Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 24 September 2015[1]

Joined Cases C-359/14 and C-475/14

ERGO Insurance SE, acting through its branch ERGO Insurance SE Lietuvos filialas
v
If P&C Insurance AS, acting through its branch If P&C Insurance AS filialas
(Request for a preliminary ruling
from the Vilniaus miesto apylinkės teismas (Lithuania))
and
AAS Gjensidige Baltic, acting through its branch AAS 'Gjensidige Baltic' Lietuvos filialas
v
UAB DK 'PZU Lietuva'
(Request for a preliminary ruling

from the Lietuvos Aukščiausiasis Teismas (Lithuania))

(Judicial cooperation in civil matters — Determination of applicable law — Scope of application of Rome I and Rome II — Directive 2009/103/EC — Accident caused by a tractor unit coupled with a trailer, each vehicle being insured by a different insurance company in respect of civil liability — Accident occurring in a Member State other than that where the contracts for civil liability insurance were concluded)

1. A tractor unit coupled with a trailer is involved in a road traffic accident in one Member State, but both vehicles are registered in another Member State where they are insured in respect of civil liability with two different insurance companies. The insurer of the tractor unit (the towing vehicle) pays in full the compensation due to the victim as a result of the accident. That insurer then lodges a claim to recover part of that payment (a recourse action) against the insurer of the trailer (the towed vehicle).

2. In these requests for preliminary rulings the two referring courts seek guidance as to whether such a recourse action falls within the scope of the EU rules that determine the applicable law in civil and commercial matters and, if so, which rules apply. Case C-359/14 was referred by the Vilniaus miesto apylinkės teismas (District Court of the City of Vilnius); Case C-475/14 is a reference from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania). Both raise important questions

1 — Original language: English.

concerning the scope and interpretation of EU legislation harmonising conflict-of-law rules, namely the Rome I [2] and Rome II [3] regulations. The question also arises as to whether Directive 2009/103/EC [4] introduces special rules in this context for determining the applicable law in relation to motoring accidents.

Legal background

The system for the harmonisation of private international law in civil and commercial matters

3. In the context of the harmonisation, as between the Member States, of private international law in civil and commercial matters the Brussels Convention [5] set out rules identifying the State whose courts had jurisdiction to hear and determine a cross-border dispute. That was superseded by the 'Brussels I' Regulation. [6] The Rome Convention [7] was concluded in order to continue the process of harmonisation. The next stage was the adoption of two regulations (known as Rome I and Rome II) in order to ensure that in situations involving a conflict of laws the same rules are applied throughout the European Union to designate the national law governing the proceedings, irrespective of the Member State of the court where the action is brought. The principal aims of Rome I and Rome II include ensuring the proper functioning of the internal market, improving the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments. [8]

4. There are certain principles common to both regulations, including the objective of ensuring that their substantive scope and interpretation are consistent with each other as well as with Brussels I. [9] It is also compatible with the two regulations for conflict-of-law rules to be established by other provisions of EU law that govern specific areas. [10]

Rome I

5. Rome I applies '... in situations involving a conflict of laws, to contractual obligations in civil and commercial matters'. [11]

6. The general rule is that contracts are governed by the law chosen by the parties. [12]

2 — Regulation (EC) No 593/2008 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).

3 — 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).

4 — Of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263, p. 11) ('Directive 2009/103' or 'the Directive').

5 — Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36). For a consolidated text, see OJ 1998 C 27, p. 1.

6 — 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) ('Brussels I'). That regulation does not apply to Denmark (Article 1(3)).

7 — Convention on the law applicable to contractual obligations (OJ 1980 L 266, p. 1).

8 — See recital 6 in the preambles to both Rome I and Rome II.

9 — See recital 7 in the preambles to both Rome I and Rome II.

10 — See recital 40 in the preamble to Rome I and Article 23 of that regulation. See also recital 35 in the preamble to Rome II and Article 27 of that regulation.

11 — Article 1(1).

12 — Article 3(1).

7. Where the applicable law has not been chosen by the parties, the law governing the contract is in principle determined by the general rules laid down in Article 4. Article 4(1) lays down rules for determining the applicable law relating to certain specific types of contract. Other or hybrid types of contract are, under Article 4(2), governed by the law of the country where the party required to effect characteristic performance of the contract has his habitual residence. In other circumstances, the contract is governed by the law of the country with which it is most closely connected (Article 4(3) and (4)).

8. Further specific types of contract are dealt with in Articles 5 to 8. Article 7 concerns the applicable law in relation to insurance contracts. Article 7(3) provides that, for contracts of the type here at issue, the parties may choose only certain laws in accordance with Article 3. These include the law of the country where the risk is situated at the time of conclusion of the contract (Article 7(3)(a)) and the law of the country where the policy holder has his habitual residence (Article 7(3)(b)). Article 7(4) lays down additional rules for insurance contracts covering risks for which a Member State imposes an obligation to take out insurance. [13]

9. Article 15 is entitled 'Legal subrogation'. It provides: 'Where a person (the creditor) has a contractual claim against 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 to what extent 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.'

10. Pursuant to Article 16, 'If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.'

Rome II

11. Rome II applies '… in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. …'. [14]

12. Chapter II is entitled 'Torts/Delicts'. Article 4(1) sets out the general rule that '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'. Rules for particular non-contractual obligations are listed in Article 5 to Article 12. [15]

13. Article 18 makes provision for a victim to take direct action against the insurer of the person liable. It states: '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.'

14. Certain common rules are laid down in Chapter V, including provisions governing subrogation in Article 19, and multiple liability claims in Article 20. Those provisions mirror the wording of Articles 15 and 16 of Rome I.

13 — The material before the Court does not include sufficient detailed information as to the Lithuanian and German laws governing compulsory motor vehicle insurance for me to offer any useful comment as to the role that Article 7(4) might play.

14 — Article 1(1).

15 — Those rules do not, however, include claims for recourse such as those arising from a road traffic accident.

Directive 2009/103

15. Directive 2009/103 codifies the directives relating to insurance against civil liability in respect of the use of motor vehicles. Under the Directive vehicles covered by compulsory motor insurance must be insured for motoring throughout the European Union. The following recitals in the preamble to the Directive are relevant. According to recital 12, Member States' obligations to guarantee insurance cover constitute an important element in ensuring the protection of victims. Recital 26 states: 'In the interests of the party insured, every insurance policy should guarantee for a single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based, when that cover is higher.'

16. A vehicle is defined as 'any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled'. [16]

17. The general principle in Article 3 is that each Member State must take appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. [17]

18. Article 14 provides:

'Member States shall take the necessary steps to ensure that all compulsory policies of insurance against civil liability arising out of the use of vehicles:

(a) cover, on the basis of a single premium and during the whole term of the contract, the entire territory of the Community, including for any period in which the vehicle remains in other Member States during the term of the contract; and

(b) guarantee, on the basis of that single premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is normally based when that cover is higher.'

Lithuanian law

19. Article 16 of Law No IX-378 of 14 June 2001 on compulsory insurance against civil liability in respect of the use of motor vehicles is entitled 'Principles of paying compensation'. Article 16(1) requires the responsible insurer or the Bureau to pay compensation if the user of a motor vehicle incurs civil liability for damage caused to a third party. The compensation is to be paid in accordance with the legislation regulating compulsory insurance against civil liability in respect of the use of motor vehicles of the State in which the road traffic accident took place. Under Article 16(5) the general rule is that compensation for damage caused by a towed vehicle is paid under the contract of insurance covering the towing vehicle if the two vehicles are coupled at the time of the road traffic accident. Compensation under the contract covering the towed vehicle arises only if the two vehicles had become separated and the damage caused gives rise to civil liability on the part of the user of the towed vehicle.

16 — Article 1(1). See judgment in *Vnuk*, C-162/13, EU:C:2014:2146.

17 — Member States may derogate, under Article 5, from that obligation in respect of certain natural or legal persons, public or private, under certain conditions. Nothing in the material before the Court suggests that Article 5 is relevant to the main proceedings in the two cases at issue here.

German law

20. The referring court in Case C-475/14 explains that Lithuanian and German law apply different principles governing the allocation of responsibility between the insurers of the towing and the towed vehicles in cases where damage is caused in a road traffic accident by such vehicles used in combination. Under Lithuanian law, the position is as set out above. Under German law, however, the insurers of the towing and the towed vehicles are each to cover 50% of the damage caused by the combined vehicles, whether or not the towed vehicle became detached from the towing vehicle during the accident, unless the insured persons have agreed otherwise.[18] Additionally, there are differences between Lithuanian and German law as regards the limitation periods for bringing a recourse action.

Facts, procedure and the questions referred

Case C-359/14

21. On 1 September 2011, in the area of Mannheim (Germany), a tractor unit with an attached trailer, turning round in a narrow street, slid off the road and overturned, occasioning damage in the amount of EUR 2247.45 (LTL 7760.02). Police in Cochem (Germany) established that the driver of the tractor unit was responsible for the accident and the damage caused. At the time of the accident, the civil liability of the owner or lawful user of the tractor unit was covered by compulsory insurance taken out with ERGO SE ('ERGO'), whilst the trailer was insured by a branch of If P&C Insurance AS ('If P&C'). The normal place of activity of both insurance companies is Lithuania. ERGO paid compensation in respect of the damage resulting from the accident. It then brought legal proceedings in Lithuania in which it submitted that If P&C had to assume joint liability for the damage which had occurred.

22. The Vilniaus miesto apylinkės teismas explains that the Supreme Court of Lithuania has ruled that the legal relationship between the insurer of a towing vehicle and the insurer of a towed vehicle is, where a question arises as to a right of recourse pursued by the first insurer against the second insurer, contractual in nature. However, the referring court considers the position to be uncertain, because the concepts of contractual and non-contractual relations in EU law are autonomous in nature. Furthermore, there is no written contract or verbal agreement between the two insurers. In those circumstances it is also unclear whether or not the law applicable to the present case (German law or Lithuanian law) should be determined in accordance with Rome II.

Case C-475/14

23. On 21 January 2011 a road traffic accident occurred in Germany, in the course of which a tractor unit, coupled with a trailer, caused damage to a third party's property. At the time of the accident, the civil liability of the owner or lawful user of the tractor unit was covered by the Lithuanian branch of AAS Gjensidige Baltic ('Gjensidige Baltic'), whilst the trailer was insured by UAB DK PZU Lietuva ('UAB'). The German representatives of the victim lodged a claim and Gjensidige Baltic paid compensation of EUR 1254.36, (LTL 4331.05). Gjensidige Baltic then sought to recover half of that compensation, amounting to EUR 672.02 (LTL 2165.53) from the insurer of the trailer. A dispute arose concerning the law (German or Lithuanian) applicable to Gjensidige Baltic's right of recourse as well as whether that insurer is liable solely or jointly with UAB.

18 — In the order for reference in Case C-475/14 the referring court refers to judgment No IV 279/08 of 27 October 2010 of the German Federal Court. That case concerned vehicles covered by German insurance contracts subject to the German insurance regime. That is different from the position in the main proceedings which concern foreign registered vehicles covered by insurance contracts issued in another Member State.

24. The District Court of the City of Vilnius upheld Gjensidige Baltic's claim. It held that, as the damage resulting from the road traffic accident occurred in Germany, German law applied to the non-contractual obligation arising out of the tort or delict, in accordance with Article 4(1) of Rome II. That judgment was set aside by the Vilniaus apygardos teismas (Vilnius Regional Court). Gjensidige Baltic subsequently lodged an appeal in cassation before the Supreme Court of Lithuania. The latter considers that the dispute before it primarily concerns how the relations between the insurers of the towing vehicle and the insurers of the towed vehicle should be categorised and which law (German or Lithuanian) is applicable to those relations.

25. The referring court considers it important to ascertain whether Article 14(b) of Directive 2009/103 should be treated as a rule determining the applicable law not only in cases concerning the protection of road traffic accident victims, but also when dealing with an insurer's recourse action where a road accident occurs involving towing and towed vehicles used in combination.

26. The following questions have therefore been referred to the Court for a preliminary ruling in these two cases.

In Case C-359/14 the Vilniaus miesto apylinkės teismas asks:

'(1) Must Article 4(4) of [Rome I], which provides that "[w]here the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected", be interpreted as meaning that, in circumstances such as those which have arisen in the present case, German law has to be applied?

(2) If the answer to the first question is in the negative, must the principle laid down in Article 4 of [Rome II] be interpreted as meaning that, in circumstances such as those which have arisen in the present case, the law to be applied to the dispute between the insurer of the tractor unit and the insurer of the trailer must be determined in accordance with the law of the country of the place in which the damage resulting from the road accident occurred?'

In Case C-475/14 Lietuvos Aukščiausiasis Teismas asks:

'(1) Does Article 14(b) of [Directive 2009/103] lay down a conflict-of-law rule, which *ratione personae* should be applied not only to the victims of road traffic accidents but also to the insurers of the vehicle responsible for the damage caused in the accident, for the purposes of determining the law applicable to the relations between them, and is this provision a special rule with respect to the rules on the applicable law laid down in [Rome I and Rome II ?]

(2) If the first question is answered in the negative, it is important to ascertain whether the legal relations between the insurers in the present case fall within the concept of "contractual obligations" within the meaning of Article 1(1) of [Rome I]. If the legal relations between the insurers do fall within the concept of "contractual obligations", the important question is then whether those relations fall within the category of insurance contracts (legal relations) and the law applicable to them should be determined in accordance with Article 7 of [Rome I].

(3) If the first two questions are answered in the negative, it is important to ascertain whether, in the case of a recourse action, the legal relations between the insurers of vehicles used in a combination fall within the concept of a "non-contractual obligation" within the meaning of [Rome II] and whether or not these relations should be treated as derivative legal relations arising as a result of the road traffic accident (delict), when determining the applicable law in accordance with Article 4(1) of [Rome II]. In a case such as the present case, should the

insurers of the vehicles used in a combination be treated as debtors who are liable for the same claim within the meaning of Article 20 of [Rome II], and should the law applicable to the relations between them be determined according to that rule [?]'

27. Written observations were submitted by ERGO, If P&C, the German and Lithuanian Governments and by the European Commission in Case C-359/14. Written observations have also been submitted in Case C-475/14 by Gjensidige Baltic, Lithuania and the Commission. The two cases were joined for the purposes of the oral procedure and the judgment. However, no hearing was requested and none has been held.

Assessment

Preliminary remark

28. If P&C and the Lithuanian Government mention that Lithuania is a signatory to the Hague Convention on the law applicable to traffic accidents.[19] However, Article 2(5) of that convention states that it does not apply to recourse actions and to subrogation in so far as insurance companies are concerned. The convention is therefore not relevant in determining the applicable law in the present matter.

Directive 2009/103

29. In Case C-475/14 the Lietuvos Aukščiausiasis Teismas asks by its first question whether Article 14(b) of Directive 2009/103 lays down a specific conflict-of-law rule applying to a recourse action. That question is equally relevant to Case C-359/14, where it has not been raised by the Vilniaus miesto apylinkės teismas.

30. Gjensidige Baltic submits that Article 14(b) lays down such a *lex specialis*.

31. I disagree with that view.

32. It is clear from the wording and the objectives of the Directive that Article 14(b) does not lay down special rules for the determination of the applicable law in an action for recourse between insurers.

33. First, as the Commission rightly points out, the Directive does not harmonise rules for determining the applicable law in disputes concerning motoring accidents. Rather, the general aim of the Directive is to ensure the protection of accident victims by guaranteeing that insurance cover is in place.[20]

34. Second, Article 14(a) and (b) should be read together. In respect of vehicle insurance policies, Article 14 requires Member States to ensure that a single premium covers the entire territory of the European Union for the duration of the contract and to guarantee on the basis of that premium, in each Member State, the cover required by its law or the cover required by the law of the Member State where the vehicle is based if that cover is higher.[21] The text deals exclusively with the territorial extent and level of cover that the insurer is required to provide, so as to ensure adequate protection for the victims of road traffic accidents.

19 — See the Hague Conference on Private International Law Acts and documents of the 11th session 1968 (Volume III, Road Traffic Accidents p. 223).

20 — See recital 12 in the preamble to the Directive.

21 — See recital 26 in the preamble to the Directive.

35. There is thus no scope for considering that the text can be stretched so as to constitute a special rule for determining the applicable law in disputes between insurance companies concerning recourse actions. Simply stated, neither the text nor the purpose of the Directive support such a reading.

General remarks on Rome I and Rome II

36. The parties take different approaches to the question of whether the law applicable to the recourse action should be determined by the rules of Rome I or Rome II. Essentially their positions differ depending on whether they trace the origins of the recourse action to a contractual relationship (the insurance contracts) or to a non-contractual relationship (the road traffic accident).

37. In Case C-359/14, three parties (If P&C, Germany and the Commission) submit that, since the recourse action has its origins in and is linked to (a) the contract between the policy holder and the insurer of the towing vehicle and (b) the contract between the policy holder and the insurer of the towed vehicle, the recourse action is contractual in nature. The applicable law should therefore be determined pursuant to Rome I and it is the Lithuanian rules that apply. If P&C considers that Article 7 of Rome I, dealing specifically with insurance contracts, governs the position. Germany submits that Article 16 of Rome I, concerning multiple liability claims, applies.

38. The Commission points out that in the context of Article 5 of the Brussels Convention, the notion of 'matters relating to tort, delict or quasi-delict' is 'residual', in that it arises after consideration of 'matters relating to a contract'. The Commission submits that the insurer's claim comes within the scope of Article 15 and Article 16 of Rome I. It follows from Article 16 (governing multiple liability) that where a creditor has a claim against several debtors liable for the same claim, the debtors do not themselves need to be linked by a contractual relationship. In order for a situation involving multiple liability claims to fall within the scope of Rome I, it is therefore sufficient for there to be contractual relations between each debtor and his creditor.

39. ERGO submits that Rome II applies. The road accident gives rise to non-contractual relations between the perpetrator and the victim. Therefore, under Article 4(1) of Rome II the applicable law is German law and the rules on multiple liability in Article 20 of Rome II govern the recourse action. The Lithuanian Government argues that the notion of non-contractual obligations should be interpreted broadly and that the relationship between insurers is closer to a non-contractual relationship.

40. In Case C-475/14 Gjensidige Baltic submits that the legal relationship between the insurers of the towing and towed vehicle is derived from the road accident and is therefore covered by Rome II. Article 20 (concerning multiple liability of debtors) of that regulation therefore determines the applicable law in the action for recourse between the insurers. Lithuania and the Commission adopt the same respective positions as in Case C-359/14.

41. Does a recourse action by a towing vehicle's insurer against a towed vehicle's insurer derive from a contractual obligation or from a non-contractual obligation? The following points at least appear not to be in dispute.

42. First, the term 'contractual obligations' is not defined in Rome I.

43. Second, the substantive scope of Rome I and Rome II should be consistent with each other and with Brussels I.[22]

22 — See recital 7 in the preambles to both Rome I and Rome II. See further judgment in *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 28.

44. Third, the Court is here asked whether the rules in Rome I or Rome II determine the applicable law in a situation where two or more insurers might be jointly and severally liable, under the respective insurance contracts, to compensate a victim who has suffered loss through a tortious act of the policy holder, and one insurer has paid that compensation in full and seeks a contribution from the other(s). Whilst the Brussels I case-law concerning jurisdiction and the recognition and enforcement of judgments cannot automatically be applied, the Court can nevertheless derive assistance from that case-law.

45. It seems to me that the following principles derived from the Brussels I case-law are relevant.

46. First, the concepts of 'matters relating to contract' and 'matters relating to tort, delict or quasi-delict' in Article 5(1) and (3) respectively of Brussels I must be interpreted independently, by reference to its scheme and purpose.[23] The same must be true of the concepts of 'contractual obligations' in Rome I and 'non-contractual obligations' in Rome II.

47. Next, it should be borne in mind that in so far as Brussels I replaces the Brussels Convention, the Court's interpretation of the provisions of the latter is also valid for the provisions of Brussels I.[24]

48. Furthermore, it is well established that the concept of 'matters relating to a contract' within the meaning of Article 5(1)(a) of Brussels I presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based.[25] The concept of a 'contractual obligation' under Rome I should therefore have the same basis.

49. Finally, the concept of 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Brussels I covers all actions which seek to establish the liability of a defendant and which do *not* concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of that regulation.[26] As the Commission rightly points out, the notion of non-contractual matters is residual. The same logic should apply to drawing the dividing line between contractual obligations governed by Rome I and non-contractual obligations governed by Rome II.

50. My starting point is therefore to examine whether an insurer's recourse action is essentially contractual in nature. Only if it does not fit appropriately within that category should it be considered to be non-contractual.

Rome I

51. In Case C-359/14 the referring court asks whether Article 4(4) of Rome I means that German law must be applied in the main proceedings (Question 1). In Case C-475/14 the referring court wishes to know whether the legal relations between the respective insurers of the tractor unit and the trailer give rise to contractual obligations within the meaning of Article 1 of Rome I. If so, it then asks: does Article 7 of Rome I apply to determine the applicable law (Question 2)?

52. Two points are clear from the orders for reference. First, in each case there is no contract between the two insurers. Thus, there is nothing to which the freedom of choice provisions in Article 3 and the rules governing the applicable law in the absence of choice in Article 4 of Rome I can apply; and Article 7 is likewise irrelevant. Second, contracts of insurance indubitably do exist between the policy holders of the towing and towed vehicles and the respective insurers.

23 — See judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 18 and the case-law cited.

24 — See judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraph 19 and the case-law cited.

25 — See judgment in *ÖFAB*, C-147/12, EU:C:2013:490 paragraph 33 and the case-law cited.

26 — See further judgment in *Brogsitter*, C-548/12, EU:C:2014:148, paragraphs 20 and 21. See also judgment in *ÖFAB*, C-147/12, EU:C:2013:490 paragraph 32 and the case-law cited.

53. There is no finding in either Case C-359/14 or Case C-475/14 that those contracts are governed by Lithuanian law. To the extent that it is necessary to determine the law applicable to the insurance contracts that must be done in accordance with Articles 3, 4 and/or 7. Whilst this is ultimately a matter for the national court, the material before the Court suggests that it is likely to be Lithuanian law. [27]

54. As regards the insurer's recourse action, I nevertheless consider that the applicable law should be determined according to the rules in Rome I, for the following reasons.

55. Article 1(1) of Rome I states '[t]his Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters'. Those words are capable of covering situations such as those at issue in the main proceedings.

56. Article 5(1)(a) of Brussels I [28] uses slightly different wording, namely '… in matters relating to a contract …'. However, the substantive scope of measures on the harmonisation of private international law in civil and commercial matters should be consistent. [29] The meaning to be ascribed to the words 'contractual obligations' in Article 1(1) of Rome I determines the substantive scope of that regulation. It is therefore legitimate to turn for assistance to the case-law concerning Brussels I.

57. The Court has stated that Article 5(1)(a) of Brussels I does not require the conclusion of a contract, although it is nevertheless essential in order for that provision to apply to identify an obligation, since the jurisdiction of the national court under that provision is determined by the place of performance of the obligation in question. The rule of special jurisdiction laid down in Article 5(1)(a) 'presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based'. [30] To interpret that provision without laying down such a requirement would go beyond the situations envisaged by Brussels I.

58. I consider that those criteria for analysing the existence of a 'matter relating to a contract' (and by necessary implication, the existence of 'contractual obligations') are met here. Each insurer is subject to a contract with its policy holder which gives rise to mutual obligations. The insurer's obligations include providing civil liability cover for the policy holder. The policy holder's obligations include paying the insurance premium. There is nothing to suggest that those obligations are not freely assumed by one party towards the other. We are, in short, clearly dealing with 'matters relating to a contract' and with 'contractual obligations' so far as those parties are concerned.

59. In order to categorise the civil claims at the heart of the main proceedings, it may now be helpful to explore further the relationships between the different parties involved in more abstract terms.

60. Let us imagine that a road traffic accident occurs, involving a towing vehicle and a towed vehicle. The accident causes damage to a victim who is in no way to blame for the incident. Let A be the policy holder of the towing vehicle, B the policy holder of the towed vehicle, X the victim of the road traffic accident, C the insurer of the towing vehicle and D the insurer of the towed vehicle. A and B have caused and/or are responsible for the damage and injury caused to X. X therefore has a non-contractual claim against A and B in tort or delict.

27 — Possibly by express choice (Article 3); otherwise because the service provider (the insurance company) or the policy holder are habitually resident in Lithuania (Article 4(1)(b) and Article 7(3)(b) respectively). It is also probable that, at the time of conclusion of the contract, the risk was situated in Lithuania (Article 7(3)(a)). As to the possible relevance of Article 7(4), see footnote 13 above.

28 — The general rule under Brussels I is that persons domiciled in a Member State may be sued in the courts of that State (Article 2). Article 5(1)(a) of Brussels I introduces a rule of special jurisdiction derogating from that general rule, which provides that in matters relating to a contract a person domiciled in a Member State may be sued in the place of performance of the contractual obligation.

29 — See point 43 above.

30 — See judgment in *Česká spořitelna*, C-419/11, EU:C:2013:165, paragraphs 46 and 47 and the case-law cited. See also my Opinion in that case, *Česká spořitelna*, C-419/11, EU:C:2012:586, points 43 to 45.

61. A and B each have a contractual relationship with their respective insurers C and D. Compensation is paid to X pursuant to those contracts. However, even if X is paid by C and/or D directly there is no contractual relationship between X, on the one hand, and C and/or D, on the other hand. The road traffic accident and the claims under the insurance policies are the events that trigger the obligation to pay.

62. Whether payment is made to the policy holders (A and B) or directly to the victim X is not a relevant consideration. As the obligation to pay is rooted in contract, the identity of the recipient of that payment (whether that be the policy holder, the victim, or the insurer of the towing vehicle) cannot alter the nature of the obligation. Thus, the centre of gravity of the obligation to indemnify is in the contractual obligation (of the insurer to indemnify the policy holder), rather than any non-contractual obligations between the perpetrator and the victim arising from the road traffic accident. If the perpetrator were not insured he would himself be obliged in tort/delict to compensate the victim for the damage caused. In the absence of an agreement to provide cover, the insurance companies would have no liability. It follows that the recourse action by one insurer against the other (C against D in my example) is rooted in the contracts of insurance; that it is therefore intimately bound up with the two insurers' contractual obligations to their respective policy holders; and that, accordingly, it falls within Rome I.

63. Do Articles 15 ('Legal subrogation') and 16 ('Multiple liability') shed any further light on whether the applicable law in the recourse action is within Rome I?

64. In my view they do not.

65. Article 15 provides that the law which governs a third person's duty to satisfy a creditor shall determine whether and to what extent 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. Article 16 concerns situations where a creditor has a claim against several debtors who are liable for the same claim.

66. I begin by observing that the fact that those provisions are mirrored in Articles 19 and 20 of Rome II suggests that they cannot be decisive for the purposes of determining what is contractual (and hence governed by Rome I) and what is non-contractual (and thus governed by Rome II).[31]

67. Regrettably nothing in the preamble to Rome I explains the provenance of Article 15 or Article 16 or the purpose of those provisions. The wording of Article 15 of Rome I is similar to Article 13(1) of the Rome Convention. The Giuliano and Lagarde report states that '"subrogation" involves the vesting of the creditor's rights in the person who, being obliged to pay the debt with or on behalf of others, had an interest in satisfying it' and, since the Convention applies only to contractual obligations, that rule is limited to rights which are contractual in nature.[32] The authors of the report explain that the rules on subrogation do not apply to subrogation by operation of law when the debt to be paid has its origin in tort (for example, where the insurer succeeds to the rights of the insured against the person causing damage). A situation of legal subrogation might more commonly arise where a creditor grants a loan to a debtor under guarantee. If the guarantor (the third person) pays the creditor in full satisfaction of the debt, he is then subrogated (substituted) for the creditor and has a claim against the debtor.

68. The situation in both sets of national proceedings at issue here, however, is not as straightforward as that of a creditor, a debtor and a guarantor.

31 — See the Explanatory Memorandum to the Commission's 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), p. 26.

32 — See the Report by M. Giuliano, Professor, University of Milan, and P. Lagarde, Professor, University of Paris I, on the Convention on the law applicable to contractual obligations (OJ 1980 C 282, p. 1), Article 13 ('Subrogation').

69. Article 16 of Rome I preserves continuity of applicable law where there is multiple liability in the context of contractual obligations. However, it does not assist for the purposes of determining whether a particular initial obligation is contractual or non-contractual.

70. In my view, therefore, neither provision sheds further light on whether the recourse action falls within the scope of Rome I.

71. On the basis of the analysis that I have earlier set out, I conclude that where two or more insurers are jointly and severally liable to compensate a victim who has incurred loss, damage or injury through a tortious or delictual act or omission of their policy holder(s), and where one insurer has paid that compensation and seeks a contribution from the other(s), the insurer's obligation to indemnify the policy holder or to compensate the victim on behalf of the policy holder should be classified as contractual for the purposes of Rome I. Whether the insurer pays the amount directly to the victim or one insurer pays an amount to another when making a contribution to that amount, the contractual nature of the obligation to pay the indemnity remains the same. Thus, the applicable law is to be determined pursuant to Rome I.

Rome II

72. I have reached the conclusion that the insurer's recourse action falls within Rome I. Strictly speaking, there is therefore no need to examine Rome II. However, for the sake of good order I shall do so briefly.

73. In my view the insurer's recourse action is not within the scope of Article 1(1) of Rome II for the following reasons.

74. First, non-contractual obligations are a residual category. It follows from my analysis at points 58 to 62 and my conclusion at point 71 above that the main proceedings concern contractual obligations. Article 1(1) of Rome II therefore cannot apply.

75. Second, the general category of non-contractual obligations in Article 4 of Rome II cannot determine the applicable law. That is because there is no harmful event between the insurer of the towing vehicle and the insurer of the towed vehicle. The insurer of the towing vehicle has not caused damage to the insurer of the towed vehicle, nor has the latter damaged the former. Thus, *there are no non-contractual obligations between the two insurers*. While it is true that the road traffic accident and the damage caused thereby to the victim triggered the claim(s) under the insurance contract(s), the insurers were not protagonist(s) in that act and are remote from it. Their only connection is through the obligations in their contract(s) of insurance with their respective policy holder(s).[33] It is settled case-law that '… liability in tort, delict or quasi-delict can arise only on condition that a causal connection can be established between the damage and the event in which that damage originates.'[34]

76. Third, the insurer's recourse action does not come within any of the categories of non-contractual obligations governed by Articles 5 to 12 of Rome II.

77. What of Article 18, which provides for choice of law where 'the person having suffered damage' (that is, the victim) wishes to take direct action against the insurer of the perpetrator '… if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides'?

33 — See point 60 above.

34 — See judgment in *ÖFAB*, C-147/12, EU:C:2013:490 paragraph 34 and the case-law cited.

78. Whilst there is no recital to shed light on the meaning of Article 18, assistance can be derived from the Explanatory Memorandum to the Commission's proposal concerning Article 14 (which subsequently became Article 18), which states: 'Article 14 determines the law applicable to the question whether the person sustaining damage may bring a direct action against the insurer of the person liable. The proposed rule strikes a reasonable balance between the interests at stake as it protects the person sustaining damage by giving him the option, while limiting the choice to the two laws which the insurer can legitimately expect to be applied[:] the law applicable to the non-contractual obligation and the law applicable to the insurance contract. At all events, the scope of the insurer's obligations is determined by the law governing the insurance contract. As in Article 7, relating to the environment, the form of words used here will avert the risk of doubts where the victim does not exercise his right of option.'

79. It seems to me that Article 18 does no more than give the victim the option of proceeding directly against the insurer (rather than the perpetrator) whilst leaving untouched the basic parameters of the situation. Whether the victim can claim against the perpetrator will be governed by the law applicable to non-contractual obligations. Whether the insurer is legally required to pay compensation in place of the perpetrator will depend on the terms of the insurance contract as construed under the law applicable to the contract.

80. I am therefore confirmed in my view that Rome II does not apply and that, in consequence, the rules in Article 20 on multiple liability are not relevant in determining the applicable law in Case C-359/14 or Case C-475/14.

Conclusion

81. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Vilniaus miesto apylinkės teismas in Case C-359/14 and the Lietuvos Aukščiausiasis Teismas in Case C-475/14 to the following effect:

— Article 14(b) of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, does not lay down a special rule for the determination of the applicable law.

— Where two or more insurers are jointly and severally liable to compensate a victim who has incurred loss, damage or injury through a tortious or delictual act or omission of their policy holder(s), and where one insurer has paid that compensation and seeks a contribution from the other(s), the insurer's obligation to indemnify the policy holder or to compensate the victim on behalf of the policy holder should be classified as contractual for the purposes of Article 1(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Whether the insurer pays the amount directly to the victim or one insurer pays an amount to another insurer in order to contribute to that amount, the contractual nature of the obligation to pay the indemnity remains the same. Thus, the applicable law is to be determined pursuant to Rome I.