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We have just had the opportunity of listening to the very interesting comments made by Professor Staudinger. To seek to avoid as far as possible any duplication Professor Staudinger previously kindly shared with me a draft of his talk and in order to offer a different prospective I have sought to focus my own talk on providing a practitioner's view from the other side of the Channel.

You will be aware that in the United Kingdom we frequently approach matters differently; we drive on the other side of the road and unlike most other European Member States we follow what is essentially a common law tradition rather than a more codified Roman law approach.

I have divided my talk today into three main sections. The first includes some reflections on where the Odenbreit decision fits in the evolving process of Community law in this area, and its significance.

Secondly I offer some thoughts on the interplay of the new jurisdictional framework which exists since 13th December 2007 and the rules governing applicable law, both as they exist at present in the United Kingdom and are likely to apply following the coming into force of EC Regulation 864 /2007 (Rome II).

The third area which I propose to address briefly relates to potential difficulties which may arise in the field of recognition and enforcement of judgments across Member States following the Odenbreit decision.

I The Odenbreit decision as part of an evolving process

The first Motor Insurance Directive of 24th April 1972 refers to the objective of the Treaty establishing the then European Economic Community. One of the main purposes was the creation of a Common Market which itself had as an essential condition the free movement of goods and persons.

Frontier controls on insurance documentation were identified as impeding that free movement but at the same time it was acknowledged that the purpose of such checks had been "to safeguard the interests of persons who may be the victims of accidents caused by such vehicles", that is vehicles travelling from another Member State. The solution found was to implement measures not only to ensure that all motor vehicles based in the territory of a Member State should be insured, but that the contract of insurance should also be required to provide at least the minimum cover stipulated in other Member States [Article 3]

The second Motor Insurance Directive (84/5/EEC) provided further protection to victims of road traffic accidents by raising minimum levels of cover, outlawing certain restrictions in motor insurance policies (for example in relation to members of the driver's family) and ensuring that common measures were in place to protect victims of unidentified and uninsured drivers.

The third Motor Insurance Directive (90/232/EEC) of 14th May 1990 recognised that "significant disparities still exist" in the Member States in relation to motor insurance cover. Reference was also made to "gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States". Article 1 of the third Motor Directive introduced an obligation for policies to provide cover to all passengers and by Article 2 it became a requirement that all compulsory insurance policies arising out of the use of vehicles should cover the entire territory of the Community on the basis of a single premium.

The combined thrust of these first three Motor Directives can therefore be seen at least in part as being aimed at enhancing the position of victims of road traffic accidents where the responsible vehicle involved came from another Member State following the removal of frontier checks on the existence of appropriate motor insurance.

The fourth Motor Insurance Directive (88/357/EEC) of 16th May 2000 was to focus upon a rather different range of issues .

Whilst noting that "the Green Card Bureau System ensures the ready settlement of claims in the injured party's own country even where the other party comes from a different European country" it pointed out that "the Green Card System does not solve all the problems of an injured party having to claim in another country against a party resident there and an insurance undertaking authorised there (foreign legal

system, foreign language, unfamiliar settlement procedures and often unreasonably delayed settlement)."

In order to address those difficulties the fourth Motor Insurance Directive required that Member States should ensure that injured parties enjoy a direct right of action against the insurer covering the responsible party (Article 3) ; introduced a new system of Claims Representatives in each Member State to be responsible for handling and settling claims arising from an accident suffered in another Member State and prescribed time limits by which those Claims Representatives should respond to claims submitted. Further it introduced new Compensation Bodies in each Member State having the responsibility to ensure that Claims Representatives acted in the manner required, backed up by what are described as "appropriate , effective and systematic financial or equivalent administrative penalties " where there was default. (Article 4). Article 5 of the same Directive required the creation of information centres to maintain registers of the vehicles based in the territory of the state in question and of insurance policies covering those vehicles.

Whilst it was provided that Claims Representatives should have "sufficient powers to represent the insurance undertaking in relation to injured parties" it was explicitly set out in recital 13 that "the system of having Claims Representatives in the injured party's Member State of residence affects neither the substantive law to be applied in each individual case nor the matter of jurisdiction."

From my perspective as a practitioner this new system of Claims Representatives can be viewed as a partial success. It addressed one of the issues identified by the legislator (namely the problem of seeking to resolve claims in another language) but given that it emphasised that the measure affects neither the substantive law to be applied nor the question of jurisdiction it has had no real bearing on the issue of unfamiliar settlement procedures. In terms of speeding up the procedure I believe that there has been some success in relation to smaller claims but as regards more complicated cases it could be argued that greater delays have been created by reason of the addition of another intermediary between the victim and the responsible insurer. If negotiations break down, or even in circumstances where a settlement offer is received, the domestic practitioner [or the victim if acting in person] still frequently needs to turn to a lawyer qualified in the jurisdiction of the accident in order to receive reliable advice as to the reasonableness or otherwise of the amount proposed by way of settlement in accordance with the law and practice of the country where the accident took place.

The fourth Motor Directive came into force in May 2000. As mentioned earlier it was stated explicitly that it made no changes to rules governing jurisdiction. Those rules are to be found in the Brussels Convention as amended. For the purposes of civil claims arising from road traffic accidents the Convention gave jurisdiction to the Courts of the domicile of the responsible party and/or to the Courts where the harmful event took place, effectively where the injury was suffered.

As a practitioner advising an English client injured in another Member State I have very frequently been asked if it was possible to bring a claim before the English

Court. Until recently it was almost invariably the case that the answer was in the negative, unless of course the accident involved another United Kingdom domiciled party.

Council Regulation 44/2001 brought in a revision of the rules governing jurisdiction. It came into force on the 22nd December 2000, some 7 months after the fourth Motor Directive. In recital 13 are contained the words "in relation to insurance ….. the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for." As mentioned by Professor Staudinger Denmark did not adopt this Regulation.

Section 3 of the Regulation (Articles 8-14) deals with matters relating to insurance and by Article 9 .1 (b) it was provided that an insurer might be sued in a Member State where the Claimant was domiciled "in the case of actions brought by the policyholder, the insured or a beneficiary."

Those words were open to interpretation but certainly before the English Court it was held in more than one case that the terminology did not afford an additional jurisdiction to an injured victim of an insured accident which had taken place in another Member State. It is the proper understanding of those words upon which the European Court of Justice has now given a clear ruling.

Earlier this year I was privileged to attend a meeting of the Pan European Organisation of Personal Injury Lawyers in Valencia. Amongst other distinguished contributions those attending had the benefit of hearing a talk from Professor Doctor

Camelia Toader, Judge of the European Court of Justice and Rapporteur in the Odenbreit case. Having heard the Learned Judge's talk I have to say that my abiding sentiment is that the reasoning behind the judgment in Odenbreit is not so much derived from any detailed analytical interpretation of the words in Regulation 44/2001 but rather a teleological interpretation of the text and the overriding wish to protect "the weaker party."

As a country situated towards the northern part of the Community the United Kingdom enjoys what may be described as variable weather. No doubt this plays some part in encouraging large numbers of its citizens to travel south and enjoy some of the benefits of its more southerly and sunny neighbours. Despite our island location many now make use of the tunnel linking the United Kingdom to what we continue to refer to as the "continent". Many thousands travel in their own cars, others choose to hire cars having flown to their destination and still more are transported by road from airports to their holiday resorts.

Whether as drivers, passengers, cyclists or pedestrians large numbers of these holidaymakers and those travelling for business are exposed to the risk of accidents in what can seem an unfamiliar jurisdiction with its own legal provisions and procedures. To enable those involved to have an opportunity to seek redress before the Courts in their home country and in their own language marks a major step forward in my view and fits in with what I believe to be an evolving process aimed at protecting the so-called 'weaker party' in such cases - the victim of an accident in an unfamiliar jurisdiction.

How far its scope will extend remains to be seen. Professor Staudinger has already spoken of the uncertain position of Social Security organisations but will Odenbreit permit one motor insurer to bring a claim against another in the home jurisdiction of the claimant insurer? What will be the position of the travel insurer who has paid for the repatriation to his home country of a injured party? Will a direct claim exist in the victim's home country against a Guarantee Fund acting on behalf of an unidentified or uninsured driver in another Member State? If the scope of application is not given such wide application do we face a risk of conflicting judgements given in different Member States arising out of the same event?

II Interplay between the Odenbreit decision and rules governing applicable law

If the decision of the European Court of Justice given on 13 December 2007 clarifies the position of individual claimants who have been the victim of accidents in another Member State as to jurisdiction and their ability to bring a direct action in their country of residence against the relevant insurer, this constitutes an answer to but one part of the question facing such victims and those advising them.

Both also need to know what will be the law applicable to their cases once the Courts in their home countries are seised of such cases. Rules governing the law applicable in such cross-border cases show marked differences across the Community. In the field of road traffic accidents some Member States are signatories to the Hague Convention of 4 May 1971 but others, including the United Kingdom, are not.

In the United Kingdom the question of applicable law in such cases was long a question of common law with various principles emerging from decided cases. However the position was codified under Part III of our Private International Law [Miscellaneous Provisions] Act 1995.

Section 11 of this Act provides a general rule that the "applicable law" is the "law of the country in which the events constituting the tort or delict in question occur" [lex loci delicti].

Section 12 provides for the displacement of the general rule in certain cases in which it is "substantially more appropriate " for the applicable law to be different.

In what is believed to be the first reported case decided under this new statutory regime it was adjudged that the general rule should be displaced in a case following a road traffic accident in Spain as a result of which the claimant, Jane Edmunds, sustained serious injuries whilst travelling as a passenger in a Spanish hire car driven by another English person with whom she was on holiday . As a consequence all aspects of the quantification of the injuries and losses sustained by Miss Edmunds were to be decided by reference to English law. (Edmunds v Simmonds). This resulted in an award of damages considerably greater than if the case had been decided based upon a quantification based upon Spanish principles.

In subsequent cases where it was considered that the general rule should be applied distinctions have however been maintained between questions of substantive and

procedural law. The leading case on this subject Harding v Wealands is a decision of our highest Court, the House of Lords in what was also a road traffic case.

That case involved a Claimant and Defendant who were living together in London. The Defendant Miss Wealands was an Australian who had returned to New South Wales to attend a family wedding. She was joined later by the Claimant in Australia. Whilst he was travelling as a passenger in the Defendant's Australian motor vehicle it was involved in an accident as a result of which he sustained very serious injuries. Both parties returned to London after the accident and Mr Harding brought proceedings before the English Court for damages for his injuries. Liability for the accident was admitted but the question arose as to whether the English Court should assess the damages according to English law or whether that process was to be regulated by the law of New South Wales, which limited the amount of damages which could be recovered in a number of important respects.

The outcome of the Appeal to the House of Lords was that the statutory provision governing damages in New South Wales was held to be procedural and therefore fell to be ignored and the English Court awarded damages for the injuries along conventional English principles. Matters of substantive law were to be decided by reference to the law of New South Wales. Those included the question of heads or kinds of loss for which damage could be awarded, but the quantification of those losses was adjudged to be a matter of procedural law to be decided by the Court of the forum in England. The result for the victim was that substantially greater damages were awarded than would have been the case had the law of New South Wales been

followed as this included various caps or limits on damages, all of which were considered procedural in nature.

That therefore is the position which prevails at present in the United Kingdom. I appreciate that this approach to conflict of laws is not one which is consistent with that followed in other Member States. How will this be affected by the advent of Regulation 864/2007 (Rome II)?

Article 32 of Rome II stipulates that the Regulation is to apply from the 11th January 2009.

Article 4 of Regulation 864/2007 sets out the general rule namely that the applicable law shall be the law of the country in which the damage occurs. For the purposes of personal injury claims Recital 17 makes clear that this is to be the law of the country where the injury was sustained or the property was damaged. Article 4 .2 provides a specific exception where the person claimed to be liable and the person who has sustained damage both have their habitual residence in the same country in which event the law of that country should apply.

Article 4. 3 provides a more general exception leading to the application of another law where the tort/delict is "manifestly more closely connected" with a country other than that indicated in Article 4.1 or 4 2.

Article 15 provides that the scope of the law applicable is to be very wide. It will govern amongst other issues:

a the basis and extent of liability;

b the grounds for exemption from liability, restriction of liability or any contributory negligence;

c the existence, the nature and the assessment of damage or the remedy claimed. It is also to govern questions of prescription or limitation and, by virtue of Article 22, rules which raise presumptions of law or determine the burden of proof.

Subject to that exception, Article 1.3 stipulates that the Regulation shall not apply to evidence and procedure.

What does this mean in practice?

My first impression is that in a few short months both lawyers and the Judiciary face the increased prospect of dealing with cases before their own Courts but subject to the law of another country. English Judges may find themselves having to pronounce on cases where Greek law is to be applied. Hungarian Judges may have to decide upon points of Portuguese law and Irish Judges apply Italian Law. Except in the rarest of circumstances those dealing with such issues will have little or no experience of the foreign law in question. In my view this is bound to give rise to serious complications, particularly between jurisdictions where the legal traditions are very different.

Before English Courts questions of foreign law are deemed to be matters of fact which require proof and are ultimately decided by a single Judge. We have already seen that subject to limited exceptions Article 1.3 of Rome II provides that the Regulation shall not apply to matters of evidence and procedure. English Courts

consider that the best evidence is usually oral evidence and we can therefore envisage an increasing number of cases where an English Judge will find himself having to decide between what are competing interpretations of the law of another country.

I do not suggest that this is impossible but it is certainly complicated and can be very time consuming, and extremely expensive. I remember vividly being involved in a case before a London Judge following an accident in the port of Dieppe when the nature of a tenancy agreement of a ship-to-shore ramp under French law was hotly debated by two French Avocats. The English Judge was ultimately forced to choose between those two different interpretations following argument lasting several days. Both Avocats required the assistance of interpreters which further extended the duration and cost of the procedure.

That case provides an illustration of difficulties which can arise regarding interpretation of specific points of foreign law. To my mind however the issue of assessment of damages in personal injury cases raises other more delicate issues. This results by reason of the fact that there are frequently overlapping considerations between law and procedure when it comes to the different approaches adopted by Courts across Member States in relation to the assessment of damages in personal injury cases. A simple example may illustrate the point. In France damages for personal injuries are usually assessed by the Courts by reference to the reports of Court-appointed medical experts who are charged with assessing injuries in accordance with pre-determined scales and percentages. French procedure provides rules for the appointment of such experts; how they are to be paid; how their intervention is monitored and the circumstances in which their reports can be

challenged. It goes without saying that no corresponding procedure exists in England. How one may ask is an English Judge to proceed in the light of the provision that neither questions of evidence nor procedure are to be regulated by Rome II, but where he is nevertheless required to apply French law?

Conversely I anticipate not inconsiderable difficulties for the French judiciary required to apply English law to the assessment of damages assuming it continues to apply its domestic procedural framework.

One example of the sort of difficulty which can arise is perhaps illustrated by the recent case of Dawson v Broughton. This claim brought before the English Courts in 2007 resulted from a fatal road traffic accident in France. The learned Judge found under our 'general rule' that French law should apply to the case whilst at the same time he felt it appropriate as a result of the claimants bringing their claim before the English court to reduce the entitlement to compensation by a factor to reflect the position that the deceased passenger had not been wearing a seat belt, thereby disregarding the French legal position, and applying a concept of English law under which the wearing of seatbelts is mandatory and the failure to respect that provision is frequently regarded as constituting a degree of contributory negligence – a strange hybrid you may think of English and French law and a possible foretaste of things to come?

It seems likely that if a similar case were decided following the introduction of Rome II English law would normally be deemed to be the applicable law under Article 4.2 in circumstances where the parties involved both have their habitual residence in the

United Kingdom, whereas if the claim were brought following Odenbreit against the insurer of the French driver involved in the accident French law would be considered applicable, being the law of the country where the accident took place. In that case no account would normally be taken of a failure to wear a seatbelt under the 'Loi Badinter'.

This also begs the question of what will be deemed the applicable law in a case where an innocent passenger brings a claim against two defendants one of whom is based in his own country of residence and the other in the territory of another Member State? One law for one Defendant and another for the other?

III - Potential Difficulties in connection with enforcement of Judgments

Whilst the decision in Odenbreit confirms a new alternative jurisdiction, and the imminent coming into force of Rome II introduces new rules governing the question of applicable law, the third piece of the jigsaw remains that of certainty of recognition and enforcement of judgements.

The authors of Regulation 864/2007 (Rome II) recognise the interelationship between rules governing applicable law and enforcement of judgments. Recital 6 to Rome II puts it in these words " the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict of law rules in the

Member States to designate the same national law irrespective of the country of the Court in which an action is brought."

To the extent to which the Odenbreit decision is likely to increase significantly the number of judgments given in one Member State against an insurance undertaking in another Member State it is clearly important both to litigants and those representing them that difficulties in relation to recognition and enforcement of judgments are not created. But will the Courts of one Member State [those of the insurer] readily accept the interpretation given of its own national law by the Courts of another Member State [those of the victim]? Should they fail do so the entire objective behind the Odenbreit decision would be thwarted and far from strengthening the position of the victim would result in a significant worsening of that position.

It is very difficult at this point in time to put forward anything resembling a definitive assessment of the full impact of the Odenbreit decision. I am conscious that during the course of this talk I have raised a number of questions to which I cannot myself provide answers. I believe that the decision of the European Court of Justice in the case of Odenbreit marks a step forward in facilitating the resolution of claims brought by citizens living in one Member State following accidents sustained whilst visiting another Member State. However, and perhaps inevitably, such reforms give rise to a range of new questions. I rather suspect that the Judges of the European Court of Justice in reaching their decision in Odenbreit have created for themselves a busy time in the years to come.

Michael Zurbrugg