LITIGATING CROSS-BORDER ROAD TRAFFIC ACCIDENT CLAIMS

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What are we going to cover?

• When and where a claim can be brought for an overseas RTA.
• RTAs in the UK involving foreign registered vehicles.
• Applicable law and limitation periods.
• Assessing prospects of success and quantum.
• Service of proceedings.
• RTAs on package holidays.
WHEN AND WHERE A CLAIM CAN BE BROUGHT FOR AN OVERSEAS RTA
Overseas RTA – When can a claim be brought in England and Wales?

- Domicile of Claimant at the time of issue.
- RTA in EU Member state.
- RTA in Iceland, Norway or Switzerland.
- RTA anywhere else.
- RTAs involving foreign registered vehicles in the UK.
- Claims against the MIB.
RTAs in the EU
RTAs in the EU: Jurisdiction Rules

• RTA occurs in an EU Member State.

• Regulation 44/2001 – ‘Brussels 1’ – applied from cases issued on 01.03.2002.

• Replaced by Regulation 1215/2012 - ‘Brussels Recast’, ‘Brussels 1a’, ‘the Judgments Regulations (recast)’ – applies from cases issued on 10.01.2015.
RTAs in the EU: Jurisdiction Rules

• Art 4(1) – Defendant to be sued in Home Court.

• Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

• Art 7(2) – Place of the harm
  • in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.
  • “Harm” is construed narrowly.
Direct Rights of Action against the Motor Insurer


• All Member States are required to provide victim of RTA with direct right of action against insurer of person responsible.

• European Communities (Rights Against Insurers) Regulations 2002.
Brussels Regulation

Article 9 (Brussels 1(a) art 11).

1. An insurer domiciled in a Member State may be sued:
   (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled.

Article 11 (Brussels 1(a) art 13)

2. Articles 8, 9 and 10 [10, 11 and 12] shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.
FBTO Schadeverzekeringen NV v Jack Odenbreit (Case C-463/06)

The ECJ held

“...the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State”
Odenbreit – practical application

• Applies to actions brought against an insurer domiciled in EU Member State
• The direct action must be permitted under “national law”
• Clarified subsequently by Art 18 of Rome II
  • The applicable law of the insurance contract, OR
  • The law applicable to the non-contractual obligation i.e. the place where damage occurred.
• The Claimant has to be domiciled in England or Wales at the time of issue of proceedings in order to bring proceedings in the Courts of England & Wales.
Odenbreit – practical application

• A person injured in an RTA in a Member State in which he is not domiciled may therefore bring proceedings against the insurer of the responsible party in the Member State in which he is domiciled.

• Fourth (now Sixth) Motor Directive – obligation on Member States to provide direct right of action against insurer.

• Does not change Rome II, article 4 or Recital 33.

• Information as to foreign insurer, registered keeper, claims representative – Art 23 of Sixth Directive.
Correct pleadings are very important.

Foreign law must be pleaded – considered to be an issue of evidence/fact (Bianco v Bennett).

Advisable that the applicable enabling law is actually pleaded or at least referenced to.

Not enough to refer to just to Motor Directives.

Arguably not enough to just rely on Brussels Regulations / Art 18 Rome II.

European Communities (Rights Against Insurers) Regulations 2002 have no application.
Odenbreit – Pleadings

• Consequences of incorrect pleadings:
  • Challenge to jurisdiction.
  • Strike out for lack of cause of action.
• Amendment, addition/substitution applications (and additional cost).
• Try not to leave things until it’s too late...
• Nemeti and others v Sabre Insurance Co. Ltd [2013] EWCA Civ 1555
RTAS in Iceland, Norway or Switzerland
RTAs in Iceland, Norway or Switzerland

- The Lugano Convention applies.
- Non-EU EFTA countries (except Liechtenstein).
- Virtually identical to Brussels 1 (Regulation 44/2001) (not Recast Regulations).
- Includes identical provisions regarding insurance.
- Not bound by decisions of ECJ.
- Any reason not to use Odenbreit principles IF “national law” permits?
RTAs occurring outside the EU/EFTA
RTAs occurring outside EU/EEA

- Brussels 1a.
- D domiciled in England & Wales?
- Lugano Convention.
- Common law rules apply.
- Brownlie v Four Seasons Holdings [2015] EWCA Civ 665
- Restricted scope – where the harm occurred.
- Appeal to the Supreme Court will be heard this year.
- Amendment to 6BPD.3.1 (9)
- A claim is made in tort where – (a) damage was sustained, or will be sustained, within the jurisdiction.
RTAs involving foreign registered vehicles in the UK
RTAs involving foreign registered vehicles in the UK

- Can sue the tortfeasor in the part of the UK the harm was caused i.e. driver / employer.
- **Cannot rely on European Communities (Rights Against Insurers) Regulations 2002.**
- Only applies to RTAs involving vehicles that are “normally based in the UK”
- Therefore must rely on law of insurance contract.
- Argument that Rome II / Brussels 1a not apply – as no conflict of law / jurisdiction issue.
- Recommend to include the tortfeasor in proceedings if UK based RTA.
Claims against the MIB involving an RTA in another EEA state

• Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003

• A claim can be pursued where:

• Regulations 11 and 12: Foreign Insurer identified and:
  • No reasoned reply within 3 months.
  • Insurer failed to appoint a UK Representative.

• Regulations 13: Vehicle/Insurer not identified.
• NOT the insolvency of an Insurer.
Moreno v MIB [2016] UKSC 52

- Liability and quantum to be determined under Rome II principles

- Reverses:
  - Jacobs v MIB [2010] EWCA Civ 1208
  - Bloy v MIB [2013] EWCA Civ 1543
APPLICABLE LAW AND LIMITATION
Applicable Law

- Regulation 864/2007 – Rome II
- Non-contractual claims (torts and delict) for events occurring after 11/01/2009 (Homowoo)

- For events occurring on or before 11/01/2009
Rome II: Applicable Law
General rule: Article 4(1)

Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the **law of the country in which the damage occurs** irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
Rome II: Applicable Law
Exceptions: Article 4(2)

“However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
Rome II: Applicable Law
Exceptions: Article 4(3)

Where it is clear from all the circumstances of the case that the tort/delict is **manifestly more closely connected with a country** other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a **pre-existing relationship between the parties, such as a contract**, that is closely connected with the tort/delict in question.
Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability.

(c) the existence, the nature and the assessment of damage or the remedy claimed; ...

• Article 15(c) reverses Harding v Wealands.

• Assessment of damages based on applicable law.
Recent cases

- Procedure based on law of forum.
- **Wall v Mutuelles de Poitiers Assurances** [2014] EWCA Civ 138

- Do not make assumptions based on nationality / location of the Claimant
- **Winrow v Hemphill** [2014] EWHC 3164
- **Panagaki v (1) Apostolopoulos** [2015] EWHC 2700 (QB)
Recent cases

• Brownlie v Four Seasons

• Pending appeal to the SC

• Lazar v Allianz (ECJ C-350/14)
Limitation

• Limitation period will be determined by the applicable law.

• Will need to take steps to either issue proceedings with the limitation period.

• Or (where possible) interrupt limitation – as in Spain.

• Seek expert advice.
Assessing prospects of success

• Different laws have very different approaches to liability and contributory negligence principles.

• An example – “Loi Badinter” – RTA liability in France.

• Burden of proof.
Quantum

• Avoid assumptions!

• Tariff based systems of compensation.

• Additional medical evidence to assist with quantification.

• Novel heads of damage.

• Early conference with legal expert advised.
Service

• CPR Part 6
• Service Regulations
• UK Claims Representatives
• Spedition Welter GmbH v Avanssur SA C-306-12
• Riley v Carpatica ASIG SA (Liverpool County Court) (2016)
RTAs ON PACKAGE HOLIDAYS
15(1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.
Package Holidays

• If transport – such as transfer or coach travel - is included in the holiday contract the Organiser may have a liability for any breach of duty of a supplier.

• Local Standards
• Burden on Claimant to establish the nature and extent of standard as well as breach.

• Excursions and extras.
• Consumer contacts claims
• Brussels (recast) arts 17 & 18.
DISPUTING JURISDICTION AND STRIKE OUT
Disputing Court’s Jurisdiction/Strike Out

- CPR Part 11 procedure.
- **Do not put in a Defence.**
- Must acknowledge service.
- Application with 14 days of acknowledgement of service.
- Otherwise deemed to have accepted jurisdiction.
- Care not to take steps to otherwise submit to jurisdiction.
- Burden on Claimant to prove jurisdiction- good arguable case not balance of probabilities.

- Strike out for disclosing no reasonable grounds for bringing claim.
- Example situations:
  - Reliance upon European Communities (Rights Against Insurers) Regulations 2002 – Defendant was using a foreign registered vehicle.
  - Failure to plead foreign national provisions permitting direct right of action against insurer.
  - Failure to plead applicable foreign law (if it applies) i.e. **Bianco**
- **Cook v Virgin Media Ltd, McNeil v Tesco** [2015] EWCA Civ 1287
EXPERTS AND EVIDENCE
Foreign Law Experts

Evidence may cover:
- Liability
- Limitation
- Quantum
- Medical evidence
- Local safety standards

Guidance may also be required on practicalities of evidence gathering etc.
Attention to Cost Budgeting – importance of specialist counsel

Important to chose wisely.
Thank you.

Any questions?
Litigating Cross-border Road Traffic Accident Claims

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