

Case C-427/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

4 June 2019

Referring court:

Sofiyski rayonen sad (Bulgaria)

Date of the decision to refer:

27 May 2019

Applicant:Joint-stock insurance company ‘Bulstrad Vienna Insurance Group’
AD**Defendant:**

Insurance company ‘Olympic’

Subject matter of the main proceedings

The proceedings pending before the referring court — Sofiyski rayonen sad (District Court of Sofia) — were initiated by the action for damages brought by a Bulgarian insurance undertaking against a Cypriot insurance undertaking with a branch in Bulgaria in connection with the payment of an insurance benefit from a compulsory civil-liability motor vehicle insurance policy. The referring court stayed the proceedings, as it established that the Cypriot insurance supervisory authority had withdrawn authorisation from the defendant and appointed a provisional liquidator for it. The court now has to decide on the applicant’s application that the proceedings be reopened and, to that end, it must assess how the decision of the Cypriot authority is to be classified with regard to Directive 2009/138 and whether the directive requires the application of the relevant Cypriot legislation.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of EU law; Article 267 TFEU

Questions referred

1. When interpreting Article 630 of the Kodeks za zastrahovaneto (Insurance Code) in the light of Article 274 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), is it to be assumed that the decision of an authority of a Member State to withdraw authorisation from an insurer and appoint a provisional liquidator for it without court-ordered winding-up proceedings having been opened constitutes a ‘decision to open winding-up proceedings’?
2. If the law of the Member State in which an insurer from which the licence has been withdrawn has its head office, and in respect of which a provisional liquidator has been appointed, provides that, in the event that a provisional liquidator has been appointed, all court proceedings against that company must be stayed, must that legislation be applied by the courts of the other Member States, even if this is not expressly provided for in their national law, pursuant to Article 274 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)?

Legislation and case-law of the European Union

Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), recitals 117 to 121 and 125 as well as Article 268 and 274

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings: Article 1(1) and (2)(a)

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: Articles 11 and 13

Provisions of Bulgarian law

Kodeks za zastrahovaneto (Insurance Code):

‘Article 624(1) A decision to open winding-up or insolvency proceedings with regard to an insurer authorised in another Member State shall take effect in the

Republic of Bulgaria as from the date on which the decision becomes effective in the Member State concerned.

(2) If the [Komisia za finansov nadzor (Financial Supervision Commission)] is informed by the competent authority of another Member State of the opening of winding-up or insolvency proceedings, it shall take measures to inform the public.

(3) The notification pursuant to paragraph 2 shall contain information regarding the administrative or judicial authority that is competent for the winding-up or insolvency in the Member State concerned, regarding the applicable legislation and regarding the liquidator or insolvency administrator that has been appointed.

...

Article 630(1) Bulgarian law shall apply to winding-up or insolvency proceedings with regard to an insurer, unless otherwise provided for in this section.’

Kodeks na mezhdunarodnoto chastno pravo (Code on private international law, ‘the KMChP’):

‘Article 43(1) The court or other judicial body shall establish the content of the foreign law of its own motion. ...

...

Article 44(1) The foreign law shall be interpreted and applied in accordance with its interpretation and application in the State in which it was enacted.

(2) Non-application of foreign law and incorrect interpretation and application thereof shall constitute grounds for an appeal.’

Provisions of Cypriot law cited by the referring court

Ο περί Εταιρίων Νόμος (Zakon za druzhestvata, Law on companies), Article 220: If a decision to open insolvency proceedings is taken or if a provisional liquidator is appointed, an action may be brought or proceedings initiated or continued only with the approval of the insolvency court and under the conditions stipulated by it.

Ο περί Ασφαλιστικών και Αντασφαλιστικών Εργασιών και Άλλων Συναφών Θεμάτων Νόμος του 2016 (No 38(I)/2016) (Zakon za zastrahovatelnite i prezastrahovatelnite druzhestva i drugi svarzani vaprosi, Law on insurance and reinsurance undertakings and related matters of 2016): Pursuant to Article 315(4) of that law, Articles 215, 220, 305 and 306 of the Law on companies shall apply *mutatis mutandis* in relation to the effects of the insolvency within the framework of the procedure for settling the claims of individual creditors.

Brief summary of the facts and procedure

- 1 The joint-stock insurance company ‘Bulstrad Vienna Insurance Group’ brought an action against the insurance undertaking ‘Olympic’, a company registered under the law of the Republic of Cyprus, represented by the insurance undertaking ‘Olympic Insurance Company’ - Bulgaria Branch Office as the Bulgarian branch of a foreign commercial undertaking.
- 2 It is asserted in the action that, on 5 January 2018 in Bansko, the driver of a motor vehicle culpably caused a road accident with another motor vehicle and damaged it. The driver of the latter motor vehicle held a comprehensive insurance policy with the applicant, which subsequently paid out an insurance benefit of 7603.63 Leva (BGN) to him.
- 3 At the time of the materialisation of the risk, the driver who caused the road accident held a compulsory civil liability insurance policy with the defendant.
- 4 The applicant asserts that, in paying the insurance benefit, it was subrogated to the rights of the person who sustained the damage against the person who caused the damage and his insurance company. The applicant sent the defendant a request asking it to fulfil its right of redress, which the latter received on 6 July 2018. An insurance benefit has not yet been paid, however. The applicant therefore requests that the defendant be ordered to pay the sums claimed and that the defendant bear the court fees.
- 5 In its statement of defence, the defendant asserts that the action is unfounded.
- 6 By order of 26 September 2018, the District Court of Sofia stayed the proceedings for the following reasons. Pursuant to the Kodeks za zastrahovaneto (Insurance Code), the branch has a legal status under which an insurance or reinsurance undertaking operates in the territory of a Member State on a permanent basis by establishing a place of business that is managed by its employees or other persons who have been expressly and permanently authorised by the insurer to act in its name. In addition, it follows from Article 13(2) of Regulation No 1215/2012 in conjunction with Article 11 thereof that an action can be brought directly against the insurer at the domicile of its branch. If, therefore, the Bulgarian branch of an insurer registered in another Member State is specified as the defendant in the action, it can be assumed that the insurer itself is also named. The translation of the decision of the head of insurance supervision in the Republic of Cyprus of 10 August 2018, by which GH was appointed as the provisional liquidator for the insurance undertaking ‘Olympic’, was simultaneously submitted in the present proceedings. The District Court of Sofia asked the Komisia za finansov nadzor (Financial Supervision Commission, ‘the KFN’) of its own motion for information as to whether it had been informed of the opening of winding-up or insolvency proceedings in relation to the defendant before the competent court in the Republic of Cyprus. According to the letter from the KFN of 19 March 2019, at that time there was not yet any information regarding the opening of winding-up

proceedings in relation to the insurance undertaking ‘Olympic’. It is pointed out that GH was entered as the authorised representative of that company in the Bulgarian commercial register on 21 September 2018.

Principal arguments of the parties in the main proceedings

- 7 The applicant requests that the proceedings be reopened. It asserts that, taking account of the relevant case-law in cassation, there was no reason to stay the proceedings.
- 8 This relates to the order of the Varhoven kasatsionen sad (Supreme Court of Cassation, ‘the VKS’) of 7 February 2019, in which the following is stated: ‘the court’s finding that winding-up proceedings (insolvency) were opened in relation to the insurance undertaking ‘Olympic’ ... is incorrect. Such information cannot be gathered from either the website of the KFN or the entry in the commercial register regarding the branch of the insurance undertaking ‘Olympic’ ..., or from the evidence produced in the proceedings. It can be seen from the entries and announcements in the commercial register regarding the branch — of which the court takes judicial notice — ... and the evidence produced in the proceedings that authorisation was permanently withdrawn from the Cypriot insurance undertaking ... A provisional liquidator for the undertaking was appointed on 10 August 2018 ... The appointment... of the provisional liquidator ... was carried out on the basis of the application filed for dissolution and winding-up owing to the insolvency of the insurance undertaking, as the percentage of outstanding commitments from compulsory civil-liability motor vehicle insurance policies was 90% of the total outstanding commitments of the undertaking. Proceeding on the basis of the facts thus established, the court assumes that authorisation was withdrawn from the Cypriot insurance undertaking and it was appointed a provisional liquidator, and an application to open winding-up proceedings (insolvency without the right to restructuring) in relation to the undertaking was filed, but the competent court in Cyprus has not yet taken a decision on that application. It can be assumed that, by its very nature, the finalised procedure for withdrawing authorisation, which precedes the winding-up proceedings, cannot be equated with the opening of winding-up proceedings in relation to the insurance undertaking. The appointment of a provisional liquidator is significant with regard to the power of representation in relation to the undertaking from which authorisation has been withdrawn. However, the appointment cannot be equated with a decision to open winding-up proceedings either. The application of Article 624(1) of the Insurance Code and of Article 274 of Directive 2009/138/EC ... requires that a decision to open winding-up proceedings (owing to insolvency) has been issued in relation to the Cypriot insurance undertaking. As no such decision has been issued, however, the conclusion of the appellate court that, pursuant to the aforementioned provisions, Article 220 of the Cypriot Law on companies is applicable with regard to the claims against the Cypriot insurer pending in Bulgaria is incorrect.’

Brief summary of the basis for the reference

- 9 The defendant in the present case is a joint-stock company registered under the legislation of the Republic of Cyprus. Pursuant to Article 624(1) of the Insurance Code, a decision to open winding-up or insolvency proceedings with regard to an insurer authorised in another Member State takes effect in the Republic of Bulgaria as from the date on which the decision becomes effective in the Member State concerned. If the KFN is informed by the competent authority of another Member State of the opening of winding-up or insolvency proceedings, it must take measures to inform the public. The notification pursuant to paragraph 2 must contain information regarding the administrative or judicial authority that is competent for winding-up or insolvency in the Member State concerned, regarding the applicable legislation and regarding the liquidator or insolvency administrator that has been appointed. In the exercise of its powers, the KFN provided the public with information via its official internet portal, meaning that it was evident to the court that insolvency proceedings were opened in relation to the insurance undertaking ‘Olympic’ and it was appointed a provisional insolvency administrator pursuant to the legislation of the Republic of Cyprus.
- 10 Taking the above statements into account, the Chamber finds that it must determine the applicable law, as the insolvency proceedings with an international dimension are of significance for the outcome of the present court proceedings.
- 11 In the present case, the only rule for determining the applicable law can be found in Article 630 of the Insurance Code, which must be interpreted grammatically, systematically, teleologically and in line with EU law (so-called harmonious interpretation, which results in EU law having indirect effect). The national court is therefore obliged to interpret and apply national provisions in the light of the spirit and purpose of the relevant EU law (see judgment of the Court of Justice of 10 April 1984, *Von Colson [and Kamann]*, C-14/83, [EU:C:1984:153]). According to settled case-law of the Court of Justice of the European Union (see paragraph 20 of the judgment of 12 July 1990, *Foster and Others*, C-188/89, EU:C:1990:313; paragraph 23 of the judgment of 14 September 2000, *Collino and Chiappero*, C-343/98, EU:C:2000:441; paragraph 40 of the judgment of 19 April 2007, *Farell*, C-356/05, EU:C:2007:229; paragraph 39 of the judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33), the national court is obliged to interpret national law in the light of the relevant EU law, irrespective of whether or not the directive has been implemented or the conditions necessary for it to produce direct effect have been satisfied (see judgment of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395). In order to discharge this obligation, the national court must do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by the legal doctrine and case-law, with a view to achieving an outcome consistent with the spirit and purpose of the provisions of EU law (see paragraph 111 of the judgment of 4 July 2006, *Adeneler*, C-212/04, EU:C:2006:443; paragraph 200 of the judgment of 23 April 1999, *Angelidaki and*

Others, C-378/07, C-379/07 and C-380/07, EU:C:2009:250; paragraph 27 of the judgment of 24 January 2012, *Dominguez*, C-282/10, EU:C:2012:33).

- 12 The referring court finds that Article 630 of the Insurance Code must be interpreted in the light of Article 274 of Directive 2009/138.
- 13 Recitals 117 to 121 and 125 to that directive provide that, since national legislation concerning reorganisation measures and winding-up proceedings is not harmonised, it is appropriate, in the framework of the internal market, to ensure the mutual recognition of reorganisation measures and winding-up legislation of the Member States concerning insurance undertakings, as well as the necessary cooperation, taking into account the need for unity, universality, coordination and publicity for such measures and the equivalent treatment and protection of insurance creditors. It should be ensured that reorganisation measures which were adopted by the competent authority of a Member State in order to preserve or restore the financial soundness of an insurance undertaking and to prevent as far as possible a winding-up situation, produce full effects throughout the Community. However, the effects of any such reorganisation measures as well as winding-up proceedings vis-à-vis third countries should not be affected. A distinction should be made between the competent authorities for the purposes of reorganisation measures and winding-up proceedings and the supervisory authorities of the insurance undertakings. The definition of a branch for insolvency purposes, should, in accordance with existing insolvency principles, take account of the single legal personality of the insurance undertaking. However, the legislation of the home Member State should determine the manner in which the assets and liabilities held by independent persons who have a permanent authority to act as agent for an insurance undertaking are to be treated in the winding-up of that insurance undertaking. Conditions should be laid down under which winding-up proceedings which, without being founded on insolvency, involve a priority order for the payment of insurance claims, fall within the scope of this Directive. Claims by the employees of an insurance undertaking arising from employment contracts and employment relationships should be capable of being subrogated to a national wage guarantee scheme. Such subrogated claims should benefit from the treatment determined by the law of the home Member State (*lex concursus*). All the conditions for the opening, conduct and closure of winding-up proceedings should be governed by the law of the home Member State.
- 14 Article 268 of the directive, which contains definitions, defines ‘winding-up proceedings’ as collective proceedings involving the realisation of the assets of an insurance undertaking and the distribution of the proceeds among the creditors, shareholders or members as appropriate, which necessarily involve any intervention by the competent authorities, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory. Interpreting the terms of the directive autonomously, the court therefore concludes that so-called ‘winding-up proceedings’ also encompass insolvency proceedings.

- 15 Pursuant to Article 274[(1)](e) of the directive, the decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects, as well as the effects of the winding-up proceedings on proceedings brought by individual creditors are governed by the law of the home Member State.
- 16 Accordingly, in interpreting Article 630 of the Insurance Code in the light of Article 274 and the aforementioned recitals 117 to 121 and 125 of the directive, the court comes to the conclusion that the law of the Republic of Cyprus governs the consequences of the insolvency proceedings. The effects of the insolvency proceedings that have been opened should therefore be considered in the light of the positive law of the Republic of Cyprus.
- 17 Article 43(1) of the KMChP provides that the court or other judicial body is to establish the content of the foreign law of its own motion. It may use the methods provided for in international treaties, ask the Ministerstvo na pravosadieto (Ministry of Justice) or other authorities for information and also request opinions from experts and specialist institutes. In this respect, the court is empowered to determine and apply relevant foreign law, which is to be interpreted and applied in accordance with its application in the State in which it was enacted.
- 18 In the exercise of its powers, the Chamber determined the applicable law of the Republic of Cyprus of its own motion.
- 19 In the present case, the court takes the view that the effects of the insolvency proceedings arise from the provisions of Article 220 of the Law on companies of the Republic of Cyprus. In interpreting that provision, the court comes to the conclusion that the approval of the insolvency court is a prerequisite for conducting other proceedings. That being the case, the present proceedings must be stayed, and the applicant must lodge its claims in accordance with the procedures provided for in the Republic of Cyprus, whereby, in the event that those claims are established, the present proceedings would have to be closed. They could then only be continued if the insolvency court gives its approval or if it is proven that the claims have not been established in the procedures provided for in the Republic of Cyprus.
- 20 For the sake of completeness, it should be made clear that the provisions of Regulation 2015/848 on insolvency proceedings are not applicable in the present case, since, pursuant to Article 1(2)(a) thereof, the regulation does not apply to proceedings referred to in paragraph 1 that concern insurance undertakings.
- 21 For the reasons given, the Chamber comes to the conclusion that the interpretation of Article 630 of the Insurance Code in the light of Article 274 of Directive 2009/138 is of importance for a correct resolution of the dispute, so that it can be assessed whether the proceedings should be stayed or closed with a view to enforcing the rights of the persons concerned before the competent court in the Republic of Cyprus.