BRITISH INSURANCE LAW ASSOCIATION

19 June 2017

BREXIT AND INSURANCE

JURISDICTION, APPLICABLE LAW AND ARBITRATION POST-BREXIT

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The issues for insurance, post – Brexit, concerning jurisdiction, applicable law and arbitration

- Not here to discuss the merits of "Brexit"
- Will assume it is going to happen.
- Now Article 50 has been triggered, there will be a sequence of events – explained below, unless the Article 50 notice is withdrawn – unlikely.
- There will be consequences in two particular areas which affect the law concerning insurance:
  - Jurisdictional issues: Brussels 1 Recast ("B1R") and the Lugano Treaty 2007 ("Lugano 2007") will cease to apply unless negotiations to make them do so: so what next;
  - Applicable law issues: Rome I (contractual obligations) and Rome II (non-contractual obligations) will cease to apply because they are governed by EU Regulations: so what next?
- In relation to arbitration concerning insurance, I expect little change, save perhaps in one respect – see below.

Importance of jurisdiction and applicable law in insurance disputes

- Insurance – including reinsurance - disputes often have a cross-border element.
- Most commercial insurance policies have a “proper law” clause.
- Some policies have jurisdiction clauses; others contain arbitration clauses.
- At present:
  - Questions of jurisdiction, meaning whether a claim is to be made in court or by arbitration, have frequently have to be determined – in an English court - by reference to the EU jurisdictional rules, viz, B1R, or Lugano 2007.
  - Insurance has its own jurisdictional regime in B1R: in Section 3: Articles 10-16.
  - Questions of the applicable law of the insurance contract have to be determined by Rome I.
  - Questions concerning the applicable law of claims in tort have to be determined by Rome II (tort) and either RomeI or II.
- What happens after Brexit?

Effect of Brexit (1)

- Art 50 has been triggered.
- Art 50(2) contemplates the EU and the withdrawing state concluding a "withdrawal agreement" after notification has been given.
- Art 50(3) provides that "….the Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement, or failing that, two years after the notification….unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period".
- Thus if there is no "withdrawal agreement" and no extension of the 2 year period, Art 50(3) will have effect and the "Treaties" will cease to apply.
- "The Treaties" means the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). It is Art 288 of the latter which states that a "regulation shall have general application. It shall be binding in its entirety and directly applicable to all Member States".
- So no Treaty, no applicable regulation.
- See also s 2(1) of the European Communities Act 1972. This gives effect to "all such rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Treaties". Those include the TEU and TFEU.
- If the Treaties cease to have effect in the UK under Art 50, there is nothing left for s.2(1) to bite on.

Effect of Brexit (2)

- My view (and that of most commentators) is that, *in the absence of any "withdrawal agreement",* then at the end of the two year period:
  - B1R (and its predecessor EC Reg 44/2001) will cease to have effect
  - Lugano 2007 will cease to have effect
  - Rome I and Rome II will cease to have effect.
- Two questions arise:
  - (1) What will be the "default position" with regards to:
    - Jurisdictional issues between the UK and EU and EFTA states
    - What conflict of laws rules will the English courts apply in the absence of Rome I and Rome II?
  - (2) What should be done if the "default position" in relation to jurisdiction and/or applicable law conflicts rules does not seem satisfactory.

The present position: Jurisdiction between EU states and EEA states.

- Regulation (EU) 1215/2012 ("Brussels 1 recast" or B1R) sets out the rules for jurisdiction of courts in civil and commercial matters as between Member States:
- The same regulation governs the rules for recognition and enforcement of judgments made in accordance with this jurisdiction regime.
- The Lugano Convention 2007 governs the jurisdictional rules as between EU Member States and Switzerland, Norway and Iceland (EFTA states but not LIchtenstein). It was concluded by the European Commission on behalf of all EU Member States. It has "direct effect" in the UK under the European Communities Act 1972 because the Convention was made an EU "Act" by the Council Decision of 15.12.2007: [2007] OJ L339/3.

Key points about B1R and Lugano 2007 (1)

- Since the UK adopted the Brussels Convention in the Civil Jurisdiction and Judgments Act 1982, (CCJA 1982), well settled rules have been developed for deciding jurisdiction of the English courts in relation to cross-boarder disputes in civil and commercial matters involving EU Member States, including insurance disputes. We are all used to operating these.
- B1R has much improved Reg 44/2001 and the old Brussels Convention. Main new "good points" under B1R:
  - "arbitration exception" now explained and clarified, although ***West Tankers*** itself remains good law. No "anti-suit" injunctions still, save where the injunction is a part of an arbitration award: ***Gazprom.***
  - Enforcement of jurisdiction clauses regardless of domicile of parties
  - "Italian torpedo" now effectively disarmed in cases where there are jurisdiction clauses, by new Art 31(2)
  - A measure of "forum conveniens" regarding courts of states outside the EU by new Arts 33 and 34, although circumstances in which it can be used are limited.

Key points about B1R and Lugano 2007 (2)

- Lugano 2007 is, effectively, Brussels 1: reg 44/2001.
- Isssues of interpretation of B1R ultimately have to be decided by the CJEU. Even for Denmark, which was a late adherent to Brussels 1.
- Lugano 2007 Protocol 2 recognises the danger of "divergent interpretations" of Brussels 1 and Lugano 2007, BUT the CJEU does not have jurisdiction over the courts of Switzerland, Norway and Iceland on issues of interpretation of Lugano 2007, although it does for all EU Member States.
- Instead Art 1(1) of Protocol 2 requires that any EFTA state court applying an interpreting Lugano 2007 must pay "due account" to the principles laid down " by any relevant decision concerning the provisions" of the Brussels convention 1968 (as amended) Lugano 1988 and Reg 44/2001

The “default position” on jurisdiction after Brexit (1)

- Section 2(1) of the CJJA 1982 remains in force.
- That states that “the Brussels Conventions (note the plural) shall have the force of law in the UK and judicial notice shall be given of them”.
- The plural is there to encompass Lugano 1988, the 1971 Protocol to Brussels Convention (giving the ECJ jurisdiction to interpret Brussels) and various Accession Conventions.
- When Brussels 1 was agreed in 2000, Art 68 stipulated that it would “supersede the 1968 Brussels Convention”.
- But it continued to apply as between Denmark and the other (then) European Community member states.
- The Brussels convention still also applied to various territories that were within its terms but excluded from Brussels 1 by Art 299 of the Maastricht Treaty.
- There are similar provisions in B1R about it “superseding” the Brussels convention. But Denmark is now within B1R.
- Although the current practical significance of the Brussels convention is virtually nil, it still has the force of law in the UK, save insofar B1R has effect: S1(4) of the CJJA 1982.

Default position on jurisdiction after Brexit (2)

- The Brussels Convention also still exists as an international law instrument between all the states that signed it.
- Art 68 of Brussels 1 and B1R stipulate that they supersede the Brussels Convention "as between Member States". Once the UK ceased to be such, then, it is arguable, this means the Brussels convention will come to the fore again.
- Would the Brussels convention apply to EU Member states that did not expressly sign it because they joined the EU after Brussels 1 in 2000?
- I think that it is arguable that it would: see Art 63 of the Brussels Convention, which has the effect of requiring new Member States to adhere to it. That is the only way that the Brussels convention can apply as between them and the territories that are outside the scope of Brussels 1 then B1R.
- If this became relevant and there was any doubt about it, then the issue would, ironically, have to be tested in the CJEU because of the 1971 Protocol which gave the European Court the jurisdiction to interpret the Brussels Convention. That Protocol remains in force. Would "Brexit mean Brexit" in that respect?

Default position on jurisdiction after Brexit(3)
The EU/EFTA position: Lugano 2007

- Lugano 2007 will cease to have effect upon Brexit. See Art. 216(2) of the TFEU and s.2(1) ECA 1972.
- Art 69(6) of Lugano 2007 stipulates that it "shall replace" Lugano 1988. It is doubtful whether, as an international law instrument, the earlier convention still exists.
- All references to Lugano 1988 in the CJJA were removed and replaced by references to the 2007 Convention.
- There would be no legal sense in trying to resuscitate references in the CJJA to the 1988 Convention if it has ceased to be an international law instrument: it would not bind anyone.
- This will mean that, as between the UK and Switzerland, Norway and Iceland, there would be no existing jurisdiction/enforcement regime at all – or none we could be sure about!

What needs to be done on jurisdictional issues – URGENTLY!

- The EU and EEA countries will remain important trading partners of the UK, whatever type of trade deal is struck.
- Jurisdictional issues concerning insurance contracts will remain important.
- The Hague Convention on Choice of Court Agreements 2005, which is now in force, may mitigate matters. Article 17 states that proceedings under a contract of insurance or reinsurance will not be excluded from the scope of this convention on the ground that the contract of insurance or reinsurance relates to a matter excluded from the scope of the convention (eg. Carriage of goods by sea; maritime pollution – see exclusions set out in Art. 2). Nor will recognition or enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance be limited or refused because the liability relates to a matter to which the Convention does not apply: Art 17(2).
- BUT it was ratified by the European Commission on behalf of the EU; after Brexit the UK would have to ratify the Convention on its own behalf.
- AND not all contracts of insurance/reinsurance contain Choice of Court Agreements.
- It will continue to be important for parties to be able to enforce judgments obtained in one state in another state.
- Thus, it is said, it will be important to have common rules on jurisdiction and enforcement across as wide a group of states as possible.
- The only questions are: what is the best regime for the UK and how is it to be achieved?

The best solution on jurisdictional issues: the easy bit?

- B1R made significant improvements to Brussels 1 (Reg 44/2001): see above. The UK had pressed for these in negotiations particularly in relation to “the arbitration exception”, recognising choice of court clauses and on “lis pendens”.
- It would be of considerable benefit to the UK to be able to continue to participate in the B1R regime.
- The way to achieve this is by a bilateral treaty between the UK and the remaining EU Member States, along the lines of the EU-Demark treaty of 2005, which brought Denmark into Brussels 1.
- The B1R terms would be given the force of law in the UK by an amendment to the CJJA 1982.
- I suspect that there would be very little political objection by either the UK or the remaining EU Member States to such a treaty in principle: BUT FOR…...

The best solution on jurisdictional issues: the difficult bit?

- The parties would have to resolve the issue of the jurisdiction of the CJEU on issues concerning the interpretation of the terms of any new EU-UK Treaty. That is a political “hot potato”! The previous UK Government stated that the jurisdiction of the CJEU was a “red line”. Not easy to see how this could be resolved.
- It would be in the interests of all that if there were amendments to B1R, then the UK should be involved rather than simply having to adhere to them as Denmark had to do for Brussels 1 (see Art 3(1) EU-Denmark agreement). Possible?

A second best solution on jurisdiction? adherence to Lugano 2007?

- If an EU-UK treaty based on B1R were not possible, the UK could enter into a treaty with the EU and the EFTA states to adhere to Lugano 2007: Arts 70(1)(c) and 72 of Lugano 2007.
- This does need the consent of all existing contracting parties, but I imagine the existing EFTA state parties would not object and it seems difficult to see why the Commission, on behalf of the 27, should do so.

An Alternative View?

- The main reason given for saying we should try to maintain the B1R and Lugano regimes is that it will be important to be able to have recognition and enforcement of UK judgments within the EU/Lugano regime states. The notion of the "free movement of judgments" or the "exportability" of UK judgments.
- This argument depends on how important enforcement of UK judgments in EU states is in practice. (If it is the other way around: ie it is important for judgments of other EU Member States to be enforced in the UK, then the boot is on the other foot).
- No empirical surveys have been done (so far as I know) by HMG to see how important the issue of enforcement of UK judgments in other EU states is in practice.
- If that is not such an important point, then may be we do not need to fret so much about keeping in the B1R regime. Prof Adrian Briggs QC suggested as much in his Combar lecture earlier this year (24 Jan 2017). But, he points out:
  - There are bilateral enforcement treaties still in force, particularly with France, Germany, Italy and the Netherlands
  - The free movement of judgments was the "end" to be obtained by the "means" of a common jurisdictional regime, but that jurisdictional regime has now itself become the "end" in itself; and it means that breadth of UK courts' jurisdiction is reduced by the regime of B1R.
  - If we reverted to a common law regime, English jurisdiction could actually be enhanced and the "first seised" rule could go. "Forum conveniens" could also be revived.
  - So a new "golden age" for English jurisdiction and London being a litigation centre.

Brexit and applicable law to insurance/reinsurance contracts: Rome I – the "default" position

- Post – Brexit the Rome I regulation on the applicable law relating to contractual obligations, which currently governs contractual obligations including insurance and reinsurance contracts, would cease to have effect.
- The "default" position would be that the Rome Convention 1980, given the force of law in the UK by s.2 Contracts (Applicable Law) Act 1990 would apply.
- The Rome Convention only ceased to have effect because the 1990 Act was dis-applied by new ss 4A and 4B, added by statutory instrument.
- S.4A: "nothing in this Act applies to affect the determination of issues relating to contractual obligations which fall to be determined under the Rome I regulation".
- The 1990 Act is still on the statute book and so would then resume full force and effect.
- BUT, Article 1(3) stipulates that the rules of the Rome Convention do NOT apply to contracts of insurance which cover risks situated in the territories of the member states of the European Economic Community (as it then was). In order to determine where the risk is situated, the court has to apply its internal laws. So Rome Convention would not apply to such risks. The common law?
- NOTE ALSO that under s.3 decisions of the ECJ (as it was, now CJEU) on the interpretation of the Rome Convention were/are binding on UK Courts. Will that be a problem politically? Would that have to be changed?

Brexit and the applicable law relating to claims in tort: Rome II

- Choice of law rules concerning “non contractual obligations” are currently determined by Rome II.
- Perhaps not so important in relation to disputes under contracts of insurance/reinsurance”.
- Post Brexit the choice of law rules for tort claims will revert to those set out in Part III of the Private International Law (Miscellaneous Provisions) Act 1995. Those provisions were the result of Law Commission recommendations; they did not embody any international convention.
- When Rome II came into force, Part III of the 1995 Act was “dis-applied” by virtue of new ss. 15A and 15B, added by statutory instrument, pursuant to s.2(2) of the European Communities Act 1972.
- Upon Brexit occurring, with no regulation applicable, the 1995 Act will revive automatically.

Post Brexit what would be the “best” solution for an applicable law regime insurance/reinsurance claims?

- A powerful body of legal opinion suggests:
  - There be amendment to the 1990 and 1995 Acts so as to incorporate Rome I and Rome II respectively into UK domestic law.
  - The relevant terms of those regulationsare set out in a schedule to each Act, like those of the Brussels Convention were scheduled originally to the CJJA 1982.
- The most contentious issue, politically, would probably be the extent to which the UK courts should have regard to prior and future decisions of the ECJ/CJEU on interpretation of Rome I and II.
- Best solution would be a provision in the amended 1990 and 1995 Acts stipulating that UK Courts should have “due regard” to past and future decisions of the ECJ/CJEU on the interpretation of the provisions of Rome I and II? Cf Human Rights Act 1998 s.2(1).
- This would mean that the UK courts would usually follow the decisions of the CJEU but would not be bound to do so if they thought they were clearly wrong.

Arbitration and Brexit

- Arbitration is excluded from B1R and Lugano and the Rome 1 Regulation.
- The English Arbitration Act 1996 is a domestic Act and is not based on any EU Regulation or Directive.
- It is founded in part on the New York Convention 1958, which has been ratified by 158 countries world wide.
- Enforcement of arbitration agreements and awards in EU Member States will not be affected by Brexit.
- In fact there may be a positive outcome, unless we continue to adhere to B1R or Lugano 2007; the "anti-suit" injunction, prohibited since *West Tankers,* may be resuscitated.
- The insurance/reinsurance market may wish to expand its use of London arbitration clauses in contracts.

Further Reading

- Prof Andrew Dickinson: *Back to the Future: The UK's EU Exit and the Conflict of Laws 12 Journal of Private International Law 195 (2016).*
- Sara Masters QC and Belinda McRea: *What does Brexit mean for the Brussels Regime?":* 33 Journal of International Arbitration Speciall Issue, pp 483-500 (2016).
- Richard Aikens and Andrew Dinsmore: *Jurisdiction, enforcement and the Conflict of Laws in cross –border commercial disputes: what are the legal consequences of Brexit?":* (2016) 27 European Business Law Review 903 -920.
- Prof Adrian Briggs QC (Hon): "Secession from the European Union and Private International Law: the cloud with a silver lining". Lecture to the Commercial Bar Association, 24 January 2017.