Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 20 May 2015[1]

Case C-240/14

Eleonore Prüller-Frey
v
Norbert Brodnig,
Axa Versicherung AG

(Request for a preliminary ruling from the Landesgericht Korneuburg (Austria))

(Air carrier liability in the event of accidents — Convention for the Unification of Certain Rules for International Carriage by Air — Regulation (EC) No 2027/97 — Scope — Flight made in an ultralight power-driven aircraft the operator of which does not hold an air service operating licence — Flight with the same place of departure and destination made for the purpose of showing property to a potential purchaser — Regulation (EC) No 864/2007 — Article 18 — Direct action against the insurer of the person liable)

I – Introduction

1. The present request for a preliminary ruling from the Landesgericht Korneuburg (Korneuburg Regional Court, Austria) concerns the determination of the law applicable to a claim for damages brought by an individual, resident in Austria, against an aircraft operator and his civil liability insurer following an air accident in Spain.

2. This request is interesting for two reasons from the standpoint of EU law. First, it affords the Court the opportunity to define the boundaries of the scope of both the Convention for the Unification of Certain Rules for International Carriage by Air[2] and Regulation (EC) No 2027/97[3] which implements that convention. Second, it allows the Court to determine the scope of Article 18 of Regulation (EC) No 864/2007,[4] which concerns direct action against the insurer of the liable party.

1 — Original language: French.

2 — Convention concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194, p. 38; 'the Montreal Convention'). The Montreal Convention entered into force, so far as the European Community is concerned, on 28 June 2004.

3 — Regulation of the Council of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air (OJ 1997 L 285, p. 1), as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2) ('Regulation No 2027/97').

4 — Regulation of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

II – Legal framework

A – *The Montreal Convention*

3. Article 1(1) and (2) of the Montreal Convention, entitled ‘Scope of application’, provides:

‘1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

…’

4. Articles 17 and 21 of the Montreal Convention govern the matter of compensation in the event of death or injury of passengers.

5. Article 29 of this convention is worded as follows:

‘In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.’

6. Article 33 of the Montreal Convention determines which courts have jurisdiction to entertain actions for damages brought under that convention.

B – *EU legislation*

7. Article 1 of Regulation No 2027/97 provides:

‘This Regulation implements the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by air and lays down certain supplementary provisions. It also extends the application of these provisions to carriage by air within a single Member State.’

8. Article 2(1)(b) of that regulation provides:

‘1. For the purposes of this Regulation:

…

(b) “Community air carrier” shall mean an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Regulation (EEC) No 2407/92 [5]’.

9. Article 3(1) of Regulation No 2027/97 is worded as follows:

‘The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.’

10. The operation of air services within the European Union by air carriers in the European Union is currently governed by Regulation (EC) No 1008/2008. [6]

11. Article 2(4) to (6) of Regulation No 1008/2008 provides:

‘For the purposes of this Regulation:

…

4. “air service” means a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire;

5. “flight” means a departure from a specified airport towards a specified destination airport;

6. “local flight” means a flight not involving carriage of passengers, mail and/or cargo between different airports or other authorised landing points.’

12. Article 3(1) and (3) of Regulation No 1008/2008 provides:

‘1. No undertaking established in the Community shall be permitted to carry by air passengers, mail and/or cargo for remuneration and/or hire unless it has been granted the appropriate operating licence.

…

3. Without prejudice to any other applicable provisions of Community, national, or international law, the following categories of air services shall not be subject to the requirement to hold a valid operating licence:

(a) air services performed by non-power-driven aircraft and/or ultralight power-driven aircraft; and

(b) local flights.’

13. Article 4 of the Rome II Regulation provides:

‘1. Unless otherwise provided for in this Regulation, 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.

5 — Council Regulation of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1).

6 — Regulation of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3). This regulation repealed Regulation No 2407/92 with effect from 1 November 2008.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

…'

14. Article 18 of the Rome II Regulation provides:

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

III – The dispute in the main proceedings

15. On 30 August 2010, Ms Prüller-Frey, the applicant in the main proceedings, was involved in an accident in the vicinity of Jerez de la Frontera (Spain) during a flight aboard an autogyro piloted by its owner, Mr Preiss. The place of departure and destination of the flight was the airport of Medina Sidonia (Spain) and its purpose was to view land belonging to Mr Preiss in connection with a possible real estate transaction.

16. As is apparent from the order for reference, the civil liability insurance policy covering the autogyro in question was taken out not by its owner, Mr Preiss, but by Mr Brodnig, as custodian of the machine, with Axa Versicherung AG, a German company. This insurance policy is subject to German law and provides that the German courts are to have jurisdiction.

17. It is also apparent from the order for reference that Mr Brodnig is not an undertaking with an air transport licence.

18. Ms Prüller-Frey is habitually resident in Austria. At the relevant time, Mr Brodnig had stated that he resided in both Austria and Spain. Nevertheless, it is apparent from the documents before the Court that the referring court considers, with regard to the possible application of Article 4(2) of the Rome II Regulation, that the parties to the main proceedings did not have their habitual residence in the same country at the time of the accident.

19. Ms Prüller-Frey brought an action before the referring court based on the joint and several liability of the defendants in the main proceedings, in which she claimed compensation for damage suffered as a result of the accident.

20. As appears from the documents before the Court, the applicant submits in the application in the main proceedings that the Austrian courts have jurisdiction under Regulation (EC) No 44/2001[7] and that Austrian law applies in accordance with Article 4(2) of the Rome II Regulation. She also maintains that she is entitled to bring a direct action against the insurer under Austrian law.

21. Ms Prüller-Frey argues that proceedings may be brought before the Austrian courts against Axa Versicherung AG as co-defendant under either Article 6 of the Brussels I Regulation or Article 11 thereof, concerning direct action brought by the injured party against the insurer.

7 — Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) ('Brussels I Regulation'). This regulation was replaced as from 10 January 2015 by 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 (OJ 2012 L 351, p. 1) which does not, however, apply to the dispute in the main proceedings under the transitional provisions set out in Article 66 thereof.

22. The defendants in the main proceedings dispute the jurisdiction of the Austrian courts as well as the applicability of Austrian law, arguing that the applicable law is Spanish law and that the court before which the action was brought does not have jurisdiction. As regards the possibility of bringing a direct action against the insurer, the defendants in the main proceedings contend that neither German law, to which the insurance policy is subject, nor the applicable Spanish law permits such action in the circumstances of the dispute in the main proceedings.

23. By contrast, it is apparent from the Affidavit of foreign law requested by the referring court that the applicant would be entitled to bring a direct action against the insurer under Spanish law.

24. Although it appears that none of the parties to the main proceedings rely on the Montreal Convention, the referring court none the less has doubts as to the applicability of that convention. It thus raises the question of the rules on liability applying to the facts in the main proceedings, both if the Montreal Convention were to apply and if it were not.

IV – The questions referred for a preliminary ruling and the procedure before the Court

25. In those circumstances, the Landesgericht Korneuburg decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are Article 2(1)(a) and (c) of … Regulation … No 2027/97 …, Article 3(c) and (g) of Regulation (EC) No 785/2004 [8] … and Article 1(1) of the [Montreal] Convention … to be interpreted as meaning that claims for damages by an injured party,

— who was a passenger in an aircraft which had the same take-off and landing place in a Member State,

— who was carried by the pilot free of charge,

— the purpose of the flight being, in connection with a real-property transaction planned with the pilot, to view the property from the air, and

— who was physically injured when the aircraft crashed,

must be determined exclusively on the basis of Article 17 of the [Montreal] Convention … and that national law is not applicable?

If the answer to Question 1 is in the affirmative:

(2) Are Article 33 of the [Montreal] Convention …and Article 67 of … Regulation … No 44/2001 … to be interpreted as meaning that jurisdiction to hear and rule on the claims for damages referred to in Question 1 must be determined exclusively on the basis of Article 33 of the [Montreal] Convention …?

If the answer to Question 1 is in the affirmative:

(3) Are Article 29 of the [Montreal] Convention … and Article 18 of [the Rome II] Regulation … to be interpreted as precluding national provisions which provide for a direct action by the injured party referred to in Question 1 against the civil-liability insurer of the person responsible for the injury?

8 — Regulation of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators (OJ 2004 L 138, p. 1).

If the answer to Question 1 is in the negative:

(4) Are Article 7(1)(f) of Second … Directive [88/357/EEC[9]] … and Article 18 of [the Rome II] Regulation … to be interpreted as meaning that the conditions governing the direct action brought by the injured party referred to in Question 1 against the civil-liability insurer of the person responsible for the injury are to be determined on the basis of the law of a third State if:

— the *lex loci delicti* provides for a direct action in its legislation on insurance contracts,

— the parties to the insurance contract make a choice of law in favour of the legal system of a third State,

— according to which the law of the State in which the insurer has its seat is to be applied, and

— the legal system of that State also provides for a direct action in its legislation on insurance contracts?'

26. The order for reference dated 12 May 2014 was lodged at the Court Registry on 15 May 2014. Written observations were submitted by the applicant in the main proceedings, the Austrian Government and the European Commission.

27. The defendants in the main proceedings and the French Government, none of whom had participated in the written procedure, made a reasoned application for a hearing. The parties to the main proceedings and other interested parties presented oral arguments at the hearing on 4 March 2015.

V – Analysis

28. I would point out that since the Montreal Convention forms an integral part of the EU legal order, the Court has jurisdiction to give a preliminary ruling concerning its interpretation.[10]

29. As regards actions for damages relating to accidents that have occurred during carriage by air, this convention exclusively governs the determination of the court having jurisdiction and some substantive aspects of compensation in the event of death or injury of passengers. If, however, the Montreal Convention is not applicable, the court with jurisdiction will be determined in accordance with the Brussels I Regulation and that court will examine the claim for damages pursuant to the rules of national law as decided by the conflict rules.

30. Therefore, the question of the application of the Montreal Convention must be examined before the other questions submitted by the referring court.

A – *The applicability of the Montreal Convention (Question 1)*

31. By its first question submitted for a preliminary ruling, the referring court asks, in essence, whether the Montreal Convention applies in the main proceedings, when the place of departure and the place of destination of the flight was the same airport located in the territory of a single Member State and the passenger was carried free of charge for the purpose of flying over property belonging to the owner of the aircraft in connection with a real estate transaction.

9 — Second Council Directive of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC (OJ 1988 L 172, p. 1).

10 — Judgment in *Wucher Helicopter and Euro-Aviation Versicherung* (C-6/14, EU:C:2015:122, paragraph 33 and the case-law cited).

32. The referring court considers that the applicability of the Montreal Convention to the facts in the main proceedings stems from the fact that the application of Regulation No 2027/97 was extended to cover flights within a single Member State. It also observes that although this claim for damages is not directed against an air carrier holding a licence, it nevertheless concerns liability associated with the operation of an aircraft. Regulation No 785/2004 requires not only air carriers but also aircraft operators to take out liability insurance.

33. During the hearing, the defendants in the main proceedings submitted that the Montreal Convention applied, relying on a line of argument similar to that put forward by the referring court.

34. The applicant in the main proceedings, the Austrian and French Governments, and the Commission consider — albeit for slightly different reasons — that the Montreal Convention does not apply.

35. The French Government contends that a flight having the same places of departure and destination, such as that at issue in the main proceedings, cannot be regarded as 'carriage by air' within the meaning of the Montreal Convention and Regulation No 2027/97. The other parties and interested persons claim that the Montreal Convention does not apply and rely on the fact that the flight was not made by an 'air carrier' within the meaning of Regulation No 1008/2008.

36. I note that the Montreal Convention applies, in accordance with Article 1(1) thereof, to all ' *international* [11] carriage of persons, baggage or cargo performed by aircraft'.

37. Articles 1 and 3 of Regulation No 2027/97, implementing the Montreal Convention within the EU legal order, extend its application to flights made in the territory of a single Member State.

38. Article 3(1) of Regulation No 2027/97 provides, in this respect, that the liability of a European Union air carrier is to be governed by the provisions of the Montreal Convention, and does not distinguish between international flights and national flights within the European Union.

39. Furthermore, Article 2(1)(b) of Regulation No 2027/97 defines '[European Union] air carrier' as a person with a valid operating licence granted by a Member State in accordance with the provisions of Regulation No 1008/2008. [12]

40. It follows that the rules on liability set out in the Montreal Convention apply to national flights within the European Union when such flights are operated by an air carrier holding a valid operating licence within the meaning of Regulation No 1008/2008.

41. As is apparent from recital 8 in the preamble to Regulation (EC) No 889/2002, [13] the extension of the provisions of the Montreal Convention to cover national flights was motivated by the fact that the creation of the internal air services market eliminated the distinction between international and national carriage within the European Union and justified the establishment of a single set of rules on liability. [14]

42. In the case before the referring court, the order for reference indicates that Mr Brodnig did not have an air carrier licence.

11 — My emphasis.

12 — This regulation replaced Regulation No 2407/92 as from 1 November 2008.

13 — Regulation of the European Parliament and of the Council of 13 May 2002 amending Regulation No 2027/97 (OJ 2002 L 140, p. 2). This amendment was made following the conclusion of the Montreal Convention.

14 — See the Commission proposal leading to the adoption of Regulation No 889/2002 (COM(2000) 340 of 7 June 2000, paragraph 3 of the explanatory memorandum) and the Commission proposal leading to the adoption of Regulation No 2027/97 (COM(95) 724 of 20 December 1995, p. 4). Even before the conclusion of the Montreal Convention, Regulation No 2027/97 provided for a single set of rules on liability for national and international carriage within the European Community.

43. The flight in question is therefore not covered by the provisions of Regulation No 2027/97 or by those of the Montreal Convention, since it was a national flight that was not operated by a licensed air carrier. Accordingly, the claim for damages at issue must be examined solely on the basis of the applicable national law determined by the conflict rules.

44. I also note that, in the light of the circumstances of the case before the referring court, Mr Brodnig was not required to have an air carrier licence.

45. In that regard, Article 3(1) of Regulation No 1008/2008 states that undertakings providing air transport services within the European Union are required to have an operating licence. However, under Article 3(3)(a) and (b) of this Regulation, some air services are exempted from that requirement. This exemption applies, in particular, to 'air services performed by non-power-driven aircraft and/or ultralight power-driven aircraft' and 'local flights'.[15]

46. That is the case for the flight at issue in the main proceedings, since it is a local flight with the same places of departure and destination and the aircraft in question is an ultralight power-driven aircraft.

47. In view of the foregoing, I consider that Articles 1 and 3(1) of Regulation No 2027/97 must be interpreted as meaning that the provisions of the Montreal Convention do not apply to a national flight that is not operated by an air carrier holding an operating licence within the meaning of Regulation No 1008/2008.

B – *The relationship between the Montreal Convention and the Brussels I Convention (Question 2)*

48. In the light of my conclusion concerning Question 1, it is not necessary to reply to Questions 2 and 3, which fall to be answered only should the Montreal Convention apply.

49. I will nevertheless examine them briefly, in case the Court takes the view that the Montreal Convention does in fact apply.

50. By its second question referred for a preliminary ruling, the referring court asks about the relationship between the provisions of Article 33 of the Montreal Convention and those of Article 67 of the Brussels I Regulation.

51. It should be recalled that Article 67 provides that the Brussels I Regulation is not to prejudice the application of provisions, contained in EU instruments or in harmonised national legislation, governing jurisdiction in specific matters. Article 67 thus makes express provision for the existence of specific rules in relation to the rules on jurisdiction in the Brussels I Regulation.

52. I also note that Article 67 of the Brussels I Regulation refers to a *lex specialis* contained in an EU instrument. Accordingly, unlike Article 71 of that regulation, which concerns the rules on jurisdiction contained in conventions to which the Member States were already parties when the Brussels I Regulation entered into force and allows for the application of those rules provided that they do not compromise the principles underlying the Brussels I Regulation,[16] Article 67 is not subject to any conditions.

15 — Article 2(4) of Regulation No 1008/2008 defines 'air services' as 'a flight or a series of flights carrying passengers, cargo and/or mail …'. Article 2(5) and (6) of this Regulation also distinguishes between a 'flight', namely a service involving a departure from a specified airport towards a *different* destination airport, and a 'local flight', which does not involve the carriage of passengers, mail and/or cargo between different airports.

16 — See judgments in *TNT Express Nederland* (C-533/08, EU:C:2010:243, paragraph 49); *Nipponkoa Insurance Co. (Europe)* (C-452/12, EU:C:2013:858, paragraph 36); and *Nickel & Goeldner Spedition* (C-157/13, EU:C:2014:2145, paragraph 38).

53. It is hard to deny that Article 33 of the Montreal Convention constitutes such a *lex specialis*, contained in an EU instrument, which precludes the application of the general rules on jurisdiction set out in the Brussels I Regulation. This exclusion concerns matters of court jurisdiction, which are governed by Article 33 of the Montreal Convention.

54. Nevertheless, it is still appropriate to consider whether Article 33 applies in the case of a flight made within a single Member State.

55. The Austrian Government submits in that regard that the Montreal Convention only applies to international carriage and that Regulation No 2027/97 does not extend the scope of the rules on jurisdiction laid down in Article 33 of the convention but only the scope of the substantive provisions.

56. I am not persuaded by that argument.

57. Under Article 3(1) of Regulation No 2027/97, the liability of an air carrier in respect of passengers and their baggage is governed by 'all provisions of the Montreal Convention relevant to such liability'.

58. To my mind, that reference covers all of the provisions of Chapter III of the Montreal Convention relating to the liability of air carriers, including the provisions concerning the rules on jurisdiction set out in Article 33 thereof.

59. The aim of Regulation No 2027/97 is to make the liability of air carriers subject to a single set of rules, both for international and national carriage within the European Union. This objective militates in favour of a broad interpretation of Article 3(1) of Regulation No 2027/97.

60. The rules on jurisdiction form part of the overall approach taken by the Montreal Convention to eradicate conflicts of laws and jurisdiction and to establish a foreseeable set of rules on liability, protecting passengers and enabling air carriers to manage risk more effectively. From the perspective of the broad scheme of the Montreal Convention, these rules on jurisdiction appear alongside the substantive rules in Chapter III, concerning the liability of air carriers and the extent of compensation for damage.

61. Moreover, as demonstrated in this case, the close interconnection of economic relations within the internal market means that a dispute may easily take on a cross-border dimension even if it arises as a result of an accident that occurred during a national flight. This consideration justifies the application of uniform rules on jurisdiction as regards the liability associated with national and international flights within the European Union.

62. I am therefore of the opinion that, should the Court consider that the Montreal Convention and Regulation No 2027/97 apply in the main proceedings, the court with jurisdiction to entertain the main action should be determined pursuant to Article 33 of that convention.

C – *The relationship between the Montreal Convention and Article 18 of the Rome II Regulation (Question 3)*

63. By its third question, the referring court asks, in essence, whether Article 29 of the Montreal Convention precludes a national provision that provides for a direct action by the injured party against the insurer of the air carrier.

64. This question is relevant only if the Court, contrary to my view, considers that the Montreal Convention applies in circumstances such as those in the main proceedings.

65. The referring court proceeds on the basis that, if the Montreal Convention exhaustively governs actions for damages relating to air transport, a direct action provided for by national law cannot therefore be brought.

66. I recall that Article 29 of the Montreal Convention lays down the principle of exclusivity of the rules on liability contained therein, providing that any action for liability under the convention can only be brought subject to the conditions and limits of liability set out in the convention.

67. However, I note that the Montreal Convention governs only the liability of air carriers and not the obligations of liability insurance providers.

68. Consequently, this convention does not affect the provisions of national law entitling the injured party to bring a direct action against the insurer of the liable air carrier.

69. In addition, Article 29 of the Montreal Convention applies 'without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights'. Thus, the right of the injured party to bring a claim against the insurer is not, in any event, affected by the principle of exclusivity set out in Article 29.

70. Therefore, when the liability of the air carrier is governed by the provisions of the Montreal Convention, the injured party is entitled to bring a direct action against the carrier's insurer if such a right is provided for in the law that is applicable by virtue of the two alternative possibilities laid down in Article 18 of the Rome II Regulation. This right may be provided for in the law applicable to the insurance contract or in the law that would apply to the non-contractual obligation if the Montreal Convention did not apply. In other words, the Montreal Convention does not affect the applicability of the two situations referred to in Article 18 of the Rome II Regulation.

D – *The conditions under which a direct action may be brought by the injured party against the insurer (Question 4)*

71. By its fourth question submitted for a preliminary ruling, the referring court asks, in essence, whether Article 18 of the Rome II Regulation allows the injured party to bring a direct action against the insurer, when the law applicable to the non-contractual obligation provides for such an action but the parties to the insurance contract have made a different choice of law.

72. It is apparent from the order for reference that the Landesgericht Korneuburg considers that, under Article 4(1) of the Rome II Regulation, the liability of Mr Brodnig is governed by the *lex loci damni*, namely, in this case, Spanish law.[17] According to the Affidavit of foreign law requested by the referring court, Spanish law makes it possible for the injured party to bring a direct action against the insurer in the circumstances of the main proceedings.

17 — I note that, although the applicant in the main proceedings stated at the hearing that the application of Austrian law under Article 4(2) of the Rome II Regulation could not, at that stage, be ruled out, the fact remains that it is for the referring court alone to rule on this point.

73. The referring court nevertheless points out that the parties to the insurance contract made that contract subject to German law. It draws attention to the importance of the freedom to choose the applicable law, which is possible in insurance contracts covering what are known as 'large risks', including civil liability arising out of the use of aircraft.[18] In the referring court's opinion, the injured party cannot be placed in a better position than the policyholder. If the parties to the insurance contract made that contract subject to German law, this choice must mean that the injured party is not entitled to bring a direct action against the insurer under Spanish law.

74. I think this line of reasoning is based on a false premiss.

75. Article 18 of the Rome II Regulation does not constitute a conflict-of-laws rule with respect to the substantive law applicable to the determination of the liability of the insurer or the liable party. The sole aim of this article is to determine which law applies to the question as to whether the victim can bring a claim directly against the insurer, and does not concern the extent of the insurer or the liable party's obligations.

76. Under Article 18, the right to bring a direct action exists when the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

77. Irrespective of the question whether the right to bring a direct action exists and, as the case may be, of the conditions under which such an action may be brought,[19] the obligations of the insurer continue to be governed by the insurance contract. In this respect, Article 18 of the Rome II Regulation has no effect on the choice of law made by the parties to the insurance contract.

78. It is also apparent from the wording of Article 18 of the Rome II Regulation that it is a connecting rule structured as an alternative, in that it is sufficient for one of the laws concerned to provide for the possibility of direct action.

79. This consideration applies regardless of whether the law applicable to the insurance contract is the result of (i) the choice of the parties to the contract or (ii) the application of the conflict rules set out in Regulation (EC) No 593/2008.[20]

80. Therefore, an injured party may bring a direct action against the insurer when this possibility arises either under the law applicable to the non-contractual obligation or under the law applicable to the insurance contract, whether this law was chosen by the parties to the insurance contract or determined under the conflict rules of the Rome I Regulation.

81. This interpretation is fully supported by the explanatory memorandum to the legislative proposal which led to the adoption of the Rome II Regulation.[21] According to this proposal, the conflict rule concerned determines the law applicable to the question as to whether the injured party may bring a direct action against the insurer. In any event, the scope of the insurer's obligations is determined by the law applicable to the insurance contract.

18 — The 'large risks' are those referred to in Article 5(d) of First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3), one of which is civil liability arising out of the use of aircraft, falling within part A.11 of the Annex to that directive (see Article 7(1)(f) of Directive 88/357).

19 — Moreover, I note that the question whether this conflict rule concerns not only the possibility of bringing a direct action, but also the conditions under which it may be brought and the limitations thereon, is discussed in legal literature. See Żarnowiec, Ł., 'Zobowiązania pozaumowne. Bezpośrednie powództwo przeciwko ubezpieczycielowi osoby odpowiedzialnej', in: *System prawa prywatnego, Tom 20B, Prawo prywatne międzynarodowe*, Warsaw, CH Beck, Instytut Nauk Prawnych PAN 2015, p. 872; Fras, M., Pacuła, K., *Umowa ubezpieczenia obowiązkowego w prawie prywatnym międzynarodowym*, in: *System prawny ubezpieczeń obowiązkowych. Przesłanki i kierunki reform*, Toruń 2014, p. 177; and Dickinson A., *The Rome II Regulation: The Law Applicable to Non-contractual Obligations*, Oxford, OUP 2008, p. 610.

20 — Regulation of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

21 — See the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('ROME II') (COM(2003) 427 final of 22 July 2003, p. 27), regarding Article 14 of the draft regulation.

82. Similarly, it is apparent from the academic research that preceded this legislative proposal, namely the draft Rome II Convention prepared by the European Group for Private International Law (EGPIL), [22] that the rule in question — which was taken from the draft Rome II Convention without substantive amendments — provides a special connecting factor for a direct action brought by the injured party against the insurer, including possible limits on the exercise of that right. By contrast, the scope of the insurer's obligations is determined by the law applicable to the insurance contract. Moreover, the commentary clearly shows that this is a rule entailing two alternative possibilities.

83. Since the rule laid down in Article 18 of the Rome II Regulation entails an alternative, the applicant in the main proceedings may bring a direct action against the insurer if that possibility arises under the Spanish law applicable to the non-contractual obligation, irrespective of the provision made under the German law to which the insurance contract is subject.

84. That approach is not at odds with the independent will of the parties to the contract, who may freely choose the law applicable to it. This choice cannot prejudice the rights of third parties or those of the injured party. [23]

85. I note that Article 18 of the Rome II Regulation lays down a provision that protects the interests of the injured party, granting that party the benefit of the most favourable rules and enabling him or her to bring a claim directly against the insurer. [24] The legislature has also taken account of the interests of the insurer by restricting the basis for direct action to the two laws that the insurer could reasonably expect to apply, namely the law applicable to the non-contractual obligation and that applicable to the insurance contract. [25]

86. Therefore, the choice of law by mutual agreement between the policyholder and the insurer cannot prevent the injured party from exercising his or her right to bring a direct action, when that right derives from the law applicable to the non-contractual obligation.

87. In view of the foregoing, I consider that Article 18 of the Rome II Regulation must be interpreted as meaning that an injured party may bring a direct action against the insurer of the liable party when the law applicable to the non-contractual obligation so provides, regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract.

VI – Conclusions

88. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Landesgericht Korneuburg as follows:

(1) Articles 1 and 3(1) of Regulation (EC) No 2027/97 of the Council of 9 October 1997 on air carrier liability in respect of the carriage of passengers and their baggage by air, as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002, must be

22 — See the commentary on Article 6 of the draft Rome II Convention, Fallon, M., 'Commentaire de la proposition pour une convention européenne sur la loi applicable aux obligations non contractuelles', *Groupe européen de droit international privé, réunions de la Haye des 26 à 28 septembre 1997 et de Luxembourg des 25 à 27 septembre 1998*, Revue belge de droit international, 1997/2, p. 696.

23 — As regards the freedom to choose the law applicable to the non-contractual obligation, this traditional consideration is expressly provided for in Article 14(2) of the Rome II Regulation. If neither the law of the insurance contract nor the law normally applicable to the non-contractual obligation permitted direct action, the injured party would not, therefore, be able to bring such an action against the insurer, even if it were permitted under the law agreed upon by the injured party and the liable party.

24 — It should be recalled that in disputes in matters relating to insurance, a victim who brings an action against the insurer of the liable party may be regarded as the weak party. See judgment in *FBTO Schadeverzekeringen* (C-463/06, EU:C:2007:792, paragraph 28). This consideration also underpins the establishment of the right enabling an injured party to bring a direct action against an insurer in road accident cases (see Article 3 of Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive) (OJ 2000 L 181, p. 65)).

25 — See the Proposal for a Regulation (COM(2003) 427 final, p. 27).

interpreted as meaning that the provisions of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999 and approved on behalf of the European Union by Council Decision 2001/539/EC of 5 April 2001, do not apply to a national flight that is not operated by an air carrier holding an operating licence within the meaning of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

(2) Article 18 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) must be interpreted as meaning that an injured party may bring a direct action against the insurer of the liable party when the law applicable to the non-contractual obligation so provides, regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract.