Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

9 September 2015*

(Reference for a preliminary ruling — Air carrier liability in the event of accidents — Action for damages — Montreal Convention — Regulation (EC) No 2027/97 — Flight operated free of charge by the owner of a property in order to show that property to a prospective purchaser — Regulation (EC) No 864/2007 — Direct action provided for by national law against the civil-liability insurer)

In Case C-240/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Korneuburg (Austria), made by decision of 12 May 2014, received at the Court on 12 May 2014, in the proceedings

Eleonore Prüller-Frey

v

Norbert Brodnig,

Axa Versicherung AG,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, S. Rodin (Rapporteur), A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: M. Szpunar,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 4 March 2015,

after considering the observations submitted on behalf of:

— Ms Prüller-Frey, by A. Weinzierl, Rechtsanwalt,

— Mr Brodnig and Axa Versicherung AG, by F. Hörlsberger, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the French Government, by M. Hours, acting as Agent,

— the European Commission, by G. Braun, M. Wilderspin, F. Wilman and K.-P. Wojcik, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 20 May 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1(1), 17, 29 and 33 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 (OJ 2001 L 194, p. 38; 'the Montreal Convention'), of Article 2(1)(a) and (c) of Council Regulation (EC) No 2027/97 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'), of Article 3(c) and (g) of Regulation (EC) No 785/2004 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), of Article 67 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), of 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) (OJ 2007 L 199, p. 40), and of Article 7(1)(f) of Second Council Directive 88/357/EEC 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), as amended by Council Directive 92/49/EEC of 18 June 1992 (OJ 1992 L 228, p. 1; 'Directive 88/357').

2 The request has been made in proceedings between (i) Ms Prüller-Frey and (ii) Mr Brodnig and Axa Versicherung AG ('Axa'), a German insurance company, concerning compensation for current and future damage sustained by Ms Prüller-Frey as the result of an air accident.

Legal framework

International Law

3 Article 1(1) of the Montreal Convention provides as follows:

'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.'

EU law

4 According to Article 1 of Regulation No 2027/97:

'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.'

5 Article 2(1) of that regulation provides:

‘1. For the purposes of this Regulation, the following definitions shall apply:

(a) “air carrier” shall mean an air transport undertaking with a valid operating licence;

(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 [Council] Regulation (EEC) No 2407/92 [of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1)];

(c) ‘person entitled to compensation’ shall mean a passenger or any person entitled to claim in respect of that passenger, in accordance with applicable law;

…’

6 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 (Recast) (OJ 2008 L 293, p. 3) repealed Regulation No 2407/92 with effect from 1 November 2008.

7 Article 2 of Regulation No 1008/2008 is worded as follows:

‘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;

…’.

8 Article 3 of that regulation 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.

An undertaking meeting the requirements of this Chapter shall be entitled to receive an 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’.

9 Article 2(2) of Regulation No 785/2004 provides:

‘This Regulation shall not apply to:

…

(g) aircraft, including gliders, with a MTOM of less than 500 kg, and microlights, which:

— are used for non-commercial purposes, or

— are used for local flight instruction which does not entail the crossing of international borders,

in so far as the insurance obligations under this Regulation relating to the risks of war and terrorism are concerned.

…’

10 Article 4 of Regulation No 864/2007 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.

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.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.’

11 Article 18 of that 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’.

12 Article 1 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), as amended by Directive 88/357 (‘Directive 73/239’), reads as follows:

‘1. This Directive concerns the taking-up and pursuit of the self-employed activity of direct insurance, including the provision of assistance referred to in paragraph 2, carried on by undertakings which are established in the territory of a Member State or which wish to become established there.

…

3. The classification by classes of the activity referred to in this Article appears in the Annex.’

13 Article 5 of Directive 73/239 provides:

‘For the purposes of this Directive:

...

(d) “large risks” means:

(i) risks classified under classes 4, 5, 6, 7, 11 and 12 of point A of the Annex;

...’

14 The Annex to Directive 73/239 specifies:

‘A. Classification of risks according to classes of insurance ...

5. Aircraft All damage to or loss of aircraft. ...

11. Aircraft liability All liability arising out of the use of aircraft (including carrier’s liability).

...’

15 Article 7(1) of Directive 88/357 states:

‘The law applicable to contracts of insurance referred to by this Directive and covering risks situated within the Member States is determined in accordance with the following provisions:

...

(f) In the case of the risks referred to in Article 5(d) of Directive 73/239/EEC, the parties to the contract may choose any law.

...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 On 30 August 2010, Ms Prüller-Frey, who was at that time domiciled and habitually resident in Austria, took a flight aboard a ‘Calidus’ autogyro with a maximum take-off mass (MTOM) of 450 kg, which was piloted by Mr Preiss, over an aloe vera plantation, as she was considering the possibility of purchasing that plantation.

17 Prior to the flight, Mr Preiss, who was the owner of that autogyro, had asked Mr Brodnig to help him to obtain insurance on favourable terms. As Mr Brodnig had a greater number of flying hours than Mr Preiss and the insurance premium is calculated by reference to the number of flying hours, Mr Brodnig, who was registered for residence purposes both in Spain, where he had been living since 2007, and in Austria, concluded, on 6 May 2009, in his capacity as the custodian of the autogyro in issue in the main proceedings, an insurance contract with Axa for multiple-risk civil liability insurance covering the custodian of that autogyro and passengers on board it.

18 The Axa insurance policy defined the intended use of the autogyro in issue in the main proceedings as follows: ‘business and private flights and demonstration flights for the purpose of sale’. Under the terms of the insurance policy, the latter was subject to German law and the courts having jurisdiction in

respect of actions arising out of the policy were 'those of the Federal Republic of Germany'. That insurance policy did not, however, exclude, as the terms of the policy also made clear, 'other fora for which there are mandatory grounds of jurisdiction under German law'.

19 The autogyro in issue in the main proceedings took off from Medina Sidonia (Spain) and was involved in an accident near Jerez de la Frontera (Spain).

20 Ms Prüller-Frey, who was physically injured in that accident, brought an action before the Landesgericht Korneuburg (Korneuburg Regional Court) seeking an order that the defendants pay her the sum of EUR 142 946.40, together with 4% interest from 2 October 2012, and a declaration that the defendants are jointly and severally liable for any future damage attributable to the accident, liability being limited, however, in the case of Mr Brodnig, to the maximum statutory amounts and, in the case of Axa, to the sum insured under the insurance contract in issue in the main proceedings.

21 In the proceedings before the Landesgericht Korneuburg, the defendants maintain that the Austrian courts do not have jurisdiction in respect of the dispute in the main proceedings and submit that Spanish law, not Austrian law, is applicable to the case. They submit that whether Ms Prüller-Frey may bring a direct action against Axa depends on the insurance policy in issue in the main proceedings. Given that that policy is subject to German law, which does not allow such an action to be brought, and that the situation in the main proceedings is governed by Spanish law, which does not provide for a direct action procedure, Ms Prüller-Frey's action should be dismissed. The parties in the main proceedings are agreed, however, that the insurance in this case is compulsory insurance and that the Montreal Convention does not apply to the facts of the case before the referring court.

22 The referring court expresses some doubt regarding the proposition that the Montreal Convention does not apply to the facts of the case before it given that the scope of that Convention extends to domestic flights by virtue of Regulation No 2027/97. In that regard, the referring court is seeking to determine which set of rules on liability applies to those facts and, in the event of the Montreal Convention not being applicable, whether Article 18 of Regulation No 864/2007 must be interpreted as allowing Ms Prüller-Frey to bring a direction action against Axa in accordance with the law applicable to the non-contractual obligation, regardless of the law applicable to the insurance contract in issue in the main proceedings, which was chosen by Mr Brodnig and Axa.

23 In those circumstances, the Landesgericht Korneuburg has decided, in view of its doubts concerning the interpretation of EU law, 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 No 785/2004 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?

2. If the answer to Question 1 is in the affirmative, 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?

3. If the answer to Question 1 is in the affirmative, are Article 29 of the Montreal Convention and Article 18 of Regulation No 864/2007 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?

4. If the answer to Question 1 is in the negative, are Article 7(1)(f) of Directive 88/357 and Article 18 of Regulation No 864/2007 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?'

Consideration of the questions referred for a preliminary ruling

The first question

24 By its first question, the referring court asks, in essence, whether Article 2(1)(a) and (c) of Regulation No 2027/97 and Article 1(1) of the Montreal Convention are to be interpreted as meaning that a claim for damages brought by a person who — whilst she (i) was a passenger in an aircraft that had the same place of take-off and landing in a Member State and (ii) was being carried free of charge for the purpose of viewing from the air a property in connection with a property transaction planned with the pilot of that aircraft — was physically injured when the aircraft crashed, must be determined exclusively on the basis of Article 17 of the Montreal Convention, the application of national law thus being excluded.

25 In order to reply to that question, it is necessary to determine, *in limine*, whether the Montreal Convention is applicable to the case before the referring court.

26 In that regard, it must be noted that, according to Article 1 of Regulation No 2027/97, that 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.

27 Accordingly, in order to determine whether the Montreal Convention is applicable to the case before the referring court, it is necessary to ascertain whether that case falls within the scope of Regulation No 2027/97.

28 For that purpose, it must be recalled that Article 1 of Regulation No 2027/97 rendered that Convention applicable to carriage by air within a single Member State.

29 However, that regulation applies only to 'air carriers' within the meaning of Article 2(1)(a) thereof, namely air transport undertakings with valid operating licences, and to 'Community air carriers' within the meaning of Article 2(1)(b), namely air carriers with a valid operating licence granted by a Member State in accordance with the provisions of Regulation 2407/92.

30 In that regard, it is apparent from the order for reference that the defendants do not fall within the meaning of an 'air carrier' as referred to in Article 2(1)(a) of No 2027/97, since they are not air transport undertakings with valid operating licences.

31 Nor, moreover, do the defendants in the main proceedings fall within the meaning of 'Community air carriers' as referred to in Article 2(1)(b) of Regulation No 2027/97, given that they are not air carriers with a valid operating licence granted by a Member State in accordance with the provisions of Regulation 2407/92.

32 That finding is also borne out by the fact (i) that the flight in issue in the main proceedings, which was operated free of charge within a Member State with a view to the possible conclusion of a real-property transaction and which did not involve the carriage of passengers between different airports or other authorised landing points, was a 'local flight' within the meaning of point (6) of Article 2(1) of Regulation No 1008/2008 and (ii) that, under Article 3(3) of that regulation, a flight of that kind is not subject to the requirement to hold a valid operating licence.

33 In those circumstances, given that the defendants in the main proceedings can be regarded neither as 'air carriers' nor *a fortiori* as 'Community air carriers' within the meaning of Article 2(1)(a) and (b) of Regulation No 2027/97, the case before the referring court does not fall within the scope of that regulation.

34 Consequently, the Montreal Convention, which is applicable to flights within a single Member State only if those flights fall within the scope of Regulation No 2027/97, is not applicable to the case before the referring court.

35 It follows from the foregoing that Article 2(1)(a) and (c) of Regulation No 2027/97 and Article 1(1) of the Montreal Convention must be interpreted as meaning that they preclude a determination on the basis of Article 17 of that Convention of a claim for damages brought by a person who — whilst she (i) was a passenger in an aircraft that had the same place of take-off and landing in a Member State and (ii) was being carried free of charge for the purpose of viewing from the air a property in connection with a property transaction planned with the pilot of that aircraft — was physically injured when the aircraft crashed.

36 Since the first question has been answered in the negative, there is no need to answer the second and third questions.

The fourth question

37 By its fourth question, the referring court asks, in essence, whether Article 18 of Regulation No 864/2007 is to be interpreted to the effect that, in a situation such as that of the case in the main proceedings, a person who has suffered damage is entitled to bring a direct action against the insurer of the person liable to provide compensation, where such an action is provided for by the law applicable to the non-contractual obligation which forms the basis of the claim for damages, regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract.

38 In answering this question, it should be borne in mind that in certain circumstances, liability for the damage caused by an aircraft crash may be within the category of non-contractual obligations referred to in Article 2 of Regulation No 864/2007.

39 In such a case, a person who has suffered damage is entitled to bring his or her claim against the insurer of the person liable to provide compensation when — as is clear from the wording of Article 18 of Regulation No 864/2007 — the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

40 As the Advocate General has noted at point 75 of his Opinion, Article 18 of Regulation No 864/2007 does not constitute a conflict-of-laws rule with regard to the substantive law applicable to the determination of the liability of the insurer or the person insured under an insurance contract.

41 Article 18 merely makes it possible to bring a direct action where one of the laws to which it refers provides for such a possibility.

42 The right of the person who has suffered damage to bring a claim directly against the insurer of the person liable to provide compensation does not affect the contractual obligations of the parties to the insurance contract concerned. Similarly, the choice, made by those parties, of the law applicable to that contract does not affect the right of the person who has suffered damage to bring a direct action in accordance with the law applicable to the non-contractual obligation.

43 Consequently, in order to determine whether, in the present case, Ms Prüller-Frey may bring her claim directly against Axa, it is for the referring court to ascertain whether the law applicable to the non-contractual obligation in issue in the main proceedings, determined in accordance with Article 4 of Regulation No 864/2007, or the law applicable to the insurance contract entered into between Axa and Mr Brodnig, permits such a claim to be brought.

44 In that regard, the law applicable to the insurance contract concerned cannot be a bar to a direct action being brought — should that be possible — on the basis of the law applicable to the non-contractual obligation.

45 It follows from all the foregoing that Article 18 of Regulation No 864/2007 must be interpreted as meaning that, in a situation such as that of the case before the referring court, a person who has suffered damage is entitled to bring a direct action against the insurer of the person liable to provide compensation, where such an action is provided for by the law applicable to the non-contractual obligation, regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 2(1)(a) and (c) of Council Regulation (EC) No 2027/97 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, and Article 1(1) 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, must be interpreted as meaning that they preclude a determination on the basis of Article 17 of that Convention of a claim for damages brought by a person who — whilst she (i) was a passenger in an aircraft that had the same place of take-off and landing in a Member State and (ii) was being carried free of charge for the purpose of viewing from the air a property in connection with a property transaction planned with the pilot of that aircraft — was physically injured when the aircraft crashed.**

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, in a situation such as that of the case before the referring court, a person who has suffered damage is entitled to bring a direct action against the insurer of the person liable to provide compensation, where such an action is provided for by the law applicable to the non-contractual obligation, regardless of the provision made by the law that the parties have chosen as the law applicable to the insurance contract.**

[Signatures]