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Jurisdiction in insurance disputes: possible changes

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1. Introduction

This article discusses, from the insurance perspective, proposals for reform of European civil jurisdiction rules formulated by the European Commission in December 2010[1].

2. Context

The outcome of international disputes will often be determined by the jurisdiction in which they are tried or most likely to be tried, as much as by the merits of the claim or defence. Most judges and juries do their best to put aside national, cultural, class, sex and racial prejudice, but they are not always successful. This is most obvious, perhaps, when one considers pronouncements of judges in past generations, for example Lord Atkinson's castigation of "considerations of socialistic philanthropy and of feminist ambition" in *Roberts v Hopwood* [1925] AC 578.

Commercial practices which are acceptable in distant parts of the world may appear shocking or fraudulent in England. These cultural factors also influence the development of national rules in commercial law and civil procedure.

In common law jurisdictions foreign litigants may have more difficulty than nationals of the state in question in understanding and complying with procedures which require the disclosure of documents which undermine as well as those that support their case.

Communication problems may arise when foreign witnesses are cross-examined, particularly when their command of English is less than perfect or when they give evidence through an interpreter. This can sometimes contribute to their oral evidence coming over as less compelling that of a native English speaker. An illustration of this proposition in an insurance context is *Morgan Grenfell & Co Ltd v Sace- Istituto Per I Servizi Assicurativi Del Commercio* [2001] EWCA Civ 1932 (19 December 2001). In that case the trial judge's description of the evidence of an Italian law professor as "unreliable and impartial to the extent that I could place no reliance whatever on any of his opinions" was not shared by the Court of Appeal.

Insurance companies have the additional problem of often being viewed as "deep pockets", unfairly trying to wriggle out of paying meritorious claims to policyholders or third party claimants. In her recent book, reviewed in this issue of the BILA Journal[2], Judith Summer remarks of the Financial Ombudsman Service that "the FOS should not be able to force insurers to make payments outside the terms of the contract when there is nothing inherently unfair about the contract terms or its sales process. Sometimes an event occurs which is bad for the claimant, but is simply uninsured. Sympathy for the claimant should not be relevant to policy construction."

In the context of wholesale insurance, where this issue is also a problem, firms operating on the London market often prefer to have disputes resolved in the London Commercial Court or by arbitration in London. Where these dispute resolution procedures are adopted a stricter approach may be applied to insurance law than, for instance, in jurisdictions where disputes are determined by lay judges or juries. In his article in this issue of the BILA Journal, Richard Jacobs QC explains that one of the reasons why the Bermuda form, providing for arbitration in England, was developed was because of "the US court system which was perceived by insurers as being too pro-policyholder and unwilling to give effect to the language used in their policies."

3. Current UK and European jurisdiction rules: a simplified summary

In this section I give a necessarily highly simplified overview of current European jurisdiction rules in order to put the Commission's reform proposals in context.

3.1 The Brussels Regulation and the Lugano Convention

In cases before the courts of members of the European Union (EU) involving defendants in the EU or where an agreement confers jurisdiction on an EU court, jurisdiction for civil and commercial disputes is determined by a Community Regulation, known as the "Brussels Regulation"[3]. This has direct effect in the law of EU member states.

There is a separate regime applying to some other European states[4] and to cases in EU Courts involving defendants in those states. This is based on a multilateral convention, the "Lugano Convention"[5], which is similar in general approach, although not in all detailed respects, to the Brussels regime. This is because it is based on the "Brussels" multilateral convention which was superseded by the Brussels Regulation.

3.2 The general rule: defendant to be sued in home court

The general rule under the Brussels Regulation is that the defendant with an EU domicile must be sued in the jurisdiction of his or its domicile. There are a number of exceptions to this rule. For instance:

- in contract cases the defendant may be sued in the "place of performance of the obligation in question", a highly loaded concept – in general, however, where the contract is governed by English law a debtor is required to seek out his creditor, so where a sum is, for instance, due from a reinsurer to a cedant, the place of performance would normally be the office of the cedant where payment is to be made[6],
- in matters related to tort (i.e. most civil obligations not related to a contract) "in the courts for the place where the harmful event occurred or may occur",
- as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated[7] - this ground, which extends to non EU insurers[8], is likely to

be relied upon by policyholders of non-European insurance companies whose operations in the EU are extensive enough to qualify as a branch, etc. as opposed to the remote supply of insurance services, over, for instance, the internet without a local presence [9], and

- "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled" and "as a third party in an action on a warranty or guarantee or in any other third party proceedings" – these grounds sometimes allow, for instance, reinsurers, or retrocessionaires, to be joined in proceedings against cedants[10].

3.3 Consumers and employees

In most disputes involving consumers, including consumers in retail insurance transactions (e.g. involving intermediaries), and employees, the consumer or employee can sue his supplier or employer and must be sued in the courts of his domicile[11]. In the case of consumers this extends to suppliers not domiciled in the EU but with a branch or agency in the EU. These rules cannot be departed from by a jurisdiction agreement.

3.4 Insurance and reinsurance

In most cases concerned with direct insurance the policyholder, insured or beneficiary[12] has the option of suing an insurer domiciled in member states in (and must be sued by that insurer in) the courts of the claimant's domicile[13]. In liability insurance the insurer can also be sued in the courts for the place where the harmful event occurred, or joined as a co-defendant in proceedings by the injured party against the insured.

In direct insurance cases involving EU domiciled insurers jurisdiction agreements are only effective:

- where they are entered into after the dispute has arisen,
- where they enlarge the policyholder's options,
- where they confer jurisdiction on the courts where both the policyholder and the insurer are domiciled,
- where they concern policyholders not domiciled in the EU,
- where the policy covers "large risks", as defined in the EU Insurance Directives, or
- where the policy covers certain other business and transport related risks as fully set out in the regulation[14].

The Court of Justice of the European Communities has held that the special rules on insurance do not apply to reinsurance or retrocession[15].

3.5 Exclusive jurisdiction

There are certain cases where exclusive jurisdiction is conferred on specific courts in respect of certain disputes. For instance jurisdiction in disputes concerning land is generally conferred on the courts of the state where the land is situated. These rules are not of general interest to insurers although they may sometimes arise in disputes where insurance cover has been given.

3.6 Jurisdiction agreements

Subject to the special rules concerning consumers, employees, direct insurance and exclusive jurisdiction an agreement conferring jurisdiction on the courts of an EU member state will be effective, even where the defendant is domiciled outside Europe[16]. These jurisdiction agreements are also generally respected in the courts of other major jurisdictions worldwide, including, for instance, the United States of America.

3.7 Related actions

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court "first seised" shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. The UK courts consider themselves to be seised of proceedings when the document commencing the proceedings (usually the "claim form") is served on the defendant[17].

3.8 Arbitration

The Brussels Regulation does not currently apply to arbitration proceedings or to the stay of court proceedings subject to an arbitration agreement. Nonetheless EU member states are contracting parties to the New York Arbitration Convention. Under article II(3) of this Convention, where there is an arbitration agreement, the court " shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed."

In insurance disputes in the wholesale market arbitration agreements (most often clauses in standard form insurance cover) have a number of advantages over agreements conferring jurisdiction on national courts.

First, whereas there is no international convention applying worldwide for the mutual recognition of civil judgments, the New York Convention applies between a large number of contracting parties across the world, including the United States of America.

Secondly the restrictions on the effectiveness of jurisdiction agreements in direct insurance transactions listed above do not apply to arbitration agreements in wholesale transactions. This is because there are no equivalent rules in the New York Arbitration Convention restricting the effectiveness of arbitration agreements.

Arbitration agreements are, however, unlikely to be effective in retail transactions, except, perhaps, where the policyholder is very sophisticated and the amounts involved are very high: e.g. a billionaire insuring his ocean going yacht or Damian Hirst artwork. This is because of the combined effect of rules in the Unfair Terms in Consumer Contracts Directive 93/13/EEC and, in the UK, its implementing regulations[18], sections 89 to 92 of the Arbitration Act 1996 and the jurisdiction of the Financial Ombudsman Service[19].

3.9 Enforcement and recognition

Judgments granted in the courts of EU member states are entitled to enforcement and recognition in other member states subject to limited defences. These currently include where the judgment is considered to be contrary to public policy[20].

4 Jurisdiction where the Brussels regulation and the Lugano Convention do not apply

The rules in the Brussels Regulation and the Lugano Convention do not usually apply:

- in cases where the defendant is domiciled outside the EU or the territory of the Lugano Convention contracting states, and
- there is no jurisdiction agreement conferring jurisdiction on an EU or Lugano Convention contracting state court.

In such cases each state applies its own jurisdiction rules.

The rules applying in England and Wales (England for short) allow the defendant to be sued in the English courts where he can be served there (e.g. because he is temporarily in England or has a branch there) or in certain other cases specified in the Civil Procedure Rules.

For insurance purposes one of the most important of these cases is where the contract is governed by English law[21]. It allows the English courts to assume jurisdiction in insurance cases where there is no jurisdiction or arbitration clause and no obvious connection with England except, for instance, the fact that the policy was negotiated through the London market[22]. Even where there is no express choice of law clause the English courts may treat an insurance contract as governed by English law if that appears to have been the intention, which will often be the case for London market insurance.

The English jurisdiction rules apply subject to the operation of the doctrine of "forum non conveniens" which in effect render the rules discretionary rather than mandatory in their application. Even, for instance, where the English court might have jurisdiction, it will not exercise it if it is considered inappropriate in all the circumstances of the case (for instance, the applicable law or the location of the witnesses) for the dispute to be tried in England. Conversely, if it can be established that one of the parties may not get a fair trial in the most obvious or "natural" forum for resolution of the dispute, the English court may assert its own jurisdiction. Only the most compelling evidence, however, will lead it to adopt the latter course[23].

5 Problems with existing jurisdiction rules

5.1 Problems more or less specific to insurers

Often problems with jurisdiction rules arise because insurers still do not include jurisdiction or arbitration clauses in their documentation in cases where such clauses are appropriate and would be effective or partly effective. This is perhaps likely to be a diminishing problem from now on following the implementation of the London market's "contract certainty" initiative[24]. This should result in improvements in insurance documentation and in the timetable by reference to which it is generated. There, are, of course, some transactions where insurers and reinsuers may not be able to negotiate the "ideal" jurisdiction or arbitration clause.

Secondly, even where such clauses are included, they are not necessarily recognised as effective in the courts of all foreign, including EU, member states. For instance a foreign court may not recognise the effectiveness of a jurisdiction or arbitration clause in a standard form incorporated by reference in email correspondence. In such a case the courts of the foreign state might be unwilling to decline jurisdiction in favour of the court or arbitration forum chosen in the jurisdiction or arbitration clause.

Even where it is not obvious that the agreement is ineffective according to legal rules applied by the court in question, the court might put off its decision on the jurisdiction issue until the final determination of the proceedings.

So when the case is heard the jurisdiction issue will be considered at the same time as the merits of the dispute. By this time it might be pointless to continue to pursue the jurisdiction issue. This contrasts with the procedure in England, where jurisdiction issues are considered before the merits of the dispute are determined.

Thirdly it has been held that where proceedings have been issued in two EU jurisdictions, the "first seised" rule applies even where the court "second seised" has been chosen in a jurisdiction agreement. This is the case even where the proceedings in the court first seised have been issued in bad faith and for the obvious purpose of frustrating the proceedings in the chosen jurisdiction.

It was so held by the European Court of Justice in *Erich Gasser GmbH v MISAT srl* [2003] ECR-I 4693, a decision colourfully criticised thus in a leading textbook[25]:

> "The Court was unmoved by the legitimate expectations of commerce, that contracts will be enforced, or by the evidence of chicanery on the part of the Italian party; and as for Article 6 of the European Convention on Human Rights, it might as well have been part of the law of Mars for all the impact it had. Few will trouble to persuade themselves that this was the Court's finest hour".

Initially the London Commercial Court, when it was the court "second seised", reacted to this problem by sometimes granting an "anti-suit injunction" requiring the claimant in the

"first seised" court to discontinue. The European Court, however, eventually stopped this practice by ruling that such anti-suit injunctions are incompatible with the Brussels Regulation[26].

So it is not uncommon for a reinsurer faced with a disputed claim to rush off to the Commercial Court and issue and serve a claim for a declaration of non liability with a view to ensuring that that Court is established as "first seised".

5.2 Other problems

Other problems with the existing regime affect insurers in common with other litigants. These include the fact that the procedure involved in achieving enforcement and recognition of judgments across member states is difficult and the defences wider than is appropriate within a harmonised jurisdiction regime.

The regulation recognises the validity of "provisional including protective measures" such as, in the UK, freezing orders. These do not need to be granted by the courts of the member state having jurisdiction in the dispute to which they relate. However the recognition regime in relation to such measures is not fully developed.

The fact that the regulation does not apply to most proceedings against defendants outside Europe has created a gap and inconsistent approaches to such cases in different member states.

6 The Commission's reform proposal

The Commission accordingly adopted a proposal for an amended version of the Brussels Regulation in December 2010[27]. The proposal includes many and extensive proposed changes, only some of which are discussed in this article.

The changes proposed include the following.

6.1 Jurisdiction agreements

Where there is a jurisdiction agreement, the "first seised" rule will be subordinated to the operation of any jurisdiction agreement. The chosen court will take precedence over the first seised court. Issues as to the effectiveness of the jurisdiction agreement must be decided by the chosen court.

6.2 First seised

If, apart from any jurisdiction agreement, there is an issue as to the jurisdiction of the court first seised, that court must normally rule on that issue within 6 months. In general "first seised" status will be established by issue (rather than as currently in England, service) of proceedings, thus making it easier in England, and possibly in other jurisdictions, to achieve first seised status.

6.3 Arbitration proceedings

The proposed amendments to the regulation will address the interface between court and arbitration proceedings. Where a party relies on an arbitration agreement in a case where court proceedings in a member state have been issued in alleged breach of the arbitration agreement, that court must stay its proceedings until the validity of the agreement has been established by the arbitration tribunal or by the courts of the state of the seat of the arbitration.

6.4 Proceedings against non European defendants

The Commission proposes a new regime for allocating jurisdiction in cases involving non European defendants and no jurisdiction agreement. This regime follows in broad outline the grounds on which proceedings may be issued against EU defendants. So the rules allowing EU domiciled policyholders under direct insurance contracts to sue insurers in the court of the policyholder's domicile will extend to insurers with no presence at all in the EU.

This regime will replace, among others, the current equivalent rules in the UK Civil Procedure Rules discussed above.

It should be noted that the new rules do not allow claimants to rely, in itself, on the fact that the contract is governed by the law of any state. They do, however, borrow some of the UK forum non conveniens principles, thus allowing courts some discretion in deciding whether to exercise jurisdiction.

One of the grounds for assuming jurisdiction in the proposed new article 26, is described as "forum necessitatis", i.e. where assumption of jurisdiction is necessary to ensure the "right to a fair trial or the right to access to justice". Example of such cases might be:

- where the court which might otherwise assume jurisdiction is in a war zone or a state of anarchy[28], or
- "if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied"

Where EU courts assume jurisdiction against non EU defendants in accordance with the rules relating to non EU defendants, the judgment will be enforceable in the EU. Whether it is enforceable outside the EU will, however, depend on the applicable rules in the jurisdiction in question.

6.5 Provisional including protective measures

The proposal provides expressly for recognition and enforcement of provisional including protective measures which have been granted by a court having jurisdiction on the substance of the case. These include, subject to certain conditions, measures which have been granted

without notice to the other party. By contrast provisional measures ordered by a court other than the one having jurisdiction on the substance only take effect within that state.

6.6 Enforcement and recognition

In most cases defences to recognition and enforcement will be abolished. The procedure will not require the claimant formally to apply to the court where enforcement is required. Instead the initiative is left to the defendant to apply to set aside the judgment on much more limited grounds, e.g. where it is alleged that proper notice of the original proceedings was not given. Public policy will no longer be a ground for refusing enforcement.

The old defences and procedure, however, are retained in defamation cases in which an individual claims that rights relating to his personality or privacy have been violated by the media. The Commission considers that member state approaches to such rights still differ to such an extent within Europe as to preclude abolition of all restrictions on "free circulation of judgments".

7 Towards implementation

The Commission's proposal is subject to consultation and adoption through the EU legislative processes. It is possible that it may be amended and watered down, particularly since it might be said to be primarily serving the UK agenda, the UK being the leading European chosen court jurisdiction for international disputes. Even if the proposal is adopted in its present form, further problems may nonetheless emerge.

One problem which the Commission's proposal will not resolve is the delay of 2 years or more which arises every time the court of a member state makes a reference to the European Court of Justice on an issue arising under the regulation. Many such references are perhaps likely to be made on, for instance, the operation of the new doctrine of "forum necessitatis".

The proposal reinforces the case for reinsurers, and insurers covering wholesale risks, to consider using arbitration clauses where these can be included in standard forms or otherwise negotiated. Reinsurers, and direct insurers covering large risks and the transport related risks described in section 3.4 above, should also give further thought to the systematic use of jurisdiction clauses.

Under the new regime, if it is implemented, jurisdiction and arbitration clauses are much more likely to prevail. By contrast where such clauses are not included in transactions having no other obvious connection with the preferred court, it will become less likely that either (re)insurers or cedants will be able to require that their disputes are invariably resolved in that preferred court.

Endnotes

[1] COM(2010) 748 final.
[2] See page 45.
[3] COM(2010) 748 final.
[4] Denmark, Iceland, Norway and Switzerland.
[5] http://curia.europa.eu/common/recdoc/convention/en/c-textes/_lug-textes.htm.
[6] See *Glacier Reinsurance AG v Gard Marine and Energy Ltd* [2010] EWCA Civ 1052, discussed at page 4 in the February 2011 edition of "Insurance Law Monthly".
[7] Brussels Regulation articles 5(1)m (3) and (5).
[8] Brussels Regulation article 9(2).
[9] The European Commission has published an "interpretative communication" that contains guidance on the distinction between these two business models http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:043:0005:0027:EN:PDF.
[10] See note 6 above.
[11] Ibidem Articles 15 to 21.
[12] Referred to collectively as "policyholder" hereafter for the sake of brevity.
[13] Injured third parties have the same option where the courts permit them to sue the insurer directly.
[14] Brussels Regulation, articles 13 and 15.
[15] *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)* Case C-412/98.
[16] Brussels Regulation Article 23.
[17] *The Sargasso* [1994] 3 All ER 180.
[18] The Unfair terms in Consumer Contracts Regulations 1999.
[19] Part XVI of the Financial Services and Markets Act 2000.
[20] Brussels Regulation article 34.
[21] Civil Procedure Rules Practice Direction 6B para 3.1(6)9(c).
[22] As in, for instance, *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm).
[23] See *Pacific International Sports Club Ltd v Soccer Marketing Ltd* [2010] EWCA Civ 753
[24] See the "contract certainty" material on London Market group's web site http://www.londonmarketgroup.co.uk/ .
[25] *Cherney v Deripaska* [2009] EWCA Civ 848.
[26] *Turner v Grovit* Case C-159/02
[27] (2010) 748 final.
[28] As in *Alberta Inc. v Katanga Mining Ltd. and others* [2008] EWHC 2769 (Comm).