Anonymised version

Case C-685/21

Request for a preliminary ruling

Date lodged:

15 November 2021

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

21 October 2021

Applicant:

YV

Defendant:

Stadtverkehr Lindau (B) GmbH

In the case between the applicant YV […] and the defendant Stadtverkehr Lindau (B) GmbH, Lindau, […] Germany, […] in which the applicant seeks EUR 58 710 […] and declaratory judgment (value of the dispute EUR 10 000) in respect of the extraordinary appeal on a point of law lodged by the applicant against the order of 18 March 2021 of the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck, Austria), sitting as appeal court, in Case 1 R 5/21a-12, by which that court upheld the order of 28 December 2020 of the Landesgericht Feldkirch (Regional Court, Feldkirch, Austria) in Case 45 Cg 72/20t-5, […] the Oberster Gerichtshof (Supreme Court) […] made the following

O r d e r:

1. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

> Does ‘insurer’ within the meaning of Article 11(1) and Article 13(2) of 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 (recast) include an undertaking which, although not an insurance undertaking, is liable under the applicable law as 'quasi insurer' for the motor vehicles kept by it, as if it were an insurer under the provisions of insurance law, due to a derogation from the obligation in respect of compulsory insurance within the meaning of Article 5(1) of 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 (codified version)?

2. […] [stay of proceedings]

G r o u n d s:

1. Succinct presentation of the facts

1 On 30 July 2019, the applicant, who is domiciled within the district of the court of first instance, was seriously injured in Lindau (Germany) in an accident with a bus kept by the defendant. The defendant is an urban local transport company which is exempt under Paragraph 2(5) of the German Pflichtversicherungsgesetz (Law on Compulsory Insurance) from the obligation to take out a contract for compulsory civil liability insurance.

2. Arguments of the parties

2 The applicant is seeking compensation from the defendant. The international jurisdiction of the Austrian courts is in dispute.

3 The applicant, relying on Article 13(2) of Regulation (EU) No 1215/2012 (Brussels Ia Regulation), read in combination with Article 11(1)(b) thereof, argues that, although the defendant is not an insurance undertaking, as a provider of public transport services exempt from the obligation in respect of compulsory insurance under German law, it is liable under German law for losses or injuries covered by the obligation in respect of compulsory insurance in the same way as it would be under a compulsory civil liability insurance policy and, for that reason, she should also be able to initiate a direct action in the court with jurisdiction for matters relating to insurance.

4 The defendant contends that the action should be dismissed. It argues that, as it is not an insurance company, the provisions on insurance in the Brussels Ia Regulation do not apply, and that the derogation from the obligation in respect of compulsory insurance does not change that.

3. Succinct presentation of the procedure in the main proceedings

5 The court of first instance dismissed the action due to lack of international jurisdiction. It found that jurisdiction under Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof, only applies to actions against an insurance undertaking and not, as in the present case, against the keeper.

6 The court of appeal upheld that decision. It agreed with the court of first instance that an action brought against the keeper of a motor vehicle involved in an accident is not a matter relating to insurance within the meaning of the Brussels Ia Regulation, and that the fact that the defendant is not subject to the obligation in respect of compulsory insurance does not change that finding.

7 The Supreme Court has to rule on the applicant's appeal on a point of law seeking a judgment recognising the jurisdiction of the Austrian courts. The applicant further argues that she is entitled to bring an action in the courts for the place where she is domiciled in accordance with Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof; that under German law, the defendant itself is liable as if it were an insurer, due to the derogation from the obligation in respect of compulsory insurance; that the applicant is the 'weaker' of the two parties within the meaning of the case-law of the Court of Justice of the European Union; and that, given the risk of inconsistency, that factor must also be taken into account for the purposes of the law on jurisdiction.

4. Legal basis of the request

8 4.1. Article 11(1)(b) and Article 13(2) of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) read as follows:

> 'Article 11
>
> 1. An insurer domiciled in a Member State may be sued:
>
> (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.
>
> …
>
> Article 13
>
> 2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer.'

9 The Court has consistently found in its settled case-law that it follows from those provisions, which were previously included in Regulation (EC) No 44/2001

(Brussels I Regulation), that the injured party may bring an action directly against the civil liability insurer of the other party to the accident in the courts for the place where he or she is domiciled, provided that such a direct action is permitted under the applicable law (judgments in *Odenbreit*, C-463/06, and *KABEG*, C-340/16).

10 4.2. The defendant is exempt from the obligation in respect of compulsory insurance under point 5 of Paragraph 2(1) of the German Pflichtversicherungsgesetz (Law on Compulsory Insurance, 'the dPflVG'). According to that provision, Paragraph 1 of the dPflVG (ordering compulsory insurance) does not apply to:

> '5. legal persons covered by a civil liability indemnification scheme exempt from insurance supervision under point 4 of Paragraph 3(1) of the Law on insurance supervision.'

11 That provision refers to point 4 of Paragraph 3(1) of the German Versicherungsaufsichtsgesetz (Law on Insurance Supervision), which states that the following are not subject to supervision:

> '4. groupings of municipalities and associations of municipalities without legal capacity, inasmuch as they aim to apportion and indemnify the following losses or injuries from risks to their members and to undertakings operated as part of a public service mission in which one member or several municipal members or, in the cases referred to in point (b), other local authorities have a stake of at least 50%: …
>
> b) loss or injury resulting from the keeping of motor vehicles;
>
> …'

12 This derogation typically applies to municipal transport operators which, instead of taking out a contract for civil liability insurance in respect of their vehicles, indemnify losses and injuries via groupings with other municipalities under an apportionment procedure and thus spread the risk between them […]. The 'civil liability indemnification scheme' gives rise to members' claims against each other; the injured party has no claim against the grouping (which has no legal capacity).

13 4.3. Where a derogation from the obligation in respect of compulsory insurance applies, Paragraph 2(2) of the dPflVG provides as follows (emphasis added by the Chamber):

> '(2) Vehicle keepers exempt from the obligation in respect of compulsory insurance under points 1 to 5 of subparagraph 1 shall bear liability in the same way and to the same extent as an insurer under a civil liability insurance policy, unless civil liability cover is provided under insurance contracted by them in compliance with the provisions of this law, for the

losses and injuries referred to in Paragraph 1 of the driver and the other persons which would have been covered by civil liability insurance contracted on the basis of this law. That obligation is limited to the minimum insured sums specified. Where injury or damage is caused, the keeper of the vehicle shall bear liability towards a third party even where the driver intentionally and unlawfully caused the event for which it bears liability towards the third party. Paragraph 12(1), second to fifth sentences, shall apply mutatis mutandis. The provisions of Paragraphs 100 to 124 of the Versicherungsvertragsgesetz (Law on insurance contracts) and of Paragraphs 3 and 3b and of the Kraftfahrzeug-Pflichtversicherungsverordnung (Regulation on the compulsory insurance of motor vehicles) shall apply mutatis mutandis. If the keeper of the vehicle fulfils the requirements of the first sentence, it can claim compensation for the expenditure incurred in application, mutatis mutandis, of Paragraphs 116 and 124 of the Law on insurance contracts, provided the insurer would have no obligation to indemnify the driver or the other co-insured person under an insurance policy; otherwise, the keeper shall have no recourse against those persons.'

14 The derogation from the obligation in respect of compulsory insurance therefore establishes the liability of the keeper towards the injured party as if it were a civil liability insurer, and it is therefore referred to in Germany as a 'quasi-insurer' or 'self-insurer'. That liability applies in addition to the liability of the keeper and applies in lieu of the liability that the civil liability insurer would otherwise bear […].

15 4.4. The rule on derogations from the obligation in respect of compulsory insurance in Paragraph 2 of the dPflVG is based on Article 5(1) of Directive 2009/103/EC 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 ('the Motor Insurance Directive'). That provision reads as follows (emphasis added by the Chamber):

'1. A Member State may derogate from Article 3 in respect of certain natural or legal persons, public or private; a list of such persons shall be drawn up by the State concerned and communicated to the other Member States and to the Commission.

A Member State so derogating shall take the appropriate measures to ensure that compensation is paid in respect of any loss or injury caused in its territory and in the territory of other Member States by vehicles belonging to such persons.

It shall in particular designate an authority or body in the country where the loss or injury occurs responsible for compensating injured parties in accordance with the laws of that State in cases where Article 2(a) is not applicable.

It shall communicate to the Commission the list of persons exempt from compulsory insurance and the authorities or bodies responsible for compensation.

The Commission shall publish that list.'

5. The question referred for a preliminary ruling

16 5.1. It is clear from their unequivocal wording that Article 10 et seq. of the Brussels Ia Regulation refer solely to 'matters relating to insurance'. The same applies to direct action against the civil liability insurer in accordance with Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof. That provision does not therefore apply to actions against the keeper (judgment of the Supreme Court, 2 Ob 189/18k, SZ 2018/89, and, to the same effect, judgment of the Bundesgerichtshof (Federal Court of Justice, Germany), VI ZR 279/14). That is also consistent with the purpose of the special rules in matters relating to insurance highlighted by the Court, which is to grant more favourable protection, that is a wider range of jurisdiction, to the (respective) insured, who is typically the weaker party (judgments in *Group Josi*, C-412/98, paragraph 64; *Odenbreit*, C-463/06, paragraph 28; *KABEG*, C-340/16, paragraph 28; and *Hofsoe*, C-106/17, paragraph 40).

17 5.2. In the present case, however, the applicant is not suing the defendant as the keeper of the motor vehicle. On the contrary, she is relying on the fact that, under German law, the defendant is liable as if it were a civil liability insurer, due to the derogation from the obligation in respect of compulsory insurance, and in particular, on the fact that, according to Paragraph 2(2) of the dPflVG, the rules enacted in the German Law on Insurance Contracts ('the VVG') on civil liability insurance (Paragraphs 100 to 112 of the VVG) and on compulsory insurance (Paragraphs 113 to 124 of the VVG) apply *mutatis mutandis*.

18 5.3. That raises the question of whether the rule on jurisdiction in Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof, also applies in this case.

19 (a) A literal interpretation of those provisions might suggest that only persons who actually operate an insurance undertaking should be classed as 'insurers'. That does not apply here, as the defendant is liable simply as a self-insurer; it does not offer insurance services to other persons. One might therefore also hold that a person injured in an accident is not the 'typically' weaker party compared to the defendant (a limited liability company providing local transport services).

20 (b) However, the wording of Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof, does not prevent anyone liable under the applicable law (in this case, German law) from being classed as an 'insurer' in accordance with the rules of insurance law.

21 That is supported by [the] systematic interpretation: both the obligation in respect of compulsory insurance under Directive 2009/103/EC and the courts for the place where the claimant is domiciled in accordance with Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof, serve equally to protect the injured party. The obligation in respect of compulsory insurance is intended to ensure that the injured party obtains compensation regardless of the injuring party's financial situation. The jurisdiction of the courts for the place where the claimant is domiciled is intended to facilitate the enforcement of that claim in cases with a cross-border element. There is therefore a substantive link between these rules of EU law and they are consistent in that regard.

22 Article 5(1) of Directive 2009/103/EC now allows Member States to provide for derogations from the obligation in respect of compulsory insurance, provided they ensure that injured parties receive compensation nonetheless. This is obviously based on the European legislature's assessment that a derogation from the obligation in respect of compulsory insurance must not put accident victims in a less favourable position. This is put into practice under German law (as regards this particular case) in that (a) the derogation from the obligation in respect of compulsory insurance depends upon the risk being covered through a 'civil liability indemnification scheme' governed by the law of contract, so that, just as with insurance cover, there is no risk to the injured party from insolvency of the injuring party and (b) the injured party can sue the keeper exempted from the obligation in respect of compulsory insurance as if it were an insurer. The injured party is therefore protected under substantive law even where a derogation from the obligation in respect of compulsory insurance applies, regardless of whether the injured party is domiciled in Germany or in another state.

23 If, on the other hand, Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof, is interpreted to mean that it only covers actions against insurance undertakings, the protection of injured parties in the form of a wider range of jurisdiction would be frustrated in cases with a cross-border element where a derogation from the obligation in respect of compulsory insurance applies. In the present case, the possibility of enforcing a claim in the courts for the place where the claimant is domiciled would depend on whether the other party to the accident was a coach with civil liability insurance or a local transport bus exempted from the obligation in respect of compulsory insurance. The consistency between the rules on compulsory insurance and the rules on international jurisdiction that would otherwise apply would thus be lost.

24 For that reason, it makes sense, including in accordance with the principle of consistency of EU law (Article 7 TFEU), to also take account of the legislature's assessment on which Article 5(1) of Directive 2009/103/EC is based for the purposes of interpreting Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof. Thus, even a derogation from the obligation in respect of compulsory insurance should not put the accident victim in a less favourable position in this case either. That could be achieved in this case by classing as an 'insurer' anyone who bears liability under the applicable law

where a derogation from the obligation in respect of compulsory insurance applies.

25 In that context, the applicant could also be readily regarded as the (typically) ‘weaker party’ within the meaning of the case-law of the Court. Although it is possible that, unlike an insurance undertaking, the defendant does not have its own claims processing structure, the ‘civil liability indemnification scheme’ (that is the apportionment of the risk between several municipalities) also ensures it can compensate higher claims without putting its financial survival at risk. Thus, it is in a far stronger financial position than a typical injured party who has to rely on compensation.

26 5.4. For those reasons, the Supreme Court is inclined to take the view that the jurisdiction of the courts for the place where the claimant is domiciled in accordance with Article 13(2) of the Brussels Ia Regulation, read in combination with Article 11(1)(b) thereof, should also apply in the present case. However, a different interpretation is also possible. As the court of last instance, the Supreme Court is therefore required to make an order for reference.

6. Stay of proceedings

[…]

Supreme Court

Vienna, 21 October 2021

[…]