FORUM OF INSURANCE LAWYERS

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Litigation in the Aftermath of Brexit

This event, held on 13 May 2021, was hosted by the FOIL EU SFT and led by **Sarah Crowther QC** of **Outer Temple** chambers and **Sarah Prager** of **1 Chancery Lane** chambers. This was a follow-on to a similar roundtable held in September 2020.

In introducing this event, FOIL Technical Director **Shirley Denyer** commented that while Brexit was now 'done' it continues to throw-up a raft of issues. Among those is cross-border litigation but, unlike some other areas, there is some certainty as to the current position, as would be outlined by the speakers.

Sarah Prager

What has not changed?

Quite a lot of EU law has been retained. The applicable law is still governed by Rome II on tortious claims. The effect of that is that the law of the place where the accident occurred is retained in most cases, but also Article 18 of Rome II is retained. That gives the direct right of action under either the law of the tort, or the law of the insurance contract. So, we are still looking at direct rights of action against insurers, even though under English law that is not done very much. A check needs to be made to ensure that a direct right of action is available: it probably will be in a RTA case but not necessarily under other insurance contracts.

Foreign insurers in particular may need to be reminded that English proceedings are still governed by English procedural rules and that may have costs implications (e.g., the costs consequences of Part 36). The

IN BRIEF

Two experts in the field looked, in particular, at the problems now facing claimants wishing to enforce judgments where proceedings were issued after Brexit day.

They also considered areas where EU law still plies to tortious claims; where it no longer applies; and the current position with *Vnuk*

distinction between substantive and procedural matters will become more important. This has already been seen in cases relating to the service of proceedings. It is possible that post-Brexit we may see more movement in the way in which the distinction between substantive and procedural matters is interpreted.

What has changed?

Recast Brussels applies only to claims issued prior to 1 January 2021 (and linked claims), with claims issued since Brexit day governed by common law rules.

Sarah Crowther QC

Prior to Brexit, a judgment obtained in (say) London could be enforced relatively easily in another EU jurisdiction and vice-versa, under the Brussels 1a regulation. That reciprocity no longer exists.

However, under Article 67 of the Withdrawal Agreement, an action commenced (i.e., proceedings instigated) before 1 January 2021 retains the benefit of the Brussels 1a system, however far into the future the judgment may be. This had led to a flurry of claims being issued just before Brexit. Some of those cases may not have been ready for issue, which is throwing up other problems now. The Withdrawal Agreement did not deal with the issue of what steps were needed to institute proceedings. This has not yet been the subject of judicial interpretation. The speaker's view was that for English proceedings, the issue of the claim would be sufficient, provided that the rules for service were subsequently complied with. There may, however, be alternative arguments and also issues around later amendments of the claim form, including the addition of parties. Again, the speaker's view was that Brussels 1a would probably apply to the whole claim, as it is difficult to see how the original claim could be caught but the amended part of the claim subjected to common law rules. The two sets of rules do not dove-tail in any way.

There is some uncertainty about how additional (Part 20) claims should be treated. Common sense suggests that they should be anchored to the original action and have the benefit of Brussels 1a but this may turn on the definition of proceedings under Article 67. It is to be hoped that a pragmatic approach will be adopted to enable both a main action and appropriate additional proceedings to be dealt with at the same time and under the same jurisdictional rules.

Proceedings issued on or after 1 January 2021

Common law rules apply and these are to be clarified by the Supreme Court (UKSC) in *Brownlie.*

In contract the rules are relatively generous in terms of jurisdiction for England and Wales but the tort gateway, which until now has been held relatively wide, is under attack. In *Brownlie* the claimant has come to the UKSC for the second time and even some eight years after proceedings were first served, the parties are still arguing over the right of the English courts to hear her claim, which arises from an accident in Egypt.

The claimant had been injured in a road traffic accident in which her husband and his daughter were killed and two other children injured. The claim was brought against Four Seasons, which had sold the claimant the excursion, a one-day jeep safari, during which the accident happened. After a first set of proceedings were aborted because the wrong party had been sued, the second set of proceedings has become focused on the tort gateway. Can it be said that the damage sustained by the claimant was suffered in England and Wales, as required by the tort gateway at the time? The argument for the claimant is that if an injury is sustained abroad but the consequences of that injury

are suffered in England, that must satisfy the requirements of the gateway. The defendant argues that the damage can only be the direct damage, not any indirect damage and that this approach sits with European law. The defendant therefore seeks a narrow interpretation of the gateway, to align with European law and that was the intention of Parliament when the rules were drafted.

If the claimant succeeds, it will be sufficient to establish the tort gateway that *some* of the damage is sustained in England or Wales.

The position at common law is that there are three stages for establishing jurisdiction. First, that the claimant has a reasonably arguable case. Secondly that the claimant meets the gateway. Thirdly, that the claimant can establish that England and Wales is a suitable venue for the dispute (the *forum non conveniens* test). This did not exist under the EU scheme and will front-load the debate about jurisdiction in personal injury claims arising in tort. There is also more doubt about whether or not jurisdiction will attach in any given case. The rules are likely to be refined over the next few years but in the meantime, early consideration will need to be given to the issue of jurisdiction and the merits of incurring the cost of arguing the point. While the suffering of damage within the jurisdiction may be a sufficient ground for arguing the point successfully, that does not mean that liability arguments may not also succeed. (It may be some time before any judgments become available, given that many claims were issued before 1 January 2021 and it seems that few claims have yet been issued since). There will be a period of uncertainty as to which cases the courts of England and Wales will be prepared to hear and a number of decisions will be needed before it can be seen if any broad principles emerge. Issues such as the location of witnesses; the cost of translation; documents; complexity of the applicable law; and what the main issues in the case are. The ultimate test is which court is *the* proper forum and not just *a* proper forum.

There was discussion about the extent to which the centre of gravity of the case should be viewed as the basis for determining jurisdiction. If, as in *Brownlie*, it was the damage suffered, might it be tactically better for a defendant not to concede liability, so as to leave that as the centre of gravity? It was agreed that such an approach might be sensible for defendants and indemnity arguments could be added to the mix.

In response to a comment by a delegate, the view was given that the English courts are probably not as nationalistic as they may have been (i.e., willing to be seised of a claim because the claimant was English) but where an English court *does* now take jurisdiction, there could be later problems with enforcement in the foreign jurisdiction. That would not be a good argument for a defendant contesting jurisdiction but it is something to be borne in mind. Views expressed by foreign courts in previous cases should be considered, e.g., the Greek courts' unhappiness over the level of costs in cases in England and Wales. The courts of England and Wales are more likely to look at practicalities, such as the difficulties faced by a severely injured claimant dealing with quantum only.

Service

With so many claims being issued just before the 31 December 2020 deadline, there are now issues as to service. The best option was always to issue and serve before Brexit day.

Service must now be affected on the defendant or nominated solicitors and *not* on UK handling agents. Service on UK handling agents is defective, will be set aside and the action struck out.

An example of a problem that can occur with proceedings issued before 31 December 2020 against (say) a Greek insurer is where service is then affected on solicitors who have *not* been nominated to accept service. Unless the claimant appreciates the error and that the purported service was not valid in time to correct the error (by serving on the insurer in Greece) the claim will be struck out.

The risks are compounded where proceedings were only issued on 31 December 2020 and only now (May 2021) is thought being given as to how to serve them. The courts are unlikely to be sympathetic towards applications to extend the life time of the claim form for the purposes of service, in circumstances where no steps have yet been taken to effect service. Once the original claim has been brought to an end, the claimant's only option is to start again, but under the common law rules. The courts of England and Wales will not then necessarily accept jurisdiction with potentially major costs consequences.

Defendants must also consider the rules carefully to see whether, in a given case, the claimant has not affected service in accordance with the rules. Foreign insurers may attempt to 'torpedo' English claimants by commencing actions in their home courts, something that started even before Brexit day. Different countries have different rules as to service and English claimants will not always get it right. Applications to challenge service are therefore on the increase and will become even more common.

With claimants making applications without notice to extend the time for service, there is a duty of candour as to what has been going on. There are examples in the case reports of that duty being breached and defendants should scrutinise with care the evidence relied on by the claimant in making the application. Where appropriate, the defendant must be ready to challenge the order made, particularly where the claimant has done little or nothing before the application was made or relies on an invalid reason for the delay. A point for defendants to make is that the extension potentially deprives the defendant of a jurisdictional defence.

Enforcement

Claims issued by 31 December 2020 may be enforced in Europe under the Recast Brussels mechanism but those issued after that date are not, as matters stand at present. Claimants must therefore consider the prospects of being able to enforce any judgment, even if liability is established. This throws the problem back onto the Lugano Convention, which the EU Commission has recommended that the UK should not be permitted to join. This leaves uncertainty as to whether the UK may be permitted to join at some later date; or will it be possible to conclude bilateral agreements? Bilateral agreements with member states are unlikely as jurisdictional issues fall under the competency of the EU. Resolving the problem has become a political one and may take several years.

Where a judgment has been obtained in proceedings issued post-Brexit, whether or not it can be enforced will depend on the law in the jurisdiction in question. This requires local law input, which for claimants may best be obtained at the beginning of the process. The questions are how the local court is likely to deal with a judgment of this type; how long the process may take; and the costs involved. By way of example, it is thought that it will be relatively easy to enforce an English judgment in the Netherlands but not in Spain.

Defendants will also wish to consider the enforceability of a judgment in any given case against them under the common law rules. It may be worth pointing out to the claimant the potential

problems they may face in enforcing all or certain parts of the judgment, even if obtained. (It is then open to the claimant to bring the claim in that jurisdiction).

The Hague Conventions offer little assistance, as they do not apply in tortious situations and only where both countries are signatories and there is a choice.

A delegate expressed the view that foreign insurers have probably not yet given a great deal of thought to what stance they will take on judgments. Some are adopting a wait and see attitude. The advice being given was that the insurers should deal with claims arising within their country in the way they would normally deal with them. Which court should be seised of jurisdiction did not yet appear to be an issue under detailed consideration.

Another delegate commented that the insurers' responses depended very much on which country they were from with Greek insurers resisting payment, with Spanish and French mutuals generally being happier to pay but baulking at costs.

Vnuk

The CJEU judgment in 2014 left any vehicle, on any terrain, subject to compulsory motor insurance, removing the limitation to use on roads or in public places. Use was also extended to all use consistent with it being a motor vehicle, regardless of that use.

Following a series of reviews in Europe, the trend seemed to be moving towards a definition that would have included both public and private spaces but with certain exceptions, such as motor sport and limited types of motorised equipment.

However, the UK government has now elected to 'bin' *Vnuk*, but without any clarification of what this meant. It is unclear what is intended in regard to roads in private ownership or other land not classified as a road. Conceivably, the government may simply leave the 1988 Road Traffic Act as it is. Alternatively, the government may pass new law, in alignment with Europe, provided it is close to what has been suggested most recently (*Vnuk '*lite').

There is an issue for the UK insurers of vehicles that are kept in an EU state and used there. If there is a divergence between UK and EU law, that may create complications for the insurer. Would the Green Card scheme continue to function if there was a divergence in the law? This is particularly acute in Ireland with vehicles crossing and recrossing the border.

There is clear evidence of the beginning of a divergence between UK motor law and the EU Motor Directives, which fell away for the UK after Brexit. This could well lead to a reduction in UK motor insurers' liability in cases which will no longer be read down in reliance on the Motor Directives. This also impacts on causes of action in cross-border claims.

It must be borne in mind, however, that until any new law is passed, UK case law decided after *Vnuk* remains binding. For the time being, it is not at all clear what are the government's intentions: remain aligned to EU law, or revert to the Road Traffic Act and reverse the post-*Vnuk* case law.

UK insurers will need to consider their policy wording where vehicles are being used in another EU jurisdiction.

The reason for diverging from the full impact of *Vnuk* is that it produces a forecast saving of £5b, or around £50 per motorist on their premiums. This does, however, include a substantial allowance for fraudulent claims, brought primarily in relation to accidents on private land.

In response to a question, it was confirmed that for limitation purposes, it is the date that a claim form is delivered to the court office that counts, not the date of issue. However, there is no reason why EU law on the institution of proceedings should align with this. A contrary view was that an English judge may take the view that there should be symmetry between the two situations, rather than having two rules and requiring that the claim for be stamped as issued. This may be one for the Court of Appeal in the future. A delegate with her claimant hat on preferred the second view, as with some courts the delay between filing and issue was several weeks. Another delegate believed this had been dealt with in the Withdrawal Agreement or a Practice Direction.

The point has now been verified by Sarah Prager who advises that under the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019. s.95(2):, a court is seised of proceedings **"***when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps the applicant was required to take to have service effected on the respondent."*

See also CPR PD7A Para. 5.1: **"***5.1 Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is 'brought' for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date***."**

So it's receipt that counts.