A foreign affair

Chris Pamplin looks at some of the expert witness issues that can arise in litigation that crosses EU member state borders

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In a shrinking commercial world, lawyers may well find themselves involved in some form of cross-border litigation. Such litigation carries with it potential difficulties and, not least among these, is the form and manner in which experts are appointed and expert evidence is taken. Within the EU, however, there have been attempts to "streamline" the process, but these can throw up their own problems.

When you crash your car in France

In cases in which some obligation arises (other than through contract) that have a connection with more than one European state, such as road traffic accidents involving citizens of more than one EU member state, EU Regulations (Council Regulation (EC) No 44/2001 of 22 December 2000 (Brussels I)) permit the injured party to bring an action directly against the insurer in the courts in the country in which the claimant is domiciled, provided that a direct action is permitted and the insurer is also domiciled in a member state (*FBTO v Odenbreit C-463/06*). Prior to this, it would have been necessary to bring the claim in the state in which the cause of action had arisen.

To facilitate such litigation, regulations were formulated that were designed to ensure greater uniformity between member states. Regulation (EU) 864/2007 on the law applicable to non-contractual obligations (Rome II) determines the governing law of torts. In summary, the legislative purpose of Rome II is to improve the predictability of the outcome of litigation, in part by achieving certainty as to the applicable law. It was considered that uniform rules applied in all states would help to ensure predictability and justice, in the form of a reasonable balance between the interests of the person claimed to be liable and the person who has sustained the damage.

Whose rules do we play by?

The general rule is that the applicable law will be the law of the country in which the damage occurred (Art 4). The scope of the applicable law is covered by Art 15, which states that it will govern, among other matters, the nature and assessment of damage. However, Art 1(3) provides that Rome II shall not apply to evidence and procedure. These matters are governed by the law of the country in which the case is heard. In recent years, however, the scope of the applicable law of contracts and torts has been gradually extended to embrace, for example, limitation of actions and assessment of damages.

In *Wall v Mutuelle De Poitiers Assurances* [2013] EWHC 53 (QB), [2013] 2 All ER 709 the court was called upon to consider whether questions concerning expert evidence were to be determined by the applicable law or were procedural matters for the purposes of Art 1(3) of Rome II (and consequently excluded from the Regulation and so a matter for the law of the forum).

Wall v Mutuelle De Poitiers Assurances

The facts of the case, briefly stated, were these. The claimant was English. In July 2010 he went to France for a holiday on his motorcycle during which a collision occurred between himself and a car driven by a Mr Clement. As a result, the claimant sustained very severe and extensive personal injuries.

> *"The judge was mindful of the differences in the adversarial & inquisitorial systems pertaining to the two countries"*

After emergency treatment in a French hospital, he returned home to England. On 22 December 2011 he issued a claim seeking damages for personal injury and naming Clement's French motor insurers as defendant. There was no dispute that this was a course he was entitled to adopt following Brussels I. Neither was there any dispute that the collision occurred as a result of the negligence of Clement. Consequently, on 21 May 2012 judgment was entered for the claimant for damages to be assessed.

It was common ground that Rome II applied to this case and that, even though the claim had been brought in the English courts, the applicable law would be French, pursuant to Arts 4 and 15.

In accordance with English law and practice, the claimant wished to call a number of experts to adduce evidence relating to the nature and extent of his various injuries and the assessment of his damages. The defendant wanted a single expert to be appointed in accordance with what was said to be French law and practice. The defendant argued that the appointment of the expert and the scope of the expert evidence were matters that were subject to the applicable French law.

Appointing experts

Mr Justice Tugendhat was therefore called upon to decide whether the expert evidence ordered by the court should be determined:

i. by reference to the law of the forum (English Law) on the basis that this was an issue of "'evidence and procedure" within Art 1.3 of Rome II; or
ii. by reference to the applicable law (French law) on the basis that this was an issue falling within Art 15 of Rome II.

In making his deliberations, the judge was mindful of the differences in the adversarial and inquisitorial systems pertaining to the two countries. He pointed out that Civil Procedure Rules (CPR) Pt 35 (Experts and Assessors) was introduced on the basis of the reports by Lord Woolf in *Access to Justice*. Lord Woolf had considered the differences between the ways in which courts in different countries received expert evidence and, in his Final Report at chapter 13, he said this: "The traditional English way of deciding contentious expert issues is for a judge to decide between two contrary views. In continental jurisdictions where neutral, court-appointed experts are the norm, there is an underlying assumption that parties' experts will tell the court only what the parties want the court to know. For the judge in an inquisitorial system, the main problem is that it may be difficult for him to know whether or not to accept a single expert's view. There is no suggestion, however, that he is inevitably less likely to reach the right answer than his English counterpart."

Tugendhat J pointed out that, in saying this, Lord Woolf no doubt had in mind that some practices in the common law states are unknown in most civil law states. Furthermore, rules of evidence also differ widely across the various jurisdictions.

Practices specific to common law states include an obligation upon litigants to disclose documents that adversely affect their own case or support another party's case (CPR Pt 31 6(b)), the preparation and exchange of witness statements for use at trial (CPR Pt 31 14), and the cross-examination of both witnesses of fact and expert witnesses.

Adversarial v inquisitorial

The adversarial procedures in common law states are designed, he said, to assist the court to arrive at the truth. But they require more work to be done by litigants and their lawyers (often with correspondingly less work for the judge) than is required under most civil law inquisitorial systems. The result is that the direct costs of litigation which have to be borne by the parties are much higher in common law states. This is so, even when the comparison is between a civil law and a common law state in which rates of remuneration charged by lawyers are at comparable levels. On the other hand, in common law states fewer judges are required, and fewer cases are actually tried, instead of being settled. These facts may help to keep down the cost to the common law states of providing for the administration of justice.

Having regard to the differences of procedure, it was not surprising to Tugendhat J that outcomes were different, even in those cases where there was no significant difference between the provisions of the substantive laws of the states in question.

> *"The court decided that, although the applicable law in this case was French law, it did not mean that the court had to put itself in the position of a court in France & decide the case as that court would have decided it"*

The judge identified the provision in the French Code of Civil Procedure for the appointment of experts. It was common ground that the fact that these provisions are in a Code entitled "Civil Procedure" is not, according to EU law, determinative of whether it counts as part of the applicable law for the purposes of Rome II Arts 1.3 and 4.

French Code of Civil Procedure

The effect of the French Code of Civil Procedure is broadly as follows:

- Personal injury damages are assessed with the assistance of medical experts.
- There may be one or more experts.
- The expert may be appointed by agreement between the parties, or of the court's own motion.
- In practice, a medical expert is always chosen from a list drawn up by the Courts of Appeal or the Court of Cassation in accordance with the provisions of French law.
- A single expert is appointed unless the judge considers it necessary to appoint more than one (Art 264).
- A person who is appointed an expert may obtain the opinion of another expert, but only in a specialism that is different from his own (Art 278).

An expert whose opinion is sought under Art 278 is known as a "*sapiteur*". In practice, this makes it possible for there to be one expert who directs the work and produces a single comprehensive report, which includes the opinions of any *sapiteurs*. For example, when the victim's accommodation requires adaptation, the medical expert will appoint an architect to give an opinion on the works in question. Another example given is where the victim has suffered serious brain damage and a specialist opinion is required on that.

Rules as to the conduct of the expert and related matters are set out in Arts 232–286. These include the following:

- The expert holds hearings, of which notice must be given to the parties.
- The expert receives documents and information from them, conducts examinations and must disclose to the parties information and documents upon which the opinion is based, and give the parties an opportunity to make representations.
- The judge is not bound by the opinion of the expert (Article 246).

In practice, the judge assesses the losses suffered by the victim, item by item, on the basis of the report.

English court, English rules

Having concluded that the contrasting way in which expert evidence was adduced in the two jurisdictions arose out of procedural differences, the court decided that, although the applicable law in this case was French law, it did not mean that the court had to put itself in the position of a court in France and decide the case as that court would have decided it. To do so would have involved the court in adopting new procedures, and this it was plainly not required to do.

In the judge's view, questions of what expert evidence the court should order, and, in particular, whether there should be one (or more) single joint experts pursuant to CPR 35, were matters of procedure, as referred to in Art 1(3). Such questions should, therefore, be determined by the law of the forum, in this case English law. **NLJ**

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