

## ACCIDENTS ABROAD

### **Key Points**

Where a foreign legal element is involved, there are 2 principal questions:

- Can the court exercise jurisdiction over the subject matter of the dispute and the persons involved in the dispute?
- Which law should be applied by the Court to the facts before it - English law or the law of another country?

### **1. The traditional rules: Forum Non Conveniens**

**1.1** Traditionally the English Courts have enjoyed a discretionary power to refuse jurisdiction. As will be seen below the European law has significantly eroded this power and imposed restrictions on the circumstances in which it can be exercised.

**1.2** At common law the basis of the English court's jurisdiction in personam is that the defendant is present in England so that the claim form commencing proceedings can be served on him here, or if he is not present in England that he has submitted to being sued here. If he is not present and has not submitted to the jurisdiction then the court may have power under CPR 6.20 to exercise jurisdiction by giving permission for process to be served out of the jurisdiction. This power arises where, notwithstanding the fact that

the defendant is foreign, the events or subject matter of the dispute are connected with England.

**1.3** An important feature of the traditional rules is that the outer limits of the court's jurisdiction are fixed by a number of discretions.

- Where a defendant is served with process in England as of right (because he is physically in England at the time of service) the court may nevertheless grant a stay of the English proceedings at the request of the defendant on the basis there is a more appropriate forum abroad (forum non conveniens) e.g. factors such as which law is likely to govern the dispute, where the witnesses reside etc.
- Similarly in exercising its powers to give permission for service of process out of the jurisdiction under CPR 6.20 the court has a discretion and will permit service only if it is shown that England is the appropriate forum.

**1.4** When the traditional rules are compared with the Brussels regime the obvious difference in approach is that under the Brussels regime the exercise of jurisdiction is, for the most part, mandatory whereas under the traditional rules the scope of the court's jurisdiction is determined to a large extent by the exercise of discretion on the basis of an assessment of whether the English court is the appropriate forum. The most important limitation on this discretion is in relation to cases where the possible competing forum is in another EC country. In such cases the allocation of jurisdiction is governed by the provisions contained in Council Regulation (EC) 44/2001 ('the Brussels Regulation'). Where it applies, the English Court either has jurisdiction (by virtue of the regulations) and has no jurisdiction to refuse a case, or has no jurisdiction.

## 2. Jurisdiction: Where to sue?

### **The Brussels Regime [Council Regulation (EC) 44/2001 (formerly found in the Brussels Convention)]**

2.1 The Brussels Convention was entered into by the member States of the European Community. It regulates jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Brussels Convention was incorporated into domestic law by the Civil Jurisdiction and Judgments Act 1982.

2.2 The Judgments Regulation came into force on the 1<sup>st</sup> March 2002 and is directly effective in all Member States except Denmark. After 1<sup>st</sup> March 2002, the Brussels Convention in so far as it governs relationships with Denmark, and the Lugano Convention<sup>1</sup> remain in place. In all other respects the Brussels Convention is superseded by the Judgments Regulation.

2.3 The Judgments Regulation and the Conventions regulate jurisdiction issues in litigation between parties domiciled in Regulation and Contracting states. They do so at the price of rigidity and where they operate, they preclude a common law analysis of which forum is the most appropriate and convenient to deal with a particular case.

2.4 As regards allocation of jurisdiction under the Brussels Regime, ***the defendant's domicile is 'the point on which the jurisdiction rules hinge'***.

2.5 The basic rule is that a defendant shall be sued in the member state in which he is domiciled (Article 2).

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<sup>1</sup> The Lugano convention is closely modelled on the 1968 Brussels Convention. However the Lugano Convention was entered into between the members of the European Free Trade Association while the Brussels Convention was entered into by the members of the European Union.

## *Article 2*

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

**2.6** However this basic rule must be considered in conjunction with Articles 5 and 6 : special jurisdiction. Article 5 is premised on the existence of a close connection between the cause of action and the forum (unlike Art. 2 which is based on the defendant's connections with the forum). Article 6 deals with cases involving multiple defendants and is based on the simple idea that it is often convenient for related proceedings involving two or more defendants to be heard by the same court.

## *Article 5*

*A person domiciled in a Member state may in another Member State be sued:*

*(1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question:*

...

*(3)in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;*

...

## *Article 6*

*A person domiciled in a Member State may also be sued:*

*(1)where he is one of a number of defendants in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings;*

*(2)as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the courts seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;*

*[There are also specific provisions relating to insurance disputes, consumer contacts, employment contracts etc. Further articles provide for exclusive jurisdiction e.g. where the dispute is about real property, only the court of the member State in which the property is situated will have jurisdiction.]*

The upshot is a potential claimant may have a choice. Although a person domiciled in France may be sued in France, the Brussels regime specifies circumstances in which a person domiciled in one member state may be sued in other member states.

**Example:**

**RTA in France. English driver at fault. The driver in the other car is French.**

**English driver may be sued in England (Article 2) or France (Article 5.3). If chooses England, the English Court has no jurisdiction to refuse, even if witnesses in France.**

The choice is entirely for the claimant; there is no mechanism whereby the defendant can require the claimant to opt for one jurisdiction rather than another.

**2.6** Where a dispute involves more than two parties it is often just and convenient for all claims to be decided at the same time by the same court. Article 6 seeks to mitigate the effects of those provisions which tend towards fragmentation of the various disputes which may arise out of a single set of facts. Article 6(1) provides that jurisdiction can be assumed over co-defendants who are domiciled in other member states only if the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings. But, according to the judgement of the ECJ in *Réunion Européenne SA v Splietoff's Bevechtungskantoor BV 1998 ECR I-6511*, the conditions of Article 6(1) are not satisfied in a case involving two claims directed against different defendants and based in one instance on contractual liability and in the other in tort. This led to what might seem to be a bizarre result in *Watson v First Choice, Aparta Hotels 2001 EWCA Civ 972*. Mr Watson went on a package holiday bought from First Choice. While there he visited an accommodation block called Caledonia Park owned and managed by Aparta Hotels. He had an accident

and suffered injury. He claimed against both defendants in an action in England – against First Choice in contract (a contract made in with an English company under English law – their liability arising under the Package Tour Regulations) and against Aparta in tort. On the basis of the *Réunion Européene* case, the judge set aside service against Aparta. Although the Court of Appeal referred the case to the ECJ, the parties settled before hand, and so we do not know what the outcome would have been.

**2.7** One must always be alive to the consequences of one of the parties to a proposed action being connected to another member state. *Owusu v Jackson 2002 EWCA Civ 877* amply demonstrates the point. (This was a Brussels convention case but the principle is the same)

**Mr O booked a holiday villa in Jamaica from Mr J. While there he had a swimming accident and suffered catastrophic injuries rendering him tetraplegic. He sued Mr J (domiciled in England) and 5 other Defendants involved in the control and management of the site where the accident occurred (all of whom were domiciled in Jamaica). He brought proceedings in England. It goes without saying all the witnesses etc were in Jamaica. However there was a tactical advantage in having the proceedings here and Mr J's domicile enabled his solicitors to issue here.**

**Mr J applied to have the claim stayed on the grounds of forum non conveniens, and the other Defendants applied to have service against them set aside. Mr O contended there was no power to stay the claim against Mr J. To do so would be inconsistent with the Brussels Convention since Article 2.1 provides a mandatory requirement that (unless other articles override) a person be sued in the state of domicile. The same article did n't apply to the other 5 defendants but there would be practical implications if the trials were in different jurisdictions. The defendants argued the Brussels convention was concerned with regulating jurisdiction between member States not between Member and non member State, which was not a matter of legitimate Community interest.**

**The judge accepted the argument that Jamaica was the appropriate forum but he agreed with Mr O that the Brussels Convention precluded a stay against Mr J and so refused to stay the claim against any defendant. The Court of Appeal referred the matter to the European Court of Justice.**

**The ECJ<sup>2</sup> supported the claimant's position, and held since Mr J was domiciled in England, Mr O had an absolute right to sue him here. However the claims against the other defendants were remitted to Jamaica irrespective of the complications which might flow e.g. inconsistent judgements, contribution proceedings etc.**

**2.8** This illustrates the mandatory nature of the regime.

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<sup>2</sup> [reported at 2005 QB 801]

### **3. Which country's law is applied**

**3.1** As we have seen, it is quite possible for a wrongful act to be performed in one country but to be litigated in another. However, it does not necessarily follow that if you sue in England, English law is applied. That is the default position, but if one party establishes the action should be governed by foreign law, then the English Court will apply that foreign law. In practice the Court relies on an expert who gives evidence on that foreign law as a matter of fact and the judge then applies that foreign fact solution to decide the case.

**3.2** The choice of law affects a large number of issues, and is not just a question of convenience. For example,

(a) liability – different countries may apply different tests to establish liability. Although most countries have a fault based system for road traffic accidents, and the various directives underlying the UK workplace regulations ought to result in similar standards at work, there may be differences which may affect the merits;

(b) damages - rules relating to quantification of damages vary, in particular with regard to such issues as deduction of benefits;

(c) limitation may also be another significant factor.

Inevitably this leads to the question as to which law is to govern in these circumstances. So where the claimant who is injured in France but sues the negligent English driver in England, would the English Courts apply French law or English law?

**3.3** The starting point is Part 11 of the private International Law (Miscellaneous Provisions) Act 1995. However, be aware of recent developments, yet to come into force, introduced by '**Rome 11**' ( see paragraphs 3.21 – 3.27 below).

#### **General Rule**

**3.4** The general rule is to be found in Section 11. If the accident happens abroad, the applicable law will be the law of the country in which the accident happens.

**3.5** The simplest situation is where events constituting a tort occur in a single country. The applicable law is that of the country. So if a French driver negligently runs down an English tourist in Scotland, the applicable law under the general rule is Scottish law.

**3.6** But what if a tortious act occurs in one country and an injury in another? In situations where elements of the events constituting the tort occur in different countries a choice has to be made between adopting a rigid rule based on a single connecting factor or a more flexible rule. If a rigid rule is adopted a further question arises: which connecting factor should be used - the place where the defendant committed the wrongful act or the place where the victim suffered the injury? The 1995 Act adopts different approaches to different types of claim. With regard to cases involving personal injury or property damage the general rule is based on an inflexible connecting factor. The applicable law under the general rule is **‘the law of the country where the individual was when he sustained injury’**. [s.11(2)(a)] So, if the defendant, a chemical manufacturer, negligently releases poisonous fumes into the atmosphere as a consequence of which X suffers personal injury in Belgium and Y in the Netherlands, the general rule provides that X’s claim is governed by Belgian law, whereas Y’s claim is governed by Dutch law.

### **The Exception**

**3.7** But the general rule may be displaced by the law of another country with which the tort is more closely connected [see factors set out in *section 12*.]

*12 (1) If it appears in all the circumstances from a comparison of*  
*(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and*  
*(b) the significance of any factors connecting the tort or delict with another country,*  
*that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other*

*country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.*

*(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.*

**3.8** In practice, if the exception is invoked, the decision facing the court will normally be whether the *lex loci delicti* (law of the place where the tortious act occurred) or the *lex fori* (law of the place where a case is being adjudicated) is the most appropriate. While the general rule is easy to apply, it is not so straight forward to determine whether it may be displaced. Normally, there is a strong case for saying that a law other than the *lex loci delicti* is the most appropriate law only if neither party is connected with the country in which the tort is committed.

**3.9** To illustrate the point - the case of *Edmunds v Simmonds* 2001 1 WLR 1003. The claimant was on holiday in Spain with the defendant, when she was seriously injured in a road traffic accident caused by the defendant's negligent driving. He was in collision with a Spanish lorry. Both parties were English, and the claimant had returned to England and would suffer all her losses in England. The Court held there were overwhelming factors leading to the application of section 12, so the general rule (which would have meant Spanish law would be applied) was displaced.

**3.10** It may also be possible to displace the general rule in relation to some issues only. In *Roerig v Valiant* 2002 1WLR 2304, a Dutch widow brought a claim in England under the FAA 1976 following the death of her husband, who was a crew member on an English registered trawler. Liability was not in dispute. It was agreed that following the general rule, the applicable law was English. (The accident happened on an English trawler, making England the place 'where the events constituting the tort' happened). However the Defendants relied on section 12 to displace the general rule on the basis

there were significant factors connecting the tort with Holland. They did not suggest the whole matter be governed by Dutch law, only the assessment of damages, the reason being there was no equivalent of section 4 of the FAA i.e. certain valuable benefits fell to be deducted under Dutch law thereby reducing the Defendant's liability.

**3.11** Waller LJ, delivering the lead judgement found that factors connecting the tort with England were essentially that the accident happened on an English registered boat, and the defendant was an English company. Although there were more factors connecting the tort with Holland, namely the deceased was Dutch, he was employed on the ship by a Dutch company, and his family would suffer their loss in Holland, Waller LJ did not accept that they made it 'substantially more appropriate' as section 12 required before the general rule is displaced. To find otherwise would mean that in almost every case where the claimant was from another country, it would be appropriate to assess damages according to the law of that other country. He did not think the section was intended to have that effect.

### **Substantive/Procedural**

**3.12** When applying foreign law as the *lex causae* (the law of the legal system applicable to the legal dispute), a distinction is made between the substantive law and procedural law. As a general principle, only the substantive laws of the *lex causae* will be applied by an English Court, and the English law of procedure will regulate proceedings. However, the 1995 Act does not define what is a question of substance and what is a question of procedure. This has led to some uncertainty.

**3.13** At common law the leading authority is the House of Lords decision in *Boys v Chaplin 1971 AC 356*. The issue facing the court was whether damages for non pecuniary losses could be recovered notwithstanding the fact that Maltese law did not award such damages. A minority decided that this central question was a procedural one and therefore governed by English law (as the *lex forum*); the fact Maltese law did not award general damages was irrelevant. A majority decided however that whether there is recovery for a particular head of damage is a substantive question which was to be

governed by the *lex delicti*. This still leaves unresolved where exactly the line between substance and procedure is. The traditional view is that pure questions of quantification are to be regarded as procedural so that once a defendant is liable for the claimant's physical injuries the precise sum of money awarded is a matter for the *lex forum*. So English law determines the compensation for the loss of a foot, even if the foreign law governs the substantive claim.

**3.14** The issue was further considered in *Harding v Wealands* 2006 3 WLR 83. This concerned a road traffic accident in Australia in the state of New South Wales (NSW). The Claimant, an Englishman was rendered tetraplegic following a road traffic accident. The Defendant, who was driving the vehicle, was an Australian national. The claimant issued and served proceedings seeking damages in England where the Defendant was working. The Defendant contended that the law of NSW, and relied upon the provisions of the Motor Accidents Compensation Act 1999 which imposed a ceiling on damages. The major question facing the court was, was this a substantive rule or procedural? The judge at first instance held that although NSW was the place of the tort and so prima facie provided the governing law, the factors connecting the case with England rendered it substantially more appropriate to apply English law. He also held that in any event the quantification of the damages was a procedural matter as decided in *Roerig*, and the Motor Accidents Compensation Act 1999 inapplicable, so section 12 became academic.

**3.15** The Court of Appeal unanimously overturned the decision relating to the choice of law, holding it could not accept a conclusion that the defendant's link with England and with Mr Harding was far more significant than her Australian connection. *'Where the general law by virtue of section 11 being the law where the tort occurred, is also the national law of one of the parties it will I suggest be difficult to envisage circumstances that will render it substantially more appropriate that any issue be could be tried by reference to some other law.... Ms Wealands had left her car in NSW, was still a citizen of Australia driving on a NSW driving licence, and the accident occurred in NSW.'*

**3.16** However, unless the Court of Appeal also overturned the judge on the question of whether the limits imposed by the Motor Accidents Compensation Act 1999 were substantive or procedural, the success on the first issue would have been academic. In the event the majority concluded the rule should be regarded as substantive. They felt it was artificial to say matters of such fundamental importance as a statutory cap on damages was merely procedural.

Note: Waller LJ dissented - In Roerig Waller LJ had also held that whereas the question of whether the loss of dependency was recoverable was a matter of substantive law, the question of whether benefits were deductible was procedural. So even if the law applicable to the assessment had been Dutch, once it was established that dependency damages were known to Dutch law, they would still have been calculated in accordance with English law.)

**3.17** However, the House of Lords overturned the majority of the Court of Appeal on this issue and restated the traditional understanding of the distinction as applied to the quantification of damages. In summary they concluded:

- Under common law rules of private international law, question of the quantification or assessment of damages had long been regarded as procedural rather than substantive; they did not accept that Boys v Chaplin left the position open. Pursuant to section 14(3)(b) of the 1995 Act questions of procedure were to be decided by the law of forum.
- There was nothing in the 1995 Act which suggested Parliament intended to change this longstanding rule.
- The Australian High Court had in a previous decision treated the MACA as a procedural rather than a substantive statute and were right to do so.

**3.18** Having reached a decision on this question, it was not necessary to decide whether the Court of Appeal was right to overturn the application of section 12. The approach of the Court of Appeal on this issue in Roerig and Harding remain good law.

### **Limitation**

**3.19** Another matter affecting the choice of law is limitation. In cases with a foreign element being tried in England, which limitation period applies? Is it the period set by the

applicable (foreign law) or the *lex forum*? The answer lies in the **Foreign Limitation Periods Act 1984**. This provides that where any matter is governed by the law of a foreign country, then that country's law on limitation shall apply irrespective whether it classifies the rule as substantive or procedural, *except* where application of the foreign law would conflict with public policy. [section 2(1)]. A rule will conflict with public policy, inter alia, to the extent that its application would cause undue hardship to a party.[section 2(2)]

**3.20** The public policy exclusion will be exceptional. The fact that a period is shorter than under English law will not suffice. The hardship must be caused by the application of the foreign law of limitation rather than English law. [*Arab Monetary Fund v Hashim 1993 1 Lloyds 543*]. If the foreign limitation period took no account of the claimant's state of knowledge then it might be contrary to public policy. In *Jones v Trollope Colls Cementation Overseas Ltd (the Times 26.1.90)* the Court of Appeal held that the 12 month foreign limitation period would cause undue hardship in circumstances where the Claimant was hospitalised for a long period and believed her claim would be met.

### **Recent Developments Soon to Come into Force: Rome 11**

**3.21** The harmonisation of choice of law rules for non-contractual obligations has been on the agenda for many years. The Rome 11 Regulations on the law applicable to non-contractual obligations was adopted in July this year. It will apply from 11<sup>th</sup> January 2009 to events giving rise to damage occurring after its entry into force.

**3.22** The general rule remains the same. *Article 4(1)* provides that the law applicable shall be the law of the country in which the damage occurs.

**3.23** However where the proposed claimant and defendant both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. (*Article (2)*)

**3.24** There is also an escape route akin to that provided by section 12 of the 1995 Act, so that these general rules are subject to the proviso that :

*‘where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with a country other than that indicated in (1) and (2) the law of that country shall apply. A manifestly more closely connection with another country might be based in particular on a pre-existing relationship between the parties such as a contract, that is closely connected with the tort.’ (Article 4(3))*

**3.25** However under *Article 14*, except in cases involving the infringement of intellectual property rights, the parties are free to select the applicable law after the dispute has arisen. *‘The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice third parties.’* The applicable law has to be balanced against mandatory and overriding rules of other countries. Convention states that the applicable law yields to the overriding rules which form part of the law of the forum and may be displaced by the overriding rules of a third country. It is also provided that the application of the governing law may be refused if it is manifestly incompatible with the public policy of the forum.

**3.26** *Article 1 (3)* states that the Regulation shall not apply to evidence and procedure, without prejudice to Article 21 (formal validity) and Article 22 (burden of proof).

**3.27** See also *Article 17* – ‘Rules of Safety and Conduct’ and *Article 18* – Direct Action Against the Insurer of the Person Liable’.

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**Kerstin Boyd**

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**8<sup>th</sup> November 2007**

