

**Case C-264/22**

**Request for a preliminary ruling**

**Date lodged:**

20 April 2022

**Referring court:**

Tribunal da Relação de Lisboa (Portugal)

**Date of the decision to refer:**

5 April 2022

**Appellant:**

Fonds de Garantie des Victimes des Actes de Terrorisme et d'Autres Infractions

**Respondent:**

Victoria Seguros S.A.

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**Appeals under the common and special procedure (2013)**

**Case No 121/17.0TNLSB.L1**

Appeal – final ruling

Lower court – Tribunal Marítimo de Lisboa (Maritime Court, Lisbon, Portugal) – J2 (Court No 2)

**Appellant:** Fonds de Garantie des Victimes des Actes de Terrorisme et d'Autres Infractions

**Respondent:** Victoria Seguros, S.A.

**Summary**

1. Given that the facts at issue involve a conflict of laws between two Member States of the European Union, the law applicable to civil (and commercial) non-contractual liability, where an attack on life or physical integrity must be considered to be involved, will be determined, firstly, by the Rome II Regulation [Regulation (EC) No 864/2007 of 11 July 2007], in accordance with Article 1(l)

thereof, which is directly applicable in domestic law pursuant to Article 8(3) of the Constitution of the Portuguese Republic.

2. The reference for a preliminary ruling is intended to attain the twofold objective of being an instrument guaranteeing the shared nature of the application of European Union law and the role of national courts as common courts of European Union law, with the aim of ensuring the legal equality of all European citizens.

3. In view of the reasonable doubt concerning the application and interpretation of the legislative framework of the Rome II Regulation, which is of fundamental importance to the final outcome of the dispute between the parties, and, in particular, to the assessment of the subject matter of the appeal, a reference for a preliminary ruling to the Court of Justice of the European Union is necessary in order to prevent divergent interpretations of the Community law in question.

4. It has therefore been decided to submit a request for a preliminary ruling to the Court of Justice of the European Union, worded as follows: Is the law applicable to the limitation rules for the right to claim compensation that of the place of the accident (Portuguese law), in accordance with Articles 4(l) and 15(h) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, Rome II, or, if the injured party's place is taken by subrogation, is the 'law of the third person' subrogee (French law) applicable in accordance with Article 19 of that Regulation?

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**The judges of the Seventh Division of the Court of Appeal, Lisbon decide:**

## **I. FACTS**

### **1. Application**

The **Fonds de Garantie des Victimes des Actes de Terrorisme et d'Autres Infractions** brought an action claiming payment, under the ordinary procedure, against **Victoria Seguros, S.A.**, seeking an order that the defendant reimburse to the applicant the sum of **EUR 229 480.73** (two hundred and twenty-nine thousand four hundred and eighty euros and seventy-three cents), plus late-payment interest calculated from the date of notification of the application.

In that connection, the applicant submitted that, on 4 August 2010, at Alvor beach, [...], a French citizen, was hit by a boat steered by its owner, [...], whose civil liability was insured by the defendant; the boat's propeller struck the person concerned who was swimming and snorkelling in a place where boats were prohibited from operating and which was intended to be used exclusively for bathing and swimming; as a result, that person suffered serious bodily injuries and underwent a number of medical treatments.

The swimmer in question sued the Fonds de Garantie des Victimes des Actes de Terrorisme et d'Autres Infractions, in its capacity as the French body which covers, inter alia, compensation due for accidents, before the Court of First Instance, Lyon, claiming compensation for the damage suffered as a result of the accident of which he was the victim in Portugal.

In those proceedings, the parties agreed compensation of EUR 229 480.73, which the applicant has already paid to the injured party.

Accordingly, by this action, the applicant seeks an order that the defendant must reimburse to the applicant the abovementioned amount paid, arguing that Portuguese law should apply in relation to the accident and the obligation to pay compensation, and that French law should apply in relation to the rules on the limitation period and the calculation of time limits, as is apparent from Article 19 of Regulation (EC) No 864/2007 of 11 July 2007.

In its defence, the defendant, first, put forward a substantive plea that the claim is time-barred, and, second, as regards the merits, it denied many of the facts relating to the accident and claimed that the action should be dismissed.

Thus, in summary, the defendant argued that Portuguese law applies, inter alia, to the matter of limitation, having regard to Article 45(1) of the Civil Code, and it raised that plea for the purposes stipulated in Article 498(1) of the Civil Code, in view of the fact that, on the date when the application was lodged – 29 November 2016 – the applicant's right to bring a claim had lapsed a long time ago; in other words, more than six years had passed since the date of the accident.

In its defence in relation to the merits, the defendant merely acknowledged the occurrence of the accident and the existence of the marine insurance taken out with it by the owner of the boat involved, but not the specific circumstances in which that accident occurred, and it relied on facts aimed at establishing that the swimmer alone was at fault, inter alia, because he was swimming beyond the buoys used to mark the navigation channel and outside the permitted bathing area, more than 300 metres from the coast and without using a marker buoy; in any event, the defendant argued that the amount claimed is excessive.

In reply to the plea raised, the applicant contested the admissibility of the plea that the claim is time-barred, arguing, in summary, that the limitation period had not expired under French law or under Portuguese law either, in accordance with Article 498(3) of the Civil Code, which lays down a 10-year limitation period for exercising the right to reimbursement; that period only started to run when the last compensation payment was made to the injured party, that is on 7 April 2014, the date of the final payment made by the applicant to the injured party.

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[...] [procedural steps]

In the normal course of proceedings, the hearing was held and judgment was then given allowing the plea that the action was time-barred, dismissing the application, and finding that the defendant was not liable in respect of the claim brought against it.

## 2. Appeal

The applicant was dissatisfied and brought an appeal; its arguments end with the following submissions:

(A) On the date on which the application was lodged, the applicant's right to claim, by way of subrogation, the amount that it had paid to the injured party was not time-barred. (B) The applicant's right by way of subrogation arose only after it had paid the compensation the reimbursement of which is claimed in this action. (C) In accordance with Article 9 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, French law is the law applicable to this case in the event of subrogation. (D) French law stipulates that the limitation period in the event of subrogation of the Fonds de Garantie des Victimes des Actes de Terrorisme et d'Autres Infractions runs from the date of the judgement, which was given on 20 March 2014. (E) Nevertheless, only after 10 years have passed [...]. [reference to the arguments] (F) Then, pursuant to French law, on the date the application was lodged, the applicant's claim was not time-barred. However, and without admitting facts that are detrimental to it, (G) if it is accepted that the solution is that laid down in Portuguese law, in accordance with Article 498(1) and (2) of the Civil Code, the limitation period starts to run only from the date of the payment or payments of compensation to the injured party. In fact, (H) no subrogation occurred before that payment. (I) Before paying the amount of EUR 229 480.73, the appellant was not even able to bring the action, since no subrogation existed in relation to future payments, that is to say, payments which were not due. Thus, (J) under Article 498(2) of the [Civil Code], counting from the date of the last payment (7 April 2014), the limitation period would only end on 7 April [2017],<sup>1</sup> much later than the date on which the application was lodged and notified to the defendant. (K) In that connection, the applicant relies on the judgments cited in paragraph 51 of these arguments, in particular, judgment No 2/2018 which was intended to ensure the uniformity of the case-law of the STA (Supreme Administrative Court, Portugal) [...] which gave a contrary ruling to that under appeal. (L) On those grounds, owing to an error of interpretation and of non-application, the [...] lower court breached the law referred to in the arguments and in these submissions. Therefore, (M) the judgment under appeal must be quashed and the submissions put forward herein accepted. Furthermore, (N) the appellant's right to be reimbursed by the defendant was not time-barred on the date on which the application was lodged. And, (O) on the facts, as established and not established, the defendant must be ordered to pay the amount claimed, plus the relevant late-payment interest, all in accordance with

<sup>1</sup> Due to a typing error, it states 7 April 2014 when it certainly means 7 April 2017, further to what was stated above.

the considerations set out in the application. It is fair that the judgment under appeal should be quashed in line with the arguments set out herein.

In its response to the appeal, the respondent rejected the appellant's arguments, repeating that the right claimed is time-barred and arguing, in summary, that the judgment absolving it of liability is well-founded and should be confirmed.

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The appeal was ruled admissible with devolutive effect.

[...] [procedural steps]

### 3. Subject matter of the appeal

The scope of the appeal is delimited by the appellant's submissions and it is necessary to rule on the issues raised therein [...]. [procedural steps]

Once the appellant's claims have been examined, **it will be necessary to decide whether, in the situation at issue, French law is applicable, in accordance with which the limitation period for the right claimed has not expired, or [whether], in the alternative, if it is decided to apply Portuguese law, the right has not lapsed either, in view of the date of the last payment to the injured party.**

This is a decisive point which gives rise to discussion of the following questions raised in the appeal:

- The national law applicable pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, Rome II, which governs non-contractual obligations between citizens of Member States, and the conflict rule laid down in Article 45 of the Civil Code.
  - The interpretation and application of Articles 4(l) and 15(h); the applicant's position whereby it has been subrogated to the injured party's rights and the scope of Article 19 of the Rome II Regulation; the general rule of *lex loci damni* and the special rule governing the subrogee to the injured party's rights;
  - The objective and subjective scope of Article 498(2) of the Civil Code, the legal nature of the right claimed in relation to the concept of subrogation or the concept of the right of redress; the academic and judicial interpretation of the provision; the day on which the limitation period starts to run for financial compensation paid by instalments.

## II. REASONING

### A. Facts

**The lower court considered that the following facts have been established:**

(1) On 4 August 2010, at around 17:30, an accident occurred off Alvor beach (Algarve) between the boat [...] steered by its owner, [...], and the swimmer [...], a French national [...] [reference to the case file]. (2) While that boat was sailing in the area off Alvor beach [...] its propeller struck the swimmer, (3) [...] who was swimming using goggles, a snorkel and flippers. (4) That collision took place some 250 metres to the east in relation to the coastline, around 120/140 metres from land and on the surface of the water; (5) [...] in an area where boats are prohibited from operating (6) [...] and which is for use solely as a bathing and swimming area. (7) [...] (8) The boat did not have any kind of navigational aid equipment (such as GPS or radar) on board. (9) As a direct result of his body being struck by the propeller, the swimmer suffered [...] [detailed description of the bodily injuries suffered]. (10) [...] [*idem*]; (11) Immediately after the accident, the swimmer was taken to the Hospital do Barlavento Algarvio. (12) He was then transferred by helicopter to the Hospital de São José in Lisbon, where he was operated on and was admitted from 4 to 9 August 2010 [...] [reference to the case file]. (13) On 9 August 2010, he was transferred by plane to France, where he was admitted to hospital until 7 September 2010 [*omissis*] [*idem*]. (14) He also underwent a number of surgical operations [...] [*idem*]. (15) Between 7 September and 11 November 2010, the accident victim was a patient at the Val de Rosay Functional Rehabilitation Centre; from 16 to 19 June 2011, also as a result of the accident described, he was admitted to the Park Clinic, where he had surgery [...]; [description of the surgical operations] (16) He was completely incapacitated from 4 August to 11 November 2010, from 16 to 19 June 2011 and on 14 February 2012 [...] [reference to the case file]. (17) He was incapacitated as to 60% from 12 November 2010 to 2 January 2011 (18) and incapacitated as to 50% from 3 January to 15 June 2011, from 20 June 2011 to 13 February 2012 and from 15 February to 28 December 2012. (19) As a result of the accident described above, the victim [...] [identification of the victim's address] lodged a claim for compensation against the applicant (guarantee fund), which is the French body responsible for compensating accident victims in the first instance [...] [reference to the case file]. (20) [...] The proceedings were conducted in the Court of First Instance, Lyon [...] [*idem*]. (21) In those court proceedings, the victim and the applicant in these proceedings agreed compensation in the total amount of EUR 229 480.73 [...] [*idem*]. (22) In that agreement, signed on 3 March 2014 and approved by the court on 20 March 2014, both parties agreed that the consequences of the accident were as determined by the medical report drawn up by the expert [...] [...] [identification of the expert]. (23) Compensation was set for the reparation of all damage resulting from the accident concerned and it corresponds to the sum of the following items [...] [reference to the case file]: – Miscellaneous expenses: EUR 2 028.78. – Consolidation care based on an hourly cost of EUR 13.00: EUR 10 640.50. – Costs of adapted vehicle: EUR 5 826.11. – Living support: EUR 76 153.24. – Total temporary discomfort based on an hourly cost of EUR 25.00: EUR 2 415.00. – Partial temporary discomfort 60%: EUR 717.60. – Partial temporary discomfort 50%: EUR 8 199.50; – Non-material damage: EUR 22 000.00. – Temporary disfigurement: EUR 3 000.00. –

Permanent functional deficiency (45%): EUR 76 500.00. – Permanent disfigurement: EUR 7 000.00 euros. – Damage affecting social integration and personal fulfilment: EUR 15 000.00. (25) The applicant in these proceedings paid the accident victim [...] the total amount mentioned in respect of the damage suffered of EUR 229 480.73, by cheques dated 15 February 2013 (EUR 10 000.00) and 7 April 2014 (EUR 219 480.73), [...] [reference to the case file]. (26) This legal action was brought on 28 November 2016, and the defendant was notified of it on 12 December 2016 [...] [*idem*]. (27) The owner [...] concluded with the defendant in these proceedings a marine insurance contract under the class of ‘pleasure boats’ to insure the boat identified above [...] and that insurance includes civil liability cover with an insured capital amount of EUR 250 000.00 [...] [identification of the policy]. (28) On 12 August 2014, the defendant filed a defence to the claim which had been lodged by the applicant’s representative on 31 July 2014, contesting the claim and arguing that it was time-barred and also that the accident was the sole fault of the injured swimmer [...] [reference to the case file]. (29) The criminal proceedings instituted at the request of the Public Prosecutor’s Office following the accident were discontinued by the Tribunal Judicial de Portimão (Juiz de Instrução Criminal) (Court of Preliminary Investigations, Portimão (Portugal)) on 28 November 2012 [...] [*idem*]. (30) [...] Following the request to open the preliminary investigation, that court, on the basis that exercise of the right to bring a claim had expired and that therefore the Public Prosecutor’s Office had no standing to bring the criminal action, stayed the criminal proceedings instituted against the person under investigation [...] and ordered that the case be removed from the register, which was notified on 3 December 2012 [...] [*idem*]. (31) Those proceedings were assigned the number 37/10.1MAPTM and the Public Prosecutor’s Office charged the accused with the offence of causing injury through negligence, (32) [...] by an indictment dated 30 May 2012. (33) The day after the accident, [...] [the insured] gave the Portimão Maritime Police a written report about the accident, dated 5 August 2010 and signed by himself, according to which, inter alia, the insured could not have avoided the accident because not only was the French swimmer underwater but he was also in an area prohibited to swimmers and for the exclusive use of boats [...] [*idem*]. (34) After the accident, the defendant requested the assistance of the undertaking Peritotal – Sociedade de Peritagens e Avaliações, S.A., whose expert [...] prepared a documented report [...] [reference to the case file and identification of the witness]. (35) In the performance of his duties, that expert carried out a number of enquiries, identified in the report he submitted, and took a written statement from the witness [...] on 10 January 2011 [...] [reference to the case file and identification of the witness]. (36) Later, on 31 January 2011, the same expert took a written statement from the witness [...] [reference to the case file and identification of the witness]. (37) According to the account given by the expert, ‘it was established’ that the French swimmer was, at the time of the accident, beyond the buoys which marked the navigation channel; that the accident occurred when the swimmer was swimming outside the usual bathing area, that is, outside the bathing area and in an area (more than 300 metres) away from the coast, in a place where the boat could sail. (38) The expert also stated

that, at the time of the accident, the French swimmer was using a diver's mask, a snorkel and flippers [...]. (39) [...] [reproduction of a written statement from a witness including a number of details about the accident]

**And it has not been established that:** **I.** The French swimmer, who was snorkelling, only became visible when he emerged and he had not given any warning signal before the accident in question occurred. **II.** Immediately after the accident occurred, the insured [...] provided all the help he could to the French swimmer. **III.** The collision occurred when the boat in question [...] was a long way from the coast and in an area for the exclusive use of boats. **IV.** At the time of the crash, the French swimmer was beyond the buoys which marked the navigation channel. **V.** The collision occurred when the swimmer was swimming outside the usual bathing area, that is, in an area more than 300 metres away from the coast (the beach), **VI.** [...] where that boat could sail without restrictions.

## **B. The merits of the appeal**

### **1. Synopsis of the dispute**

After the accident which happened at Alvor beach on 4 August 2010, involving a swimmer, who is a French citizen, and a Portuguese boat, insured by the defendant, the applicant, a body recognised under French law for that purpose, paid the victim the total sum of EUR 229 480.73 as compensation for the damage suffered as a result of the accident.

Claiming that the accident was the sole fault of the captain of the boat, the applicant has now brought a civil liability claim against the defendant on the grounds of an unlawful act by the insured, seeking reimbursement of the sum it paid to the accident victim under French law, which it submits is applicable pursuant to Article 19 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, Rome II.

The defendant, while acknowledging that the accident in question took place and that the marine insurance taken out by the owner of the boat exists, contested from the outset<sup>2</sup> the claim for payment brought by the applicant, on the ground that the right of subrogation had lapsed under Article 498(1) of the Portuguese Civil Code, which is applicable to the situation at issue in this case in accordance with Article 45 of the Civil Code.

While still disagreeing with the application of Portuguese law, the applicant responded that, in the light of Article 4[9]8(3) of the Civil Code, the limitation period running from the date of the last payment to the injured party has not expired either.

<sup>2</sup> In so far as is important for the present purposes, the plea raised that the civil court lacked jurisdiction was upheld and the maritime court was ruled to have jurisdiction to hear the case.

In the judgment, the lower court, on the basis of the established facts, found that the plea that the right claimed by the applicant had lapsed should be upheld, in accordance with Article 498(1) of the Portuguese Civil Code, and it ruled that the defendant was not liable.

At issue in the appeal is the upheld plea, which leads to lapse of the right claimed and the factual conditions for which are not in dispute; accordingly, the appellant's claim is confined strictly to the alleged error of law in the judgment.

## **2. Applicable national law**

The situation adjudicated on by the national courts is cross-border in nature and is based on a complex cause of action relating to civil liability for an unlawful act; specifically, Portugal is the location of the accident, the boat and the boat owner allegedly responsible for the accident; the victim is of French nationality and resides in France; the applicant is a body created and governed in accordance with French law, which is suing the boat owner's insurer, having taken the victim's place by subrogation and having paid the victim compensation for the damage suffered.

When the lower court examined that preliminary issue, it found, in summary, that Portuguese law was applicable to the resolution of the dispute, especially in view of the nature of the right claimed by the applicant and the rules governing the limitation period. Applying Portuguese law, the lower court held that it had been established that the right claimed was time-barred because more than three years had passed since the date of the accident, in accordance with Article 498(1) of the Civil Code, and, since the applicant has been subrogated to the injured party's right to compensation for the damage suffered, it does not qualify for the new limitation period relating to the insurer's right of redress, laid down in Article 498(2); the lower court also held that the applicant cannot rely on the longer limitation period for the criminal proceedings relating to the unlawful act, laid down by Article 498(3), since the injured party did not institute the criminal proceedings and nor did he bring a separate civil action.

The appellant, which does not dispute the assertion that it is litigating in its capacity as subrogee to the injured party's claim against the defendant, the insurer of the boat, contends, on the contrary, that French law is applicable to the situation at issue, relying on Article 19 of the Rome II Regulation.

The appellant thus argues that, in accordance with French law, in particular, Article 706.11 of the French Code of Criminal Procedure, Article L-422.1 of the Code des Assurances (Insurance Code) and Article 2270 of the French Civil Code, the limitation period for exercising the right to reimbursement of the compensation which it paid to the injured party has not expired, from which it follows that the judgment under appeal must be set aside.

### ***Quid juris?***

The facts involve a conflict of laws between two Member States of the European Union, which is why the law applicable to civil (and commercial) non-contractual liability, which must be taken to include damage to life and physical integrity, will be determined, first, by the Rome II Regulation [Regulation (EC) No 864/2007 of 11 July 2007], in accordance with Article 1(1) thereof,<sup>3</sup> which is directly applicable in domestic law pursuant to Article 8(3) of the Constitution of the Portuguese Republic.

The solution adopted by the Portuguese domestic conflict-of-law rules is not, in principle, applicable to supranational conflict-of-law rules.

While it is acknowledged that there is some dispute among legal commentators regarding preliminary issues of private international law, for example, about the matter of whether or not the Rome II Regulation requires a subordinate connection, to the detriment of the autonomous connection through the conflict rules of the *lex fori*, that is not relevant for the purposes of the decision in this case.<sup>4</sup>

As regards the freedom to choose the law, enshrined in Article 14 of the Rome II Regulation, that is not possible either in the present case because, since the unlawful act/accident happened on Portuguese territory, Article 4(1), (2) and (3) of the Portuguese Civil Code provide that Portuguese law is applicable.

Likewise, the dispute cannot be resolved by applying the ‘most favourable law’ solution, since it is clear that this case does not involve a direct action brought by the accident victim against the insurer, as provided for in Article 18 of the regulation, which should be based on the interpretation of the law applicable to the prevalence of the predominant systematic element of the protection of the injured party; that is, the principle of the law most favourable to the relevant protection against the insurer.<sup>5</sup>

As Moutinho de Almeida explains in a commentary on the Rome II Regulation, the ‘ways in which obligations may be extinguished are the appropriate fulfilment and compensation or the death of the person liable and, as regards the limitation period and the expiry of that period, it is important to observe that the principle of the most favourable law is not applicable.’<sup>6</sup>

Lastly, Portuguese law provides for protection of the subrogee and the defendant accepts that the applicant has substantive *locus standi* to claim reimbursement of the amount it paid to the injured party in respect of the accident at Alvor beach,

<sup>3</sup> Assuming also that no other international convention to which France or Portugal is a party is applicable in relation to the subject matter at issue.

<sup>4</sup> [...].

<sup>5</sup> [...].

<sup>6</sup> In *O Regulamento Roma II*, 2107, [Ed.] Principia, p.164.

which allegedly occurred through the sole fault of the owner and crew of the boat involved, which was insured by the defendant.

The defendant's defence is based solely on the claim that the right to compensation has lapsed under Portuguese law.

That said, as regards non-contractual obligations arising from liability based on an unlawful act or for risk, Article 4(1) of the Rome II Regulation lays down the general rule that the applicable law is the law of the country in which the damage occurs.

Article 15(h) provides, in relation to the scope of the law applicable, that that law covers *'the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.'*

Since the accident from which the action arose took place in Portugal, that provision provides that Portuguese law should apply to the situation at issue, especially as regards the disputed assertion that the right claimed by the applicant has lapsed.

In parallel, Article 19 of the Rome II Regulation, under the heading 'Subrogation', provides as follows: *'Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.'*

Having set out the details of the issue, it is appropriate to ask whether the aim of Article 19 of the Rome II Regulation is to guarantee for a third person who has made a payment to the injured party the foreseeability that the law governing the (domestic) relationship between the subrogor and the subrogee will apply, and the extent to which that third party is entitled to exercise the right against the debtor and person liable in the non-contractual relationship for an unlawful act or for risk, that is, whether the law of the 'third person' limits its applicability to the definition of the conditions for the exercise of subrogation. Or whether the law of the third person who has taken the place of the injured party by subrogation will also be applicable to the rules governing lapse of the right, relied on by the insurer of the person who caused the damage, and taking precedence in this regard over the provision contained in Article 15(h) and Article 4(1) of the Rome II Regulation.

To put it another way, it is necessary to determine whether Article 19 of the Rome II Regulation must be interpreted as meaning that, where the right of compensation for an unlawful act has been exercised by the person subrogated to the rights of the injured party, the applicant in this case, the national law of that

third person, who was not a party to the non-contractual relationship, in this case French law, is applicable, or whether that provision refers solely to the matter of the basis of and the conditions for subrogation and, as regards the limitation rules applicable to the right, the provisions of Article 15(h), *ex vi* Article 4(1), of that regulation continue to apply, since the case concerns not only the relationship between the ‘third person’ and the creditor but also, within the substantive limits of the exercise of the injured party’s right to compensation, the non-contractual relationship.

In the light of that reasonable uncertainty concerning the interpretation and application of the legislative framework of the Rome II Regulation, with essential implications for the final outcome of the proceedings between the parties, and in particular for the examination of the subject matter of the appeal, it is necessary to submit a request for a preliminary ruling to the Court of Justice of the European Union in order to avoid any divergent interpretations of the Community law in question.

### **3. Request for a preliminary ruling**

In accordance with Article 65(b) of the Treaty of Lisbon, the Community is required to adopt measures in the field of judicial cooperation in civil matters having cross-border implications, in particular, measures which promote the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

The reference for a preliminary ruling is intended to attain the twofold objective of being an instrument guaranteeing the shared nature of the application of European Union law and the role of national courts as common courts of European Union law, with the aim of ensuring the legal equality of all European citizens.<sup>7</sup>

It is important to note in that regard the provisions of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice on those matters.

In accordance with Article 19(3) of the Treaty of Lisbon, the Court of Justice of the European Union will give rulings [...] *[transcription of the article in question]*

And, pursuant to Article 267 of the Treaty on the Functioning of the European Union, ‘*the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: ... (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*’ furthermore, ‘*where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*’

<sup>7</sup> [...].

The dispute in the present case concerns whether French national law or Portuguese national law should apply to the limitation period and to the date on which the right to compensation on grounds of civil liability for an unlawful act which occurred in Portugal lapses, where the victim and the subrogee who is suing the insurer are of French nationality.

The Hague Programme, adopted by the European Council on 5 November 2004, urged the active pursuit of work on conflict-of-law rules regarding non-contractual obligations (Rome II).<sup>8</sup>

In the specific situation before the Portuguese court, there is a dispute concerning the application of Article 19, in conjunction with Articles 4(1) and 15(h), of the Rome II Regulation, which determines whether Portuguese law or French law is to apply with regard to the rules on the limitation period for the right and the method of calculating that period, leading to different outcomes for the proceedings.

Moreover, having consulted the case-law of the national courts and that of the Court of Justice, the referring court takes the view that the complex nature of the examination of the issue in contention does not dispel the uncertainty which has arisen, and therefore the difficulty of interpretation of the provisions cited of the Rome II Regulation remains.

Accordingly, the need for a reference for a preliminary ruling in this case is justified.

**In summary, the essential facts of the proceedings**

- An accident occurred in Portugal between a swimmer of French nationality and a Portuguese pleasure boat.
- The swimmer and accident victim brought an action before a French court against a body formed under French law for that purpose and he received compensation for the damage suffered as a result of the accident.
- The French body sued the insurer of the boat in the present proceedings, claiming reimbursement of the sum paid and relying on subrogation to the victim's rights.
- The insurer accepts that the subrogee has *locus standi* but argues that the right to compensation is time-barred under the system laid down in Portuguese law.

**The following question is referred to the Court of Justice of the European Union:**

<sup>8</sup> The central aim of the Rome II Regulation is to promote the proper functioning of the internal market.

Is the law applicable to the limitation period for the right to claim compensation that of the place of the accident (Portuguese law), in accordance with Article 4(l) and Article 15(h) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, Rome II, or, since the claimant has taken the injured party's place by subrogation, is the 'law of the third person' subrogee (French law) applicable in accordance with Article 19 of that Regulation?

### III. DECISION

On those grounds, this Court decides:

- a) To stay the decision on the merits of the appeal.
- b) To refer the following question to the Court of Justice of the European Union for a preliminary ruling: Is the law applicable to the limitation rules for the right to claim compensation that of the place of the accident (Portuguese law), in accordance with Articles 4(l) and 15(h) of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, Rome II, or, if the injured party's place is taken by subrogation, is the 'law of the third person' subrogee (French law) applicable in accordance with Article 19 of that Regulation?

The proceedings are stayed pending the final decision of the Court of Justice of the European Union.

The request for a preliminary ruling must be dealt with in accordance with the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. Once receipt of the request for a preliminary ruling is confirmed, the registry will ask for information about its progress every three months.

No costs are payable.

Lisbon, 5 April 2022