

Applicable law—delict and breach of fiduciary duty claims (Kingdom of Spain v Serwin and others)

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Dispute Resolution analysis: The applicable law issues grappled within this case were by no means straight forward. As to claims in delict, the applicable law is determined by Article 4 of Rome II. In terms of the place of loss for the purposes of Article 4(1), Mr Justice Foxton thought this was a misappropriation case and that it was appropriate to locate damage at the place where an asset is taken from the control of the claimant. As to whether the general rule was displaced by the ‘exception’ in Article 4(3), on the facts, there was a manifestly closer connection to Sweden than Malta. As to claims for breach of fiduciary duty, one needs to consider in what context the duties arise. It is unlikely to be satisfactory that tort and fiduciary claims are subject to different applicable laws. Written by Natalie Todd, partner at Cooke Young & Keidan.

Kingdom of Sweden v Serwin and others [\[2022\] EWHC 2706 \(Comm\)](#)

What are the practical implications of this case?

The case is a useful reminder of how complicated applicable law issues can be. Helpfully, Foxton J navigated his way through the authorities and gave some helpful guidance.

Claims in delict

Delict is the civil law equivalent of common-law tort. The applicable law is set out in [Article 4](#) of Regulation (EC) 864/2007. Having considered the authorities in *Lakatamia v Su* [\[2021\] EWHC 1907 \(Comm\)](#), (at para [859]) and *Avonwick Holdings Limited v Azitio Holdings Ltd* [\[2020\] EWHC 1844 \(Comm\)](#), (at paras [156] and [175]), Foxton J, at para [80], stated that he had regard to the following:

- ‘... (i) The fact that Article 4(3) is an exception to the general rule in Article 4(1) does not mean that it should be given an overly restrictive construction.
- (ii) Before Article 4(3) applies, it is not required that the tort not be connected with the jurisdiction which would engage Article 4(1).
- (iii) “All the circumstances” as referred to in Article 4(3) might include a variety of features, including the location of assets which are “at the heart of” the alleged wrongdoing, even if this is not the place where the direct damage occurred and any “pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question”.
- (iv) Article 4(3) has as its focus “agreements in place before the allegedly tortious acts took place” and not “mechanisms by which the allegedly dishonest scheme was implemented.”

Claims for breach of fiduciary duty

When considering the applicable law in breach of fiduciary duty claims, Foxton J referred to the summary in Dicey, Morris & Collins [36–069]–[36–070]:

- ‘... (i) If equitable obligations of a fiduciary character arise in the context of a contractual relationship, there is a strong argument that the law applicable to the parties’ contractual relationship under Rome I determines whether a fiduciary relationship exists and the nature and content of the duties imposed.
- (ii) If, however, the equitable obligations are characterised as incidents of a company law relationship rather than as “contractual”, common law principles determine the applicable law (company law matters are excluded from Rome I and Rome II).
- (iii) If a fiduciary duty arises where the parties were not in a prior relationship, such as in the case of a recipient of trust property, then the “better view” is that the obligation is non-contractual in nature and falls within the ambit of Rome II.’

What was the background?

The Kingdom of Sweden (Sweden) made an application for summary judgment on its claims against various of the Respondents (the SJ Respondents). Sweden claimed that the SJ Respondents were parties to a substantial fraud which resulted in the misappropriation of more than €115m from pension saving accounts. By the time of the hearing, lengthy criminal proceedings had already taken place before the Swedish Courts and several of the SJ Respondents had been convicted. None of the SJ Respondents filed an acknowledgment of service or a defence.

In Sweden, pension savers may invest in funds registered on an online platform (PPM) maintained by the Swedish Pension Authority (SPA). These include 'UCITS funds' approved by the Swedish Financial Supervisory Authority. A company wishing to participate in the investment was required to enter into a cooperation agreement with the SPA. Two UCTIS funds were involved in these proceedings: Optimus and Falcon.

Optimus

Sweden alleges that the first to third defendants procured the purchase by Optimus using pension funds of mortgage-backed securities at inflated prices from companies owned by some or all of them. The evidence is clear that this took place.

Falcon

One of the defendants established a new UCTIS investment vehicle in Malta called Falcon which was registered on PPM. The SPA entered into a Co-operation Agreement with Falcon governed by Swedish law. The transfer of Sweden's funds (€365m) to Falcon was by way of a transaction under which it acquired shares in the Falcon funds.

In each respect, Foxton J considered the applicable law.

What did the court decide?

Optimus: There was no challenge to Sweden's assertion that the law applicable to its claims was Swedish law. Whether that issue was approached by reference to Article 4(1) or 4(3) of Rome II, Foxton J was satisfied that Swedish law is the applicable law.

Falcon: Sweden's application required the court to be satisfied that its claims in delict and for breach of fiduciary duty were governed by Maltese law and not Swedish law.

Claims in delict

The applicable law is determined by Article 4 of Rome II. Sweden argued that Article 4(1) applied and that the damage was suffered in Malta when the Falcon funds were applied to loss-making investments.

Foxton J was not persuaded, to the summary judgment standard, that irreversible loss was not suffered until the funds were applied by Falcon in losing investments. Applying the statement in Dicey, Morris & Collins on The Conflict of Laws (16th) [35–027] 'in misappropriation cases...it seems appropriate to locate damage at the place where an asset...is taken from the control of the claimant or another person with whom the claimant has a relationship'—he thought that it was strongly arguable that this happened when Sweden's funds became subject to Falcon's control.

In addition, as far as concerned some of the SJ Respondents, Sweden's case would appear to arguably fall within Article 4(2) with parties having their habitual residence in Sweden at the relevant time.

Even if Sweden had been right about the place of loss for the purposes of Article 4(1), was this a case in which that general rule was displaced by the 'exception' in Article 4(3)?

Sweden's case is that the same continuing course of conduct aimed at perpetrating misappropriation of the same assets gives rise to claims under two different systems of law. Foxton J accepted that Article 4 of Rome II is not overtly hostile to the idea that where the same wrongful act causes damage in two different countries, two different systems of law may well be engaged (Dicey, Morris & Collins, [35-028]), but he didn't regard this case as warranting such an approach.

Foxton J held that he was satisfied that it is realistically arguable that Swedish law governs the tort claims arising from the Falcon phase.

Breach of fiduciary duty claims

Many of the SJ Respondents in the Falcon phase were involved in the Optimus phase. The key contract in the Falcon phase was governed by Swedish law. Sweden pitched its claims not as shareholder, but as investor in respect of its own funds and submitted that the SJ Respondents were accessories to breaches of Falcon's fiduciary duties. This all lent support to the view that Swedish law applied.

Foxton J held that it is at least arguable that the claims for breach of fiduciary duty were also governed by Swedish law, and, on the facts of this case, he would not regard the contention that the tort and fiduciary claims were subject to different applicable laws as particularly satisfactory. In both cases, the gravamen of Sweden's complaint is that duties owed to it, in respect of funds emanating from it, were breached, leading to the loss of those funds. The case is not about duties owed to Falcon, but about duties arising from the management of Sweden's funds, which the SJ Respondents are accused of having targeted through Falcon.

All in all, Sweden's application was successful in part in respect of the Optimus phase but failed against all SJ Respondents in respect of the Falcon phase.

Case details:

- Court: King's Bench Division (Commercial Court)
- Judge: Mr Justice Foxton
- Date of judgment: 27 October 2022

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