Rome-ing Instinct?

In February this year, the English courts appeared finally to have woken up to the arrival of the Rome II Regulation, with the first published decision addressing its provisions.

In Jacobs v Motor Insurers Bureau [2010] EWHC 231 (QB), Mr Justice Owen applied Rome II's provisions to reach the conclusion that the compensation to be paid by the MIB (acting as the UK's compensation body under the Fourth Motor Insurance Directive) to the claimant as a result of an accident in a Spanish shopping centre car park in December 2007 in which the other driver was German (and uninsured) should be assessed in accordance with Spanish law, as the law of the place where the damage occurred. In the course of his judgment, the judge rejected the claimant's arguments that (1) the matter was not one involving a "conflict of laws" within Art. 1(1) of the Regulation, (2) damage was suffered in England for the purposes of Art. 4(1) by reason of the MIB's failure to compensate the claimant there, (3) the reference to the "person claimed to be liable" in the common habitual residence rule in Art. 4(2) was a reference to the named defendant (here, the MIB) not the primary tortfeasor (i.e. the uninsured driver), and (4) that the "escape clause" in Art. 4(3) should be invoked by reason of the MIB's involvement, on the basis that its compensation obligation was manifestly more closely connected to England. Owen J concluded that, insofar as the UK statutory instrument which obliged the MIB to compensate the claimant appeared to require that the compensation be assessed in accordance with English (or British) law (as to which, see below), it must be considered to have been overridden by Rome II's provisions.

That decision has now been reversed by the Court of Appeal ([2010] EWCA Civ 1208), which treated Rome II as having no material impact on the issues to be determined in the case before it and did not consider it necessary to address any of the (interesting and important) issues concerning the proper application of Art. 4. In the Court's view (para. 38 of its judgment), the relevant provision within the UK Regulations invoked before it (reg 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations (SI 2003/37) (the "Compensation Body Regulations")) defined the MIB's compensation

obligation in such a way as to require the application of English law principles to the assessment of compensation and did not constitute a rule of applicable law which was incompatible with, and could be trumped by, the Rome II Regulation. The Court considered that its conclusion was entirely consistent with the scheme and provisions of the Fourth Motor Insurance Directive (Directive (EC) No 2000/26), which the Compensation Body Regulations were designed to implement.

Assuming that there is no further appeal, the claimant Mr Jacobs will receive compensation according to English law principles of assessment, with the result that his award will likely be higher than if the MIB had prevailed in his argument that Spanish law should be applied. That consequence, no doubt, will be of great comfort to him and may appear to many (given that the economic burden will be spread widely among those holding motor insurance policies) as a "fair result". Nevertheless, certain aspects of the decision remain troubling.

First, the Court did not consider whether and, if so, how the MIB's obligation to pay compensation fitted within the framework of the Rome II Regulation. Here, a number of very interesting questions arise (apart from those identified above concerning the proper interpretation of Art. 4):

- Did Mr Jacobs' claim against the MIB constitute a "civil and commercial" matter within Art. 1(1) of the Rome II Regulation? At first instance, Mr Jacobs' counsel had conceded that it did (and Owen J agreed with that concession – see para. 19 of his judgment), but it is not entirely clear that the concession was correct, given that the MIB was acting as the UK's compensation body under the Fourth Motor Insurance Directive and its (putative) obligation was subject to a special regime established pursuant to the Directive and the Compensation Body Regulations.
- Did any obligation owed by the MIB constitute a "non-contractual" obligation falling within the scope of the Rome Regulation? If so, did it constitute a "non-contractual obligation arising out of a tort/delict" within Art. 4? Owen J found that it did (see para. 30 of his judgment), but it may be doubted whether a scheme of this kind for compensating victims of anti-social conduct from public funds was intended to fall within the ambit of the Regulation.
- If the Rome II Regulation does apply, what is its effect in terms of defining

the applicable law and its relationship with the Compensation Body Regulations? In principle, the Rome II Regulation applies to determine the law applicable to a non-contractual obligation in its entirety and not only to a specific issue, for example the assessment of damages. If the MIB's (putative) obligation fell, therefore, within the scope of the Rome II Regulation then the starting point would be that not only the amount of compensation payable but also the basis and extent of the MIB's liability would fall to be determined in accordance with the law applicable in accordance with its provisions. This leads to the following conundrum: if Art. 4 points in this case to Spanish law (as Owen J concluded), how can the MIB be under any obligation at all as no provision of Spanish law will impose any compensation obligation on the MIB (as opposed to its Spanish counterpart)? The answer, it is submitted, may be found in Art. 16 (overriding mandatory provisions) whereby provisions of the law of the forum may be given overriding effect in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation. The Compensation Body Regulations, being intended to fulfil the United Kingdom's obligations under the Fourth Motor Insurance Directive, may well be of this character, although the Court of Appeal did not explicitly seek to explain their application in these terms.

Against this background, it is disappointing that the Court of Appeal did not consider it necessary to address any of these issues in concluding (para. 38) that:

> *Rome II has no application to the assessment of the compensation payable by the MIB under regulation 13 [of the Compensation Body Regulations] and it is therefore unnecessary to consider the issues relating to the construction of Article 4 that would arise if it did so.*

(Earlier in his judgment, although not necessary for the decision in Jacobs as liability was not in issue, Moore-Bick LJ did appear to accept that the law applicable under Rome II should govern the question whether the driver of the uninsured/untraced vehicle was "liable" to the claimant, being (as the Court held – para. 32) an implicit pre-condition to a compensation claim under regulation 13. If correct, this would involve a partial, statutory incorporation of the Regulation's rules with respect to the driver's non-contractual obligation, without applying

them in their full vigour to the MIB's compensation obligation. It may, however, be questioned whether this approach can be supported, given that its effect is to distort the Regulation's scheme by applying its rules only to the question of liability and not questions concerning the assessment of damages.)

Secondly, the Court of Appeal's explanation of the legal effect of the relevant provision in the UK Regulations appears incomplete. Regulation 13(2) of the Compensation Body Regulations provides as follows:

> *(2) Where this regulation applies—*
>
> *(a) the injured party may make a claim for compensation from the compensation body, and*
>
> *(b) the compensation body shall compensate the injured party in accordance with the provisions of Article 1 of the [Second Motor Insurance Directive] as if it were the body authorised under paragraph 4 of that Article and the accident had occurred in Great Britain.*

The Court of Appeal accepted (para 34) a submission on the part of the MIB that the intention underlying the closing words in sub-para. (b) ("as if it were the body authorised *[under Art. 1(4) of the Second Motor Insurance Directive*] and the accident had occurred in Great Britain") was to require the MIB to respond to Mr Jacobs claim on the basis of a legal fiction that the accident had occurred in Great Britain. In such cases, it must be noted, the MIB is also the body responsible for providing compensation to the victim of an accident involving an uninsured or untraced driver under the extra-statutory scheme established by the Uninsured and Untraced Drivers Agreements between the MIB and the UK Secretary of State for Transport. These Agreements, in their current form, seek to implement the UK's obligations to establish a compensation mechanism under the Second Motor Insurance Directive.

Taking this submission to its logical conclusion (although it does not appear that the MIB sought to press it this far), it would follow that the content of the MIB's statutory obligation under regulation 13 ought to have be determined by reference to the terms of either the Uninsured or the Untraced Drivers Agreement (as applicable), on the premise that the accident had occurred in Great Britain and not abroad. The Court, however, proceeded to the conclusion

that the MIB was under an obligation to compensate Mr Jacobs in accordance with English law principles, without any further analysis of the Agreements to determine (for example) (a) which of the Agreements applied to the facts of the case, (b) whether any pre-conditions for obtaining compensation under the applicable Agreement (for example, in the case of the Uninsured Drivers Agreement, the obtaining of an unsatisfied judgment) had been or were capable of being met, or (c) whether the applicable Agreement provided any guidance for the assessment of compensation by the MIB.

Instead of undertaking this exercise, and without citing any supporting authority, the Court concluded (para. 35) that:

> *The mechanism by which the MIB's obligation to compensate persons injured in accidents occurring abroad involving uninsured or unidentified drivers is established is to treat the accident as having occurred in Great Britain, but in the absence of any provision limiting its scope it is difficult to see why it should not also affect the principles governing the assessment of damages, particularly in the absence at the time of complete harmonisation throughout the EEA of the conflicts of laws rules governing that issue. Nonetheless, the matter is not free from difficulty. As I have already observed, at the time the Regulations were made damages recoverable as a result of an accident occurring in Great Britain would normally have been assessed by reference to the lex fori, yet regulation 13(2)(b) does not make any provision for the application of English or Scots law as such, presumably leaving it to the court seised of any claim to apply its own law.*

This reasoning is unconvincing. In short, it does not appear to be tied to the wording of regulation 13 or to be consistent with the Court's explanation of why it was so worded. A further examination of the Agreements may have found them to be impossible or excessively difficult to apply to foreign accident cases such as Jacobs or of being incompatible with the Fourth Motor Insurance Directive and this analysis, in turn, might have led the Court to doubt its approach to statutory construction. The short-cut taken by the Court, however, appears to leave a sizeable gap in its reasoning.

Third, the Court comforted itself (para 37) with the fact that (on the interpretation that it favoured) regulation 13 of the Compensation Body

Regulations (dealing with untraced or uninsured drivers) would produce the same outcome for a claimant in Mr Jacobs' position as for a claimant relying on the apparently clear wording of regulation 12 (dealing with the situation where an insurer's representative has not responded within the prescribed time, in which case the Regulations refer to "the amount of loss and damage … properly recoverable … under the laws applying in that part of the United Kingdom in which the injured party resided at the date of the accident"). In each case, English law principles would normally be applied to the assessment of compensation (a result which would also accord with English private international law at the time that the Compensation Body Regulations were adopted: Harding v Wealands [2006] UKHL 32). As the Court also recognised, however, this understanding of the Compensation Body Regulations produces two apparent anomalies (see paras. 29 and 30):

- *In many cases, the claimant will receive more compensation from the MIB in cases of "insurance delinquency" than if it had sued the driver or made a direct claim against its insurer, being claims to which the rules of applicable law in the Rome II Regulation would undoubtedly apply.*
- *The MIB, having paid that compensation, will be unable to pass the full burden to the compensation body in the Member State where the vehicle is based or the accident occurred, pursuant to the provisions of the Fourth Motor Insurance Directive. Under the 2002 Agreement between the Member States' compensation bodies, the MIB's recovery will be limited to the amount payable under the law of the country in which the accident occurred. Nor will the MIB have any express right of subrogation under the Directive for the balance against the driver or its insurer, such right being limited to the reimbursing compensation body.*

Powerless as the Court of Appeal may have been to address these anomalies, they deserve the attention of the UK legislator (and – dare I say it – the European legislator) at the earliest opportunity. In the meantime, it remains to be seen whether there will be a further appeal to the Supreme Court in Jacobs.