Tick, Tock: Temporal Application of the Rome II Regulation Referred to the CJEU

Two recent decisions of the English High Court consider the temporal effect of the Rome II Regulation, with the first of these making a reference to the CJEU as to the combined effect of Articles 31-32 of the Regulation (to my knowledge, the first reference with respect to this Regulation).

Each of the cases (Homawoo v GMF Assurance SA [2010] EWHC 1941 (QB) and Bacon v Nacional Suiza [2010] EWHC 1941 (QB)) concerned proceedings with respect to injuries suffered by the claimant in a road traffic accident occurring (a) in a Member State (France in Homawoo and Spain in Bacon) and (b) in 2007 (but in each case after 20 August, the first critical date in terms of defining the temporal effect of the Regulation). In each case, proceedings were issued in England before 9 January 2009 (the second critical date). In Bacon, the sole defendant was the insurer of the only car involved in the accident (Mr Bacon was a pedestrian). In Homawoo, although the driver and owner of the car causing injury were also joined, proceedings were only pursued against the insurer. Liability was disputed (successfully) in Bacon, but accepted in Homawoo.

The question for decision by each of Sharp J (Homawoo) and Tomlinson J (Bacon) was whether the Rome II Regulation applied, with the result that damages would fall to be assessed by reference to the law applicable under the Regulation (French or Spanish law) and not the law of the forum (cf. Harding v Wealands [2007] 1 AC 1, under the pre-existing English rules of applicable law).

Under Article 31 of the Rome II Regulation, the Regulation "shall apply to events giving rise to damage which occur after its entry into force". Under Article 32, the Regulation (with the sole exception of Article 29) "shall apply from 11 January 2009". This combination clearly suggests, as both judges accepted, a distinction between the date of entry into force of the Regulation and its date of application, with only the latter being specifically designated in Article 32 (9 January 2009). If that view, supported by records of the discussions in the Council's Rome II working group, is accepted as representing the legislative intention of the EU, it

would seem to follow that the date of entry into force must be fixed at 20 August 2007 in accordance with Article 254 of the EC Treaty (now TFEU, Article 297). Nevertheless, an important conundrum remains to be resolved, in that the precise meaning of the words "shall apply" in Articles 31 and 32 must be explained: What is it to which the Regulation's rules of applicable law "shall apply"?

Needless to say, given the unsatisfactory drafting, commentators differ in their approaches (for my own, see Dickinson, The Rome II Regulation (2008), paras 3.315-3.321), as did the two judges in these cases.

In Homawoo, Sharp J (at [43]-[49]) was unhappy with interpretations of Article 32 as referring to the date of commencement of legal proceeedings or the date of determination of those proceedings. She suggested (at [50]) that a reading of Articles 31 and 32 as inter-linking and complete in themselves so that the Regulation would apply only to events giving rise to damage after 11 January 2009 "would give legal certainty", but accepted that the "clear language of Article 31" made it impossible to reach this conclusion, at least without a preliminary reference to the CJEU. Accordingly (at [51]) she posed the following questions:

> *If the meaning and effect of Article 31 is that Rome II is to apply to events giving rise to damage which occur after the 'entry into force' of the Regulation on 20th August 2007, what is the meaning and effect of 'shall apply from 11th January 2009' in Article 32? Is it 'apply to proceedings commenced' or 'apply to determination by a court' after that date? What is the meaning and effect of Article 31? Should it be interpreted so that the Regulation shall apply to events giving rise to damage which occur on or after 11th January 2009?*

In Bacon, it was not necessary for Tomlinson finally to decide the temporal application point or to consider whether to make a reference, as he had held the claimant on the facts solely responsible for the accident and exhonerated the defendant under Spanish law, which it was agreed applied to the question of liability in any event. Nevertheless, having heard arguments similar to those advanced before Sharp J, he concluded (at [61]) that the Regulation applied to the determination as from 11 January 2009 of the law applicable to a non-contractual obligation arising out of an event giving rise to damage on or after 20 August 2007.

Although Sharp J (at [46]) had observed that parties who are considering the possibility of settlement will wish to understand what law applies to the calculation of damages and they (like judges) need to know whether Rome II applies, Tomlinson J took the view (I would submit, correctly) that the Regulation is directed at the Member States and their courts (see [61]). This is not to deny that the Regulation's provisions are not relevant in calculating the parameters of settlement, but merely to accept that the parameters of settlement must themselves be calculated by reference to a hypothetical future determination by a court or tribunal having jurisdiction over the matter. Settlement discussions, as other commercial negotiations, are conducted by reference to the putatively applicable law, and in cross-border transactions it must be accepted that the rights and obligations of the parties may fall to be determined at different times and by different courts or tribunals according to different legal rules.

On the view taken by Tomlinson J (according with the wording and legislative history of Articles 31-32) the likely date of any future judicial determination was a factor which those negotiating settlements in the EU before 11 January 2009 would need to take into account, alongside such other factors as the identity and geographical location (within or outside a Member State) of the court(s) or tribunal(s) before which the matter could be brought if their negotiations were not to bear fruit. That is not illogical or unjust (see Tomlinson J, at [38]). Nor does it involve giving retroactive effect to the Regulation's provisions, which were published in the Official Journal on 31 July 2007. Nor, at the point of determination, does it result in any uncertainty as to the source of the rules of applicable law that the court must apply. Further, as Tomlinson J pointed out (at [65]), the opportunity for taking any tactical advantage of the separation of entry into force and application of the Regulation ended (if this interpretation is accepted) on 11 January 2009, following which any determination by a Member State court of the law applicable to a non-contractual obligation must carried out in accordance with the Regulation's rules. From that date, the Regulation (at least according to its major objective) promotes a different kind of certainty (decisional harmony), in ensuring that Member State courts apply the same law in the determination of non-contractual obligations, even if the event giving rise to damage occurred between 20 August 2007 and 11 January 2009. The harmonisation of approach in this area across the Member States is, of course, the primary objective of the Rome II Regulation (see Recitals (6) and (15)) and this interpretation appears, therefore, teleologically superior, even if it leads to a

short term problem (now expired) in terms of the foreseeability of court decisions (see Recital (16)).

In any event, it may be questioned whether the form of "legal certainty" craved by Sharp J and other proponents of this solution is of any significant or lasting value. The very fact of a reference to the CJEU on this point (and the contrary view of Tomlinson J and many others) will leave those engaging in settlement discussions with respect to events occurring between 20 August 2007 and 11 January 2009 in doubt as to the source of the rules for determining the law applicable to the parties' non-contractual obligations for years to come. By the time that we have a firm answer, the large majority of cases (particularly those involving traffic accidents) will likely have settled notwithstanding that doubt (unpredictability of outcome may even be seen as a driver of settlement). If the CJEU follows the view of Tomlinson J, as I would submit that it should, all those whose claims remain (and those whose claims remain undiscovered) will know where they stand, even if the events on which the claim is based occurred in the interregnum. As decisional harmony will (or ought to) have been improved, even in the latter class of cases, so too the incentive for one party to upset settlement discussions by rushing off to bring proceedings in a Member State court that it considers will apply a favourable law will (or ought to) have been diminished. We will all, according to the tin, be better off.

It is suggested that, what as first sight may appear an awkward or "arbitrary" (Tomlinson J, at [38]) combination of provisions in Articles 31 and 32, is in fact a combination of puritanism and pragmatism. The authors of the Regulation, in their unremitting quest to harmonise the rules of European private international law, were anxious that their new creation should be vivified at the earliest opportunity. That, however posed a problem in that the objectives of the Regulation might be put at risk if the creature's handlers (Member State judges) were not trained as to how to use it, with the result that a period of education was built in. The modified prospective effect of the Regulation can be seen, therefore, as an attempt to resolve the conflict between the ideals of a single area of justice and the reality of twenty six different ones.

The significance of questions of temporal effect will, of course, fade over time as claims are resolved and new ones arise. In a few years, we may all be better off and wonder what the excitement was about, although Mr Homawoo, Mr Bacon and others in their position may question exactly what they have found

themselves in the middle of.