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Σε αναζήτηση της Δικαιοσύνης

Mélanges en l'honneur de Spyridon Vl. Vrellis

Essays in honour of Spyridon Vl. Vrellis

Festschrift für Spyridon Vl. Vrellis

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International Jurisdiction in Insurance Matters under Regulation Brussels I

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Section 3 of Chapter II of the Regulation 44/2001 (Brussels I) establishes special rules for the conferral of jurisdiction in matters of insurance[1]. One of the main underlying ideas is that the weaker party to the contract has to be protected as far as international jurisdiction is concerned. The "overriding aim of protecting the economically weakest party"[2] supersedes the party autonomy: this is the way conflicting interests (i.e. an issue Professor *Vrellis* has extensively analyzed in depth[3]) are dealt with by Regulation Brussels I in insurance matters[4]. The same position is adopted with regard to disputes arising out of consumer contracts and individual labor contracts, whereby the weaker party is also protected by special rules of international jurisdiction. There is however a significant difference: insurance contracts give very often rise to a multi-party litigation involving the injured party, the allegedly liable party and their insurers. This is unlikely to happen within the framework of disputes related to consumer contracts or to individual labor contracts.

Main tenets of this protective framework are a) the option granted to the weaker party to seize the courts of his/her domicile which are exclusively competent if this party is the defendant, b) the limits imposed on party autonomy as to the permissibility of choice-of-court clauses, the purpose being to deny the validity of clauses designed to the benefit of the insurer.

Art. 8 ff. of Regulation 44/2001 are applicable to insurance contracts covering risks situated in and outside the territory of other Member States of the European Union[5].

1. ECJ, 12.5.2005, Case C-112/03, *Société financière et industrielle du Peloux v. AXA Belgium and others*, paragraph 29; ECJ, 17.9.2009, Case C-347/08, *Vorarlberger Gebietskrankenkasse v. WGV-Schwäbische Allgemeine Versicherungs AG,* paragraph 40.
2. ECJ, 26.5.2005, Case C-112/03, *Société financière et industrielle du Péloux v. AXA Belgium and others*, paragraph 33.
3. See S. VRELLIS, *Conflit ou coordination de valeurs en droit international privé – A la recherche de la justice*, RCADI, t. 328 (2007), Martinus Nijhoff, Leiden/Boston 2008, pp. 179 ff.
4. The wide scope of the protective framework is being criticized by T. HUB, *Internationale Zuständigkeit in Versicherungssachen nach der VO 44/2001/EG, Berlin 2005, Dunker & Humblot, pp. 95 ff. and 225 ff.*
5. Pursuant to its Article 7, Regulation Rome I covers risks within and/or outside the territory of the Member States of the European Union. Regulation Rome II is in principle applicable to torts taking place within and/or outside the territory of the Member States of the European Union, given that its

Their application is conditional upon the insurer being domiciled in the territory of a Member State of the European Union[6]. This is in line with the general rule laid down in Articles 2 and 4 of Regulation 44/2001, according to which the domicile of the defendant must be located in the territory of one of the Member States of the European Union.

The changes made by Regulation 2015/2012 in section 3 itself (amendments were made through Art. 26 par. 2 and 31 par. 4 of the new Regulation) are merely arithmetical: the recast is limited only to the numbers of the relevant articles, the new ones being Articles 10 to 16 (instead of 8 to 14). We prefer to stick to the numeration of the provisions applicable at the time this text is being redacted.

I. The main jurisdictional bases

Pursuant to Article 8 of Regulation 44/2001, jurisdiction in insurance matters shall be determined by the rules contained in this Section "*without prejudice to Article 4 and paragraph 5 of Article 5*". Article 9 determines for the jurisdictional bases when the insurer is the defendant. An insurer domiciled in a Member State may be sued under par. 1:

scope of application is not conditional upon the law of a Member State being applicable as *lex loci damni* by virtue of Article 4: Article 3 provides for the application of Regulation Rome II, irrespective of the law which is designated.

As to the conflict-of-law rules in relation to insurance contracts contained in the Regulation Rome I, see A. Bělohlávek, *Rome Convention - Rome I Regulation. Commentary: New EU Conflict-of-laws rules. Contractual obligations*, vol. I, Juris, Huntigton, N.Y., 2010, p. 1273 ff; M. Fricke, *Artikel 7: Versicherungsverträge*, in T. Rausch (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht EUZPR / EuIPR – Kommentar*, Sellier, München, 2011, p. 333 ff; IBID. *Das Internationale Privatrecht der Versicherungsverträgenach Inkrafttreten der Rom-I Verordnung,* VersR 2008, pp. 221-228; U.P. Gruber, *Insurance contracts*, in F. Ferrari-S. Leible (eds.), *Rome I Regulation: The law applicable to contractual obligations in Europe*, Sellier, Munich, 2009, p. 109 ff; H. Heiss, *Insurance contracts in Rome I: Another recent failure of the European legislature*, Yearbook of Private International Law 2008, p. 261 ff; *ibid*, *Versicherungsverträge in "Rom I": Neuerliches Versagen des europäischen Gesetzgebers, FS für Jan Kropholler zum 70 Geburtstag*, Tübingen, 2008, p. 459 ff; X. Kramer, *The new European Conflict of Law rules on insurance contracts in Rome I: A complex compromise*, The Icfai University Journal of Insurance Law 2008, p. 23 ff, R. Merkin, *The Rome I Regulation and reinsurance*, Journal of Private International Law, 2009, p. 69 ff; L. Merrett, *Choice of law in insurance contracts under the Rome I Regulation*, Journal of Private International Law 5 (2009), pp. 49-66; A. Staudinger, in F. Ferrari, E.-M. Kleninger, P. Mankowski, K. Otte, I. Saenger, G. Schultze, A. Staudinger (eds.), *Internationales Vertragsrecht: Rome I-VO, CiGs, CMR, FactÜ, Kommentar*, Beck, 2 Aufl., 2012, p. 195 ff. From the relevant legal literature in Greek language, see: A. Emilianides, The new European Private International Law of contracts under the Rome I Regulation, Athens-Thessaloniki, 2009, p. 218 ff; D. Stamatiadis, *The party autonomy in the field of international contractual obligations*, Nomiki Vivliothiki, Athens, 2011, p. 312 ff; A. Tsavdaridis, *The Private International Law of insurance contract: From the Rome Convention and the Community insurance directives to Regulation "Rome I"*, in the volume published in honor of Prof. I. Voulgaris, Ant. Sakkoulas Publications, Athens-Komotini, 2010, p. 385 ff; M. Varela, *International Insurance*, in C. Pamboukis (ed.), *Law of International Transactions*, Nomiki Vivliothiki, Athens, 2010, p. 1104 ff

6. See also Art. 9 par. 2.

«(a) in the courts of the Member State where he is domiciled, or

(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[7]*,*

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

Art. 8 ff. are not applicable to the relationship between a reinsured and a reinsurer in connection with the reinsurance contract[8]. An interpretation issue arises out as to their application whenever the defendant is not the insurer, but the insurance broker who has been handling on his behalf. The Court of Appeal of Piraeus has denied the application of Art. 8 ff. in this context[9].

According to Art. 9 par. 2, an insurer who is not domiciled in a Member State shall be deemed to be domiciled in that Member State where he/she has a branch, agency or other establishment, whenever disputes arising out of the operations of the branch, agency or establishment are the object of the litigation.

This allows the insured, the policyholder[10] or the beneficiary as claimants to sue the insurer before the courts of the place where they are domiciled[11]. This procedural strategy can take shape through the remedies provided for by the *lex fori processualis* (for instance, this law is to be applied as to the permissibility of an *action oblique* that could involve the insurer as a litigant in the proceedings[12]). Establishing a *forum actoris* in insurance matters has been dictated by the need to protect the weaker party, the insurer being rightly held as the economically strong party in the insurance contract. Recital 13 in the preamble to Regulation 44/2001 states that *«in relation to insurance contracts …, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for».*

The ECJ explicitly held twice in May 2005 that there is a well settled case-law *«according to which the insured is being afforded a wider range of jurisdiction than that available to the insurer»*. This is reflecting *«an underlying concern to protect*

7. Under Art. 8 of the Brussels Convention the *forum actoris* was granted only to the policyholder.
8. ECJ, 13.7.2000, Case C-412/98, *Group Josi Reinsurance v. Universal General Insurance.*
9. *Court of Appeal of Piraeus*, judgment nr. 546/2006, *Harmenopoulos* 2008.437.
10. As to the interpretation issues arising out of the term "policyholder' used in the English version see Report SCHLOSSER, nr. 152.
11. It should be borne in mind that, in practice, the proceedings against their insurer may be preceded by the service of the initial claim to the insured, the policyholder or the beneficiary in their capacity as defendants.
12. *Areios Pagos*, judgment nr. 798/2012, *Helliniki Dikaiosyni* 2012.1241: an *action oblique* under Art. 72 of the Greek Civil Procedure Code is permitted only after the insured has been serviced with the initial claim.

the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically».[13]

The protection of the weaker party is strengthened by Article 12 par. 1. It states that *«without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary»*[14].

It is contended that the protection granted to the weaker party, as to the courts before which he is allowed to sue, is being afforded to him to the detriment of legal certainty[15]. Even on the assumption that this criticism is well-founded (whereby there should be serious doubts), it does not seem that legal certainty must set aside the protection of the weaker party. However, it is likely that some of the persons who benefit from the *forum actoris* are domiciled in different member States[16]: it is true that, in such an event, a complicated procedural strategy may be developed upon the jurisdiction of different national courts.

In this context, it should also be envisaged that the choice of forum may have an indirect, albeit significant, incidence on the way the substance of the dispute is going to be dealt with by the court seized. Actually, Article 9 par. 2 of Regulation Rome I must also be taken into account. This provision prescribes the application of the overriding mandatory provisions of the *lex fori*:

> *«Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum»[17].*

This entails that if the weaker party (insured, policy-holder or beneficiary) prefers to seize as claimant the courts of the country of his/her domicile (upon the basis of Article 9 par. 1b of Regulation Brussels I), this choice of forum is very likely to lead, pursuant to Article 9 par. 2 of Regulation Rome I, to the overriding mandatory provisions rules of the insurance law of the *lex fori* being applied, notwithstanding the fact that another

13. ECJ, 12.5.2005, Case C-112/03, *Société financière et industrielle du Péloux v. AXA Belgium and others,* paragraph 30, ECJ, 26.5.2005, Case C-77/04, *Groupement d'intérêt économique (GIE) Réunion européenne and Others v. Zurich España and Société pyrénéenne de transit d'automobiles (Soptrans)*, paragraph 17, see also ECJ, 14.7.83, Case 201/82, *Gerling and Others* v. *Amministrazione del Tesoro dello Stato*, paragraph 17 and ECJ, 13.7.2000, Case C-412/98, *Group Josi Reinsurance v. Universal General Insurance*, paragraph 64.

14. Art. 12 paragraph 1 is applicable, even if the insurer is not domiciled in a Member State.

15. E. PATAUT, comments on the judgment of ECJ in the case C-463/06, Revue critique de droit international privé 2009.371.

16. KROPHOLLER/von HEIN, *Europäisches Zivilprozessrecht, 9. Auflage, Frankfurt a.M., 2011,* Art. 9 Nr. 2.

17. For an analysis of Article 9 Rome I on overriding mandatory provisions, see J. HARRIS, *Mandatory rules and Public Policy under the Rome I Regulation*, in F. FERRARI, S. LEIBLE (eds.), *Rome I Regulation. The law applicable to contractual obligations in Europe*, Sellier, Munich, 2009, p. 291 ff; see also I. KUNDA, *Internationally mandatory rules of a third country in European Contract Conflict of Laws, Rijeka Law Faculty, 2007,* passim.

law should be applicable on the merits[18]. In such an event, the *forum actoris* may have an impact on the contents of the judgment delivered on the substance of the case.

II. Article 10: International jurisdiction of the courts for the place where the harmful event occurred

A. The function of Article 10

A dispute in insurance matters very often implies a *'cumul'* of contractual and non-contractual claims. This is due to the fact that usually a tort triggers the application of the insurance contract clauses. Article 10 states that:

> *«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».*

In most cases, it is to be assumed that the victim as claimant will sue the insurer, whom the person allegedly liable (the insured/defendant) has concluded an insurance contract with. In such an event, the claimant is entitled to benefit from the *forum delicti* (if this is advantageous for him) in order to attract the defendant's insurer, too, before the same court where he has chosen to initiate proceedings against the defendant the damage is attributed to. If the latter has a counterclaim, he may rely on the same provision in order to sue the claimant's insurer. It should be borne in mind that pursuant to Article 12 par. 2 «*the provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending*».

It is obvious that Article 10 enhances the importance of the *forum delicti* with regard to insurance litigation. It also consolidates the coherent judicial dispute resolution, in as much as it leads to the "concentration" before the same tribunal of all claims, i.e. the claims related to tort liability as well as those referring to the insurance contract.

B. The main interpretation issues arising out of Article 10 of Regulation 44/2001

A lot of interpretation issues arise out of Art. 10. The most interesting ones are linked to the determination of the place the harmful event occurred and to the question whether

18. In contrast, the court is not bound to give effect to overriding mandatory provisions of a foreign law. Article 9 par. 3 of Regulation Rome I states:
«Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In consideration whether to give effect to those provisions, regard shall be held to their nature and purpose and to the consequences of their application or non-application».

the option granted to the claimant (= to sue the insurer in the place where the harmful event occurred) presupposes that the insurer is domiciled in a Member State.

1. How is the place of the harmful event's occurrence to be determined?

This place is to be determined in conjunction with Article 5 paragraph 3 of Regulation 44/2001, although the claim against the insurer is based upon the insurance contract entered into between the injuring party and the insurer[19]. It is obvious that a practitioner faced with this question should dig into the interesting and abundant case-law regarding Article 5 paragraph 3 of Regulation 44/2001 in order to ascertain the place where the harmful event occurred. It is well known that there is a distinction between the place of the harmful event and the place where the damage has occurred. Both places can be considered as *locus delicti*. However, given the distinction between aa) direct and indirect damage and bb) initial and subsequent damage and bearing also in mind the ECJ's preference for the place where the direct[20] and initial[21] damage occurred, the place where the harmful event giving rise to the damage has taken place is to be taken strongly into account[22].

This approach is correctly being subject to a substantiated criticism. The ECJ tried to alleviate the unequal results its initial approach has triggered, by its judgment in the case *Zuid Chemie*[23]. In particular as far as insurance matters are concerned, it seems that the place where the damages have been suffered is more significant than the place where the harmful event giving rise to the damage has occurred. In contrast, the place where the event giving rise to the damage has occurred is being prioritized in most tort disputes. Attributing to both places the same relevance regarding international jurisdiction in insurance matters should be accepted as the appropriate solution, on the grounds that it strikes the balance.

Furthermore, if the damage has been suffered in more than one countries, it is likely that more than one places can be characterized as *locus delicti*. In such an event, it seems that the claimant may have the option to choose one of the multiple *fora loci delicti*. It has to be mentioned that the Greek Supreme Court has squarely admitted, in view of designating the law applicable on the merits, that the claimant has the option to choose among the laws of the different places where the tort has been committed[24].

It is noteworthy how the place of the harmful event's occurrence is determined pursuant to Article 4 par. 1 of Regulation Rome II. This rule of conflict of laws states

19. KROPHOLLER/von HEIN, *Europäisches Zivilprozessrecht, 9. Auflage, Frankfurt a.M., 2011,* Art. 10 Nr. 1.
20. ECJ, 11.1.1990, Case C-220/88, *Dumez France SA & Tracoba SARL v. Hessische Landesbank and others*.
21. ECJ, 19.9.1995, Case C-364/93, *Marinari v. Lloyd's Bank*.
22. This means that in the event of a collision of ships, the damage occurs where the harmful event takes place. The same can be said for most torts committed on board, to the extent that indirect or subsequent consequences are not sufficient for establishing the international jurisdiction of the place they are incurred.
23. ECJ, 16.6.2009, Case C-189/08, *Zuid-Chemie BV v. Philippo's Mineralenfabriek NV*.
24. *Areios Pagos*, judgment nr. 295/2000, *Nomiko Vima* 2001.410.

that the law applicable to a non-contractual obligation arising out of a tort/delict shall be in principle the law of the country where the damage occurred *"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".*

Article 4 par. 1 of Regulation Rome II prioritizes the place where the damage occurred and paves the way to downsizing the importance of indirect consequences of the harmful event. Maritime torts deserve a special approach on that score: it has to be inferred that in most cases the *locus delicti* shall be the place the ship was at when the initial damage occurred. If the tort was committed aboard a ship on the high seas, the flag of the ship can determine the place where the damage has occurred. This has been explicitly accepted with regard to international jurisdiction by the ECJ in the judgment *DFDS Torline*, where it has been held that the State of the ship's flag must be considered as the place where the damage has occurred[25].

2. The domicile of the insurer

Another issue arises as to whether the option granted to the claimant (= suing the insurer before the courts for the place where the harmful event occurred) is conditional upon the insurer being domiciled in a Member State. As stated above, Art. 8 ff. of Regulation 44/2001 are applicable, when the insurer is domiciled in the territory of a Member State of the European Union. However, one should not lose sight of Article 9 par. 2 of the Regulation. This means that an insurer who is not domiciled in a Member State, but has a branch, agency or other establishment in a Member State, can be sued before the courts of the place of the harmful event, if the object of the litigation is a dispute arising out of the operations of the branch, agency or establishment in question.

This can be of great significance in those cases, in which the branch of the insuring company is inside the EU, although the latter's seat is outside the EU. In such an event, the insurer may be sued before the courts for the place where the harmful event occurred.

III. Article 11: Joinder of proceedings against the insurer and of proceedings undertaken by the injured party against the insured

A. The role of Article 11

Article 11 par. 1 states that *"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".*

25. ECJ, 5.2.2004, Case C-18/02, *DFDS Torline v. LO Landsorganisationen i Sverige*, paragraph 44. For the relevance of the flag in matters of torts see J. BASEDOW, *Rome II at Sea - General Aspects of Maritime Torts* -, RabelsZ 2010.131-2.

The joinder of proceedings against the insurer and of proceedings brought by the injured party against the insured must be permissible by the *lex fori* of the court seized with regard to the action against the insured. This is a purely procedural issue, whereby it is clear that the main claim prevails. This entails that the law of the court having jurisdiction on it is to be applied in view of deciding if the insurer may be joined in the main proceedings brought against the insured. Although the wording of this provision is not unambiguous, it must be admitted that the court seized by the injuring party must have jurisdiction pursuant to Art. 8 ff. of the Regulation[26].

Article 11 par. 2 deals with the issue of direct actions by the injured party against the insurer. It reads as follows:

> *«Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted».*
>
> *This provision is of particular significance, because it enables the victims of a tort to sue the insurer of the injuring party in the courts referred to in Art. 8 ff. of the Regulation.*

Pursuant to Article 11 par. 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»*. This rule aims at avoiding the issuance of irreconcilable judgments by different courts. It allows the insurer to attract the policyholder or the insured to the court, before which the injured party has already brought a direct action against him (=the insurer). On the contrary, the injured party is not allowed to benefit from Art. 11 par. 3 in order to achieve a joinder of proceedings against the policyholder or the injuring party, given that the claim against them is not arising out of the insurance contract[27].

It should be noted that, pursuant to Art. 65 par. 1 of the Regulation, Art. 11 may not be resorted to in Germany, Austria and Hungary in actions on a warranty of guarantee or in any other third party proceedings.

B. Interpretation issues regarding Article 11 par. 2

The core of interpretation issues lies in the application of Article 11 par. 2. In our view, the most important of them are the following:

1. Under which law is a direct action permissible?

In contrast to Article 11 par. 1, there is no indication in par. 2 as to the law under which it is permissible to bring a direct action against the insurer[28]. This is a

26. KROPHOLLER/von HEIN, *Europäisches Zivilprozessrecht, 9. Auflage, Frankfurt a.M., 2011,* Art. 11 Nr. 3.

27. KROPHOLLER/von HEIN, *Europäisches Zivilprozessrecht, 9. Auflage, Frankfurt a.M., 2011,* Art. 11, Nr. 5. Contra *Maher and another v. Groupama Grand Est,* European Legal Forum 2010. I-71.

28. E. PATAUT (Revue critique de droit international privé 2009.369) considers that the sentence "*where such direct actions are permitted*» is useless and confusing.

consequence of the action's permissibility being a corollary of the alleged substantial right of the injured party to sue directly the insurer. Although there are procedural repercussions, the matter is directly related to the rights of the injured party as they are determined by the law applicable on the merits.

This means that the answer as to a direct action being permissible within the framework of Article 11 par. 2 is not to be looked into by resorting to the *lex fori processualis*. The relevant rules of Private International Law have to be applied. The choice is between

– the lex contractus governing the contract entered into between the insured and the insurer, and

– the lex loci delicti applicable to the claims related to the damage the injured party suffered on the grounds of the illegal or negligent behavior of the insured.

From the point of view of the insurer, the *lex contractus* should prevail as applicable law. The insurer has in particular a legitimate interest to know whether he can be sued directly by a third person (=the injured party) he is not contractually connected to. The insured may also be interested in having a clear picture as to whether the insurer can be directly sued by the injured party (in such an event, the insured's role in the litigation should diminish). On the other hand, it is likely that the law chosen as *lex contractus* contains provisions which hamper any direct action against the insurer. As a matter of fact, the latter can impose his preference as to the applicable law. The non-permissibility of direct actions by the law of country A could be an incentive for choosing that law, whereby the insured may refrain from objecting to it (even if he is aware that the choice of the law of A could engineer such an implication).

This approach indicates indirectly why the injured party may on the contrary prefer the application of the *lex loci delicti*. It has to be assumed that the injured party is more familiar with this law, which is very likely to be the law of the place where he is domiciled (although it cannot be excluded that the injured party may actually have a loose connection with the place where the harmful event occurred).

A third solution could be the alternative application of the *lex contractus* and the *lex delicti*. This leads in practice to facilitating the acceptance of a direct action against the insurer, in as much as it suffices that the direct action is permissible under only one of these laws. As a matter of fact, it cannot be anticipated which of the two competing laws is the one that permits the direct action in the case at issue. From the point of view of the weaker party's protection, the alternative application of the *lex contractus* and the *lex delicti* is the convenient solution, as it is beneficial to both the injured party and the insured, to the detriment of the insurer: it makes more likely the direct action against the insurer, thus downsizing the insured's involvement in the litigation before a court he may not be familiar with.

The alternative application of the *lex contractus* and the *lex delicti* is enshrined in Article 18 of Regulation Rome II. This provision states that:

«The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides».

However there is a risk that the injured person and the person allegedly liable choose pursuant to Article 14 of the same Regulation a law permitting the direct action. According to this provision, the parties involved in the tort dispute may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred (par. 1).

It is likely that both the injured person and the insured (as the person alllegedly liable) choose a law which is detrimental to the insurer. It could also be a bargaining asset for the insured to agree that a law allowing the injured party to sue directly the insurer is to be applied as *lex loci delicti*. Insurance companies should be cautious about how to tackle such a prejudicial manoeuvre. Their protection does not seem to be secured by the first paragraph's last sentence, where it has been added that *"this choice shall not prejudice the rights of third parties'*. Neither could the insurer rely on the restrictions to such a choice of law as prescribed by the next two paragraphs of Article 14 of Regulation Rome II[29].

Such a hidden *fraus legis* (in the sense that it amounts to obviating the application of the law which should govern the dispute)[30] is in particular likely in cases in which the sums at stake are very high: for instance, damages arising out of maritime torts are usually higher than those incurred in case of average torts.

2. Can the injured person bring the direct action before the courts of his domicile?

Article 11 par. 2 actually refers to Articles 8-10 as being applicable *"to actions brought by the injured party directly against the insurer"*, provided that such direct actions are permitted by the law applicable as described above (under III B 1) .

29. «*2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.*

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement».

30. Regarding the relationship of party autonomy and *fraus legis* within the framework of contracts see S. VRELLIS, *Fraus legis in Private International Law* (in Greek), Athens 1979, p. 151 ff.

The issue is about the analogous application of Article 9 par. 1b) of the Regulation to direct actions of the injured person. If the analogous application is admitted, then the injured person may seize the courts of the place of his domicile, instead of the courts of the place where the insured person or legal entity allegedly liable for the damage is domiciled (in case the domicile/seat is located in another country that the injured person's).

Given that Article 9 par. 1b) of the Regulation establishes the *forum actoris*, to the effect that the weaker party in the litigation may seize his domicile's courts, it should be taken into account that the injured person is the weak party in comparison to the insurer against whom he may have the right to bring a direct action. This approach seems to imply that the injured person in his capacity of claimant may benefit from the *forum actoris* prescribed for by Article 9 par. 1b) of the Regulation in favor of the weaker party to the insurance contract.

A similar issue arose out of the Directive 2000/26/EC[31] which states in its Article 3 (entitled "direct right of action") that:

> *«Each Member State shall ensure that injured parties referred to in Article 1 in accidents within the meaning of that provision enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability»[32].*

The ECJ followed this approach in its judgment delivered on 13 December 2007 in the Case C-463/2006 (*FBTO Schadeverzekeringen NV v. Jack Odenbreit*). It took cognizance of submissions alleging that the injured party is the weak party in the litigation[33] and ended up holding with regard to Art. 9 par. 1b) of the Regulation (whereby it stated that its interpretation is being supported by the wording of Directive 2000/26[34]), that the person having suffered the damage is a weak party and,

31. Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (OJ 2000 L 181, p. 65), as amended by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 (OJ 2005 L 149, p. 14).

32. See recital 16a in the preamble to Directive 2000/26: *"Under Article 11(2) read in conjunction with Article 9(1)(b) of (EC) Regulation No 44/2001, injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled"*.

33. Paragraph 18: «*The defendant in the main proceedings, all the Member States which submitted observations to the Court and the Commission maintain that the provisions of Regulation No 44/2001 on jurisdiction in matters relating to insurance reflect the need to protect the economically weaker party, a principle of interpretation which is set out in Recital 13 in the preamble to that regulation and established in the case-law of the Court (Case 201/82 Gerling Konzern Speziale Kreditversicherung and Others [1983] ECR 2503, Case C-412/98 Group Josi [2000] ECR I-5925, paragraph 64, and Case C-112/03 Société financière et industrielle de Peloux [2005] ECR I-3707, paragraph 30). The very aim of Article 11(2) is therefore to extend to the injured party the arrangements provided for the benefit of claimants by Article 9(1)(b) of that regulation»*.

34. Paragraph 29.

consequently, is covered by the same protection (paragraph 26). The Court held also that

> *«the application of that rule of jurisdiction to a direct action brought by the injured party cannot depend upon the classification of that injured party as a "beneficiary" within the meaning of Article 9(1)(b) of Regulation No 44/2001, since the reference to that provision in Article 11(2) thereof allows that rule of jurisdiction to be extended to such disputes without the claimant having to belong to one of categories in Article 9(1)(b)» (paragraph 27).*

This reasoning was supported as follows:

> *«That line of reasoning is also based on a teleological interpretation of the provisions at issue in the main proceedings. According to Recital 13 in the preamble to Regulation No 44/2001, the Regulation aims to guarantee more favourable protection to the weaker party than the general rules of jurisdiction provide for (see, to that effect, Group Josi, paragraph 64, Société financière et industrielle du Peloux, paragraph 40, and Case C-77/04 GIE Réunion européenne and Others [2005] ECR I-4509, paragraph 17). To deny the injured party the right to bring an action before the courts for the place of his own domicile would deprive him of the same protection as that afforded by the Regulation to other parties regarded as weak in disputes in matters relating to insurance and would thus be contrary to the spirit of the Regulation. Moreover, as the Commission correctly observes, Regulation No 44/2001 strengthened such protection as compared with the protection resulting from application of the Brussels Convention" (paragraph 28).*

It has also been pointed out that the fact that an action in tort is disconnected from the insurance contract is not relevant for the interpretation of Article 9(1)(b) of Regulation 44/2001[35].

The inference to be drawn is that the injured party may as claimant take advantage of the *forum actoris* prescribed for by Art. 9 par. 1b) of the Regulation and sue the insurer through a direct action before the courts of his domicile.

3. Does Article 11 par. 2 apply with relation to torts committed outside the Member States of EU?

Some torts committed outside the territory of Member States can have repercussions on natural or legal persons domiciled or seated inside the EU. In the event of a tort committed outside the territory of any Member State, Article 10 of Regulation 44/2001 does not operate. The reason is that this provision prescribes the international jurisdiction of the courts where the harmful event occurred, on the assumption that

35. «*...The application of the rule of jurisdiction provided for by Article 9(1)(b) of Regulation No 44/2001 to such an action is not precluded by the latter's classification, in national law, as an action in tort relating to a right extrinsic to legal relations of a contractual nature. The nature of that action in national law is of no relevance for the application of the provisions of the Regulation*» (paragraph 30).

the latter is located in the territory of a Member State. That is why we should examine if, upon the basis of what has already been mentioned with relation to Article 11 par. 2, the injured party as a claimant can bypass some of the disadvantages linked to the lack of a *forum delicti* within the EU.

In such a case the injured party may rely on (the analogous application of) Article 9 par. 1b) of the Regulation in order to sue the insurer by a direct action before the courts of his domicile. The tribunals of a member State could be seized pursuant to this jurisdictional provision, if the claimant has a domicile (or a seat) within the EU (the answer to this question is to be given by virtue of Articles 59 and 60 of the Regulation).

If the injured party is not domiciled within the EU, he can sue the insurer

- by virtue of Article 9 par. 1a) of the Regulation, i.e. before the courts of the Member State where the insurer is domiciled, or
- by virtue of Article 9 par. 1a) and 9 par. 2 of the Regulation, i.e. before the courts of the Member State where the insurer who is not domiciled in a Member State has a branch, agency or other establishment (provided that the tort at issue is related to the operations of the branch, the agency or the establishment in question).

As Regulation Rome II is in principle applicable to torts taking place within or outside the territory of the Member States of the European Union, this allows to take into account its Article 18 within the framework of Article 11 par. 2 of Regulation 44/2001 (with relation to torts committed outside the Member States of EU). The practical consequence lies in one of the laws alternative designated by Article 18 of Regulation Rome II (*lex contractus* or *lex delicti*) being applicable, in order to decide whether the direct action is permissible, as required by Article 11 par. 2 of Regulation 44/2001.

4. Persons entitled to make use of Article 11 par. 2

It was held by the ECJ that even persons who indirectly suffered the damage fall under the scope of application of Article 11 par. 2:

> *«there are differences between the different language versions of Article 11(2) of Regulation No 44/2001. The French version uses the term "victim", which, on a semantic interpretation, refers to the person who directly suffered the damage. On the other hand, the version in German, which is the language of the case, uses the term "der Geschädigte", which means the "injured party". Accordingly, that term may refer not only to persons who directly suffered the damage, but also to persons who suffered it indirectly»*[36].

This approach widens the scope of application of Article 11 par. 2 and has to be accepted, as it enhances the protection of the persons that have been exposed to the

36. ECJ, 17.9.2009, Case C-347/08, *Vorarlberger Gebietskrankenkasse v. WGV-Schwäbische Allgemeine Versicherungs AG*, paragraph 25. The Court has also taken into account that the term "person who suffered the damage" is used in 8 other versions of the same provision (paragraph 27).

tort's consequences. It should be noted that the Greek Supreme Court has reached the same conclusion, whereby it held explicitly that the "injured party" is a beneficiary under Art. 9 of the Regulation[37].

Furthermore, the protection granted under Art. 9 par. 1b) and 11 par. 2 should encompass an insured legal entity, on the grounds that it is considered as the weaker party in comparison to the insurer[38]. However, this protection is not extended to a social security institution acting as the statutory assignee of the rights of the directly injured party: such an institution may not bring an action directly in the courts of the Member State where it is established against the injuring party's insurer, if the latter is established in another Member State. This solution is founded upon the social security institution not being presumed to be economically weaker and less experienced legally than the insurer[39].

IV. Prorogation of jurisdiction in insurance matters

A. The rule: Article 13 and the restrictions imposed to choice-of-court clauses

Choice-of-court clauses are reasonably deemed to be the result of the stronger contracting party imposing his will as to the court which shall have jurisdiction. As the ECJ has held, the concern to protect the insured, who in most cases is the economically weaker party and therefore lacks a substantial margin for negotiation, is reflected in denying the validity of a clause conferring jurisdiction to the benefit of the insurer[40]. This entails that a choice-of-court clause cannot be relied on against a beneficiary under the contract who has not expressly subscribed to the clause and is domiciled in a Member State other than the one the insurer and the policyholder are domiciled[41].

Article 13 of the Regulation provides some protection to the policyholder, the insured or the beneficiary: it restricts to a large extent the permissibility of prorogation of jurisdiction in insurance matters, whenever such a prorogation may be presumed to be prejudicial to the weaker contracting party. This provision is applied in conjunction with Art. 23 par. 5 of the Regulation, according to which clauses contrary to Art.13

37. *Areios Pagos*, judgment nr. 2163/2009, *Epitheorissi Politikis Dikonomias (= Civil Procedure Law Review)* 2010.68 annotated by I. DELICOSTOPOULOS, *Areios Pagos*, judgment nr. 640/2010, *Epitheorissi Emporikou Dikaiou (= Commercial Law Review)* 2010.640 annotated by A. TSAVDARIDIS.

38. OLG Celle, 27.2.2008, 14 U 211/06, *NJW* 2009.61 = *IPRax* 2009, Heft 4, p. XVI.

39. ECJ, 17.9.2009, Case C-347/08, *Vorarlberger Gebietskrankenkasse v. WGV-Schwäbische Allgemeine Versicherungs AG*), paragraph 42.

40. ECJ, 26.5.2005, Case C-77/04, *Groupement d'intérêt économique (GIE) Réunion européenne and Others v. Zurich España and Société pyrénéenne de transit d'automobiles (Soptrans)*, paragraph 17; ECJ, 12.5.2005, Case C-112/03, *Société financière et industrielle du Péloux v. AXA Belgium and others*, paragraph 30.

41. ECJ, 12.5.2005, Case C-112/03, *Société financière et industrielle du Péloux v. AXA Belgium and others*.

have no legal force[42]. Choice-of-court clauses resulting in conferring jurisdiction to courts other than those designated by Articles 9 ff. of Regulation 44/2001 are only permitted[43] in the following cases:

> *«The provisions of this Section may be departed from only by an agreement:*
>
> *1. which is entered into after the dispute has arisen, or*
>
> *2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or*
>
> *3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or*
>
> *4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or*
>
> *5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14».*

The validity of the prorogation agreement entered into after the dispute has arisen is related to the time the prorogation has been agreed upon (Art. 13 point 1). As such an agreement has been concluded when the main issue is whether the insurer is going to fulfill the obligations he has undertaken under the insurance contract, the choice-of-court clause is considered as valid on the grounds that it has not been imposed by the mere will of the insurer.

On the other hand, it remains unclear whether the exception provided for by Art. 13 point 2 is sufficiently protective for the policyholder, the insured or a beneficiary. Actually, a choice-of-court clause allowing them *"to bring proceedings in courts other than those indicated in this Section"* confers jurisdiction to a court that is disconnected with the dispute (given that the jurisdictional bases laid down by Section 3 reflect a closeness to the dispute). It seems unlikely that the insurer accepts either before or after the dispute arises to grant such an option to the benefit of the other side[44]. On the contrary, such a conferral of jurisdiction to a *forum* the contract

42. The non-validity of choice-of-courts clauses is an incentive for the insurer to try to insert arbitration clauses into the insurance contract, in view of avoiding to be sued before a forum pursuant to Art. 8 ff. of the Regulation.

43. ECJ, 12.5.2005, Case C-112/03, *Société financière et industrielle du Péloux v. AXA Belgium and others*, paragraph 31: derogations from the jurisdictional rules in matters of insurance must be interpreted strictly.

44. Cf. F. SEATZU, *Insurance in Private International Law*, Hart Publishing, 2003, pp. 63-64: *"....agreements or jurisdiction clauses which widen the choice of fora available to the insured under Articles 8 to 11 are unlikely to be concluded in the real world because most insurers would probably deny their consent...."*

is not sufficiently connected with should usually be befitting to the insurer's interests, unless this provision is to be construed as limiting the validity only to agreements granting unilaterally a privilege to the weaker party.

As to Article 13 point 3, it is considered as a permissible derogation to the *forum delicti*, in particular as it confers jurisdiction to the courts of a place both sides (insurer-policyholder) are closely connected to[45].

In the event of a prorogation agreement having been concluded between the sender and the carrier under Art. 31 paragraph 1 of the CMR Convention, pursuant to Art. 11 paragraph 1 of the Regulation the insurer may be joined in proceedings brought by the injured party. This is in line with the applicability of the CMR Convention according to Art. 71 of the Regulation[46]. In that case, the insurer is practically bound by a choice-of-court clause he did not subscribe to.

B. The exception of Article 14

The particularity of the risks set out in Article 14 (and referred to in Article 13 point 5) lies in them being to a large extent directly related to aircraft or maritime transport[47]. For all insurance contracts covering risks falling under Article 14, there may be a prorogation agreement resulting in conferring international jurisdiction to a court other than one of those designated by Articles 9-12 of Regulation 44/2001. In these cases, a choice-of-court clause in defiance of the weaker party's protection is valid. If on the contrary the risks at issue do not fall under the scope of application of Article 14, a choice-of-court clause obviating the rules laid down by Articles 9-12 of Regulation 44/2001 is not permitted.

45. KROPHOLLER/von HEIN, *Europäisches Zivilprozessrecht, 9. Auflage, Frankfurt a.M., 2011*, Art. 13 Nr. 4 (see also ibid., Art. 11, Nr. 3).

46. ECJ, 4.5.2010, Case C-533/08, *TNT Express Nederland BV/AXA Versicherung AG*.

47. Article 14 states that:

«The following are the risks referred to in Article 13(5):

1. any loss of or damage to:

a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in paragraph 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in paragraph 1(b);

3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in paragraph 1(a), in particular loss of freight or charter-hire;

4. any risk or interest connected with any of those referred to in paragraphs 1 to 3;

5. notwithstanding paragraphs 1 to 4, all "large risks" as defined in Council Directive 73/239/EEC, as amended by Council Directives 88/357/EEC and 90/618/EEC, as they may be amended».

In the event of the insurance contract covering in part risks falling under Article 14, a choice-of-court clause in defiance of Articles 9-12 of Regulation 44/2001 may be agreed upon only regarding these risks. On the contrary, it shall be held as non valid, on the grounds of not being covered by Article 13, as far as other risks (= non mentioned in Article 14) may be the object of the litigation. It should be noticed that a fragmentation of international jurisdiction (this being the consequence of holding the choice-of-court clause as partially valid) increases the likelihood of contradictory judgments being delivered with relation to the same dispute.

In a nutshell, the application of Article 13 points 5 and 14 results in consolidating the validity of choice-of-court clauses by which international jurisdiction is being conferred to a tribunal other than those provided for by Article 9-12 of the Regulation, irrespective of whether this is done in a way beneficial to the insured, the policyholder or the beneficiary. This leads to a more balanced solution for insurance contracts covering aircraft and maritime transport, as the *forum actoris* advantage granted to the weaker person can be annihilated by a prorogation agreement to the contrary. In such a case, there seems to be a controversial issue as to the effect such a clause could have within the framework of a tripartite tort-related litigation between injured person, insured and insurer.

V. Concluding remarks

The conferral of jurisdiction in matters of insurance according to Section 3 of Chapter II of the Regulation 44/2001 (Brussels I) is designed in view of protecting the weaker party who is granted the *forum actoris* advantage prescribed by Art. 9 par. 1b) of the Regulation.

It should be borne in mind that litigation in insurance matters is very often linked to claims arising out of torts. This may lead to a multi-party litigation involving the injured party, the allegedly liable party and their insurers. In this context, the rules of the Regulation on insurance contracts can be the tools for a sophisticated procedural strategy, mainly to the detriment of the insurer who is being rightly held as the economically strong party in the insurance contract.

Article 10 enhances the importance of the *forum delicti* with regard to insurance litigation, in as much as it leads to the "concentration" before the same tribunal of all claims, irrespective of whether they are related to tort liability or to the insurance contract. The place of the harmful event's occurrence is to be determined in conjunction with what is being accepted regarding the interpretation of Article 5 paragraph 3 of Regulation 44/2001.

Article 11 allows the joinder of proceedings against the insurer and of proceedings undertaken by the injured party against the insured. The main interpretation issues arise out of Article 11 par. 2. As there is no indication as to under which law it is permissible to bring a direct action against the insurer under this provision, the

solution lies in the alternative application of the *lex contractus* and the *lex delicti* provided for by Article 18 of Regulation Rome II. The injured party may rely on the analogous application of Article 9 par. 1b) of the Regulation in order to sue the insurer by a direct action before the courts of his domicile. The protection granted to the weaker party under Article 11 par. 2 encompasses even persons who indirectly suffered the damage.

Article 13 of the Regulation provides some protection to the policyholder, the insured or the beneficiary: it restricts to a large extent the permissibility of prorogation of jurisdiction in insurance matters, whenever such a prorogation may be presumed to be prejudicial to the weaker contracting party. A more balanced solution for insurance contracts covering aircraft and maritime transport is provided for by Art. 13 point 5 and Art. 14, in particular to the extent that the *forum actoris* privilege can be annihilated by a prorogation agreement to the contrary.


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