end of the transition period and the UK's participation in the Convention becoming effective. For my part, I am not so sure. As above, the EU have always viewed this as a single market issue, with the only non-EU/EEA country participating in Lugano being Switzerland, which we well know the EU are not keen to hold up as an paradigm of EU-Third Country relationships. Even in areas where it is arguable that there it would be in the EU's interests to allow the UK to participate, the EU has remained consistently intransigent on its red line relating to division of freedoms and benefiting from single market provisions from the outside. In this sphere, as with financial services (and the Galileo program), it appears the Commission have accepted there may well be negative consequences in hindering the operation of markets where the UK is (if not dominant) a key player but that it is nevertheless better to let the Brexit chips fall as they may, and re-assess in the coming months and years.

So, broadly speaking, it will be back to common law for the rules on jurisdiction and enforcement of judgments in areas not covered by Hague 2005, albeit with a little help in some spheres from some secondary legislation – the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 for instance amongst other things, unilaterally allows UK domiciled consumers to continue to enjoy the benefits of bringing proceedings in their home courts. Otherwise, there will invariably be more applications for service outside of the jurisdiction; more arguments about *forum non conveniens* (which will become a beefed-up weapon in a foreign Defendant's armoury); more parallel proceedings and more risk of irreconcilable judgments; no ability to secure CJEU injunctions against proceedings continuing simultaneously in the EU; no automatic ability to enforce judgments in the EU and foreign law advice will be needed for foreign enforcement.

In a best-case scenario, from a UK perspective, this will merely constitute a gap, and by the springtime, the UK will have at least reached the shores of Lugano. As above, perhaps cynicized by the tribulations of Phase 1, I am less optimistic, but in the meantime have no doubt that solicitors representing a claimant in a claim with a foreign element will now be (or certainly ought to be) frantically issuing claims. Defendants should gird themselves to withstand an avalanche of half-, or even wholly un-, prepared proceedings, all of which will have to be dealt with at the same time and in the context of the Covid lockdowns and restrictions of the day.

The second article is by **Tom Yarrow.**

EU Proposals for a Reformed Motor Insurance Directive

Since the green card system was introduced in 1949, European Governments have legislated to ensure insurance coverage for the victims of road traffic accidents. Since then, beginning in the early 1970s, a number of Motor Insurance Directives were introduced. The most recent 6th Motor Insurance Directives (Directive: 2009/103/EC) consolidates the earlier five, and there is now a proposal for a further iteration.

The first six directives cumulatively sought to achieve four clear policy objectives:

a) that Member States should ensure that civil liability in respect of the use of vehicles is covered by insurance;
b) That information be provided to the road traffic accident victim promptly (and such information be provided by the national insurers' bureau or compensation body);
c) That there be expedition, rather than delay, in the response to and, if appropriate, settlement of claims presented by road traffic accident victims; and
d) that there be availability of redress within the Member State of residence of the road traffic accident victim.

Perhaps inevitably, the piecemeal development of this area of regulation has generated an increasing volume of litigation and case law, not all of it wholly easy to reconcile. Key difficulties have arisen in relation to

i) insolvent insurers (see ***Csonka v Magyar Allam*** C-409/11; [2014] 1 CMLR 14 (CJEU)) and ***Wigley-Foster v Wilson & MIB*** [2016] 1 WLR 4769 (CA)) where insolvency has led to either no adequate response or delay in responding;
ii) the scope of the requirement of compulsory insurance (see ***Vnuk*** C-162/13; [2016] RTR 10 (CJEU), where the court held that a tractor driven on a private farm fell within the scope of the requirement, and contrast with ***Rodrigues de Andrade*** C-514/16; [2018] 4 WLR 75 (CJEU) where the tort victim was killed by a defective stationary tractor which was being used to power a herbicide spray device, which the court held fell outside the scope of the requirement on the basis that the tractor was not being used *primarily as a means of transport* at the material time.

In 2016 an EU Commission work programme announced a revision of the present, consolidated, Motor Insurance Directive (2009/103/EC) and the Commission thereafter resolved to revise the legislation. The EU Parliament described the proposal as seeking to

> *"[clarify] the scope of the [consolidating] directive to ensure uniform interpretation of the obligation for motor third party liability insurance. It harmonises the minimum levels of compulsory cover for personal injury and material damage so as to ensure sufficient level of minimum protection of victims of motor vehicle accidents in the EU Member States, where currently differences exist."*

On 13 February 2019 the EU Parliament adopted a report on the matter and on 13 December 2019 the Council then published its position, but at present the consultation is ongoing. It appears clear, however, that the key objectives of the revision are:

a) to allow checks of insurance undertakings across EU Member States so as to address the problem of uninsured vehicles;
b) to designate an administrative body to provide compensation in the event of insurer insolvency (it being proposed that the compensation scheme in the EU Member State of residence of the RTA victim should provide compensation in the first instance, and this

compensation body then be reimbursed by the compensation scheme in the insolvent insurer's home EU Member State; and

c) to provide greater certainty as to the scope of the requirement that vehicles be insured.

There is some divergence as to the proposed timetable of implanting any reforms. The EU Parliament has proposed a 12-month transposition timetable, whereas the Council proposes that an amended directive be transposed/implemented 24 months after entry into force. In either case, any change will take effect after the UK has exited the transition/implementation period provided by the withdrawal agreement. The UK Government has already stated its intention to provide a degree of continuity in this area: see the Motor Vehicles (Compulsory Insurance) (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/551). Given the long history of international cooperation in this important area, which pre-dates the earliest origins of the EU, it seems likely that the revised Motor Insurance Directive (when in force and implemented) will continue to be of relevance in the UK, whatever the position on leaving the Brexit transition period after 31 December 2020.