Special Briefing: Foreign Rules in the English Courts

In the post-Brexit era the courts of England and Wales have been faced with a tsunami of claims issued on the cusp of Brexit Day. A number of recent developments raise some intriguing questions about the interface between substantive law and procedure; and about how the courts can and should exercise their discretion in applying foreign rules in the assessment of damages. Matthew Chapman QC and Ella Davis consider the applicability of Spanish rules on the assessment of interest on damages, while Sarah Prager looks at the recent Monitoring Report on the 'new' Baremo tables, and asks whether it can be considered in the exercise of the court's discretion in assessing damages.

CAN (AND SHOULD) THE ENGLISH COURTS APPLY PENALTY INTEREST UNDER FOREIGN STATUTE?

A tale of two statutes

1. The award of interest on damages in a conventional personal injury claim ought to be a straightforward matter. In England, the Court's power to award interest has a statutory foundation. The prayer at the end of a Claimant's standard Particulars of Claim must include a claim for interest (CPR 16.4(2)) and should plead the relevant statutory provision which, for claims in the High Court [1], is section 35A of the Senior Courts Act 1981. This reads as follows (subsection (1) with the consequential amendments introduced by subsection (2) for claims for damages for personal injury/death):

"*Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or*

damages there shall be included in any sum for which judgment is given unless the court is satisfied that there are special reasons to the contrary simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and— (a) in the case of any sum paid before judgment, the date of the payment; and (b) in the case of the sum for which judgment is given, the date of the judgment."

2.The appropriate rates of English law interest on damages in a personal injury claim have been considered in a number of cases (notably, among others, *Jefford v Gee [1970] 2 QB 130 (CA)*). The case law is conveniently collected in the *White Book* commentary, and the position is now settled (at least, in most cases):

a. Past losses and expenses: special account rate which is presently 0.1% per annum from date incurred to date of award (and at half this rate for past losses which are continuing);

b. General damages for pain, suffering and loss of amenity: 2% per annum from date of service of the proceedings to date of Trial or earlier settlement *(Wright v British Railways Board [1983] 2 AC 773 (HL)* approving *Birkett v Hayes [1982] 1 WLR 816*).

3. A personal injury claim for damages in the Spanish Court against a Spanish insurer is also likely to include a claim for interest. Such claim will also have a statutory foundation and this can be found in the Spanish Insurance Contract Law 50/1980 of 8 October. However, and by obvious contrast to the English law position, Article 20 of Spanish Insurance Contract Law 50/1980 contains a potential sting for the Defendant insurer. It materially provides that:

a. The Spanish Court is empowered to award interest at a penalty rate on damages in a claim brought directly against an insurer or, where there is no insurer, against the Spanish Guarantee Fund[2] (the Spanish equivalent of the UK Motor Insurers' Bureau);

b. The aim of the penalty interest regime contained in Article 20 is to discourage delay (by the insurer) in responding to a claim in those cases where the insurer is aware of its contractual obligation to make a payment (under the policy**);**

c. An important Spanish Supreme Court Judgment (1 March 2007 (RJ 2007/798)) has held that interest under Article 20 should be calculated as follows, (i) for the first two years after the relevant date[3] (usually, the date of accident), interest will accrue at the annual rate prescribed in Spanish [law increased by a substantial percentage increment; (ii) two years after the relevant date, interest accrues at 20% per *annum*;

d. These penalty interest provisions will not apply where, "*... the absence of satisfaction in indemnity or payment of the minimum amount is based on a justified cause or is not attributable to them* [the insurer]": Article 20(8). To this extent, an award of penalty interest does not follow automatically. There has been considerable Spanish case law on the scope of Article 20(8) and this is considered below;

e. Penalty interest will be levied on the entirety of the award made to the Claimant (not just, as in England, on past losses and general damages).

4. In the golden age between December 2007 (when what is now the CJEU gave judgment in *FBTO Schadeverzekeringen NV v Odenbreit Case C463/06*) and 31 December 2020 (when, at 11 pm UK time, the Brexit withdrawal agreement transition period came to an end and the recast Brussels I Regulation (No 1215/2012) ceased to be of use to English domiciled Claimants), it was a commonplace for English Claimants to sue Spanish insurance companies in the English Courts. Such claims were characterised as claims in tort (see, *Maher & Another v Groupama Grand Est [2010] 1 WLR 1564*, 1571E – F per Moore Bick LJ (CA)) and, accordingly, were subject to the Rome II Regulation (No 864/2007). In order to bring such a claim, the English Claimant made use of Spanish law (not least, the Spanish law direct right of action against an insurer:[4] being, the condition for the Claimant's exercise of the jurisdictional rights contained in section 3 of the recast Brussels I Regulation).

5. The disparity in the interest rate as between English and Spanish law (together with the wider Spanish law penalty interest regime) gave rise to a dilemma: should the English Court – in its application of Spanish law to a personal injury claim for damages against a Spanish Defendant insurer – apply the English or Spanish law interest provisions? One might have thought that the answer to this conundrum would be found in the Rome II Regulation. If only it were that simple. The issue was recently considered in *Scales v MIB* and again in *Troke v Amgen Seguro*.

Rome II: substance & procedure

6. The Rome II Regulation (No 864/2007) was and, notwithstanding Brexit etc., remains (directly) applicable in England. It governs the means by which the applicable law of the tort is to be identified (which is relatively straightforward) and, when identified, the matters to which the applicable law will be applied (which is rather less straightforward):

a. Article 4(1) provides that "*… the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*" (there is an important caveat to this presumptive rule which is contained in Article 4(2) and a so-called "*escape*" provision exception which is contained in Article 4(3), but these provisions lie beyond the scope of this paper);

b. Article 15 – sub-headed, "*Scope of the law applicable*" – identifies a number of matters to which the applicable law of the tort/delict will apply. Among these matters are limitation etc. (at paragraph (h)) and – of more potential relevance for present purposes – paragraph (c) which subjects to the law applicable, "*… the existence, the nature and the assessment of the damage or the remedy claimed*" to which the Claimant may be entitled. Article 15(d) further stipulates that the applicable law of the tort shall govern, "*within the limits of powers conferred on the court by its procedural law, the measures which a court may take to ensure the provision of compensation*";

c. Article 1(3) of Rome II provides that "*This Regulation shall not apply to evidence and procedure* [5]… . The result of this is that the law of the forum (namely, English law) will continue to apply to matters of procedure[6].

7. The boundary between substance (the substantive matters to which the applicable law of the tort will be applied) and procedure (to which the law of the forum will continue to apply) is not[7] described in any detail in the Rome II Regulation and this boundary has not been heavily policed by the English Courts. There has been no attempt by the English Court to identify a general test by which matters of substance might be separated from matters of procedure (in any contested issue). Instead, there has been piecemeal and incremental development (in the "*case by case*" manner that the common law judiciary prefer) – some examples follow:

a. As to the (medical) expert evidence on which the English Court might rely in a case of catastrophic brain injury, CPR Part 35 remains the procedural touchstone and is to be applied in a case where French law is the proper law of the tort: see, *Wall v Mutuelle de Poitiers Assurances [2014] 1 WLR 4263 (CA)*, paras 11 and 12 *per* Longmore LJ;

b. As to amendments to a statement of case, notwithstanding the application of (substantive) Russian law, the question whether or not the draft amendments raised a new cause of action was a procedural matter which fell to be decided by the procedural rules of the forum (that is, English law) without prejudice to any foreign limitation point that might be taken: see, *PJSC Tatneft v Bogolyubov [2018] 4 WLR 14 (CA)*, para 33 per Longmore LJ, "*As made clear in article 1.3 of Rome II, it does not apply to procedure. Article 15(h) is not in point since one is not here concerned with "the manner in which an obligation may be extinguished" or rules of limitation, but with the English court's procedural rules in relation to pleadings. There was no dispute that the relevant limitation period, and when that*

period began to run, was a matter of Russian law." See, further commentary in *Dicey, Morris & Collins* 5th cum supp to the 15th ed, para 7-065;

c. As to interim payments, these formed part of the procedural arsenal of the English Court and were to be considered by reference to CPR Part 25 notwithstanding the fact that, pursuant to Rome II, the proper law of the tort was French law: see, *Folkes v Generali Assurances [2019] EWHC 801 (QB)*, para 16ff per Nicol J;

d. Greek law provisions requiring issue and service of the originating process before the expiry of the Greek limitation period were substantive provisions to which the applicable law of the tort (Greek law) should be applied pursuant to Article 15(h): see, *Pandya v Intersalonika [2020] EWHC 273 (QB)* – a decision from which permission to appeal has now been refused by the Court of Appeal.

8. These cases do have in common (to a greater or lesser extent) an attempt to demarcate substance and procedure by the application of principles of construction to the Rome II Regulation. The following are basic canons of construction in this context:

a. The terms contained in Article 15 (and 15(c) in particular) shall be construed autonomously (to ensure consistent interpretation throughout the EU);

b. These terms should be construed in a manner which has regard to the context and objectives of the Regulation (set out in the recitals to Rome II);[8]

c. Article 1(3) is a derogation from the general rules contained in Articles 4 and 15 of the Regulation and, accordingly, to be construed narrowly.[9]

Interest on tort damages: substance or procedure?

9. *Maher v Groupama [2010] 1 WLR 1564 (CA)* was considered by reference to the pre-Rome II position as to applicable law in tort/delict: to be found in the Private International Law (Miscellaneous Provisions) Act 1995. However, *Maher v Groupama* has cast a long shadow over the subsequent (Rome II) case law.

10. In *Maher v Groupama* the English Court was applying French law to the substantive issues (in a claim brought by English Claimants against a French Defendant insurer). As to interest, the first issue concerned the extent to which interest was a procedural or substantive matter and the accompanying (and more critical) issue was whether English or French law was to be applied. The following passages can be found in the judgment of Moore-Bick LJ (for the Court):

"[para 33] I accept that the existence of a legal right to claim interest is properly to be classified as a substantive matter to be determined by reference to the lex causae, but the question that arises for determination in this case is whether section 35A of the 1981 Act creates a substantive right or merely a remedy. Although in Kuwait Oil Tanker SAK v Al Bader [2000] 2 All ER (Comm) 271 this court suggested that section 35A creates a right to claim interest, that is not how it has hitherto generally been regarded."

"[para 40] … the existence of a right to recover interest as a head of damage is a matter of French law, being the law applicable to the tort, but whether such a substantive right exists or not, the court has available to it the remedy created by section 35A of the 1981 Act. Having said that, the factors to be taken into account in the exercise of the court's discretion may well include any relevant provisions of French law relating to the recovery of interest. To that extent I agree with the judge that both English and French law are relevant to the award of interest. [original emphasis retained]"

11. Accordingly, the answer to the questions, is the award of interest a substantive or procedural matter and is it a French or English law matter, would seem to be that interest is both substantive and procedural and involves the application of both French and English law. However, it is clear from the judgment in *Maher v Groupama* that the Court of Appeal's approach to these questions was very largely driven by the pre-Rome II approach which:

a. Sought to divide matters of substance from matters of procedure in the assessment of damages by asking whether the contested

matter gave rise to a right or a remedy (a mere remedy – like the assessment of damages – was a procedural matter)[10]; and,
b. Permitted the Court to divide the issues pertaining to a tort and to apply a different applicable law to each issue.

12. This approach should not have survived Rome II. The Rome II Regulation subjects all matters pertaining to the *"the existence, the nature and the assessment"* etc. of damages to the applicable law of the tort (the right/remedy distinction is not known to the Rome II Regulation). Equally, the Rome II Regulation applies one applicable law to the tort (not to issues comprising the tort).

13. In the circumstances, the extent to which *Maher v Groupama* remains good law in the post-Rome II era must be (or, at least, ought to be) in question. The fact that it has continued to be applied to Rome II cases may indicate a degree of historical amnesia about the pre-Rome II English law position (as to the assessment of damages) and/or an unwillingness to accept the changes that Rome II has introduced.

14. *Hyde v Sara Assicurazioni SpA [2014] EWHC 2881 (QB)* was – like *Maher v Groupama* – a case decided by reference to the pre-Rome II position (and was a claim against an Italian insurer, to which Italian law was to be applied). The following appears in the judgment:

"[para 5,2 per HHJ Moloney QC] … following the Maher case (which, of course, dealt specifically with this issue of interest) the English court has the discretion to award interest or not in accordance with its own principles as a procedural or remedial matter, whether or not Italian law would give any substantive right to interest or impose any limit on it."

15. *AS Latvijas Krabjanka [2016] EWHC 1679 (Comm)* was – at least in part – a Rome II case (in which only one side appeared; the Defendant did not appear and was not represented). In applicable law terms, the choice for the Court was (broadly) between English law (the law of the forum) and Latvian law (the applicable law of the tort). To add to the general complexity, some of the claims in this litigation were subject to the Private International Law (Miscellaneous Provisions) Act 1995 and some of the claims were subject to Rome II. In the course of his judgment, Leggatt J (as he then was) said this:

"[para 10] Article 1(3) of Rome II states that the regulation "shall not apply to evidence and procedure." A distinction is therefore made between matters of procedure and matters of substance. It does not follow, however, that this distinction is to be drawn in precisely the same way as it is drawn at English common law and under the 1995 Act. In particular, the authors of Dicey & Morris, "The Conflict of Laws" (15th Edn, 2015) at para 7-112, point out that it might be argued that the rate of interest recoverable on damages goes to, or is intrinsically linked with, the assessment of the overall amount which the claimant can recover in respect of a damages claim and thus falls within the scope of Article 15 of Rome II. It is their tentative suggestion that the rate of interest on damages is governed by the law applicable to the non-contractual obligation. I find this suggestion and the argument on which it is based persuasive. Indeed, it seems to me that the broad wording of Article 15 requires the court to exercise any power conferred by its procedural law to award interest as compensation to a claimant for being kept out of money as a result of the defendant's wrong only when and in the way that a remedy would be granted under the applicable foreign law to provide such compensation."

"[para 13] In relation to the Bank's claims which fall within the scope of Rome II, for which the remedy as well as the right to recover interest is therefore governed by Latvian law pursuant to Article 15 of the regulation, no interest should be awarded for the period prior to the entry of judgment because such a remedy is not available in Latvian law. On the other hand, in relation to those claims outside the scope of Rome II, where the discretionary remedy provided by section 35A is available to be used, the court should exercise its discretion by awarding interest to compensate the Bank for being kept out of its money."

16. It does not appear – from the judgment – that Leggatt J obtained much assistance from *Maher v Groupama* with respect to the position mandated by

Rome II for the award of interest (although there is a reference to this decision in the judgment).

Scales v MIB & Troke v Amgen (1): Spanish law & "justified delay" pursuant to Article 20(8)

17. As indicated above, Article 20 of Spanish Insurance Contract Law 50/1980 provides as follows (in English language translation):

"If the insurers incur delay in compliance with the service, the indemnity of damages and prejudice, and notwithstanding the validity of the clauses of the contract being understood to apply which are of most benefit to the insured, then the following provisions shall apply: … (3) It shall be understood that the insurers have incurred delay if they have not complied with their service within a period of three months from the occurrence of the incident, or have not proceeded with the payment of the minimum amount which may be owed within the forty days from receipt of the declaration of the incident. … (6) The initial date for calculation of the said interest shall be the date of the incident. This notwithstanding, if the insured policyholder, the insured party, or the beneficiary have not complied with the obligation of notifying the incident within the period specified in the policy or, as a subsidiary consideration, within the seven days from this becoming known, the initial date for the calculation shall be the day of notification of the incident. With regard to the injured third party or their heirs or successors, the provisions of the first paragraph of this section shall be exempted if the insurers prove that they were not aware of the incident prior to the complaint or the exercise of direct action by the injured party or heirs or successors, in which case the initial date shall be the date of the said complaint or of the said exercise of direct action. … (8) No indemnity for delay on the part of the insurers shall be incurred if the absence of satisfaction in indemnity or payment of the minimum amount is based on a justified cause or is not attributable to them. [(9) deals with the position of the Spanish Guarantee Fund or CCS as described above]."

18. The following is a very short summary of the position (in Spanish law) as we understand it from the English translation of the authorities cited in *Scales v MIB* (which was argued a year ago)[11]:

a. Article 20(8) is an exception to the general position (summarised above) that penalty interest should be awarded. As such, it should be narrowly or restrictively applied: see, among other authorities, Spanish Supreme Court judgments of 7 February 2019 (EDJ 2019/506253 STS); of 30 June 2009 (No 510/2009 RJ/2009/4451);
b. Most of the cases in which Article 20(8) has been deployed concern scenarios where (i) there is doubt about whether the insurance coverage in question applies (on a true construction of the terms of the policy)[12]; (ii) there is doubt about whether the insurance premiums have been paid[13]; and/or (iii) there is doubt about whether there was a road traffic accident for which the Spanish Guarantee Fund might be liable[14];
c. A mere dispute about liability or quantum will not usually justify delay such that the insurer or Spanish Guarantee Fund will be able to rely on Article 20(8).

Scales v MIB & Troke v Amgen (2): outcomes as to interest

19. *Scales v MIB* was a case pursued by an English Claimant against the UK MIB (standing in the place of the Spanish Guarantee Fund or CCS) in respect of a hit and run accident in Spain. The claim was brought under regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 (SI 2003/37). It was common ground that, pursuant to *Moreno v MIB [2016] 1 WLR 3194 (SC)*, the law of Spain should be applied to the assessment of the Claimant's damages. *Troke v Amgen* was an *Odenbreit*-style claim by an English Claimant against a Spanish insurance company. Again, pursuant to Rome II, it was common ground that the law of Spain should be applied. *Scales v MIB* was decided at first instance in the High Court (Cavanagh J). *Troke v Amgen* was an appeal in the High Court (Griffiths J) from a decision (in the County Court at Plymouth) by a Recorder. An interesting (distinguishing?) characteristic of *Troke v Amgen* is the evident difficulty that Griffiths J had in identifying what had been decided at first instance

(there were different iterations of the County Court judgment and further comments by the Recorder at first instance. The reasoning found in these various pronouncements was not easy to follow). Further, in *Troke v Amgen*, Griffiths J spent some time considering the contractual position under Rome I (although the claim was a tort claim, characterised as such for private international law purposes).

20. As to interest, in *Scales v MIB*, the Court (Cavanagh J) awarded the Claimant Spanish law penalty interest. By contrast, in *Troke v Amgen* forum law (ie. English law) interest, rather than Spanish penalty interest was awarded. There has been no appeal/further appeal from the decisions in *Scales v MIB* and *Troke v Amgen*.

21. The following passages can be found in the judgments:
a.*Scales v MIB* –

"[paras 255 – 257] The existence of a right to claim interest as a head of loss is a substantive matter to be determined by reference to the foreign law, the lex causae. This was made clear by the Court of Appeal in Maher and another v Groupama Grand Est [2009] EWCA Civ, [2010] 1 WLR 1564 , at paragraph 33. It is common ground that Spanish law provides a substantive right to interest.

… In any event, whether or not such a substantive right exists, the English Court has a discretionary power, under section 35A of the Senior Courts Act 1981 , to decide whether to award interest and to determine the amount of interest: Maher , paragraph 35 and 40. This power must, of course, be exercised judicially. In exercising the Court's discretion, the Court of Appeal said in Maher that the English Court might well take into account any relevant provisions of the foreign law relating to the recovery of interest (see judgment, paragraph 40).

… There are, as I will explain, specific rules of Spanish law which govern the award of interest in cases such as these. In my judgment it is appropriate to apply these rules to the present case. It does not matter in practice whether, in theory, I do so because these rules are part of the substantive law that I must apply, or because I exercise my discretion to do so in accordance with section 35A of the Supreme Court Act 1981 . For the avoidance of doubt, however, if the award of interest is a discretionary matter under section 35A , I exercise my discretion in accordance with what I understand would have happened if these proceedings had taken place in Spain. That is in keeping with the way in which I have determined the other issues in the case. Neither of the parties invited me to take any other course of action: all of their submissions on interest were made by reference to Spanish law principles."

b.Troke v Amgen –

"[paras 55 – 65] In any event, in the present case an interest remedy was available under Spanish law, because this was stated in the joint Expert Report to be the case. The award of interest under the procedural law of England as the lex fori was not, therefore, inconsistent with or precluded by the substantive law of the lex causae.

… I conclude, therefore, that the Judge was correct in thinking that his power to award interest under section 69 of the County Courts Act 1984 as the lex fori (the counterpart of the High Court power under section 35A of the Senior Courts Act 1981) was not inconsistent with Rome II, and was permitted by article 1(3) .

… That being so, the Judge was entitled to apply the rate of interest prevailing in the forum, since he was ordering interest pursuant to the forum law (the County Courts Act 1984). This is what Treacy J did in Rogers v Markel Corpn [2004] EWHC 1375 (QB) at [81], applying Miliangos v George Frank (Textiles) Ltd (No 2) p 497B–D and Lesotho Highlands Development Authority v Impreglio SpA .

… The Judge might equally have applied the Spanish rates, not as a matter of lex causae, but using the discretion given to him by the lex fori: that is what Whipple J thought should happen in XP v Compensa Towarzystwo SA [2016] EWHC 1728 (QB); [2016] Med LR 570 , para 67, based on the suggestion in Maher . However, he was not asked to do that and, it being in his discretion, I do not think it can be said that he was bound to do that.

… But that does not entirely resolve the question. The Claimants argue that the right to interest proved in the joint Expert Report was a substantive right in this particular case, and that it was therefore part of the lex causae which fell to be applied to their tort

claim under Rome II. To that argument I will now turn.

… The Claimants are able to point to the Judge's decision in their favour "that interest would be payable under Spanish law to these two Claimants" …; that the condition precedent for the Spanish rates had been satisfied, in that no interim payment had been paid …; and the Judge's finding that "I am satisfied on the balance of probabilities that interest is recoverable under Spanish law in this particular instance… So that is finding No 1"

… On the other hand, against them is the wording in the Expert Report, which says that the relevant Spanish law "contemplates a penalty interest", and makes it clear that the Spanish rates then set out as the "applicable statutory interest rate" are only those "contemplated" as such.

… This is a point picked up in the Judge's later, more considered, judgment …, which says …: "It was unclear whether this was a mandatory entitlement as it was 'contemplated'". Having raised the uncertainty, the Judge does not resolve it in the Claimants' favour. He does not find that it is, in fact, a mandatory entitlement.

… The use of the word "contemplated" was striking, because the language used by the expert when setting out the Claimants' substantive rights to damages was not qualified in this way. It seems to me that the word "contemplated" suggested on its face that the entitlement was not mandatory, but discretionary. It was not, therefore, properly classified as a substantive right. It was a procedural right, in the discretion of the forum, and procedural rights are excluded by article 1(3) of Rome II and will be governed by the lex fori not the lex causae.

… This was also suggested by the characterisation of the Spanish rates as "a penalty interest", which arose" where insurers have not made a relevant interim payment within three months from the accident". Interim payments on account of a substantive award or settlement to be determined later seem to me to have the quality of procedural matters. A penalty, also, is to be distinguished from a substantive right. A penalty is a procedural sanction (or incentive). It is not a fundamental right. It is also to be expected that a penalty award will ultimately be in the discretion of the court (and so procedural) rather than being claimed as an absolute right (and so part of the substantive as opposed to procedural law). This is reinforced by the expert saying that the "penalty interest" is something which the Spanish law "contemplates" rather than Spanish courts awarding it automatically and as of right.

… Consequently, on the materials before the Judge, and consistently with his findings …, I reject the argument that the Expert Report was describing a substantive as opposed to a procedural right to interest. It follows that the Judge was right not to apply the Spanish rates as a matter of substantive right to be governed by the lex causae."

Conclusion

22. The fact that *Scales v MIB* and *Troke v Amgen* arrived at different conclusions on Spanish law penalty interest does not necessarily mean that one of these cases was wrongly decided:

a.The English Court was conducting a different exercise in each case: in *Scales v MIB* (following the course plotted by the Supreme Court in *Moreno v MIB [2016] 1 WLR 3194, 3210A – C per* Lord Mance JSC (SC)) the English Court's task was mechanically to strive to do exactly the same thing as the Spanish Court. Accordingly, if the Spanish Court would award penalty interest then the English Court had to do the same and Rome II had no application to cases dealt with under the 2003 Regulations (this was largely the approach taken by the English High Court (QB) at Trial in the unreported case of *Jordan Frost v MIB [2020] October* (HHJ Sephton QC, Manchester DR) where Spanish penalty interest was awarded). By contrast, the task in a Rome II case (like *Troke*) is rather different because there will – as a result of Article 1(3) of the Regulation – be inevitable differences between the outcome at which a Spanish Court might arrive and the outcome at which an English Court might arrive (see, *Wall v Mutuelle de Poitiers Assurances [2014] 1 WLR 4263, 4269F – G per* Longmore LJ (CA));

b.In Scales v MIB Cavanagh J dealt with the matter in the alternative: if Spanish penalty interest is a substantive matter then it was awarded as a matter of the applicable law; if, conversely (and as in *Troke*), it is a discretionary

matter then the Court exercised its discretion to award Spanish law penalty interest.

23. And yet, in a Rome II context, it is difficult to escape the conclusion that one of these cases was wrongly decided. If, as we suggest above, Rome II has swept away the old distinctions between rights and remedies and now subjects all matters pertaining to the assessment of damages (and the Claimant's award) to the single and indivisible law of the tort then it is very difficult to understand (i) how *Maher v Groupama* remains of any relevance; (ii) why it matters whether an award of interest is discretionary or not (matters of discretion can be just as much a matter of the substantive applicable law of the tort as anything else); and, (iii) why the rights/remedies distinction is of any continuing relevance at all.

24. The answer to this in future cases may be (i) to recall what the law was prior to Rome II; (ii) to pay closer attention to the changes that Rome II wrought to the old law; and, (iii) to arrive at a more consistent (and, we would suggest, *correct*) construction of Rome II itself (in respect of the assessment of damages and remedy to which the Claimant is entitled).

[1] The equivalent provision for claims in the County Court is section 69 of the County Courts Act 1984 (which is expressed in like terms).
[2] Consorcio de Compensation de Seguros ("CCS"): see, Article 20(9).
[3] The dies a quo, as it is termed in the case law.
[4] Article 76 of Spanish Insurance Contract Law.
[5] Article 1(3) of the Rome II Regulation is expressed in the same terms as Article 1(3) of the Rome I Regulation (No 593/2008) on the law applicable to contractual obligations.
[6] A distinction between substance and procedure has long been a feature of the English law approach to private international law and pre-dated Rome II: see, in this regard, section 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995.
[7] Save for the content of Article 15 itself (and some rather vague accompanying recitals).
[8] See, A Dickinson, The Rome II Regulation (2008), Chapter 3.
[9] On this general point, see, for example, the recent decision in KMG International NV v Chen [2019] EWHC 2389 (Comm).
[10] Prior to Rome II, the English Court applying foreign law to the assessment of damages would apply the substantive and applicable foreign law to the heads of loss which were recoverable (or not), but would apply English law principles to the assessment of damages (once the relevant head of loss was identified as recoverable according to the applicable foreign law). The reason for this was that the assessment of damages was regarded as a matter of mere remedy. Hence, procedural. Hence, dealt with according to the law of the forum. Hence, English law. See, M Chapman, "The Rome II Regulation and a 'European Law-Enforcement Area': Harmony and Discord in the Assessment of Damages" [2010] 1 JPIL 10.
[11] Any reader seeking a more detailed and up-to-date picture of the Spanish law position (in all its complexity) is advised to consult one of the excellent Spanish personal injury lawyers who have given expert evidence in English proceedings
[12] See, Spanish Supreme Court judgment of 24 May 2012 No 336/2012 (RJ 2012/6539).
[13] See, Spanish Supreme Court judgment of 18 January 2018 (EDJ 2018/1510).
[14] See, Spanish Supreme Court judgment of 7 February 2019 (EDJ 2019/506253 STS).

By **Matthew Chapman QC** and **Ella Davis**

CAN (AND SHOULD) THE ENGLISH COURTS TAKE ACCOUNT OF THE BAREMO MONITORING REPORT IN APPLYING THE BAREMO TABLES?

1. In *Scales v MIB [2020] 7 WLUK 34* the English Court applied the old Baremo tariff relating to accidents occurring prior to 1st January 2016. The tables had been the subject of criticism amongst Spanish and other commentators for years, and Cavanagh J described them as 'somewhat ungenerous to Claimants', 'confusing and difficult to follow (even for Spanish lawyers)', and 'not drafted with a view to providing full compensation for what would be called in England 'special damages''. The old tables were replaced on 1st January 2016 by a set of tables designed to be more generous to some but not all Claimants; and in order to avoid the years of

grumbling that characterised the implementation of the old regime, a Monitoring Committee was set up to make sure that the tables worked as intended. More of that later.

2. In summary, and applying the old tables, in *Scales* Cavanagh J determined that:

a. He did not have flexibility to award compensation for some heads of damage which are not specifically covered by the express language of the Baremo, and it was not possible to go beyond the tables in order to provide full restitution for a victim by compensating for losses not expressly provided for in the tables;

b. However, he *could* take account of the damages which are not otherwise covered when assessing the award for permanent injuries, since a Spanish court could do so;

c. Mr Scales was not a *gran invalido* within the meaning of the tables, with the effect that he would be significantly under-compensated; but the court could not stretch the definition of that term beyond what would be understood to be its meaning by the Spanish courts;

d. Because Mr Scales was found not to fall within the meaning of *gran invalido* provided in the tables, he did not recover a good deal of his special damages, including a significant claim for care and assistance, beyond the date at which his injuries had plateaued. Cavanagh J acknowledged that this was 'a harsh and unfair outcome', but held that he was bound so to find in Spanish law. He nevertheless went on to award Mr Scales the maximum possible sum in respect of general damages, holding that it was right in determining the general damages figure to take into account the fact that he had not been able to make any award in respect of some of the special damage claimed.

e. In addition, Mr Scales would be awarded interest in accordance with Spanish principles, and in this case that involved the payment of penalty interest which amounted to more than five times the sum awarded in respect of special damage.

3. The decision demonstrates that even where an English judge might consider that the operation of foreign law significantly under-compensates a Claimant, he or she cannot depart from it, but can only exercise his or her discretion in a manner consonant with the applicable law, taking into account that under-compensation only insofar as it is permissible to do so. It also underscores the importance of claiming penalty interest, where it is available, as a means of enabling the judge to increase the total figure awarded in order to ameliorate the harsher consequences of some foreign applicable law.

4. Accidents occurring after 1st January 2016 are governed by the new regime, of course, which is designed to provide fairer outcomes for Claimants. But the Monitoring Committee in its recent Reasoned Report on the operation of the tables reiterates that even the new tables do not achieve their stated goal, *restitutio in integrum*, or full compensation. One of the major disadvantages identified by the Committee is the fact that the tables assume that Claimants will receive Spanish welfare benefits, with the result that awards for loss of earnings and care and assistance are woefully inadequate for foreign Claimants whose home countries' welfare regimes are less generous than those of the Spanish state. This gives rise to obvious difficulties where an English Claimant makes a claim under Spanish law and where, as in *Scales v MIB*, he or she has significant care needs but is not classed under Spanish law as a *gran invalido*. Furthermore, the tariffs in the tables are predicated on Spanish discount rates, which are in turn based on rates of inflation and life expectancy in Spain, which disadvantage English litigants.

5. The Monitoring Committee has recommended some 50 'necessary and urgent' amendments to the tables, but as with all legislative change, it will take time for these amendments to be implemented (if indeed they are). In the meantime, might it be possible for practitioners to argue for a more generous interpretation of the new tables, in the light of the consensus reached by the Committee that they do not achieve what was intended by the Spanish legislature?

6. The decision in *Scales v MIB* certainly suggests that where the English courts regard foreign law as under-compensating Claimants, there is some room

for manoeuvre in increasing general damages and interest to offset under-compensation for special damage. Where, as here, the foreign Monitoring Committee itself does not consider the provisions of foreign tariffs to be fit for purpose, the argument appears even stronger. It is suggested that this, coupled with the operation of Recital 33 to Rome II, might be enough to persuade even the least Claimant-friendly of judges to increase damages awards to the extent that that is possible. It will be recalled that Recital 33 states:

According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

7. Accordingly, might it be possible to use the combination of Recital 33, the judgment in *Scales*, and the conclusions of the Monitoring Report to lift Claimants out of the tables altogether, certainly as regards claims for care and assistance, but possibly also future medical treatment and, less probably, loss of earnings? The difficulty with any such argument is that it failed in *Scales*; but then, the Report had not been published at the time *Scales* was determined, and it may be that its publication might have tipped the balance in that case, or at least might do so in future. It certainly seems an argument worth making for those representing English Claimants who have been injured in Spain; and one worth considering when contemplating settlement for those representing Defendants in such claims. It is suggested that given the glut of Spanish claims currently working their way through the English courts, sooner or later the argument will be made and considered by the higher courts. This commentator is intrigued to see what they will make of it.

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