Applicable Law and Jurisdiction Issues in Insurance contracts: Rome 1 and Brussels 1: Where Are We Now?

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Introduction

Over the years there have been many cases in the English courts concerning what I will call "business" ie. non-consumer insurance and reinsurance contracts where there have been battles about two often related threshold questions: the applicable law of the contract and where the case should be heard; whether in the English courts, in arbitration or in some other jurisdiction. These threshold questions are often related because a decision on the applicable law may affect the decision on which is the correct jurisdiction in which the case should be heard. And frequently the jurisdiction battle is fought because it is feared that if the case is heard in another jurisdiction then a less favourable applicable law will be applied. The battles over applicable law and jurisdiction are often very keenly fought. It is natural for English –indeed any - lawyers to feel more comfortable fighting a case on "home ground" and on the basis that the applicable law of the contract is the law in which they have been trained and in which they practice.

But gone are the days in which issues of applicable law - then called the "proper law" - and jurisdictional issues were decided in the English courts according to English conflict of laws rules. Since the mid -1980s issues of jurisdiction in cases in the English courts where one or more of the parties has a connection with a Member state of what is now the European Union or the European Free Trade association (EFTA) have been governed by English procedural rules which derived, first, from the Brussels and Lugano Conventions and then from *Council Regulation (EC) No 44 of 2001*. This is often called "the Brussels Regulation" or "the Jurisdiction and Judgments Regulation" or "Brussels 1". On 12 December 2012 the Council of Ministers of the EU agreed very important amendments to this Regulation and the new Regulation has been dubbed "Brussels 1 R" - short for "Brussels 1 Recast". Its full title is *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters (recast).* I will deal later on with its main changes.

English common law conflict of laws rules on ascertaining the applicable law of "business" insurance and reinsurance contracts were simple. Parties could choose the "proper law" (expressly or by implication) and, if there had been no express or implicit choice by the parties, then the "proper law" would be that system of law with which the contract had its "closest and most real connection". The common law rule was a truly flexible friend. A frequently used litmus test was: in which market had the insurance contract been effected?

These common law rules were replaced when the Rome Convention of 1980 on the applicable law of contracts was given the force of law in the UK by the *Contracts (Applicable Law) Act 1990*, which came into force on 1 April 1991 and affected all contracts made after that date. The fact that the 1990 Act was not retrospective does mean that, in respect of some long tail liability insurance contracts and reinsurance contracts, the common law is still relevant: see eg. *Wasa International Insurance Co Ltd v Lexington Insurance Co.*[1]

The 1990 Act itself has now been overtaken, with respect to all contracts made after 17 December 2009, by Regulation (EC) No 593/2008 of 17 June 2008 on "the law applicable to contractual obligations". This is the Regulation known as "Rome 1". That is to distinguish it from Rome II, which is a sister regulation which deals with the law applicable to non-contractual obligations and which in the UK, has replaced the conflict of laws rules with regard to foreign torts that are set out in Part III of the Private International Law (Miscellaneous Provisions) Act 1995, and in particular sections 11 and

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[1] [2010] 1 AC 180.

12. Of course, as you might expect Rome II was actually passed before Rome I, but that is EU Regulations for you!

Rome 1

Let me start with Rome 1. The current edition of *Dicey, Morris and Collins on the Conflict of Laws*[2] comments that "the sources of choice of law rules concerning insurance contracts remain a matter of considerable complexity". So much for EU laws making life easier! As with all EC Regulations, Rome I has a large number of paragraphs in its preamble, following the word "Whereas". In terms of discovering both the full scope of the Regulation and also as an aid to the proper construction of its terms, these preamble paragraphs are essential, if somewhat tedious, reading. We can forget about the high-sounding and somewhat fatuous statements in some of the preambular paragraphs, such as No 1, which you can read for yourselves. How or by whom it is decided *what* measures relating to judicial cooperation in civil matters with a cross-border impact were actually needed for the proper functioning of the internal market is anyone's guess. Were they the subject of detailed research in the markets? I doubt it, just as there was little practical research into whether a European sales law is needed to encourage cross-border sales of goods.

But we should pay attention to paragraph 10 of the preamble because that provides that "obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864 of 2007. Such obligations should therefore be excluded from the scope of this Regulation". Regulation 864 of 2007 is the EU Regulation on the law applicable to non-contractual obligations, ie. Rome II.

Now preamble paragraph10 of Rome I raises an interesting conflict of laws legal "chicken and egg" problem. If the putative applicable law of a particular insurance contract were English law, then, as we all know, that would mean that, under English law, viz under sections 17 to 20 of the Marine Insurance Act 1906 and the non-marine insurance contract equivalent legal rules, there are pre-contractual duties of good faith, of disclosure and also further "obligations" not to make innocent, negligent or fraudulent misrepresentations. As we all know, from decided cases, as a matter of English law, those duties or obligations do not arise out of the contract of insurance itself, but under the general law. It would seem that the effect of paragraph 10 of the preamble of Rome I is that the law applicable to those obligations is not governed by Rome 1 but by Rome II, Article 12. *Article 12* of Rome II comes within Chapter III, which has the slightly forbidding heading: "Unjust enrichment, *Negotiorum Gestio* and *Culpa in contrahendo*". (I do admire the way that EU Regulations assume that the way to promote judicial cooperation is to rely on Roman law concepts and to use Latin tags in legislation to define the scope of the subject matter of Articles in the Regulation). *Article 12*, headed "*Culpa in contrahendo"*, provides:

> Article 12
> Culpa in contrahendo
> 1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.
> 2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:
> (a) 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 occurred; or
> (b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or
> (c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

I, for my part, cannot see how one can fail to find out, by the exhaustive procedure set out in Rome I, or (if for some reason that is not applicable) a country's conflict of laws rules, what the putative

[2] 15th Ed 2012.

applicable law of the contract would be; so I cannot imagine when you would need to look at Article 12 paragraph 2. But, the answer to the "chicken and egg" problem is as follows: if there is the possibility that a claim may be brought on the basis of obligations which arise before the contract is entered into, then, under Article 12 of Rome II, the court will have to find out what the putative applicable law of that contract is and then that is the law that will apply to those pre-contract obligations. In plain English: if the putative applicable law of the insurance contract is English law, then the law applicable to the pre-contract obligations such as the duty of disclosure and the duty not to make misrepresentations, together with any rights arising out of those obligations will also be governed by English law. That is what common sense might suggest should be the case.

There are further important things to be found in the preamble to Rome I. Thus, paragraph 12 stipulates that:

> "(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated".

To my mind that paragraph expresses a part of the substantive rules for determining the applicable law of a contract and so ought to be in the body of the Regulation, but that is not the way that EU Regulations are drafted. The same is true of paragraph 19 of the preamble which states:

> "(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity".

Paragraph 20 of the preamble is curious. This provides:

> "(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts."

It does not indicate where we are to find this "escape clause". Is it meant to be in the contract itself; if it is then why is that not then a choice of law clause? I suppose that this paragraph might apply in the following circumstances: an insurance contract is concluded by an Italian insurer, with a German insured, in respect of risks arising in France. The contract has no jurisdiction clause or arbitration clause. However, there is a reinsurance of those risks, which reinsurance is written in London and which *does* have an English law and London arbitration clause in it. And, as often happens, chronologically, the reinsurance was concluded before the insurance itself. Now, in those circumstances, even in the absence of a magical "escape clause" it might be said that the insurance contract has a very close relationship with the reinsurance contract and so is manifestly more closely connected with England rather than either Italy, France or Germany. But that does not help solve the question of where the "escape clause" is to be found.

We should, lastly, note paragraph 33 of the preamble *en route* to the actual terms of the regulations in Rome I, although the paragraph seems to me to raise more problems than it solves:

> "(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States."

A "large risk" is defined in the Regulation by reference to an early EEC Council Directive.[3] Does this mean that where you have one contract of insurance, but covering several risks, none of which is "a large risk" as defined, then there is a possibility of the one contract having more than one applicable law? It looks like it; and that is confirmed by *Article 7(5)*, which we shall consider shortly.

Let us now look at the terms in the body of Rome I itself. As with all these types of Regulation, including Rome II and Brussels I, Chapter 1, Article 1 starts off with the "Material Scope" of the Regulation. Article 1 paragraph 2 sets out what is excluded from the scope of the Regulation. Of particular importance is the exclusion in paragraph 2(e): viz. that arbitration agreements and agreements on the choice of court are excluded from the scope of the Regulation. It is important because of the English law rule that an arbitration agreement is to be regarded as a separate contract from all the other terms of a contract of which the arbitration terms may, physically, be a part. So Rome I does not apply to the applicable law of an arbitration agreement found in an insurance contract. English common law conflict of laws will govern both the validity and the procedural aspects of the arbitration agreement, because the Rome Convention, scheduled to the Contracts (Applicable Law) Act 1990 also does not apply to arbitration agreements.

Also important is the exclusion in paragraph 2 (g), viz. the question of whether an agent is able to bind his principal or an organ is able to bind a company or other body corporate or "unincorporated" in relation to a third party. Thus, the issue of the law applicable to the question of whether a broker has authority to bind the insured to a contract of insurance with the insurer is not covered by Rome 1. Although the Contracts (Applicable Law) Act 1990 has not been repealed as such, (it just does not apply to determine issues governed by Rome I: see section 4A(1) of the 1990 Act), nonetheless this issue will also not be governed by the terms of the Rome Convention as scheduled to the 1990 Act, because the question of whether an agent is able to bind a principal to a third party is also excluded from its scope. Therefore, I assume, the applicable of such relationships will be determined, in an English court, by common law principles relating to the ascertainment of the applicable law. Article 1(2)(j) also excludes certain types of insurance, which are within a fairly narrow group as defined there and we need not consider that further.

The key general rule of Rome 1, as of the earlier Rome Convention and the English common law conflict rules, is that the parties are free to choose the law which shall govern a contract: so *Article 3(1)* provides:

> "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract."

Thus the choice may be express or it may be "*clearly demonstrated by the terms of the contract*" or by "*the circumstances of the case*". There are three distinct alternatives means of determining the parties' choice of law. Thus, as an example of the second, if the parties have chosen to submit all disputes to the exclusive jurisdiction of the English Commercial Court, then that would, especially in the light of paragraph 12 of the preamble, be a clear demonstration that the parties had chosen English law as the applicable law of the contract. An example of "all the circumstances of the case" might be where there had been an express choice of law in the previous year's insurance contract but then, on renewal, that clause had been left out but it was demonstrated that this was just an error and it was not the parties' intention to have a different applicable law.

However, it is important to note that, for certain types of insurance contracts, the Article 3 rules apply in a modified way. Which rules apply to which types of insurance contract is governed by Article 7. That article is within a group of comprising Articles 4 to 8. Article 4 (1) says that "to the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8" the law governing the contract will be determined as set out in that Article 4. But, effectively, Article 7 sets out specific rules for certain types of insurance contract, including rules as to which governing law the parties to an insurance contract are *allowed* to choose. Moreover, Article 23 of Rome I emphasises that, in relation to insurance contracts covered by the rules set out in

[3] The definition of "large risk" is found in Art 5(d) of the First Council Directive 73/239/EEC of 24 July 1973.

Article 7, that article prevails over other provisions of Community law which lay down conflict of laws rules relating to contractual obligations.

The combined effect of Articles 4 and 7 is, in general, that if an insurance contract comes within the terms of Article 7, then the Article 3 rules are modified by the terms of Article 7 and Article 4 does not apply if there has been no party choice. If, however, the insurance contract does not come within the terms of Article 7, then Article 3 applies in full and, if there has been no party choice in accordance with Article 3, then Article 4 will decide the applicable law.

It is therefore necessary to examine Article 7 in order to see its scope. It is technical. It does not apply to several different types of insurance contract. First, Article 7(1) states expressly that it does not apply to reinsurance contracts at all, so that they must be governed by Article 3 and by Article 4 if Article 3 cannot be applied. Secondly, Article 7 (1) stipulates that the article applies to two broad types of insurance contracts. First, the types of "large risk" contract defined in Article 7(2) and this applies "whether or not the risk is situated in a Member state". Secondly, all other insurance contracts covering risks situated inside the territory of the Member States. So, if an insurance contract is not a "large risk" type of contract and if it is a contract that covers certain "non-large" risks but those risks are situated outside the EU, then Article 7 does not apply. That must mean that (provided the exclusion in Article 1(2)(j) does not cut it out of Rome I altogether)[4] the default Articles, 3 and 4 of Rome I must do so.

To find out what particular types of insurance contract are covered by Article 7(2) we must examine its terms in more detail. It is an odd article because it does two things. First it identifies what type of insurance contract it does apply to; these are insurance contracts of the type defined as covering a "large risk" as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973, ie. one of the very early directives passed just after the UK had joined what was then the EEC, in 1973. What are these "large risks"? They are, very broadly, contracts of insurance in three categories: first, marine risks (eg. Hull and Machinery insurance), aviation risks, transport risks, cargo and goods in transit risks and marine liability risks; secondly, credit and surety risks; thirdly, damage to property, general liability and "miscellaneous financial loss" risks. Life insurance, annuities, accident insurance, legal expenses risks and the like, are all outside the definition of "large risks". So, again very broadly, "large risks" embrace a large proportion if not the whole of the London marine and aviation markets and much of the Non-marine market so far as commercial risks are concerned.

The second thing that Article 7(2) does is to redefine the conflict of laws rules that apply to such "large risk" contracts. Article 7(2) reiterates first the general rule that for "large risk" contracts of insurance, they will be governed by the law chosen by the parties "in accordance with Article 3". So that just takes you back to express or implied choice. Secondly, where the applicable law has not been chosen by the parties "in accordance with Article 3", then Article 7(2) last paragraph sets out a single rule for the default choice of law for insurance contracts which come within the Article 7(2) definition. This default choice is the law of the country where the insurer has his "habitual residence". "Habitual residence" is defined in Article 19 of Rome I. For a company or other body the "habitual residence" is the place of its central administration or, if a branch or agency is involved, it is the place where the branch or agency is involved. However, even this single rule is subject to an exception. Thus, if it is clear "from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply".

I think it is tolerably clear that Article 7(2) is, effectively, a self-contained code in respect of "large risk" insurance contracts of the type with which the London non-consumer market is concerned. As Article 7(1) makes clear, the rules in Article 7(2) apply to large risk insurance contracts wherever the risk covered is situated, whether in the EU or not. Thus a credit-risk insurance written in London in

[4] This excludes from the scope of Rome 1: "insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (1) the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work."

respect of a company whose business is in Russia (high premium perhaps) will be covered by the Article 7(2) choice of law rules.

What about all other non-large risk insurance contracts? First, what are these insurances? They will cover, for instance, life insurance,[5] accident insurance, sickness insurance, legal expenses insurance and travel assistance insurance, at least. Secondly, recall that, except for "large risks", the rules in Article 7 only apply to those insurance contracts covering risks inside EU Member states. If the insurance contract is not for "large risks" and the contract covers risks outside the EU, then it would appear that the default rules are: choice of the parties under Article 3, or, failing that, the rules in Article 4.

But if a non-large risk insurance contract is for the coverage of risks in an EU state, then Article 7(3) stipulates that only certain laws may be chosen by the parties "in accordance with Article 3". That is somewhat of a misstatement because Article 3 actually allows for total party choice, whereas Article 7(3) directs what particular choices can be made, but to the exclusion of all others. There are, however, five possible choices for the applicable law under Article 7(3). Moreover, there is a proviso after the five choices, which permits the parties a further choice if the Member state where the risk is situated, or the Member State where the policy holder has his habitual residence or the Member States identified in a case covered by paragraph 7(3)(e)[6] grant (or in the case of (e) grants) a further freedom of choice of the law applicable to the type of insurance contract covered by Article 7(1) and (3).

In the case of the UK, the Financial Services and Markets Act 2000 (Law applicable to contracts of insurance) Regulations of 2009, which gave effect to the Rome 1 regulations so far as insurance contracts are concerned, permits a wider choice of applicable law to the parties under Article 7(3) type contracts.

As *Dicey* points out,[7] the effect of this proviso in Article 7(3) is to introduce a species of *renvoi* into the choice of law allowed. As I understand the way it works, it is as follows: imagine that a policy covers accidents in all EU countries but no others. Imagine that the policy holder is a French national and lives in France. The last paragraph of Article 7(3) apparently would permit the parties to choose any applicable law according to the law of France, that being the Member State where the policy holder is a national. So you have to look at the law of that Member State, France, to see if it permits a wider choice than the 5 options set out in Article 7(3). If it does, then, provided that the parties' choice is within the choice permitted by that French law, that choice is valid. Presumably, if the law chosen by the parties is not one of those permitted by that law (in our example French law), then you have to go back to one of the five choices set out in Article 7(3).

Article 7(3) last paragraph deals with the case where the parties have not chosen an applicable law in accordance with the rules set out in Article 7(3) sub paragraphs (a) to (e). In that case the contract of insurance will be governed by the law of the Member State in which the risk is situated at the time the contract was concluded. But, what if the risks covered by the contract are situated in several Member States? Where there is an insurance contract that covers risks that are situated in more than one Member State that is within Article 7(3), ie.is in respect of a non-large risk, then Article 7(5) stipulates that the one contract of insurance will be treated as if it were several contracts, divided up so that there is one contract for each of the Member states where the risk is situated. This reflects paragraph 33 of the preamble. The principle is known in conflict of laws terminology as *Déçepage.*

This would mean, I imagine, that if there is a contract of insurance that covers accident risks in several EU Member States, then it is to be treated as if there were separate insurance contracts each of which would relate to only one particular Member State. So, if the parties have not chosen an applicable law in accordance with Article 7(3), then (at least for choice of law purposes) the contract is divided up into several mini-contracts, each with its own applicable law depending on where the risk is situated. Thus I imagine that if one of the risks covered was of an accident occurring in France, then

[5] Other than those excluded from the scope of the Regulation altogether by Art 1()(j).
[6] "where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder".
[7] Page 1997 of 15th Ed.

French law would apply to the right to recover and would apply also to issues of pre-contract non-disclosure or misrepresentation. But if the contract also covered the risk is of the accident occurring in England, then English law would apply in respect of that risk, both as to the contract terms and pre-contract obligations.

The consequence of this *déçepage* is odd: it means, presumably, that if there was a culpable non-disclosure relating to the whole contract, which came to light when a claim was made in relation to an accident in the UK, to which English law applied, the insurer could avoid the contract. But the same non-disclosure would not necessarily have that result if the claim concerned an accident in France, to which French law would apply. Does this promote more "certainty, uniformity and judicial co-operation" as the high minded preamble insists is the object of Rome I? I doubt it.

If an insurance contract does not come within the scope of Article 7 and if the parties have not made a choice within Article 3, then the applicable law has to be determined in accordance with Article 4. If (as in the case of reinsurance contracts - see below) an insurance contract not covered by Article 7 is to be regarded as a contract "for the provision of services", then Article 4(2) stipulates that it "shall be governed by the law of the country where the service provider has his habitual residence". The service provider is, obviously, the insurer; its habitual residence will be determined by Article 19.

There is, however, a further complication under Article 4, because Article 4(3) stipulates that if it is clear from all the circumstances that the contract is "manifestly" more closely connected with a country that that indicated by Article 4(2), then the law of that country is to apply. As an example, if the insurance contract not within Article 7 or a reinsurance contract (see below) provided for London arbitration, then it might be said, especially in the light of preamble article (12) that the insurance contract is "manifestly" more closely connected with the UK, rather than the habitual residence of the insurer which was, say, Bermuda. But I think that result is not obviously correct, particularly in the case of a reinsurance contract. What if there is no choice of law in the reinsurance but it is clear that this is a reinsurance of a particular insurance contract which does have an English choice of law clause in it? Perhaps Article 4(3) would apply and make English law the applicable law of the reinsurance.

If all else fails, then Article 4(4) stipulates that the applicable law is to be that of the country with which the contract is most closely connected. Now that rule rings a bell – we have come full circle to the common law rule for choice in the absence of an express or implied choice by the parties. Or to use the French: *plus ça change, plus c'est la même chose!*

What, then, are the rules concerning reinsurance contracts? For the purposes of Rome I, reinsurance has its own Euro-definition, as set out `n Directive 2005/68/EC of the European Parliament and of the Council on reinsurance. It is not a very helpful definition. It is "the activity consisting in accepting risks ceded by an insurance undertaking or by another reinsurance undertaking": see Article 2(a) of that Directive. There is also a special provision for risks ceded by Lloyd's underwriters. It strikes me that this definition may be different from the generally accepted concept of reinsurance in English law. As Lord Collins of Mapesbury reminded us in the *Wasa* case at [114]-[115], the generally accepted English law view is that a reinsurance is an independent contract between the reinsured and the reinsurer upon the same subject matter as the original insurance; therefore it is not a kind of liability insurance. But whether or not the Euro-definition of reinsurance differs from the traditional English law view is irrelevant; for the purposes of deciding which Articles of Rome I apply in order to decide which is the applicable law, the first question to be answered is: is the contract one of reinsurance within the definition of the reinsurance directive of 2005.

If the reinsurance contract does come within that definition, then Article 3 of Rome I remains the starting point, because reinsurance contracts are expressly excluded from the terms of Article 7. So, in brief, the question is: have the parties chosen an applicable law either expressly or impliedly? If not, then Article 7 still does not apply (because reinsurance is expressly excluded from its ambit) and so Article 4 must do so. There is no particular paragraph in Article 4 that is directed towards reinsurance. My view and that of *Dicey* is that, in terms of Article 4, a reinsurance contract would be regarded as one for the provision of services within Article 4(1)(b). Therefore, in the absence of a choice of law by the parties, it will be governed by the law of the country where the "service provider" has his habitual residence. For these purposes, the reinsurer must be the "service provider" and the habitual residence of the reinsurer will be determined by Article 19 of Rome I.

I should note that Article 27 stipulates that by 17 June 2013 the Commission is to submit a report on the application of Rome I and, if appropriate, it is to submit proposals. It specifically provides in paragraph 1(a) that the report will include a "study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced". That statement suggests that this exercise had not been done before Rome I was promulgated – a pity! But it provokes a question for the insurers and brokers amongst you: has anyone from the European Commission approached you for your views on how Rome I has affected you and have any proposed changes been shown to you and have you been asked what the impact of such provisions might be on your business? [8]

The Brussels Regulation

Let us move on briefly from the applicable law to the equally thorny question of jurisdiction. I will only comment on the rules concerning jurisdiction when one or more of the parties has a connection with a Member State of the EU and the issue comes before the English courts. The EU Regulation 44/2001 was given effect in the UK by the Civil Jurisdiction and Judgments Order 2001. I will call this Regulation "Brussels 1". It introduced important changes to the old Brussels convention, not the least of which were the changes to the rules concerning jurisdiction applicable to insurance contracts. Now Brussels 1 has itself been changed by the Council's decision of 12 December 2012, although the changes are not to come into force until 10 January 2015. These changes are introduced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). This is the so-called Brussels I R for "recast".

The most important "recasting" from the point of view of the UK concerns the treatment of arbitration and of jurisdiction clauses. Under Brussels 1, the ECJ or, as it is now called, the Court of Justice of the European Union (CJEU), was chiselling away at the "arbitration exception" in Article 1(2)(d), which said in plain, quite explicit terms that Brussels 1 did not apply to arbitration. Some commentators and some in the European Commission favoured the complete suppression of that exception. The ECJ and the CJEU have been, generally speaking, in favour of expanding their area of jurisdiction and so, naturally, the ambit of Brussels 1. But the UK fought hard to keep the arbitration exception and to reinforce it and it has succeeded to a certain extent.

Thus paragraph 12 of the Preamble to Brussels I R underlines that nothing in that Regulation will prevent the courts of a Member State, when seised of a matter in respect of which the parties have entered into an arbitration agreement, from referring that matter to arbitration. But it also states that nothing will prevent a court of a Member State from examining whether an arbitration agreement is null and void, inoperative or incapable of being performed "in accordance with *its* national law" (my emphasis). Now, that looks as though the Courts of Member State A could decide, according to its national law, whether the parties' arbitration agreement, which submitted disputes to arbitration in Member State B or even a non- member state, was null and void etc – the familiar language of the New York Convention of 1958. That means that the so-called "Italian Torpedo" is not disarmed entirely, despite the fact that the next sub-paragraph of paragraph 12 does go on to say that such a judgment on the efficacy of the arbitration agreement will not be recognised under Brussels 1 R. However, the usefulness of that rule is undermined by the fact that *if* the same court in Member State A which decided that the arbitration agreement was null and void according to *its* national law then went on to give a judgment on the substance of the matter in dispute, then that judgment itself would be recognised and enforced in accordance with Brussels 1 R. In short, you may get a court in Member State A deciding that an arbitration agreement whose putative applicable law is that of State B, is invalid according to the national law of State A (even when the arbitration agreement is valid by its own applicable law) and then that court goes on to decide the merits of the matter in accordance with the law of State A. That judgment will be recognised and enforced in accordance with Brussels 1 R.

It seems to me that if one party to a contract which contains an English arbitration clause tries to launch an "Italian torpedo" because it does not like the idea of English arbitration, the riposte must be to get on very quickly with the English arbitration and aim to get an award that can be enforced and can be turned into a judgment under section 66 of the Arbitration Act 1996 as soon as possible. Then that

[8] When asked for a show of hands of those attending the lecture who had been approached, there was not a single response.

judgment should be enforceable in other Member States, leaving the torpedo still not having found its target.

The other interesting change to the former Brussels Regulation relates to choice of jurisdiction clauses, or "choice of court" clauses as paragraph (20) of the Preamble calls them. That provides that if a question arises as to whether a choice of court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict of laws rules of that Member State. Thus, take the following example: an English insured sues a French insurer in the English Commercial Court, relying on Article 11(1)(b) of Brussels 1 R. The French insurer says: hold on, this is a claim on an insurance concerning damage to a seagoing ship. Therefore, in accordance with Article 15(5) and 16(1)(a) of Brussels I R (more of which in a moment), a choice of court agreement made between the insured and the insurer at the time the insurance was concluded is valid. We agreed at the time the insurance was concluded that the *Tribunal de Commerce de Paris* would have jurisdiction in the event of a dispute. The Commercial Court would have to decide on the validity of that agreement in accordance with French law, including any applicable French conflict of laws rules.

There is a further twist to this, brought about by paragraph (22) of the Preamble. Imagine that after the Commercial Court proceedings were started, the French insurer decided he wasn't happy about the Commercial Court's possible resolution of the issue of the choice of court agreement, so that it started proceedings in Paris, alleging that that agreement was valid. It seems, according to paragraph (22) of the Preamble, that the English court should stay its proceedings as soon as the "designated court" ie. the Paris court, is seised of the matter, because that court has priority to decide the validity of the choice of court agreement. And the French court can proceed even if the English court has not yet decided to stay its action. That seems to me to make sense as it means that the court that, at least putatively, the parties have agreed should have jurisdiction will be the one that decides whether that agreement is valid in accordance with the law that the parties intended should govern that agreement.

Lastly, a short word about the substance of the jurisdiction rules in Brussels I R in matters relating to insurance. The numbering has changed from the Brussels Regulation as there are two new Articles 2 and 3 dealing with various definitions for the purpose of the Regulation and the definition of "court" in particular types of Hungarian and Swedish proceedings. The General provisions on jurisdiction, contained in Section 1, Articles 4 to 6, do not generally apply to insurance contract claims. But there are exceptions to the general rules, which I think must equally apply to insurance contracts. The main exception is that set out in Article 6, which deals with defendants who are not domiciled in a Member State. In such a case, the jurisdiction of the courts of the Member State concerned will be determined by its own law. So, for example, if an English insured wished to sue a US insurer on the basis that the contract was expressly or impliedly governed by English law, then the English rules about service of proceedings out of the jurisdiction on the US insurer would apply in the usual way.

Section 3, Articles 10 to 16, lays down the rules for jurisdiction in matters relating to insurance. Article 11 sets out where an insurer may be sued: first, in the Member State where he is domiciled; and, secondly, in the Member state where the insured is domiciled, if different from the domicile of the insurer. Under Article 12, in the case of liability insurance or insurance of immovable property, the insured may sue in the place "where the harmful event occurred". That is easy to establish in the case of fire damage to a building. It is less easy when, say, an accountancy firm which is domiciled in Member State A is sued successfully for negligence which has given rise to loss by the client or a third party in Member State B.

The jurisdictional choice given to an insurer is limited. Generally, the insurer has to sue in the Member State in which the defendant is domiciled, irrespective of whether that defendant is the policy holder, the insured or a beneficiary. In this context, I think that "insurer" would not include an insurer who is suing on a reinsurance. In that circumstance I think that the "reinsured" has the choice set out in Articles 11 and (if the type of reinsurance is applicable) Article 12.

Generally speaking, choice of court agreements made between an insured and an insurer at the time of the contract and before the dispute has arisen will not be given effect. Pre-dispute agreements on choice of court will only be given effect in the case of specific type of non-consumer insurances, as set out in Article 16. These are, broadly, insurance relating to marine and aviation risks (including loss of

freight or hire risks), goods in transit risks and all "large risks" as defined in yet another Directive, this time Regulation 2009/138/EC on "the taking up and pursuit of the business of Insurance and Reinsurance".

There is, however, a debate by what is meant by an "agreement". To a common lawyer an "agreement" means a contract between two parties. However, in the context of what was Article 23 of Brussels 1, the ECJ has made it plain that the question of whether there has been an "agreement" under Article 23 is not dependent on whether there is a contract between two parties. The ECJ has emphasised that what is needed is an agreement between parties to the relevant litigation that satisfies the requirements of what was Article 23 (1), ie. has there been an agreement in writing or in a form which accords with practices that the parties have established between themselves or is in a form which, in the context of international trade, accords with a usage of which the parties are or ought to be aware. As Professor Adrian Briggs has pointed out in a recent article in [2012] 3 LMCLQ at 364, the ECJ has in its judgments effectively held that Article 23 poses a more formal question which is simply: if one of the litigants is resident in a Member State, has the party to be sued agreed in a manner set out in Article 23 to the jurisdiction of the courts of that Member state or not. That is an autonomous issue: to be decided according to the correct construction of Article 23 and the facts of the case. So this is an "autonomous" question, to be decided according to EU law. There is to be no investigation of whether, under any particular national law, there has been a contractual agreement at all. Thus, effectively, the issue is whether the party to be sued has *unilaterally agreed* to subject itself to the jurisdiction of the particular national court. The same analysis must be true under the new Article 25 in Brussels 1 R.

Now it seems to me that a big question is whether the "agreements" referred to in Articles 15 and 16 have to be in the nature of contractual agreements and, whether or not they do, they have also to conform with the autonomous requirements of Article 25 of Brussels 1R. Professor Briggs should enlighten us on this. For my part I think that the language of Article 15 (which therefore affects insurance of the type set out in Article 16 as well) is more consistent with contract in the common law sense. But I suspect that the CJEU would also hold that the autonomous requirements of Article 25 also have to be fulfilled before such "agreements" are valid for the purposes of Articles 15 and 16 of Brussels 1R. This is an area to watch, with interest, if not excitement.

There is not time to deal with the changes brought in by Brussels 1 R on how to deal with *lis pendens.* These changes are extensive and would require a talk on their own. I have tried your patience sufficiently for one evening. Whether the EU Regulations on applicable law and jurisdiction relating to insurance and reinsurance are enough to put you off "taking up and pursuing the business of insurance and reinsurance in Europe" (to use the terminology of the EU Regulation called Solvency II) is for you to decide. But it looks pretty clear that professionals in the insurance world will need the help of lawyers to guide them through the many shoals and banks that endanger to route towards finding the applicable law and correct jurisdiction. And whether all these rules help foster the EU internal market or help to develop the EU as an area of freedom, security and justice and facilitate access to justice, is also for you to decide. Luckily for me, I merely have to try and interpret the wording of the Regulations, with the aid of the sometimes Delphic utterances of the CJEU.