

FOREIGN ACCIDENT LITIGATION AFTER 31 December 2020: A PRACTICAL GUIDE

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In these slides...

IPD means Implementation
Period Completion Day

– 11pm on 31 January 2020



What we want to know...

- The applicable law?
- Which courts have jurisdiction?
- How to serve?
- How to enforce any judgment?

The answers may depend upon ...

- Tort or contract?
- Cause of action before IPD?
- Where did the damage take place?
- Proceedings commenced before IPD?

Applicable Law

- No change whatever the type or time of the claim
- Rome I and Rome II continue to apply
- So existing (EU) substantive/procedural distinctions continue to apply (remember *Pandya...*)



Rome II provisions of interest ...

- Article 4(2) & 4(3)
- Article 18 – direct right against insurer where permitted by law of (a) accident location or (b) the law of policy
- Therefore, continue to use the foreign law direct right against foreign insurers (in particular where a UK accident)



Jurisdiction

Does Brussels Recast Apply?

- Yes – if proceedings instituted and served before IPD. Look for the date on the claim form issued by the court.
- Yes – if proceedings instituted but not yet served as long as regular service is effected.
- Yes – if not yet instituted but “related” to proceedings instituted before IPD
- Otherwise - No.

So for claims instituted before IPD...

- No change on applicable law
- Jurisdiction (and enforcement) determined by Brussels Recast
- But a potential for practical difficulties with service – see later...

Jurisdiction – what now?

- No more Brussels Convention
- No more Lugano Convention (for now)
- No more Brussels Regulation
- Back to:
 - CPR Part 6
 - Common Law
 - Whatever the SC decides in *Brownlie*

Jurisdiction +

- Use the gateways (CPR PD 6B)
- No special ‘Insurance gateway’ – use ‘Tort gateway’
- Obtain ‘Permission to serve out’ – CPR 6.36.
- Show “*England and Wales is the proper place in which to bring the claim*”
- Change of emphasis away from domicile of a party to the connection between the tort and the venue

Jurisdiction new provisions

- Civil Jurisdiction and Judgments Act 1982
- New section 15B
- Contractual claims based on domicile of the consumer
(regardless of the domicile of the other party)
- Does not apply to transport contracts

Jurisdiction – favourable factors

- Defendant domiciled here
- English law or no real difference between English and applicable law
- Liability admitted
- Disclosure exercise here
- Witness and/or experts here
- Delay/lack of expertise in foreign forum
- No real access to justice in foreign forum

Service

- Service Regulation: gone
- Use CPR 6.40:
- Where there is a Civil Procedure Convention
- ? Hague Service Convention (1965) resurrected
- By any other method permitted by the law of the country of service

Recognition

Can we resurrect previous bilateral Conventions?

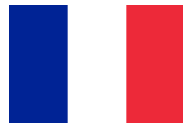
- Austria



- Belgium



- France



- Germany



- Italy

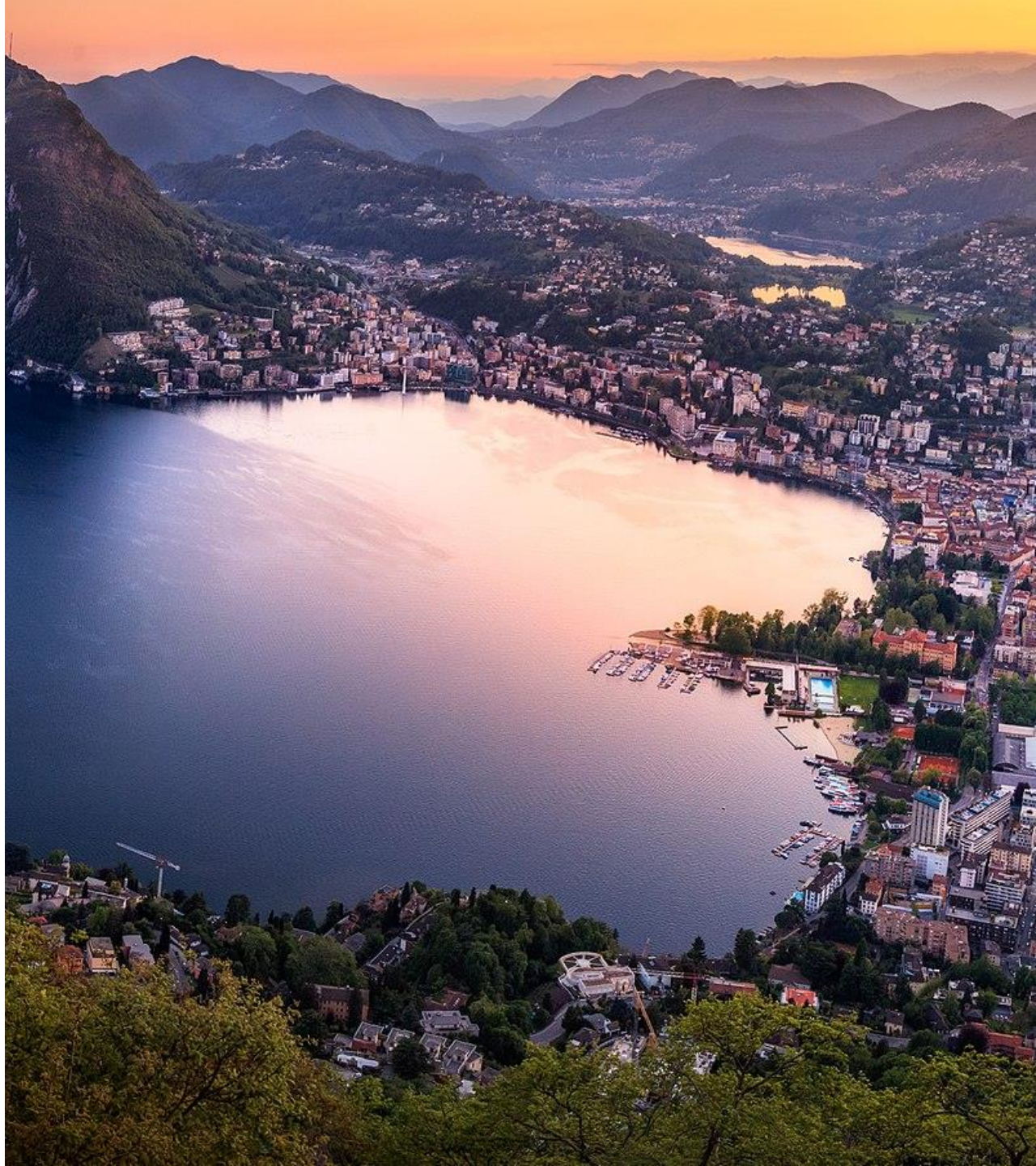


- Netherlands



Way forward

- Boils down to Lugano or something similar
- Various other instruments (2005 Hague) no real help
- New 2019 Hague: very limited grounds for recognition
- Lugano requires consent: EEA states agree; EU not yet



Hope for the Future?

- Practice point: If optimistic about Lugano then delay instituting proceedings (as applicable limitation period allows) until it arrives?
- Neither side likes delay.
- It may be that Ds/Insurers agree UK jurisdiction to conclude claims quickly.
- Worth exploring for both sides.

Alternatively...

- Ask whether Ds/Insurers prepared to accept service and if they agree – try them. Unless jurisdiction disputed in AOS no further challenge.
- For low value claims: agree to apply English law and reduce costs of experts?
- For whatever reason, some may accept.
- Motor insurers no longer required to have 4th Directive Reps in the UK but unlikely to close overnight. Investigate service under Companies Act 2006 where foreign insurer has an “establishment” in the UK.

Motor Claims

- RIP *Odenbreit* and easy service on foreign insurers in foreign accident claims
- But insurers still traceable by MIIC
- And – as above – Reps still here, “establishments” maybe here and insurers may find it worth their while to submit to jurisdiction now rather than watch the claim build for a few years then be faced with a higher outlay when C institutes proceedings after Lugano/enforcement provisions arrive.
- Foreign untraced/uninsured claims vs MIB: gone



Stronger candidates for Jurisdiction

- Where English law = proper law
- High value quantum only claims where continuing future loss
- Where you have (an) English Defendant
- Beware settling claims where not issued and costs (become) an issue

Risks

- Enforcement of Judgments: need for foreign advice
- Costs and foreign public policy
- If C has to pay own costs in foreign venue, what is the difference in practice?

Sources

- Withdrawal Agreement: Articles 67-69
- Civil Procedure Rules 1988 (Amendment) (EU Exit)
Regulations 2019, as amended (see SI 2020/1493)
- Civil Jurisdiction and Judgments (Amendment) (EU Exit)
Regulations 2019, as amended