Dr Gunnar Franck,[*]
Senior Research Fellow,
Max Planck Institute for Comparative and International Private Law,
Hamburg (Germany)

ОРИГИНАЛНИ НАУЧНИ ЧЛАНАК

UDK: 341.9:368](4-672EU)

Рад примљен: 30.06.2015.
Рад прихваћен: 03.12.2015.

INJURED PARTIES AND PERSONAL LIABILITY INSURANCE: LEGAL PROTECTION IN EUROPEAN PRIVATE INTERNATIONAL LAW

Abstract**:** *The far-reaching mobility of people, goods, services and capital within the European Union (EU) entails that various private and professional activities cause numerous events of damage having cross-border implications. The legal situation becomes even more complicated if the incurred damage is covered by liability insurance, given that this means the participation of an additional party. Despite this rather complicated situation, it should be guaranteed that the injured party receives effective and fair compensation for its loss. As concerns EU Member States, competence rests with the European legislature to enact rules governing conflicts that may arise in respect of the applicable law or jurisdiction. The article examines the mechanisms existing in European private international law which protect injured parties in cases of damage covered by personal liability insurance. Here one finds that the protection of the injured party is realized on several levels through a number of conflict-of-law measures. The paper first describes the legal status quo in case of liability insurance, then examines the private international law in relation to the existence of a direct claim of the injured party, analyzes the applicable jurisdiction in cross-border damage cases and finally discusses the questions concerning the particularities of a direct claim of the injured party.*

Key words**:** *injured party, damage, direct claim, liability insurance, conflict of laws, Rome II Regulation, insurance law, jurisdiction, Brussels I-bis Regulation, Private International Law.*

[*] franck@mpipriv.de

1. Introduction

The freedom of movement guaranteed within the territory of the European Union means that many events of damage, either in professional or private areas of life, will have cross-border implications. The coverage of an event of damage by liability insurance is in principle positive for both the damaging and the injured party, although the settlement will initially become more complex given the participation of a third party, the insurer. This is only more true for international events of damage. With the aim of providing a better overview of the salient questions arising in this context, the present article will first describe the legal status quo in cases featuring liability insurance (2.) Then, the relevant rules of private international law will be examined in view of determining the existence of a direct claim of the injured party (3.). This will be followed by an analysis of the competent jurisdiction in cross-border damage cases (4.). Finally, questions concerning the particularities of an injured party's direct claim will be discussed (5.).

2. Liability insurance

2.1. Purpose, objective and application

Our modern world of work and economic interaction entails enormous liability risks (cf. Kötz, Wagner, 2013: sec. 1 et seq.). The higher the level of technology in a society, the larger the potential damage that may be incurred. Planes can crash, factories can pollute rivers and ground water, nuclear power plants can explode, and lawyers as well as tax accountants can give erroneous advice. But tremendous risks also lurk in the personal arena. One can cause a traffic accident, damage the laptop of a colleague or cause fire in an apartment building by forgetting to turn off the stove. If we continuously thought of the various types of damage we could cause in daily life, we would not have a minute's rest. In order to nevertheless enable entrepreneurial and private initiative, the phenomenon of *liability insurance* makes it possible for the individual to take account of his/her liability risk (cf. Merkin, 2010: sec. 1-010).

By concluding a liability insurance agreement, the insured protects himself against the economic consequences of potential liability to third parties (Merkin, 2010: 20-006; Armbrüster, 2013: 476). If a damage covered by liability insurance occurs, it is the insurer who ultimately compensates the loss. Furthermore, it lies in the nature of liability insurance that not just the insured but also the injured party benefits as the enforcement of his claim for damages is guaranteed. Thus,

liability insurance strengthens the aim of compensation in the event of damage and also assumes a social purpose (Wandt, 2010: 353; Armbrüster, 2013: 476). The legislator takes advantage of this phenomenon with compulsory liability insurance provisions (Merkin, 2010: 20-001; Armbrüster, 2013: 482), the most prominent example of this probably being motor vehicle liability insurance.[1]

2.2. Functioning and mechanism

As mentioned above, the insured takes liability insurance as protection against the economic consequences of a potential liability to third parties. Through the liability insurance contract, the insured attains two rights against his insurer. First, the insurer has to relieve the policyholder from any claims asserted by a third party on the basis of the policyholder's responsibility; second, he has to defend the policyholder against non-legitimate claims inside as well as outside of court (Merkin, 2010: 20-043 et seq.; Wandt, 2010: 362 et seq.).[2] In order to enable the insurer to fulfil these obligations, the insured generally grants the insurer power of attorney in the insurance policy (Merkin, 2010: 20-046; Wandt, 2010: 365). The insurer hence becomes the focal point of the claim settlement.

2.3. Legal position of the injured party

Although the insurer generally organises the claim settlement for the insured, the injured party cannot normally bring his/her claim directly against the insurer as liability insurance is not regarded as a third-party beneficiary contract (Birds, 2010: 74; Basedow, Fock, 2002: 108). In the event of damage, the injured party can take action only against the insured. Direct action against the insurer is only possible where such a right is provided by law. On the one hand, such a right to raise a direct claim is desirable as it helps protect the injured party and makes claim settlement more efficient (Franck, 2014: 44 et seq.; Merkin, 2010: 21-002). On the other hand, it runs counter to the principle of privity of contract. In particular, it has to be guaranteed that the right to bring a direct claim does not interfere with the insurer's legitimate interests. In this context, the most relevant question is whether the objections the insurer could raise against the insured can also be raised against the injured party.

1 In addition, there are many other examples of compulsory liability insurances, e.g. the liability insurance required of lawyers and other professionals. Great differences are encountered in Europe; for example, while Sweden has about a dozen types of compulsory liability insurance, Germany has roughly 100 (Franck, 2014: 20).

2 This is expressly laid down in e.g. §§ 100, 101 of the German Insurance Contract Act 2008; otherwise, it follows mostly from the insurance policy.

2.4. Legal situation within the EU

Within the European Union (EU), the legal situation in the Member States regarding a right of a direct claim differs considerably. Some legal systems provide for a general right of direct claims in all types of liability insurance. Among them are France,[3] the country of origin of the *action directe*, Belgium[4] and Spain[5], as well as Norway[6], which is outside the EU but within the European Economic Area (EEA). Some other states provide for a direct claim in connection with all mandatory liability insurance and in exceptional situations for voluntary insurances, too. For example, this is the case in the Netherlands,[7] Sweden[8] and Finland.[9] Finally, there is a group of legal systems including countries such as Germany,[10] the UK[11] and Austria[12], which are quite sceptical towards direct claims and provide for them only in exceptional situations.

However, it is not just the scope of direct claims that differs considerably. The same is true concerning the question to what extent the insurer may raise objections against the injured party that he is entitled to raise against the insured (Micha, 2010: 77 et seq.; Basedow, Fock, 2002: 109). All the Member States of the EU are, however, obliged by a directive[13] to require compulsory motor vehicle insurance, and here the insurer is generally not entitled to raise objections against the injured party that could have been raised against the insured (Merkin, 2010: 22-001 et seq.; Micha, 2010: 68 et seq.).

2.5. Liability insurance and cross-border damages

Within the EU, the free movement of people, services, goods and capital is comprehensively guaranteed and practised by citizens. This leads to an increased

3 Art. L 124-3 *Code des assurances*.

4 Art. 150-1 *Wet betreffende de verzekeringen*.

5 Art. 76 *Ley de Contrato de Seguro*.

6 Kap. 7 § 6 *Lov om forsikringsavtaler*.

7 Art. 7-954 *Burgerlijk Wetboek Boek*.

8 Kap. 9 § 7 *Försäkringsavtalslag*.

9 § 67 *Lag om försäkringsavtal*.

10 § 115 Abs. 1 (German) *Versicherungsvertragsgesetz*.

11 Section 1 Third Parties (Rights Against Insurers) Act 1930.

12 § 157 (Austrian) *Versicherungsvertragsgesetz*.

13 Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, Official Journal of the European Union, L 263/11, 7 October 2009.

number of cross-border events of damage involving a conflict of laws. This will be illustrated by providing three examples:

(1) A German from Hamburg is on a city trip to Paris (France) by car. On the roundabout of *Place de la Concorde,* a Spanish car bumps into him and damages the German's car.

(2) A Briton from London travels to Stockholm (Sweden) for business. There, a dog owned by a Swede bites him and the Briton's leg is injured.

(3) A Belgian company based in Brussels plans an investment in the Netherlands. The company's Dutch lawyer from Amsterdam gives faulty advice that leads to pecuniary damages being suffered by the Belgian company.

Assuming that the Spaniard has a motor vehicle insurance, that the Swede has a liability insurance covering the dog bite and that the Dutchman maintains a professional liability insurance, several questions arise regarding the conflict of laws:

1. Which law decides whether the injured party may raise a direct action against the insurer?

2. Which state has jurisdiction over such a direct claim?

3. Which law decides the content, the modalities and the conditions of the direct claim, e.g. the limitation period? Which law decides on the question whether the objections the insurer could raise against the insured can also be raised against the injured party?

These questions will be answered in the following discussion. It will be assumed that the tortfeasor is insured by an insurance company residing in his home country. For the EU Member States, the decisive sources of law in this respect arise from European Union law. After the Amsterdam Treaty entered into force on 1 May 1999, the EU has competence regarding the rules applicable in the Member States concerning any conflict of laws and international jurisdiction.[14]

3. Right of a direct claim in cases of cross-border events of damage

3.1. Legal ground

The first question to be settled is which legal system will decide whether the injured party in a cross-border event of damage can raise a claim directly against the insurer of the liable party. The central conflict-of-law rule for determining the

14 Now Art. 81(2)(c) Treaty on the Functioning of the European Union (TFEU), Official Journal C 326, 26 October 2012 p. 1 – 390.

applicable law for a direct action against the insurer of the liable person is Art. 18 Rome II Regulation.[15] It states that the person having suffered damage may bring his or her action directly against the insurer of the liable person in order to claim compensation if the law applicable to the non-contractual obligation *or* the law applicable to the insurance contract so provides.

3.2. Legal nature of the underlying liability claim

It is agreed that Art. 18 Rome II Regulation applies to direct claims arising from a *non-contractual* claim against a tortfeasor (Gruber, 2011: Art. 18 Rome II sec. 11; Hartenstein, 2013: 25). In the above-given examples the liability caused by the car accident (Example 1) and by the dog bite (Example 2) come under this statute. However, some scholars argue that Art. 18 Rome II Regulation is not applicable if the direct action is based on a *contractual* claim of the injured party because these cases do not fall within the scope of the Regulation, which is limited according to Art. 1(1) to non-contractual obligations (Gruber, 2011: Art. 18 Rome II sec. 20; Junker, 2015: Art. 18 Rom II sec. 8). Hence, the claim based on the lawyer's liability in Example 3 would not be covered by Art. 18 Rome II Regulation. This assumption misjudges, though, that the "non-contractual obligation" in terms of Art. 1(1) Rome II Regulation is not the underlying claim for damages but the right of the injured party – granted by the law – to bring his or her claim directly against the insurer (Hartenstein, 2013: 26; Micha, 2010: 160 et seq.). The right of a direct claim is based upon an order of law and not upon a party agreement. The obligation of the insurer is not freely assumed in either case; therefore, Art. 18 Rome II Regulation applies to direct actions based on both non-contractual and contractual claims (Hartenstein, 2013: 26; Micha, 2010: 82). Thus, Examples 1-3 are without exception covered by Art. 18 Rome II Regulation.

Indeed, one has to admit that the European legislator apparently acted on the assumption that normally a direct claim will be based on a non-contractual obligation. Otherwise, instead of concerning the law specifically applicable to a "non-contractual obligation", the first alternative would relate to the law that is generally applicable to an "obligation" of the insured. However, this should not lead to the conclusion that Art. 18 Rome II Regulation does not cover contractual obligations; rather, it suggests that the legislator acted somewhat narrow-mindedly.

15 Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union, 31 July 2007, L 199/40.

3.3. The applicable legal orders

It is easy to recognise that Art. 18 Rome II Regulation contains a genuine *alternative* conflict rule (Altenkirch, 2011: Art. 18 Rome II sec 8; Gruber, 2011: Art. 18 Rome II sec. 5). As stated above, the injured party has a right of direct action if such a right is granted either by the law applicable to the *non-contractual obligation* or the law applicable to the *insurance contract*.

3.3.1. The law applicable to the non-contractual obligation

The law applicable to non-contractual obligations is in a majority of cases determined by the Rome II Regulation. Art. 4(1) states as a general rule 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. Decisive is thus the place of *occurrence* of the damage (the so-called *lex loci damni*), not the place of the event giving rise to the damage. Very often, though, the place of occurrence will be identical to the place of the event giving rise to the damage. In Example 1 (traffic accident), this leads to the application of French law; in Example 2 (dog bite), it leads to the application of Swedish Law. However, in Example 3 (faulty legal advice), the first alternative of Article 18 Rome II Regulation fails to provide an applicable law because the lawyer's liability is based on contract, not on tort.

In addition to the general rule in Art. 4(1) Rome II Regulation, the parties may also *choose* the applicable law. According to Art. 14(1) Rome II Regulation, the parties to the tort/delict may agree to submit non-contractual obligations to the law of their choice: (a) by 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 agreement freely negotiated before the occurrence of the event giving rise to the damage. Moreover, the injured party is protected against a prejudicial choice of law as Art. 14 Rome II Regulation orders that the choice must not prejudice the rights of third parties and the parties may not depart from national (subsection 2) and European (subsection 3) mandatory provisions (see Plender, Wilderspin, 2009: 29-029 et seq.; Bach, 2011: Art. 14 Rome II sec. 31 et seq.).

3.3.2. The law applicable to the insurance contract

The law applicable to the insurance contract is determined by the provisions of the Rome I Regulation.[16] The Regulation sets out a differentiating ruling that distinguishes between mass risks and large risks, risks situated in the EU and outside the EU, and between voluntary and mandatory insurance. The Rome I Regulation is based on the principle of freedom of choice (cf. Art. 3(1)), a principle that – with some restrictions – also applies to insurance contracts. Normally, the conditions of a liability insurance contract include a choice of law provision. In most cases, the applicable law is thus determined by a prior choice of law (cf. Art. 3, 7(2)-(4) Rome I Regulation).

A restricted freedom of choice is provided for mass risks situated within the EU. According to Art. 7(3), the parties may choose in particular: (a) the law of any Member State where the *risk is situated,* and (b) the law of the country where the *policy holder has his habitual residence*. According to Art. 7(6), the country in which the risk is situated will be determined as follows: in case of a motor vehicle insurance, the Member State of *registration* where the insurance relates to vehicles of any type; in cases involving some other liability insurance, the Member State where the policy-holder has his *habitual residence* or, if the policy-holder is a legal person, the Member State where the latter's establishment, to which the contract relates, is situated (cf. Staudinger, 2014: Art. 7 Rome I sec. 55 et seq.; Plender, Wilderspin 2009: sec. 6-055 et seq.).

Where the parties fail to choose a jurisdiction, the applicable law for *mass risks* is determined by Art. 7(3) subsection 3, namely the law of the Member State in which the risk is situated at the time of conclusion of the contract. For cases involving *large risks,* the Rome I Regulation provides a comprehensive freedom of choice. In the absence of a choice by the parties, Art. 7(2) subsection 2 states that the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. As for insurance contracts covering risks for which a Member State imposes an obligation to take out insurance, a Member State may by way of derogation lay down that the insurance contract will be governed by the law of the Member State that imposes the obligation to take out insurance. Germany, for instance, made use of this option in Art. 46c (2) EGBGB[17].

In the above-given examples, the law applicable to the insurance contract would hence be German law in Example 1, Swedish law in Example 2 and Dutch law in Example 3.

16 Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union, L 177/6, 4 July 2008.

17 Introductory Code of the Civil Code, in the version promulgated on 21 September 1994, Federal Law Gazette [Bundesgesetzblatt] I p. 2494, last amended by Article 12 of the Act of 23 May 2011, Federal Law Gazette I p. 898.

3.4. The law more favourable to the injured party

Regarding Art. 18, the drafters of the Rome II Regulation decided in favour of alternative connecting factors beneficial to the injured party. This method favours the injured party as he or she has two potential legal systems from which to derive a right of direct action. If the two applicable laws stipulate different provisions, the law most favourable to the injured party is applicable (Gruber, 2011: Art. 18 Rome II sec. 5). This technique is an example of the employment of conflict-of-law rules to achieve a certain result (cf. Basedow, 2012: 39). Although the given approach is at the expense of the insurer, it is justified as the insurance company has to be prepared for the application of both laws at any rate.

In the examples given above, the injured party in Example 1 (traffic accident) has a right of direct action in French law as well as in German law; in Example 2 (dog bite), there is no such right according to the applicable Swedish law because insurance taken out in respect of the dog is voluntary insurance and the insured is not bankrupt (cf. Franck, 2014: 96 et seq.); and in Example 3 (faulty legal advice), the applicable Dutch law provides a right of direct claim because insurance for lawyers is mandatory.

3.5. Interim findings

Art. 18 Rome II Regulation comprehensively includes all rights of a direct claim provided by law regardless of whether the underlying claim is a non-contractual or a contractual claim. The injured party has a direct claim if either the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides. In case of a contractual obligation, solely the law applicable to the insurance contract can give rise to a direct claim.

4. Jurisdiction

The next question for examination is in which countries' courts an injured party can take direct legal action against the insurer.

4.1. Key sources of the law

The determinative key source of law for actions within the EU is the instrument known as the Brussels I-bis Regulation.[18] It replaces the earlier Brussels I Regulation as of 2015.[19] With regard to jurisdiction in matters relating to insu-

18 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 351, 20 December 2013, pp. 1-32.

19 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal

rance, the recast version did not bring any modifications. The Regulation applies in principle (Art. 4(1), 6(1)) to actions against persons either domiciled or having a place of business in a Member State of the EU. The Brussels I-bis Regulation does not apply directly in relation to the EU Member State of Denmark (see recital 41), but the application of the Brussels I-bis Regulation has been agreed upon through a special treaty between the EU and Denmark.[20] In relation to the EFTA-states of Norway, Switzerland and Iceland, the Lugano Convention[21] is applicable since 2007. The Lugano Convention and the Brussels I Regulation are almost identical. It is the "domicile" of the insurer that decides which of these three sources of law applies. According to Art. 63(1) Brussels I-bis Regulation and Art. 60(1) Lugano Convention, it is: (a) the statutory seat, or (b) the central administration, or (c) the principal place of business of the company.

4.2. Jurisdiction according to the Brussels Ibis Regulation

Jurisdiction with regard to insurance matters is laid down in Arts. 10-16 Brussels I-bis Regulation. The injured party can bring an action in three different jurisdictions in cases where a direct claim exists.

4.2.1. Jurisdiction at the domicile of the insurer

According to Art. 11(1)(a) Brussels I-bis Regulation, an insurer domiciled in a Member State may be sued in the courts of the Member State where he is *domiciled*. According to the reference in Art. 13(2), this also applies to actions brought by the injured party directly against the insurer. This jurisdiction corresponds to the general principle *actor sequitur forum rei* laid down in Art. 4(1) (cf. Vlas, 2012: Art. 2 Brussels I sec. 3), and it is not surprising. Transferred to the examples given above, Art. 13(2) and Art. 11(1) Brussels I-bis Regulation provide for jurisdiction in Spain in Example 1, in Sweden in Example 2 and in the Netherlands in Example 3.

4.2.2. Jurisdiction at the place of the harmful event

Furthermore, Art. 12 alternative 1 Brussels I-bis Regulation provides for a special jurisdiction in cases involving liability insurance. Accordingly, in case of liability insurance, the insurer may additionally be sued in the courts of the

L 12, 16 January 2001, pp. 1-23.

20 Agreement between the European Union and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 240, 18 August 2014, p. 1.

21 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 339, 21 December 2007, p. 3.

place where the harmful event *occurred*. This specific jurisdiction is also due to the reference in Art. 13(2) applicable to cases of direct actions. The reason for this special place of jurisdiction is the close connection between the liability insurance and the underlying damaging event (Kropholler, von Hein, 2011: Art. 10 EuGVO sec.1).

This special jurisdiction contributes to the protection of the injured party. If the harmful event stretches over two or more countries, the claimant may – due to the open wording of Art. 12 alternative 1 Brussels I-bis Regulation – choose whether the law of the place where the tortuous act took place or where the damage eventually occurred will be applicable (Heiss, 2012: Art. 10 Brussels I sec. 2).

In our examples, Art. 12 alternative 1 and Art. 13(2) lead to jurisdiction in France in Example 1 (traffic accident), in Sweden in Example 2 (dog bite) and in the Netherlands or, alternatively, Belgium in Example 3 (faulty legal advice).

4.2.3. Jurisdiction at the domicile of the injured party

As indicated, Art. 13(2) Brussels I-bis Regulation declares that "Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted". Without any doubt, the injured party may accordingly raise a direct action against the insurer at the courts of the state where the insurer is domiciled (Art. 11(1)(a)), where the policyholder, the insured or a beneficiary is domiciled (Art. 11(1)(b)) and eventually where the harmful event occurred (Art. 12 alternative 1).

4.2.3.1. Jurisdiction of the ECJ

When the Brussels I Regulation came into force in 2002 (recalling that the now applicable Brussels I-bis Regulation did not amend any provisions relevant to the present inquiry), it was unclear whether the reference in Art. 11(2) Brussels I Regulation (identical to Art. 13(2) Brussels I-bis Regulation) additionally led to jurisdiction at the courts of the domicile of the injured party in case of a direct claim (cf. Kropholler, von Hein, 2010: Art.11 EuGVO sec. 4).

In 2007, in its first key decision on this issue raised in case C-463/06 *FBTO Schadeverzekeringen NV v Jack Odenbreit*[22], the European Court of Justice (ECJ) held that "The reference in Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly

22 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321.

against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State". The ECJ reasoned that Art. 9(1)(b) Brussels I Regulation (identical with Art. 11(1)(b) Brussels I-bis Regulation) establishes the general rule that an injured party may bring a direct claim at the court where he or she is domiciled.[23] The wording of Art. 11(2) Brussels I Regulation (identical with Art. 13(2) Brussels Ibis Regulation) gives evidence of this rule.[24] Additionally, the ECJ relies upon the sense and function of the reference. In cases involving a direct claim it gives the injured party the same privileges as provided for policyholders, insured parties and beneficiaries in Art. 9(1)(b) Brussels I Regulation (identical with Art. 11(1)(b) Brussels I-bis Regulation).[25] These privileges result from the goal mentioned in recital 18, given that in insurance matters weaker parties should be protected by rules of jurisdiction more favourable to their interests than the generally applicable rules.[26]

In 2009, the ECJ affirmed the view expressed in *Jack Odenbreit* in its second key judgment on this issue, in case *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG*.[27] There, the ECJ made it clear that the statutory *assignee* of the rights of a directly injured party should generally also be able to benefit from the special rules on jurisdiction laid down in those provisions.[28]

4.2.3.2. Criterion of the "weaker party"

The ECJ stated in its *Jack Odenbreit* judgment that the injured party should obtain the more favourable protections intended for weaker parties.[29] It remains unclear whether the court meant that the special jurisdiction requires as an unwritten condition that the injured party in fact be the weaker party in each individual case, or whether it was just a means of construing Art. 11(2) Brussels I Regulation in that the injured party is always to be regarded as a "weaker", irrespective of the individual case. In the *Vorarlberger Gebietskasse* case, the court then ruled that a social security institution acting as statutory

23 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321 para. 25.

24 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321 para. 26.

25 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321 para. 26 et seq.

26 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321 para. 18.

27 Case C-347/08, Judgment of the Court of 17 September 2009, ECR2009 I-08661 para 30.

28 Case C-347/08, Judgment of the Court of 17 September 2009, ECR 2009 I-08661 para 44.

29 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321 para 28 with reference to recital 28 of the Brussels I Regulation.

assignee of the rights of the directly injured party in a motor accident *cannot* sue at the head of jurisdiction pursuant to the combined provisions of Arts. 11(2) and 9(1)(b) Brussels I Regulation.[30] The ECJ made it clear that both the injured party and any legal successor will only be a beneficiary of the special place of jurisdiction when they are the *weaker party*[31] (cf. Lüttringhaus, 2010: 185 et seqq.; Hartenstein, 2013: 22 et seq.). In order to determine the weaker party, the court asks whether the claimant in the direct action is "economically weaker and legally less experienced" than the civil liability insurer.[32] This is to be rejected in the case of a social security institution.[33]

However, it does not follow from *Vorarlberger Gebietskasse* that each case is to be considered individually in order to determine whether the special jurisdiction applies to the direct claim. Arts. 10 et seqq. Brussels I-bis Regulation operate with a generalised assumption of the need for protection. The special jurisdiction pursuant to Art. 11(1)(b) Brussels I-bis Regulation is based upon the assumption that policy holders, insured parties and beneficiaries are in general all worthy of protection against the insurer. These individuals receive protection even in cases where the insurance is, for example, taken out for a large risk or by a major company, i.e. instances where the insured might not actually be in need of protection. The reference provision in Art. 13(2) Brussels I-bis Regulation extends this protection to include the injured party when bringing a direct action. Therefore, even large corporations will be entitled to this special jurisdiction when injured – without the need for a special analysis of the individual case. Such an analysis is as inapt under Art. 13(2) Brussels I-bis Regulation as it is under Art. 11(1)(b) Brussels I-bis Regulation. This assessment can also be reconciled with the ruling of the ECJ in its *Vorarlberger Gebietskasse* judgment, as direct actions brought by other insurers by way of recourse do not as such fall under Arts. 13(2) and 11(1)(b) Brussels I-bis Regulation, for they are not "matters relating to insurance" in the meaning of Art. 10 Brussels Ibis Regulation (Mankowski, 2015: 119 et seq.; Lüttringhaus, 2010: 185 et seq.).

4.2.3.3. Type of liability insurance

It is doubtful whether the jurisdiction that the ECJ provides for the injured party at the court where he or she is domiciled is limited to *motor vehicle liability insurance,* which is mandatory under European law, namely pursuant to Art. 18 of the

30 Case C-347/08, Judgment of the Court of 17 September 2009, ECR 2009 I-08661 para 43.

31 Case C-347/08, Judgment of the Court of 17 September 2009, ECR 2009 I-08661 para 40 et seq.

32 Case C-347/08, Judgment of the Court of 17 September 2009, ECR 2009 I-08661 para 42.

33 Case C-347/08, Judgment of the Court of 17 September 2009, ECR 2009 I-08661 para 42.

6th Motor Insurance Directive.[34] Considering such a limitation as in the two leading cases stated above, one may think that the ECJ's discussion was undertaken with reference to the respective Motor Insurance Directives and the direct claim provided therein.[35] Indeed, both cases were based on the direct claims. Hence, some scholars argue that the ECJ's judgments were implicitly limited to direct claims arising from the Motor Insurance Directive (Micha, 2011: 123 et seq.). Nonetheless, in both decisions the ECJ speaks of the admissibility of a direct action against "the insurer" in general.[36] The provisions of the Motor Insurance Directive are at all times used solely for illustrative remarks.[37] Additionally, the wording of Art. 13(2) Brussels I-bis Regulations ("actions brought [...] against the insurer") fails to imply a distinction made on the type of liability insurance. Last but not least, the notion under Art. 13(2) Brussels I-bis Regulation whereby an injured party is, in principle, structurally inferior to the insurer and therefore more worthy of protection[38] is true for all kinds of insurance and not limited to compulsory motor vehicle insurance. Accordingly, it can be assumed that the special jurisdiction granted by the ECJ at the domicile of the claimant is not limited to compulsory motor vehicle insurance but applies to other liability insurance as well and, therefore, in particular to voluntary liability insurance (Fuchs, 2008: 107).

4.2.3.4. Interim conclusion

It can be concluded that a damaged party domiciled in one Member State and entitled to a statutory direct claim may, according to the ECJ jurisprudence, sue a civil liability insurer domiciled in another Member State at the place where *the claimant* is domiciled pursuant to Arts. 13(2) and 11(1)(b) Brussels I-bis Regulation. The jurisdiction of the court depends neither on the type of liability insurance nor on whether the injured party is insofar worthy of protection as

34 Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, Official Journal of the European Union L 263, 7 October 2009, p. 11-31.

35 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321 para 29; Case C-347/08, Judgment of the Court of 17 September 2009, ECR 2009 I-08661 para 31.

36 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321 para 26, 30; Case C-347/08, Judgment of the Court of 17 September 2009, ECR 2009 I-08661 para 30.

37 This becomes especially clear in the *Vorarlberger Gebietskasse* judgment (Case C-347/08, Judgment of the Court of 17 September 2009, ECR 2009 I-08661). In para. 31 thereof, the ECJ states: "With regard to the insurance of the civil liability arising from motor accidents (...)". Therefore, the previous notes in para. 30 had a general meaning for all types of liability insurance.

38 Case C-463/06, Judgment of the Court of 13 December 2007, ECR 2007 I-11321 para 26.

the "weaker party" in the particular case. However, recourse actions brought by another insurer are not subject to this special jurisdiction as these are not "matters relating insurance" pursuant to Art. 10 Brussels I-bis Regulation.

As for the three examples given above, the injured party in question may bring a direct action against the foreign insurer in Hamburg (Example 1), London (Example 2) and Brussels (Example 3).

5. Content of the direct claim and objections of the insurer

As argued above, it is undisputed that Art. 18 Rome II Regulation governs the question concerning the existence of a statutory direct claim, i.e. whether the injured party possesses an immediate claim against the civil liability insurer.

5.1. Content of the direct claim

5.1.1. Scope of Art. 18 Rome II Regulation

Furthermore, it is agreed that Art. 18 Rome II Regulation is also decisive in regards to the question of the modalities of the direct claim, i.e. the specific content and scope of the claim (Thorn, 2015: Art. 18 Rom II sec. 1; Junker, 2015: Art. 18 Rom II sec. 13; Gruber, 2011: Art. 18 Rome II sec. 26; Jakob, Picht, 2011: Art. 18 Rom II sec. 5). This is not to be confused with the separate question of whether the injured party is entitled to a claim for damages against the insured, and – if so – up to what amount (Micha, 2010: 166). The content also entails such questions as: what kind of claims can be raised in the form of a direct action (e.g. whether claims for pain and suffering are permissible), in what form compensation can be claimed (in kind or in damages), and what the limitation period is.

5.1.2. Determining the most favourable connection

When only one of two jurisdictions provides for a direct claim, determining the most favourable connection is easy: the law of the jurisdiction allowing the direct claim is applicable for all questions concerning the direct claim. However, when both jurisdictions provide a direct claim, determining the governing jurisdiction is not as straightforward.

The general rule is that the law of the jurisdiction providing the most favourable law for the injured party will be applicable. The situation is similarly straightforward where both jurisdictions provide a direct claim but one of them is *clearly* favourable for the claimant; for example, both Swedish and German law provide a direct claim covering the full damages but the limitation period in Sweden is 10

years[39] while in Germany it is but 3 years[40] – in this case, Swedish law will govern the direct claim. When, however, one jurisdiction is more favourable than the other on one point but less favourable on another point, then the court cannot simply apply the more favourable jurisdictions separately for each question. This approach would lead to an unjustified cherry picking. The damaged party should not be overcompensated just because the case has a cross-border dimension.

5.2. Objections arising under insurance law

5.2.1. Possible objections of the insurer

Likewise, it needs to be determined which law governs the problem as to which objections, and to what extent, the insurer is entitled to raise against the insured under the insurance relationship. These objections include the characteristic insurance law objections, e.g. the non-observance of an obligation, an aggravation of risk, an intentional causing of the insured event or a delayed payment of insurance premiums. The question whether and to what extent these objections arise has no relation to the question of the direct claim and is, therefore, *not* governed by Art. 18 Rome II Regulation. Due to the close connection of these objections with the insurance contract, they are subject to the law governing the contract (Micha, 2010: 188 relating to motor vehicle insurance; 194 relating to mandatory liability insurance in general; 196 relating to voluntary liability insurance; Thorn, 2015: Art. Rom II sec. 1; Gruber, 2011: Art. 18 Rome II sec. 27).

5.2.2. Third-party effect of the insurer's objections

Last but not least, it remains to be determined which law governs the question whether the insurer may also bring these objections in court against the injured party who is entitled to a direct claim, or whether these objections do not have a third-party effect to the detriment of this party. The extent to which the insurer's objections against the insured also have third-party effect against the damaged party varies greatly in the legal systems of the Member States of the EU and the EEA (for an overview cf. Micha, 2010: 13 et seqq.).

The question of a third-party effect of the insurer's objections is not a problem specific to a direct claim but becomes relevant also where the law of the applicable jurisdiction fails to provide a direct claim and the injured party tries to obtain compensation in a different way. Accordingly, the various jurisdictions do not tend to tie this question to the existence of a direct claim but to other

39 Kap. 7 § 4(1) *Försäkringsavtalslag*.

40 § 115(2)(1) *Versicherungsvertragsgesetz*, § 195 *Bürgerliches Gesetzbuch*.

criteria, such as whether the liability insurance is compulsory or voluntary. As a consequence, Art. 18 Rome II Regulation does not decide the law applicable to a defence; instead, it is decided by the law governing the insurance contract for which Art. 7 Rome I Regulation will in most cases be decisive (Thorn, 2015: Art. 18 Rom II sec. 1; Junker, 2015: Art. 18 Rom II sec. 14; offering a differing opinion: Gruber, 2011: Art. 18 Rome II sec. 28, who wishes to subject the question of defences to Art. 18 Rome II Regulation without limitation; slightly differing: Micha, 2010: 194, 196, who differentiates between compulsory and voluntary insurance and subjects defences relating to the former to the law of the direct claim and those relating to the latter to the law of the insurance contract).

6. Conclusion

The legal protection of injured parties is realised on several levels in European private international law. Particularly noteworthy are the alternative connecting factors beneficial to the injured party in Article 18 Rome II Regulation and the jurisdiction at the domicile of the injured party according to the ECJ judgements.

Detailed examination shows that Art. 18 Rome II Regulation governs the question whether an injured party is entitled to a direct claim against a mandatory liability insurer domiciled in the EU in a cross-border case. The same goes for damage claims arising under a contract. In such cases, it is sufficient when a direct claim is provided by the law of one of the several jurisdictions applicable according to Art. 18 Rome II Regulation.

An injured party domiciled in the EU or in a state party to the Lugano Convention may bring a direct claim against a foreign liability insurer at the courts of his/her place of residence. This jurisdiction exists regardless of whether the injured party is the "weaker party" relative to the insurer in the given case. The right to bring a direct claim is not limited to compulsory motor vehicle insurance but is applicable to all kinds of liability insurance.

Art. 18 Rome II Regulation is also decisive to the question of the law governing the modalities of a direct claim. Where the applicable laws are inconsistent, the law more favourable to the injured party is applicable.

By contrast, Art. 18 Rome II Regulation is not relevant in determining the law applicable to the question whether an insurer is entitled to raise objections against his insured. This issue is regulated by the law governing the insurance contract. The same holds true for the law applicable to the question whether the insurer's objections have a third-party effect.

References

Altenkirch, M. (2011). In: Huber, P. (ed.), Rome II Regulation. Munich: Sellier

Armbrüster, C. (2013). Privatversicherungsrecht. Tübingen: Mohr Siebeck

Bach, I. (2011). In: Huber, P. (ed.), Rome II Regulation. Munich: Sellier

Basedow, J. (2012). The Law of Open Societies: Private Ordering and Public Regulation of International Relations: General Course on Private International Law. Leiden/Boston: Martinus Nijhoff Publishers

Basedow, J., Fock, T. (2002). Europäisches Versicherungsvertragsrecht. Vol. 1. Tübingen: Mohr Siebeck

Beckmann, R. M. (2013). In: Bruck, E./Möller, H. (founder), VVG-Kommentar, Vol. 4. 9th edition. Berlin/Boston: Walter de Gruyter

Birds, J. (2010). Birds' modern insurance law. 8th edition. London: Sweet & Maxwell

Franck, G. (2014).Der Direktanspruch gegen den Haftpflichtversicherer. Tübingen: Mohr Siebeck

Fuchs, A. (2008).Internationale Zuständigkeit für Direktklagen, in: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2008, pp. 104-107. Bielefeld: Gieseking

Gruber, U. (2011). In: Callies, G.-P. (ed.), Rome Regulations: Commentary on the European Rules of the Conflict of Laws. Alphen aan den Rijn: Wolters Kluwer

Hartenstein, O. (2013). Gerichtsstand und anwendbares Recht bei Direktansprüchen gegen den Versicherer, in: Transportrecht 2013, pp. 20-27, Köln: Wolters Kluwer

Heiss, H. (2012). In: Magnus, U./Mankowski P. (ed.), Brussels I Regulation. 2nd edition. Munich: Sellier

Jakob, D., Picht, P., (2011). In: Rauscher (ed.), Europäisches Zivilprozess- und Kollisionsrecht, Vol. Rom I-VO, Rom II-VO. München: Sellier

Junker, A. (2015). In: Münchener Kommentar zum BGB, 6th edition, Vol. 10. Munich: C.H. Beck

Kötz, H. Wagner, G. (2013).Deliktsrecht. 12th edition. München: Vahlen

Kropholler J., von Hein, J. (2011). Europäisches Zivilprozessrecht, 9th edition, Frankfurt am Main: Verlag Recht und Wirtschaft

Lüttringhaus, J. (2010). Der Direktanspruch im vergemeinschafteten IZVR und IPR nach der Entscheidung EuGH VersR 2009, 1512 (Vorarlberger Gebietskrankenkasse), in: Zeitschrift für Versicherungsrecht 2010, pp. 183-190. Karlsruhe: Verlag Versicherungswirtschaft

Mankowski, P. Internationales Versicherungsprozessrecht: Professioneller Leasinggeber als Geschädigter und Typisierung statt konkreter Prüfung der Schutzbedürftigkeit, in: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2015, pp. 115-119. Bielefeld: Gieseking

Merkin, R. (2010).Colinvaux's Law of Insurance. 9th edition. London: Thomson Reuters

Micha, M. (2010). Der Direktanspruch im europäischen Internationalen Privatrecht. Tübingen: Mohr Siebeck

Plender, R., Wilderspin, M. (2009). The European Private Law of Obligations. 3rd edition, London: Thomson Reuters

Staudinger, A. (2011). In: Rauscher, T. (ed.), Europäisches Zivilprozess- und Kollisionsrecht. Munich: Sellier

Staudinger, A. (2014). In: Ferrari (ed.), Rome I Regulation. Munich: Sellier

Thorn, C. (2015). In: Palandt, O. (founder), Bürgerliches Gesetzbuch, 74th edition. München: C.H. Beck

Vlas, P. (2012). In: Magnus, U./Mankowski P. (ed.), Brussels I Regulation. 2nd edition. Munich: Sellier

Wandt, M. (2010). Versicherungsrecht, 5th edition. Köln: Carl Heymanns

Dr. Gunnar Franck,
Научно-истраживачки сарадник,
Max Planck Институт за упоредно и међународно приватно право,
Хамбург, Немачка

ОШТЕЋЕНЕ СТРАНЕ И ОСИГУРАЊЕ ОД ЛИЧНЕ ОДГОВОРНОСТИ: ПРАВНА ЗАШТИТА У ЕВРОПСКОМ МЕЂУНАРОДНОМ ПРИВАТНОМ ПРАВУ

Резиме

Општа мобилност људи, роба, услуга и капитала у оквиру Европске уније (ЕУ) подразумева да разне приватне и професионалне активности имају за последицу бројне догађаје који узрокују прекограничну штету и утичу на прекограничне односе. Правна ситуација се додатно компликује у случајевима када је начињена штета покривена осигурањем од одговорности, које подразумева учешће треће стране у спору. Упркос овој прилично сложеној ситуацији, оштећена страна мора имати гаранције да ће добити ефикасну и правичну накнаду штете. Што се тиче земаља чланица ЕУ, Унија је надлежна за уређење материје сукоба закона и сукоба јурисдикција.

У чланку се разматрају механизми Европског међународног приватног права за заштиту оштећених страна у случају штете покривене осигурањем од личне одговорности. У том погледу, заштита оштећеног остварује се на више нивоа, низом колизионих мера које уређују материју сукоба закона. Аутор најпре указује на правни status quo у случајевима осигурања од одговорности, затим разматра различито уређење питања директних тужби у међународном приватном праву, након чега анализира питање надлежности и меродавног права у случајевима прекограничних спорова за накнаду штете и, на крају, разматра специфичне карактеристике директне тужбе.

Детаљна анализа показује да члан 18. Регулативе Рим II уређује права оштећеног на подношење директне тужбе против обавезног осигуравача са пребивалиштем у Европској унији. Исти закључак важи и за накнаду штете која поистиче из уговора. У таквим случајевима, довољно је да је директна тужба дозвољена бар једним од неколико меродавних права која се могу применити на основу члана 18. Регулативе Рим II.

Оштећени који има пребивалиште у ЕУ или у некој од држава чланица Луганске конвенције може поднети директну тужбу против страног обавезног осигуравача пред судовима државе свог пребивалишта. Надлежност постоји без обзира на то да ли је у кокретном случају оштећени "слабија стана" у односу на осигуравача. Право на подношење директне тужбе није ограничено на обавезно осигурање моторних возила већ се може применити на све врсте осигурања од одговорности.

Члан 18. Регулативе Рим II уједно одређује и меродавно право за различите модалитете директне тужбе. У случајевима када је меродавно право неконсистентно, примењује се право које је повољније за оштећеног. Насупрот томе, члан 18. Регулативе Рим II није релевантан за одређивање меродавног права по питању да ли осигуравач има право да уложи приговор против свог осигураника. Ово питање је регулисано меродавним правом за уговор о осигурању. Исто важи и у погледу меродавног права за дејства приговора осигуравача према трећим лицима.

***Кључне речи**: остећена страна, штета, директна тужба, осигурање од одговорности, сукоб закона, Регулатива Рим II, право осигурања, надлежност, одговорност.*