Direct actions against insurers in subrogated claims – the limits of Articles 11 to 13 of the Recast Brussels Regulation

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1. Practitioners are increasingly familiar with the right of an injured claimant to bring a claim against the liability insurer of a foreign tortfeasor in the injured Claimant's own court. This jurisdictional entitlement can be traced back to Articles 9 to 12 of EC Regulation 44/2001 and the seminal decision of the Court of Justice of the European Union in *FBTO v Odenbreit* (C-463/06). The relevant rules are now contained in Articles 10 to 13 of the Recast Brussels Regulation (EU 1215/2012).

2. What is less clear, however, is whether the policy and principle underlying the decision in the *FBTO* case extends to claims which, whilst pursued in the *name* of a private individual or company, are in reality wholly or substantially claims made to recover an insurer's outlay on a subrogated basis. This article considers this difficult and, as yet, unresolved issue.

The jurisdictional regime under the Recast Brussels Regulation

3. Articles 11 to 13 of the Regulation are contained in Section 3 - "*Matters relating to insurance"*. By virtue of Article 10, they provide an exclusive jurisdiction where they apply.

4. The text of the articles 11-13 is as follows:

Article 11

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled;

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; or

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 12

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 13

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

5. The rules must be read in conjunction with Recital 18, which states that "*In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules"*. Accordingly,

the '*underlying social purpose*'[1] of the rules on insurance is always to afford protection to the weaker party. Where the social purpose is not required, the rules should not apply.

Interpretation and case law since FBTO

6. There is a growing body of case-law regarding the proper interpretation of the jurisdictional rules governing insurance. Some of the case-law relates to the Regulation 44/2001, but in *Hofsoe v LVM AG* (C-106/107), the CJEU held that the interpretation given by the Court with regard to the provisions of the previous Regulation remain valid.

7. The relevant principles can be distilled from the case law:

    a. The proper interpretation of Articles 11 to 13 is a matter of European Law, which applies autonomous principles without reference to the domestic law of member states: *Freistaat Bayern v Blijdenstein* (C-433/01).

    b. The underlying purpose of the insurance provisions is to protect the 'weaker party'. It is an exception or '*derogation*' from the general position that a Defendant should be sued in the Courts of its own domicile. As such, the provisions must be *'exceptional'* and interpreted strictly: Hofsoe (above) at para 40. The corollary is that the provisions should "*not be extended to persons for whom that protection is not justified".*

    c. An injured individual in a road traffic accident can use Articles 11 to 13 to bring a claim against a liability insurer in the Claimant's domicile: *FBTO v Odenbreit* (C-463/06). That is because the injured claimant is plainly the 'weaker party' to the dispute.

[1] This is the term used by the Court of Appeal in the recent decision in Aspen Underwriting v Credit Europe Bank (2018) EWCA Civ 2590

d. By contrast, where an injured Claimant's claim has been assigned to a large social security institution, the jurisdictional rules cannot be used, since the institution cannot be regarded as a weaker party: *Vorarlberger v WGV* (C-347/08).

e. Identifying the circumstances in which a party will or will not be 'weaker' than the other does not and should not depend on a case-by-case analysis of the particular economic circumstances of the Claimant. This is because jurisdictional rules are intended to be predictable: *KABEG v Mutuelles Du Man Assurances* (C-340/16). It follows that even large multinational companies could, in principles, be '*weaker parties'.*

f. Instead, the critical question is whether the party is involved with a *class of business* which cannot properly be regarded as requiring protection for a weaker party *vis a* vis the Defendant insurer: *Aspen Underwriting v Credit Europe Bank* (2018) EWCA Civ 2590.

g. The class of business which does not require protection is professionals operating in the *'insurance sector".* This might either be a person who is actually an insurer or alternatively a person regularly involved in the commercial or otherwise professional settlement of insurance-related claims: see Advocate General Bobeg's opinion in *KABEG*, approved by the Court of Appeal in *Aspen*.

h. It does not follow that just because the Claimant falls into the category of persons listed in Articles 11 to 13 (the policyholder, the insured, the beneficiary and the injured party) that there is an irrebuttable presumption that they are the weaker party. At most, there is a rebuttable presumption: *Aspen* (above).

i. Examples of persons who have been held to require or not require this protection are as follows:

    i. Perhaps unsurprisingly, an insurer suing or being sued in its own name cannot rely on the special rules: *Youell v La Reunion* (2008) EWHC 2493 (Comm)

    ii. An employer who paid an injured person's earnings and then took an assignment of the claim for loss of earnings was entitled to rely on the rules. It was a weaker party because it was not an insurance professional, notwithstanding its size: *KABEG* (above).

    iii. An individual who pursued what were effectively credit-hire claims (by way of contractual assignment) arising out of road traffic accidents is not a weaker party. It did not matter that he was economically weaker than a large insurer. The critical point was that he pursued his professional activities in the insurance sector: *Hofsoe* (above);

    iv. A bank acting as mortgagee which received moneys from the Claimant insurer following the sinking of a ship does not require protection. It was enough that the bank was involved from time to time in the commercial or professional settlement of insurance related claims: *Aspen.*

8. The principle which emerges from these claims is relatively clear. A party who pursues professional activities in the insurance sector, directly or indirectly, is not entitled to the protection afforded by the special jurisdictional rules.

9. The issue which the cases do not resolve is the situation which arises when an insurer, which could never bring a claim in its own name, is instead bringing a subrogated claim in the name of its insured? Take, as an example, a haulage company whose vehicle is damaged in a foreign accident, but without the driver sustaining injury. The insured losses are paid in full by the company's insurer, which seeks to recover them from the liability insurer of the foreign tortfeasor. Under English law, an insurer sues in the name of the insured. Accordingly, the 'party' to the claim is the haulage company which plainly is not a professional operating in the insurance sector. On the other hand, the claim is in reality being pursued for losses suffered by the insurer and to protect its own interests.

Subrogation

10. In *Youell v La Reunion* (2008) EWHC 2493 (Comm) the issue was whether an insurer suing in its *own* name could be a 'weaker party'. The answer was a resounding no. However, Tomlinson J briefly considered whether the position would be different in the context of a subrogated claim (as distinct from a claim which had been assigned). He quoted from one of the leading insurance text books (Colinvaux & Merkin's Insurance Contract law):

"*Jurisdiction in such an action was held by the Court to be determined by the general jurisdiction rules of Regulation 44/2001 . As far as English law is concerned, it is unlikely that the same principle would apply in a subrogation action where, for example, a property insurer having indemnified its assured was to commence direct proceedings against liability insurers in circumstances where a direct action was permissible (for example, under the Third Parties (Rights Against Insurers) Act 1930 where the assured whose liability was in issue had become insolvent, or in respect of a motor claim). In these circumstances, the action is in the name of the assured under the property policy and not in the name of the insurers, so the claim remains one relating to insurance."*

It might be thought at first sight anomalous that the question whether a matter relates to insurance should depend on by whom the claim is brought. But the words are not to be construed in a vacuum. They are contained within a community instrument and in my judgment the guidance given by the European Court of Justice as to the proper approach is clear".

11. However, in the previous paragraph of his judgment, Tomlinson J observed that "*It may be open to question whether the ECJ would assimilate a claim brought by right of subrogation, not generally recognised in continental legal systems, to a claim brought by way of assignment"*. This is plainly a recognition of the fact that the approach adopted by the CJEU, applying autonomous principles of European Law, may well lead to a different conclusion.

12. It should also be noted that the passage from the textbook (*Colinvaux & Merkin*) that Tomlinson J cites in his judgment actually contains a footnote in which the author doubts the conclusion expressed in the main text::

"*But see Bayern v Blijdenstein (C-433/01)…in which the European Court of Justice held that a public body exercising subrogation rights was not to be treated as a maintenance debtor for the purposes of establishing jurisdiction under Regulation 44/2001 because it was not a weaker party. <u>This potentially means that even a subrogated insurer is unable to rely upon the special jurisdictional rules</u>*" (emphasis added)

13. The other leading practitioner insurance textbook, McGillivray on Insurance, says simply that the rules "*do not, it is submitted, apply to subrogated claims brought on behalf of insurers against third parties*", but without any further analysis (at 13-011).

14. In the *Bayern* case (cited above) the public body sued in its own name. Again, therefore, it is materially different to the situation which pertains under English law. However, the analysis of the court is illuminating. At paragraph 30 the CJEU recognised that:

"… a public body which brings an action for recovery against a maintenance debtor is not in an inferior position with regard to the latter. Moreover, the maintenance creditor, whose maintenance has been covered by the payments of the public body, is no longer in a precarious financial position".

15. The point, therefore, is that once the creditor (equivalent to our notional insured claimant) has had its losses paid for by the public body (equivalent to the subrogated insurer) it is no longer in a weaker position financially. It has been indemnified in full and therefore does not require protection. *A fortiori*, this must also apply to a multi-national road traffic insurer. Why, then should it matter that the insurer pursues the claim in the name of the insured?

16. Some difficulty arises from the way that English law treats the concept of subrogation. It is not correct that simply because the insurer steps into the insured shoes for all purposes, the insured becomes a purely nominal claimant with no rights. English case law establishes that whilst the insurer has an equitable right to the *proceeds* of damages recovered by its insured, the insurer does not in fact have any beneficial interest in the right of action itself, which remains the insured's throughout: *Re: Ballast Plc* (2006) EWHC 3189. The insured can take certain steps independently of the insurer, including the settlement of claims. It is certainly not an empty vessel.

17. On the other hand, there are instances where English procedural rules (and it should be remembered that jurisdiction is a predominantly procedural concept) will not simply ignore the fact that an insurer is using a Claimant to bring a subrogated claim. For example, one of the exceptions to Qualified One Way Costs Shifting protection (which exists to protect the *weaker* party) is where "*the proceedings include a claim which is made for the financial benefit of a person other than the claimant*" (CPR 44.16). Practice Direction 44PD.12.2 suggests that examples of this will include *"subrogated claims".*

18. There is perhaps a danger of getting side-tracked by domestic case law. The issue posed in this article concerns autonomous European principles. The CJEU has certainly been prepared to recognise in other contexts in the Brussels Regulation that an insurer and insured's interests may coalesce to the point that they are the 'same party', for example in the *lis pendens* rules: *Drouout Assurances SA v CMI* (C-351/96). Accordingly, it will not simply ignore the presence of an insurer in a subrogated claim, even when suing in the insured's name (para 19). It seems unlikely, therefore, that the CJEU, which has already clearly articulated its focus on the underlying social purpose of the insurance rules, would look past the fact that an insurer is suing in the name of its insured by virtue of a rule peculiar to English law, since otherwise it would create an exception for English insurers which may well not be available to insurers from other countries whose domestic laws require them to sue in their own name. This would offend against both the predictability of the rules and their purpose.

19. It is submitted that the best predictor of the approach that the CJEU would take lies in the clear and persuasive opinion of Advocate General Bobeg in the KABEG case, which was relied upon at length, and with approval, by the Court of Appeal in *Aspen Underwriting* (above).

20. Although the Claimant in the KABEG case was an employer which was suing in its own name pursuant to an assignment, the Advocate General's opinion is framed throughout in terms of the correct approach to cases brought by way of '*subrogation'*. At para 28, he explains that he uses the term subrogation:

"*in a general, neutral way, as generically referring to all kinds of legal "subrogation". It simply captures the situation of a person who steps into another person's shoes to enforce rights or assume obligations".*

21. In the accompanying footnote, he says that "*Used in such a way, no distinction is made as whether the subrogation happened on a statutory or contractual basis, or whether it was partial or full".*

22. There is a real attraction to this approach, because it removes the need to consider how the domestic legal system of each country treats subrogated claims, i.e. whether or not the insurer takes an assignment or can sue in its own name or must sue in the insured's name, and focuses on the *basic concept*.

23. The test proposed by the Advocate General in paragraphs 69 and 70 of his opinion is referred to directly, with approval, by the Court of Appeal in *Aspen Underwriting*. Paragraphs 69 to 71 are worth repeating in full:

"AG69. First, the key element for distinguishing between those indirectly injured persons who can and those who cannot rely on the insurance-related forum actoris is the existence of an insurance relationship between the respective subrogee and the directly injured person. The key question to be asked is thus: What was the reason (or the legal cause, the title) for which the subrogee paid out respective amounts to the directly injured party? If that reason was the existence of an insurance relationship of any sort, 31 then the subrogee acts as a professional in the insurance sector. It must therefore be excluded from the benefit of the forum actoris .

AG70. Secondly, I would also suggest that it is immaterial whether the specific insurance relationship between the directly injured party and the subrogee was entered into because of a private-law engagement (as a private insurance contract) or as a consequence of a public-law obligation (either because the duty to be insured is a statutory obligation or public law itself provides directly for compulsory insurance, as far as, in the latter case, the exclusion clause concerning the social security under art.2(1)(c) is respected 32). The key element common to both is that, in the end, the subrogee seeking the repayment of the damage against the insurer is simply another professional active in the sector.

AG71. Thirdly, following and extending the same logic further, the same exclusion should then also apply to a claimant who is a professional in the trading of insurance-related claims. In other words, the protective forum actoris should not be available to a person who became subrogated to the directly injured party's right based on an assignment of an insurance-related claim occurring within the subrogee's trade or professional activity, typically on a contractual basis. The use of the insurance-related forum actoris would not be justified in such a context."

24. The references throughout are, therefore, to *'subrogees'* being entitled to rely on the jurisdictional rules in section 3 of the Recast Brussels Regulation unless they fall into the class of persons who do not require protection, namely those pursuing activities in the insurance sector. There is no indication that a person suing by way of subrogation has a special exemption because they are suing in the insured's name. Indeed, the fact that the Advocate General chose to define subrogation so broadly, including 'full and partial subrogation', would suggest that this should not matter and the Court will look at the reality of the case.

Conclusion

25. It is only a matter of time before this issue falls to be determined by the Courts. There are, of course, factual scenarios which are less clear cut than the example given in this article and which will inevitably give rise to even more difficult questions. The obvious one is a *mixed* claim, for example where an injured driver brings a claim for minor personal injuries alongside a much larger claim by his or her insurer for their subrogated losses. Some commentators have suggested[2] that in this situation the correct outcome is simply that different jurisdictional rules should apply to the different heads of loss claimed. Whether this is a workable solution remains to be seen, but mixed claims of this nature are such a

[2] See, for example Doherty on Accidents Abroad: International Personal Injury Claims; Sweet & Maxwell, 2nd Edition

common feature in this area of the law that it does illustrate how important this issue may well prove to be for conflict of law practitioners in the years to come.