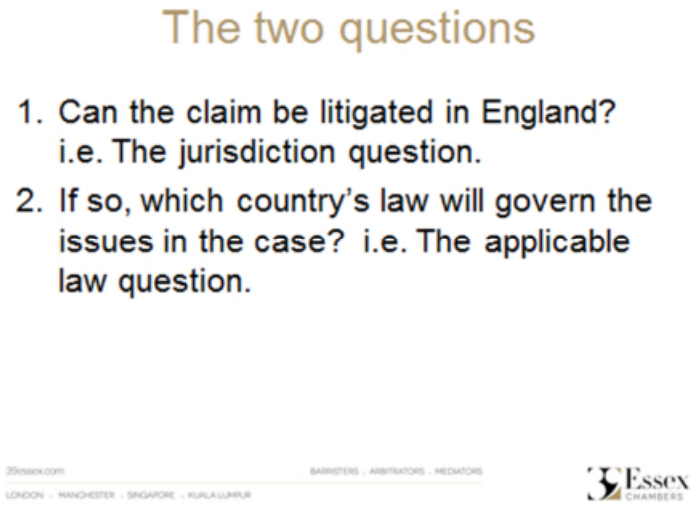
Accidents abroad – Bernard Doherty May 2017

There are quite a number of slides provided which I hope will be useful to you perhaps as a checklist or resource. There is too much material in those slides for a talk of 45 or 50 minutes so some parts I will be glossing over quite quickly. [Full slide pack is in a separate hand out]



I'm going to be concentrating today on the general questions that arise in cross-border litigation, chiefly concerned with cross-border litigation in tort and personal injury, property damage, that kind of issue. I will be looking at 2 fundamental questions namely

1. the jurisdiction question, which nearly always arises in the context of "can a claim be litigated in the English courts or does it have to be litigated elsewhere?".
2. And secondly, if it can be litigated in England, which country's law will govern the issues in the case? - that is called the applicable law question.

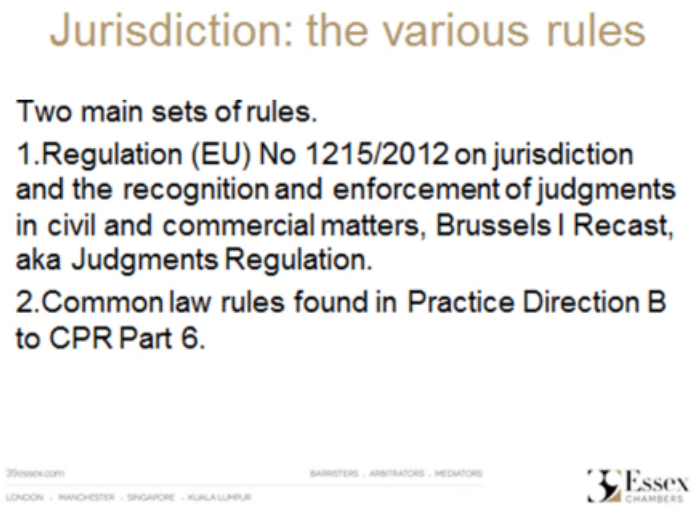
I would say for those who practice only occasionally in the area of cross-border claims, it's always very important to open any set of papers with those 2 distinct questions clearly separated in your mind. It is surprising how often instructions come in even from solicitors who do a good deal of this kind of work where there is a kind of overlapping of thinking, of one bleeding into the other, and which can easily lead you astray.

The jurisdiction question is almost always the preliminary question and it is a totally separate question to which country's law will govern the claim if the English courts do have jurisdiction.

Jurisdiction

So the first question is the jurisdiction question. If you have to advise the client on whether a claim can be, or needs to be, litigated in the English courts, you first have to work out where you're able to find the relevant rules that are going to give you the answer.

Rules on jurisdiction



There are lots of potential places where you might find jurisdiction rules but there are 2 main sets of rules that will cover the majority of cases. They are as set out there:

- Regulation No. 1215/2012 an EU regulation – or "Brussels I recast" - known in the CPR as the Judgments Regulation. I think that is the only place where known as the Judgments Regulation but if you see "Judgments Regulations" in the CPR that is what it is referring to. I will call it "Brussels I recast".

- The 2nd main set are the Common Law rules. These are found in the rather odd location of Practice Direction B to CPR part 6. You shouldn't be misled by the fact that they appear in a Practice Direction; do not think they are not significant. They are highly significant and they are rules of substantive law which for reasons best known to Lord Woolf have been relegated to a Practice Direction.

There are other sets of rules which might apply in some cases. I am just going to alert you to their existence:

- Intra-UK jurisdiction rules are for civil and commercial matters, the kind of litigation we're concerned

with, are governed by rules set out in schedule 4 of the Civil Jurisdiction and Judgements Act. They are a sort of modified version of Brussels I rules tailored to a domestic context. If you're looking at a dispute in jurisdiction between England and Scotland for example, or England and Northern Ireland, then that's where you will find the relevant rules.

- The Lugano Convention basically applies the Brussels regulations rules but it applies them to Switzerland, Norway and Iceland, in other words the states which form the EEA, or in Switzerland's case EFTA. They are not member states of the EU but follow very closely European rules to get the benefit of access to the single market. The Lugano Convention applies to people who are domiciled in those particular states and the rules are very close to the Brussels rules.
- If you have a case of carriage by air or carriage by sea these are governed by international conventions. You'll be applying rules which govern liability, assessment of damages and the conventions contain rules governing jurisdiction. So if you've got a carriage by air case and just go to the Montréal Convention - it is a one-stop shop, you don't need to worry about Brussels I or Common Law rules.

I'm not going to talk any more about those rules. I'm going to go back to the 2 main sets of rules: Brussels I re-cast rules and Common Law rules.

How do you decide which of those 2 sets applies?

The basic rule - Domicile

The basic rule is that the Brussels I re-cast rules take priority over everything else. If they apply, the Common Law rules don't. Common Law only applies in the spaces which have been left for it by the Brussels I regulations.

If the defendant is domiciled in an EU member state, then jurisdiction will be based on the Brussels I re-cast regulation. This is implicit in the whole approach and explicit in articles 4 and 28. If you want to know whether somebody is or isn't domiciled in an EU member state, you will find that slightly oddly Brussels I has specific rules as to when a company, a body corporate, will or won't be domiciled in a member state, but it leaves to national law whether an individual is domiciled in a state.

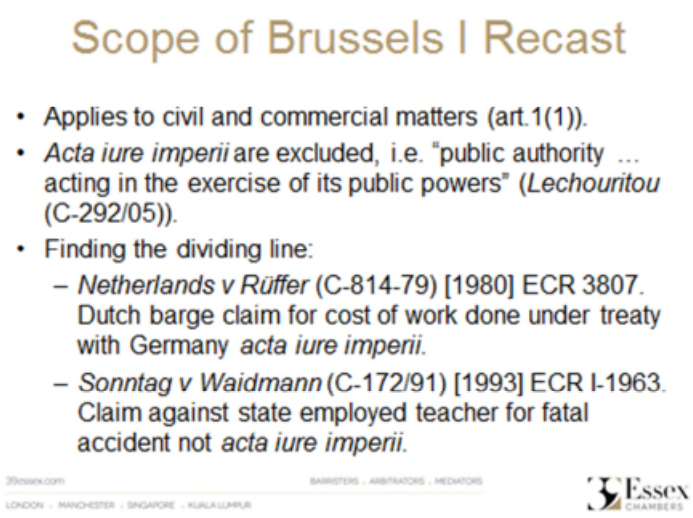
You will find rules relating to companies in article 63 (4). Rules for individuals you go to domestic law. Special

rules as to individual domicile have been created in the Civil Jurisdictions and Judgement Order 2001. It is worth bearing that in mind because Common Law rules as to domicile are very particular and as a matter of English Common Law you acquire domicile at birth and it is very hard to shake it off - it is with you through your life. Most European countries have a much more flexible concept of domicile and so the traditional Common Law concept of domicile is inappropriate for European regulations. The Civil Jurisdiction and Judgements Order creates rules as to domicile which make it much more flexible, easier to acquire domicile. Basically residence for 3 months and a significant connection to a place is enough to give you domicile for the purposes of the Brussels 1 jurisdiction.

There are certain other cases where the Brussels I recast regulations will apply. If the company is domiciled outside the EU but has a branch or agency within, and the transaction in question is carried out through that branch or agency, Brussels I rules will apply. Similarly if there is a jurisdictional agreement with a choice of court agreement in favour of the courts of an EU member state, then the Brussels I recast regulations will apply, even if the parties are domiciled outside.

A basic rule exception is that if the defendant is domiciled *outside* the EU, jurisdiction is usually determined according to the Common Law rules.

Acta iure imperii exception



There are other sets of circumstances in which Brussels I and the European rules will not apply, but this is the one most likely to be relevant to tort and insurance based litigation.

If the defendant's acts which are being called into question in the litigation are the acts of a public authority acting in the exercise of its public powers, so called *Acta iure imperii* then Brussels I is not applicable. Under the European scheme such acts, being within the scope of governmental matters, are taken outside the scope of civil and commercial matters, whereas Brussels I re-cast only applies to civil and commercial matters.

It isn't always easy to find the dividing line as to when the *Acta iure imperii* exception applies. The Netherlands and Ruffer case is a claim for the cost of work done by the State of Netherlands – it was to do with barges and activities on the river Rhine which in various places, on its meanderings to the sea, acts as a border between several countries which means there are lots of treaties which govern the conduct of activities on it. One treaty governed the removal of stricken barges and in Netherlands v Ruffer it was felt that a

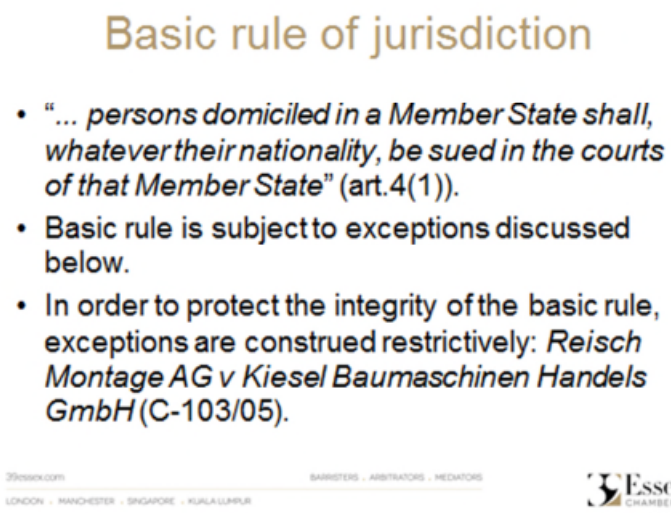
Netherlands' claim for the cost of work done under the Treaty with Germany fell within the *Acta iure imperii* exception so outside the scope of Brussels I.

In Sontag and Waidmann on the other hand, the claim fell on the other side of the line. That was a schoolteacher who took a party of German pupils to Italy. One of the pupils was killed in an accident - a fall from a mountain and the teacher was sued by the boy's family. Among the various jurisdictional defences deployed on the teacher's behalf was that this fell within the *Acta iure imperii* exception, it was a state person carrying out the state's function.

The European Court of Justice said that whilst he might have been a State employee, what he was doing looking after children was not a specific state function. It was the sort of function that a private school might carry out, or a childminder, so it is not a specific state function.

Often in claims against the MoD there might be dividing lines. If the MoD negligently lets off a shell which damages your house, then you can be pretty confident that it is within the *Acta iure imperii* exception. The firing of shells from a military base is the kind of thing that governments specialise in - private individuals don't. Typically a public act. If, for example, an army provides milk delivery services to people who live on an army base, and you get run over by the milkman on his way to work, then the MOD is much less likely to fall within the *Acta iure imperii* exception because delivering milk is not specifically a state or governmental activity. So if it is a governmental activity, it is within the exception and Brussels I doesn't apply; you fall back on the Common Law rules.

Basic rules under Brussels 1 - forum

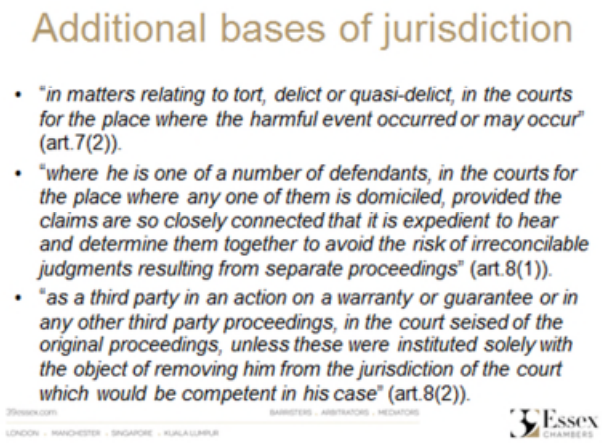


Let's assume that Brussels I recast does apply, what are the rules? There are as you can imagine quite a lot of rules. I'm going to look at a few that are most likely to be the most important in the kind of litigation people in this room do.

The basic rule is that you sue a defendant where the defendant is domiciled. That is the fundamental rule though there are lots of exceptions to that. That rule is very important because it is the bedrock and because all exceptions to that rule are construed narrowly by the ECJ. If they weren't construed narrowly then they would risk undermining the basis of the rule. The European Courts are very keen on legal certainty and clarity. They want this basic rule to still have quite wide scope. So the other rules that I'm going to talk about under

Brussels I are all exceptions to the domicile rule. The basic principle of construction is that they will be construed narrowly as exceptions.

Additional bases



Additional bases for jurisdiction apart from domicile, there are 3 that I set out here.

1. Harmful event

The first one being the most significant. In matters relating to tort, delict or quasi delict (Delict and quasi delict are concepts in the laws of other member states and indeed in the law of Scotland but not really relevant in England), the courts for the place where the harmful event occurred or may occur can have jurisdiction.

"may occur" may be relevant to an injunction, but we are usually concerned with occasions where the harmful event *has* already occurred and the damage has arisen from that harmful event. This is an additional basis of jurisdiction which is available in addition to defendant domicile.

The "harmful event" has been interpreted as meaning two things, and the claimant can fix jurisdiction on the basis of either. It means the place where the damage occurs, that can be the harmful event, but it also means where the event which gave rise to damage occurs. So jurisdiction can be fixed on either of those two places.

The facts of the case that gave rise to that ruling, the Bier case, is an example. The defendant was a mining company which pumped salts into the Rhine. Those salts made the water harmful to plants which were further downstream and in another country. The business whose plants were damaged had to take expensive mitigating measures to purify the water before they could use it for irrigation. They tried to sue the mining company in the place where the nursery was situated and the plants were damaged. The mining company said the harmful event, if there was a harmful event, was where they were discharging the salts into the Rhine which they did in France, not the Netherlands where the nursery was situated.

The European Court of Justice said either could be relied on - they could sue on the basis of harmful event either in the place where the salts were discharged or the place where the salts caused damage to the plants, where the water was taken out of the river.

The place where a harmful event occurred is a commonly used basis of jurisdiction in tort.

There are two others that are specifically worth having in mind, which I'm not going to talk about in great detail.

2. Multiple defendants

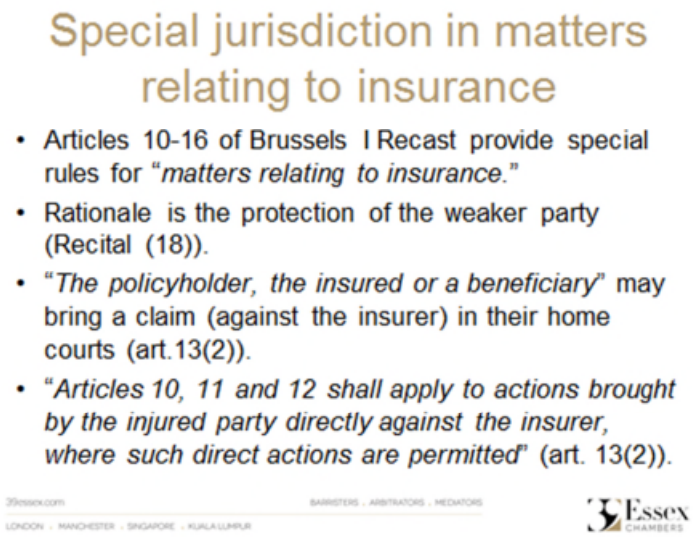
A person who is domiciled in a member state who is one of a number of defendants may be sued in the courts of the place where any one is domiciled provided that the claims are so closely connected that it is convenient to hear and determine them all together to avoid the risk of irreconcilable judgements. What that means is if, in a particular case, you've got 2 or 3 potential defendants who might be domiciled in different member states of the European Union, it's surprising how often it happens, you've got the choice of suing them each in the place of their domicile but that means bringing 3 different sets of proceedings. Alternatively, you can sue one defendant in the place of that defendant's domicile and then you can join in the other defendants in those other states into those proceedings - but you can only do so if the claims are very closely connected.

The test for whether they are closely connected is whether at the end of the proceedings, if you had two lots of proceedings, you might end up with irreconcilable judgements. A classic example is a road traffic accident which has several participants and everyone is claiming against everyone else. If you had 2 or 3 sets of liability proceedings, courts might reach different conclusions on liability and then you would be left with inconsistent judgements in different member states. You wouldn't be able to enforce those judgements in other member states because you can't enforce inconsistent judgements. In order to avoid that situation arising this rule allows all defendants to be before one Court.

3. Actions against third parties

The third of these rules is that a third party in an action on a warranty or guarantee or in any other third party proceedings, can be brought before the court seized of the original proceedings. That is a very useful rule for a defendant who wishes to join, for example, an insurance company as a third party, which isn't domiciled in the place where the original proceedings were brought. The defendant will often be able to rely upon that article.

Special rules relating to Insurance

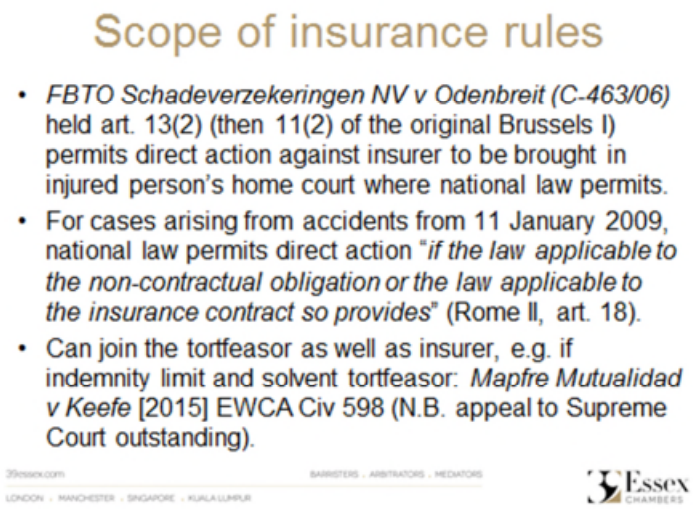


In addition to the general additional bases of jurisdiction there are special rules of jurisdiction for particular areas.

Particularly relevant to us are the special jurisdiction rules relating to insurance, for consumer contracts and for employment contracts. I'm not going to talk about them all, but the 3 sets of special rules are intended to provide protection for weaker parties. Namely, the insured who is the injured party in the insurance case, the consumer and the employee. In essence those sets of rules aim to give the weaker party the right to sue in the weaker party's home courts, but the stronger party will only be allowed to sue in the weaker parties own home courts as well.

The special jurisdiction rules in matters relating to insurance are contained in articles 10 to 16 of the Brussels I recast regulations. As I say the rationale is the protection of the weaker party. The rules provide the policyholder or insured beneficiary of a claim against the insurer, with the ability to issue proceedings in their home court. Relevantly and importantly for a lot of insurance litigation and personal injury claims, articles 10 (11) and (12) apply to actions brought by the injured party directly against the insurer where such direct actions are permitted.

What that means is that an injured person who is bringing a claim directly against an insurer, so not somebody who has entered into a contract for insurance but somebody who has a claim against the tortfeasor who is insured, if the injured person is bringing a claim directly against the insurer, then they get the benefit of the special rules of jurisdiction. They can bring that claim in their own home Court.



The decision which many of you will be familiar with that laid down that principle is the Odenbreit case. An injured person with a direct claim against an insurer can bring the claim in the injured person's own home Court where national law permits. The rule doesn't create direct rights of action against an insurer but it means that if there is direct right of action against insurers then you can exercise that in your own home Court.

The requirement is "where national law permits". How do you know if the national law permits? Well since 11th January 2009 Rome II gives the answer to that. I will talk later about Rome II in the context of applicable law, as it is the applicable law instrument. It made the rule that a direct right of action exists if the law applicable to the non-contractual obligation provides a direct right of action or if the law relating to the insurance contract provides one.

So if you have, say, a tort governed by French law and in insurance contract governed by English law and you're an injured person who wants to bring a claim against the insurer directly in your own Court, to establish if you're allowed to do so, you can look at English law for whether that provides a direct right of action against the insurer (the answer is that usually only if it is a motor claim), but then you can also look to French law and see if that provides a direct right of action (and the answer is almost always yes it does). That would bring you within the special rules of jurisdiction of matters relating to insurance and you'll be able to bring that claim in your home Court. Once you've got the insurer in, you can join the tort-feasor as well if you want to. That can be important if there is a limit of indemnity and you have a solvent corporate tortfeasor. The only word of warning about that is that's what the Court of Appeal held in the "Keefe" case. An appeal has been heard by the Supreme Court which hasn't delivered its judgement yet and there is a possibility that the Court of Appeal, will be overturned but I would be surprised.

So what are the limits to that? Obviously if you're acting for an insurance company you are going to have claimants who are able to avail themselves of the home court rules. Can you also avail yourself? To a much lesser extent because it is only available to the weaker party

One insurer can't rely on that rule against another insurer for a subrogated claim or a claim for contribution between insurers. You might want to try to rely on that rule to bring a claim in your client's home Court but you won't be able to because one insurer is not a weaker party to another. It is a categorical thing: who is the stronger party? It doesn't matter if you're a small or big insurance company; if you are an insurance company you're not a weaker party.

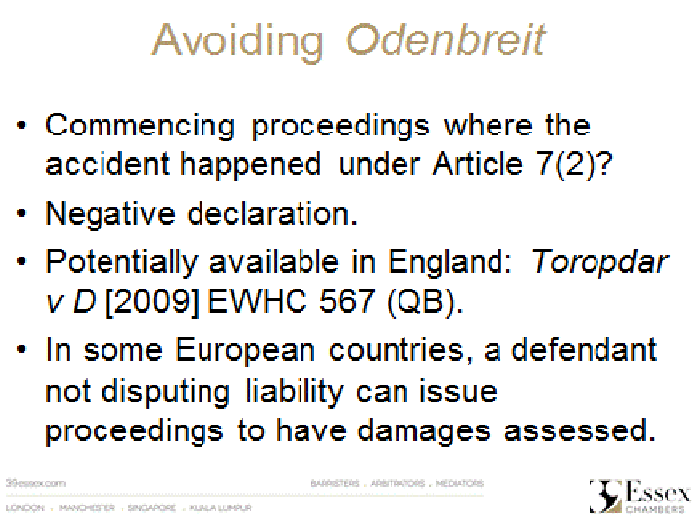
It also doesn't apply to a Social Security body which is a statutory assignee. Of course lots of continental countries have a system whereby the Social Security body which provides hospital care and social security benefits actually gets a cause of action in its own name against the tortfeasor's insurer. In the Voralberger case an Austrian Social Security body tried to rely on the Odenbreit case to bring a claim against the tortfeasor's German insurer in the Austrian courts. It was held that it couldn't rely on it because as a Social Security body it did not fall within the category of weaker party. It does apply to what I call derivative claims by which I mean dependents in a fatal accident claim or something like that - somebody who is not themselves physically injured but has a right of action as a consequence of the injury to somebody else. They can rely on this rule. There are a number of clear dicta to that effect and that is regularly reckoned to be the case.

Direct rights of action against insurers in motor claims in English law exist because the 4th directive required them to be created. They were created back in 2002. That's the limit of it in England. You potentially have claims under the Third Parties Rights Against Insurers 1930 and 2010, and there are some rights of action against insurers under the Road traffic act section 151. Those are special cases and in general it is only in motor claims direct actions exist. You should be aware in many EU member states there is a general right not only created for motor claims, it is a right that exists in their general law. Certainly it is the case in France, Belgium, Spain, Italy and other countries you can bring the direct claim.

The bottom point in the slide I just want to refer to because it does arise in public liability claims and other types of cases, look out for territorial limits in the policies. You can't have territorial limits in European motor policies. As you probably know, every EU motor policy must cover liabilities arising in every EU member state so you can't have territorial limits, but you can have those limits in other policies. And after Odenbreit insurers, particularly Spanish insurers, have started to introduce terms into the policy which say "we will

indemnify our insured against liability established by the Spanish courts". So it forces the injured person if they want this defendant to have the benefit of an insurance policy to sue in Spain.

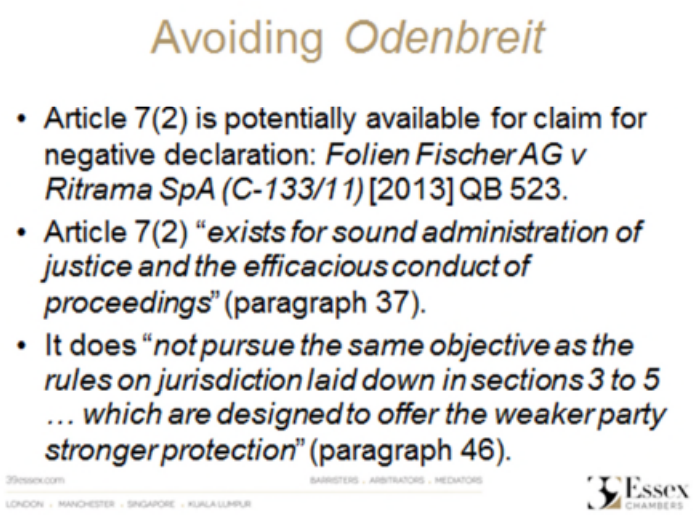
It is only a County Court decision but I've done a few of them and this is the only one (Williams v Mapfre) which has gone to trial and in Chester County Court that term was upheld. It was challenged as being contrary to European law. I expected an appeal, there was talk of a reference to the ECJ, but it didn't happen in the end. The judge upheld that term as not being contrary to European law. I thought there were strong arguments it wasn't contrary, because Europe has intervened in motor insurance to specifically outlaw territorial limits for motor policies so why would it need to do that if territorial limits in indemnity policies were already unlawful. Seemed to me that was rather a strong argument and the judge agreed.



Insurers don't like Odenbreit. It brings lots of claims in England where there are higher damages and legal costs which would once have been litigated in Spain or other countries with lower damages and lower legal costs. So what can they do about it?

Often not a great deal, but there are a few thoughts here as to things that an insurer, or if you're representing an insurer, perhaps an overseas European insurer as an agent, can do.

A claim has been intimated in England relying on Odenbreit rule. A British person has gone abroad and been injured in France or Spain or whatever. You have French or Spanish insurers saying they do not want to be sued in England but can we do anything about it? We have to look at some of the following possibilities.



Negative declarations. If you've got a case in which liability is really genuinely in dispute, you might look at the possibility of suing in order to get make yourself the claimant seeking a declaration that your client is not liable. The advantage is that you make yourself the claimant and you can choose where the claim form will be issued. In other words somebody might think of issuing proceedings for a negative declaration in the other country - that will depend on whether or not the other countries' procedural rules allows claims for negative declarations. English courts do allow them, but only on a discretionary basis. They will usually want to be persuaded that there is some good reason why, because in a way you're manufacturing litigation which doesn't otherwise exist. You don't know that the injured person is ever going to bring proceedings. So why should the Court waste its time giving negative declaration. But in the right case they will.

In Toropdar, a personal injury case arising from a road traffic accident, liability was in dispute. It was purely a domestic case. The claimant was a child who was badly injured but the claimant's solicitor said they were not going to issue proceedings until the child became 18 in 15 years' time. The insurers said they we wanted to have liability decided by the courts whilst the people who saw the accident could still remember it, while they were still alive. The claimant's solicitors still refused to issue proceedings so the defendant took the bull by the horns and issued proceedings for a declaration that their driver was not liable. The Court said that was legitimate, there is a public interest in having those matters decided whilst the evidence is still strong and clear. Incidentally it didn't work out because having decided that it would hear the case the judge refused the declaration on the basis that the driver was in fact liable for running over the child. But an authority was created even if it didn't achieve the result the insurer wanted.

And there is a procedure in some European countries for a defendant, who doesn't dispute liability, to issue proceedings to force matters along in terms of the assessment of damages. There is such a procedure in Belgium for example.

So you should ask your foreign insurer client to look at those matters with local lawyers because there is a possibility that they might be able to found the jurisdiction of a of a more favourable Court.

Avoiding *Odenbreit*

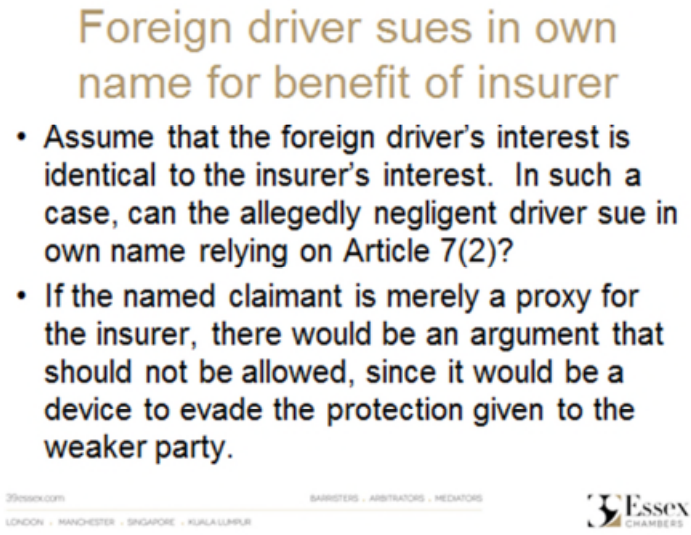
- Four types of action by defendant (assume one English and one foreign driver):
  - Insurer sues in own name.
  - Foreign driver sues in own name for benefit of insurer.
  - Foreign driver sues in own name partly for own benefit and partly for insurer's.
  - Foreign driver sues in own name for own injuries.

I'm going to pass briefly over this part which is looking at different types of claim which you might try to avoid Odenbreit in different ways.

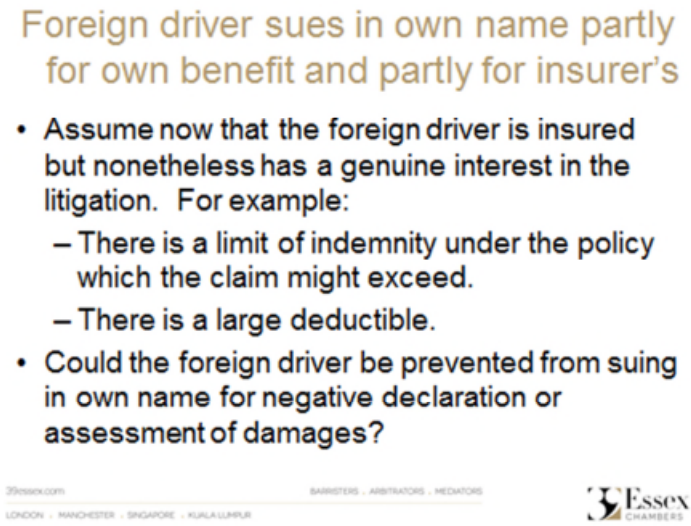
Insurer sues in own name

- As to first, insurer cannot sue in own name using *Folien Fischer*.
  - Where a case falls within special jurisdiction rules, only those rules apply: art.10.
  - By special rules, insurer may sue only in defendant's home court: art.14(1).

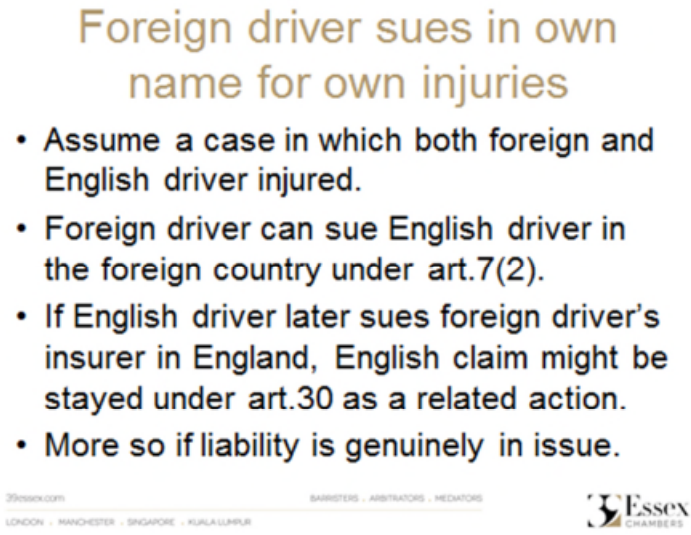
An insurer suing in its own name trying to fix jurisdiction in a particular court, will have difficulty doing so if they're suing an injured party because Odenbreit decided those claims fall within the special jurisdiction of rules of matters relating to insurance. If they fall within them when the injured person sues the insurer they must, as a matter of logic, fall within them when the insurer is suing the injured person. You can't sue the injured person except in the injured person's own home Court.



You might be able to *borrow* your driver's name as the claimant. If you do that in a case in which all the loss is actually the insurers rather than the person who is named, it seems to me there is still an argument that it is an insurer trying to avoid jurisdictional privileges given to the weaker party.

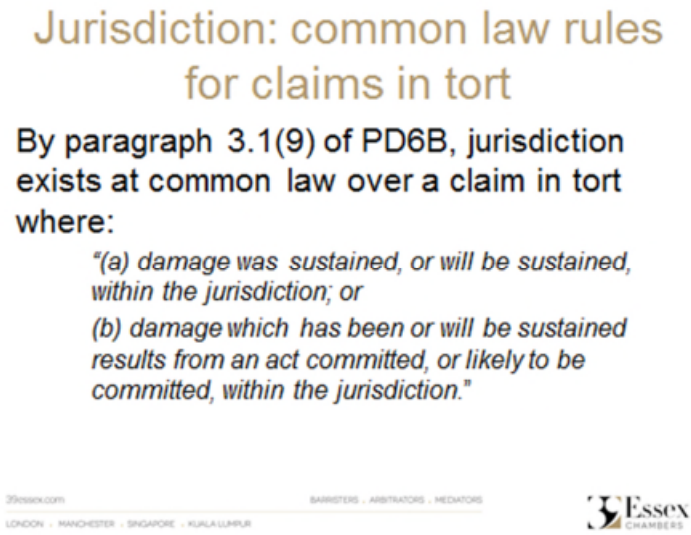


But where you have a client, say your foreign driver assuming he is your client, who has got their own losses as well as insured losses, it might be personal injury, or XS, or there might be an indemnity limit on the policy, so both the insurer and the insured have direct financial interest in the litigation, it seems to me that in those circumstances it is going to be much harder for jurisdiction to be declined by the foreign court if you issue in the foreign court.



Certainly in the last class of case where the foreign driver sues in his own name for his own injuries then there can be no objection to that being done and it may also benefit that person's insurers. Now I should say that is really most important where liability is in issue and you want it decided in the court local to the accident. If it is a liability accepted case or where it is no longer in dispute, say a 50-50 agreed case, then you might have the foreign driver sue in his or her own jurisdiction but that wouldn't preclude the injured party suing in separate proceedings in England. As you will probably see there would be no risk of irreconcilable judgements if all that is in issue is how much damages should Mr X get for his injuries in England and how much damages should Mr White gets for his injuries in, for example, France. There is no inconsistency between the two decisions so you could have parallel proceedings.

I'm going just look very briefly at the common law rules for jurisdiction over claims in tort.

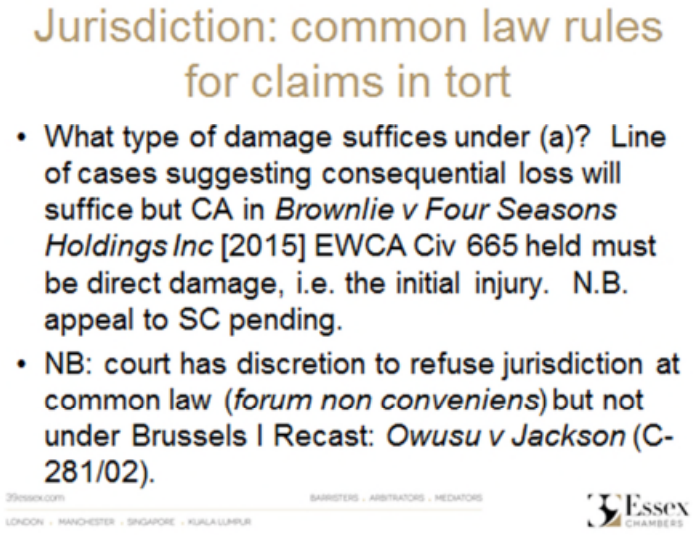


They are to be found, as I said, in a practice direction 6B.

Para. 3.19 claims in tort: you can bring a claim in England and the English courts will have jurisdiction, if damage was sustained within the jurisdiction or damage has been sustained from an act committed or likely

to be committed in the jurisdiction.

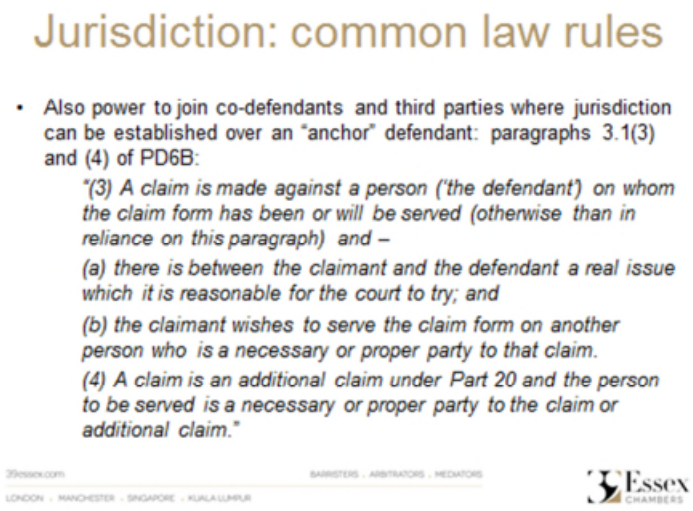
Those rules, it will probably have occurred to you, are similarly phrased to the way the ECJ interpreted the European rules in the "Bier" case, the pollution of the river, the place where the act was committed within the jurisdiction, salts going into the river, the damage being sustained where the nurseries were further down the stream, and that is the way they have been interpreted now more recently.



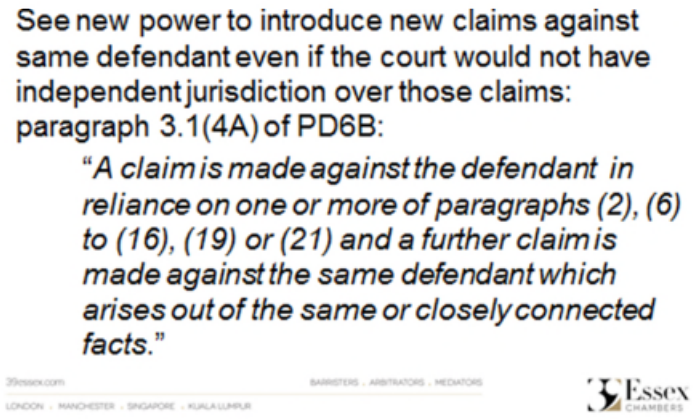
Two points to bear in mind.

They are quite like the European rules of jurisdiction in tort, (the place where the harmful event occurred) but what type of damage suffices to found the jurisdiction of the English Court? You may be aware of a line of cases beginning with Booth and Phillips in 2004 in which the courts held that the claimant could rely on consequential losses, so could have an injury in the United States, be brought back to England where they live and continue to suffer loss of earnings and medical expenses etc. in England and that type of damage would be sufficient to found jurisdiction. The damage had been sustained within the jurisdiction. But in Brownlie v Four Seasons, the Court of Appeal said "no- that wouldn't do", the damage that the rule is concerned with is direct damage. Direct damage is a concept of European Law and what it means essentially is the damage which completes the cause of action, the initial injury, the initial damage to property, not consequential losses suffered as a result of that.

The second point on the common law rules is that under the European rules a court which has jurisdiction is fixed with that jurisdiction. It has no discretion to say that it's silly trying this case here because all the many witnesses are going to have to come over from Lithuania, it is governed by Lithuanian law, everyone has Lithuanian as a first language, everything is going to have to be translated; It would be much better for the claim to take place in the Lithuania. If jurisdiction is based on Brussels I recast, the Court which has got jurisdiction has no discretion to turn it down. If jurisdiction is based on common law rules the Court does have discretion to say that although they could try the case, they have jurisdiction but it is not going to because another country's courts are the right place to try it. The forum non-conveniens power exists where jurisdiction is under common law, and does not exist where jurisdiction is under the under the European laws.



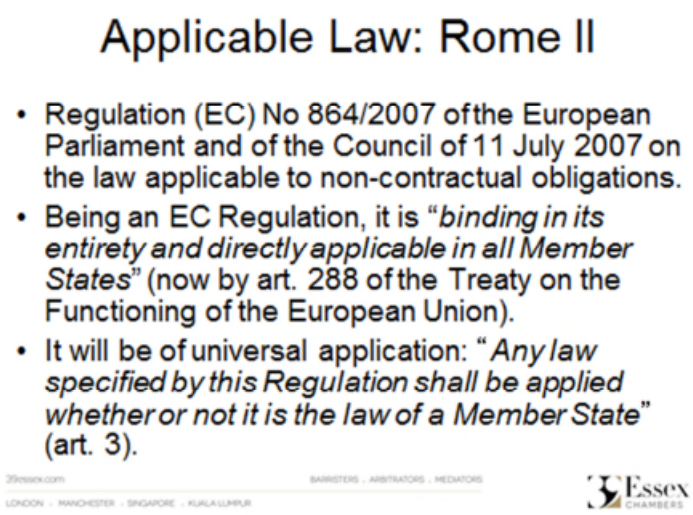
Also similar rules to Europe for co-defendants and third parties, to be joined……



……and the new power introduced quite recently, and worth bearing in mind that you can bring a new claim against the defendant. If you've got a defendant under tort rules and damage sustained within the jurisdiction, you can add another claim against the same defendant as long as it arises out of the same or closely related facts, even if it's not a claim in tort. It might be a claim in contract and the contractual rules of jurisdiction would not would not allow you to bring the claim within the jurisdiction. The new rule says if the Court has jurisdiction over the claim in tort then it will also have jurisdiction over a closely connected claim in which may be formulated for example in contract, or restitution.

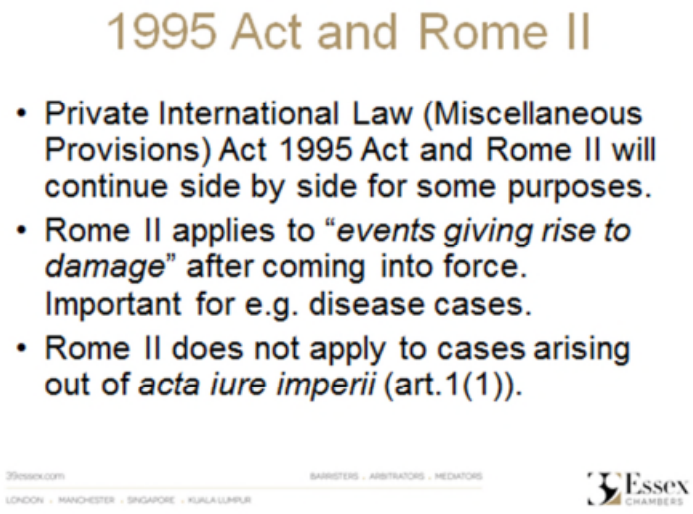
Applicable law

That is jurisdiction which is the main bulk of the talk. I'm not going to talk long about applicable law.



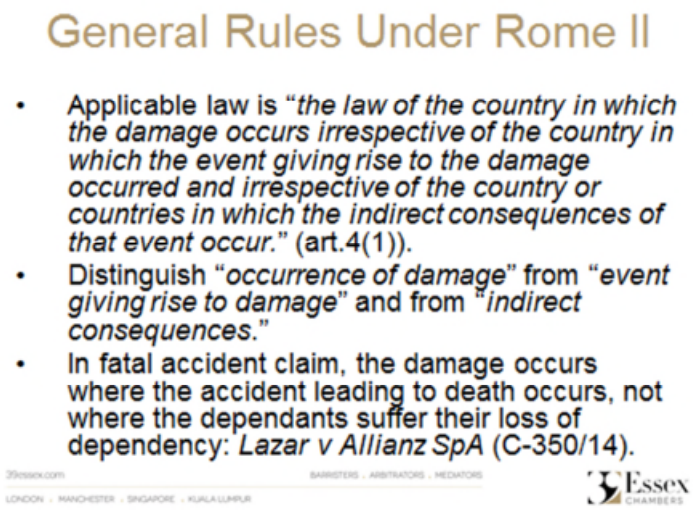
Applicable Law is governed now by Rome II for all cases in tort. It is binding in its entirety and directly applicable in all EU member states.

It is also of universal application. Any law specified by this regulation is applied, whether or not it is the law of a member State. It is rather different to jurisdictional rules in that under Brussels I recast you judge whether it [jurisdiction] applies by whether a defendant is domiciled in a EU state. Rome II applies to a conflict of laws between the law of Texas and the law of China as much as it does to the conflict of laws between the laws of France and the laws of England; it is a universally applicable instrument.



It doesn't apply *Acta iure imperii* which I've discussed in the context of jurisdiction. If it's a governmental act in issue, then Rome II would not apply. You'll have to look for the applicable law in pre-existing English law which was a mixture of a common law set of rules modified by the Private International Law (miscellaneous

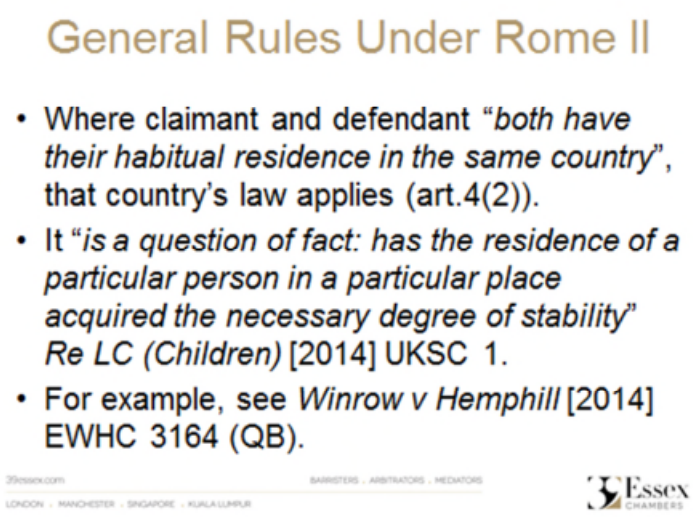
provisions) Act 1995. So that statute wasn't repealed and is still on the statute books, but it only covers the residue of cases which are not caught by Rome II.



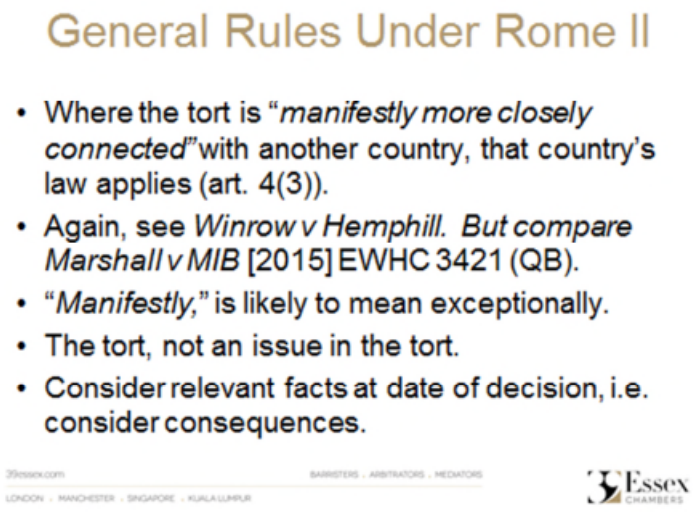
The basic rules under Rome II are in article 4. The basic rule in 4 (1) is that the applicable law is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred, and irrespective of the country in which the direct consequences of the event occur.

So, if you're mechanic looks over your car before you go on a French driving holiday, and you then take the car to France and the wheel falls off and you are injured, then applying the rules in article 4(1) the relevant event that gives you the applicable law is where the damage occurs, the injury which occurred in France. Not where the event giving rise to the damage occurred, the negligent tightening of the wheel, or the indirect consequences of the event when you're airlifted back to England for further medical treatment. It is that event, the injury, which fixes jurisdiction.

In fatal accidents claim where does the damage occur? What you quite often get in fatal cases is somebody who in this case was in Italy, was killed in a road traffic accident but is a Romanian National and her family were all in Romania suffering dependency losses in Romania. People who've never left that country and have no connection with Italy at all. So is the applicable law based on the damage occurring in Romania in such cases or does the damage occur in Italy. The ECJ has said the damage occurs in Italy so it is Italian law which governs the calculation of the dependency rather than the law of Romania.



Article 4 (1) is overridden by article 4 (2): where the claimant and the defendant both have their habitual residence in the same country you apply that country's law. The thing to remember about that, is that it doesn't depend on any pre-existing relationship between them. You might very easily get two British persons in the South of France in late July involved in a road traffic accident between one another and if that happens then your applicable law is very likely English law rather than French law. So they don't have to be a driver and a passenger in the same car or have a pre-existing relationship.



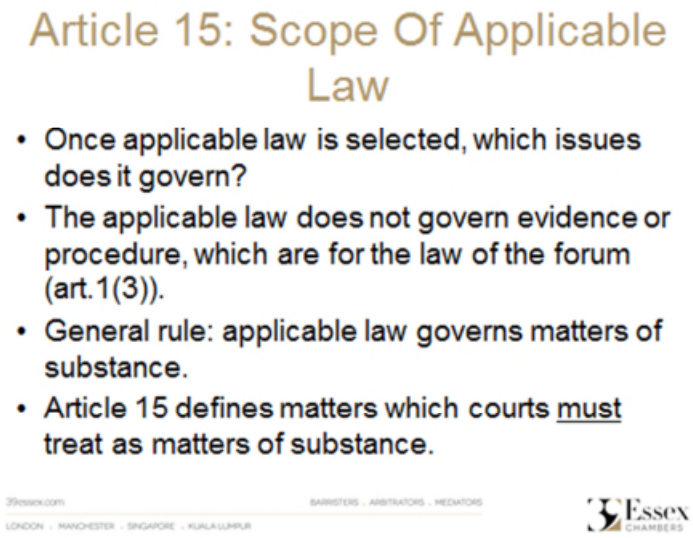
The third and final rule that you need to be aware of, is that there is an escape clause that the Court can use to choose an applicable law other than the article 4 (1) rule (where the damage occurs) or the article 4 (2) rule, (habitual residence). Where the tort is manifestly more closely connected with another country, then that country's law will apply. The only example which is given within the body of Rome II is if there is a contract between the parties and that contract is closely related to the circumstances of the tort. In an employer's liability type of case, or a carriage of goods type of case, where parties have a contractual relationship, but a claim might arise which is actually a claim in tort, then at least arguably the law which governs their contract would be the more appropriate law to govern the law of tort as well. It would be exceptional but in Marshall and the MIB there were two English habitual residents who were injured in a road traffic accident in France.

They were standing on the hard shoulder of the motorway with a breakdown vehicle when an uninsured driver veered off the motorway and hit them. One of them died, the other was gravely injured.

Because of the vagaries of French law, one of those 2 English residents, who had been a passenger, was able to bring a claim against the other equally innocent person who had been the driver of the car, because of the very strict liability rules under French law. If English law applied obviously they would have no claim because there was no negligence. On the face of it English law applied because they were both resident in England. However the judge put aside English law and applied French law instead because everything else, the other driver, the relevant insurance companies, the breakdown vehicle, everything else involved was French and obviously it was on a French motorway. It was perhaps a somewhat surprising decision, in the light of the jurisprudence, but permission to appeal was refused (for a transcript of the reasons, see [2017] EWCA Civ 17) so for the time being it seems to be it seems to be the law.

There're a few more slides in Rome II but there was more material on the slides than one hour lecture so they are left as a resource for you. [see full slide pack, separate hand out]

I would just deal with one particular subject ....



.....some of you will remember that before Rome II came into force the basic rule was that when you choose a foreign law to govern the claim, that foreign law will govern substantive issues of law but it won't govern the law of evidence of procedure. The rules of evidence and procedure will be derived from the rules of the forum. The Court which is hearing a case will apply its own rules of evidence, an English court can't readily apply French rules of evidence, and doesn't have the power to apply French civil procedure, it only has the power to apply English civil procedure.

So evidence and procedure is excluded if a case is being heard in an English Court under English rules of procedure and evidence, although the case may be subject to French substantive law. Where is the dividing line? It is often quite difficult to draw the dividing line between issues of substantive law and issues of procedural law.

Traditional English Law

- Matters relating to the remedy including the assessment of damages are procedural and for the law of the forum.
- Reaffirmed in *Harding v Wealands* [2006] UKHL 32.

Under the common law all matters relating to the assessment of damages were treated as being procedural.

Article 15(c): Damages

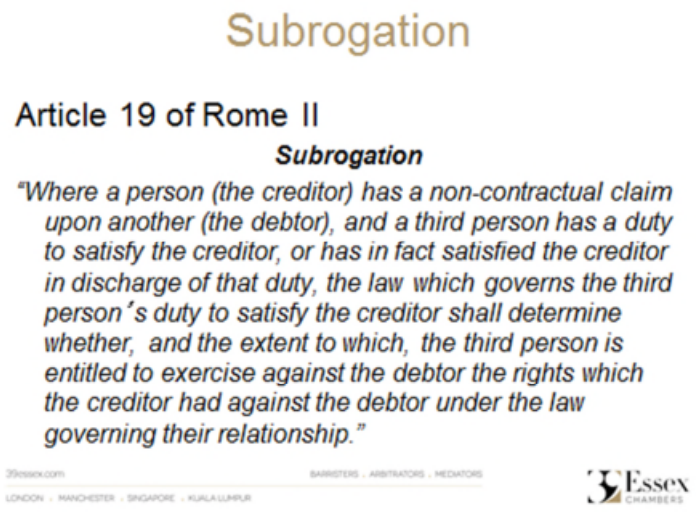
"*The existence, the nature and the* ***assessment of damage*** *or the remedy claimed*" are all to be governed by the substantive applicable law.

Rome II reversed that so that if the applicable law is French law, it'll govern questions of liability, contract, contributory negligence, limitation of action and it will also govern questions of the assessment of damages.

So if you happen to be looking at English cases which suggest the contrary you're looking at cases which predate Rome II.

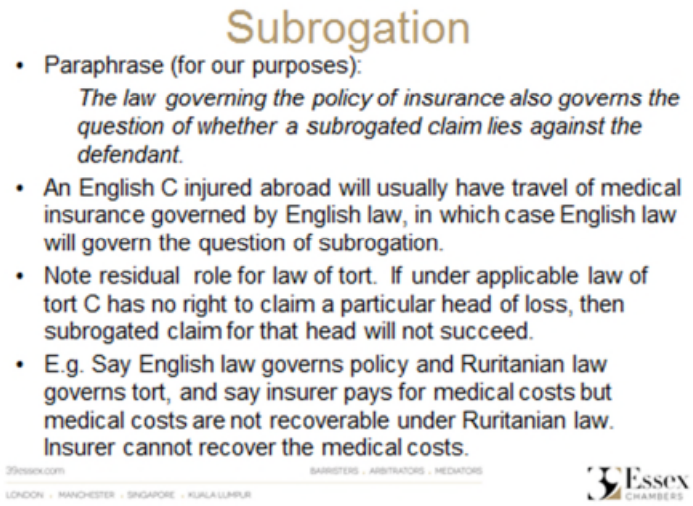
In day to day litigation that is one of the biggest single changes which has been brought about by Rome II. It means that when you're trying to work out the value of a claim you're going to need evidence from a foreign lawyer who is well versed in personal injury litigation in the relevant country. Setting out how the court would value that claim under the relevant foreign law. [Further slides on Wall v Mutuelle v Poitiers are in the full slide pack]

Subrogation



Finally this subrogation point. It is a discrete point but it comes up from time to time. Most countries allow insurers to bring subrogated claims but they allow or require the insurer to sue in its own name. English law requires the insurer to bring the claim in the name of the insured. In England such claims are usually wrapped up within another claim, an insurer will usually provide information to the claimant's solicitor and say I want my subrogated claim included. Quite often, the claim is governed by foreign laws, so typically a British person goes abroad, get injured and they have medical expenses insurance. They are injured in Spain, the claim is governed by Spanish law, under Spanish law if an insurer is going to bring a subrogated claim the insurer has to do so in their own name. What do you do as a medical expenses insurer?

Very often the issue doesn't actually arise because if you look at the rather complicated wording of the rule on subrogation in article 19 of Rome II (above) , I think I have paraphrased it for most ordinary insurance cases accurately as follows:



" the law governing the policy of insurance also governs the question of whether a subrogated claim lies against the defendant".

So the English person who is abroad will be packing in their luggage a policy of travel insurance which is governed by English law. So even though the law of the tort may be governed by Spanish law or some other law, the question of the right of the insurer to be subrogated to the claim will in most cases be governed by English law. That means the subrogated claim can be brought within the existing proceedings by the injured person without having to name the insurer in separate parallel proceedings. If you had to sue in the insurer's name you've then got jurisdictional problems potentially. You might have to go to Spain to bring your claim. In my experience the point arises often.

It is useful to bear Article 19 in mind as it is quite easy to get side tracked by the fact that the tort is governed by some other country's law, overlooking that a different countries law governs the policy of insurance under which the right of subrogation arises.