Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 18 May 2017[1]

Case C-340/16

Landeskrankenanstalten-Betriebsgesellschaft — KABEG
v
Mutuelles du Mans assurances IARD SA (MMA IARD)

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling — Jurisdiction in matters relating to insurance — Notion of 'matters relating to insurance' and 'injured party' — Action brought by the injured party directly against the insurer — Subrogation of the employer, a public-law institution, to an employee's rights against the insurer, based on statutory assignment of the rights of the person injured in a motor accident)

I. **Introduction**

1. A cyclist living and working in Austria suffered injuries in a road accident in Italy. He had to go on sick leave. His employer, a public-law institution in the health sector established in Austria, continued to pay his salary for the duration of his sick leave, in accordance with the employer's statutory obligations under Austrian law. The driver's civil liability insurer is based in France. The employer seeks the reimbursement of the amount corresponding to the salary paid to the cyclist from the driver's civil liability insurer. For this purpose, the employer started legal proceedings in Austria against the insurer.

2. To seise the Austrian courts, the employer relied on a special head of jurisdiction concerning matters relating to insurance in Regulation (EC) No 44/2001.[2] That head of jurisdiction allows, in principle, an injured party to bring a claim against an insurer in the place of the injured party's domicile. The objective of such insurance-specific *forum actoris* is to protect the weaker party.

3. Against this factual and legal background, the referring court, the Oberster Gerichtshof (Supreme Court, Austria) entertains doubts as to whether the employer can be classified as a weaker party who deserves protection in the form of the special insurance-specific *forum actoris* rule provided under Regulation No 44/2001. Those legitimate doubts bring to light the real issue of this case: the Court is invited to clarify the conditions under which the specific *forum actoris* provided for by the regulation might be passed on to another person who was subrogated to the claim of the originally or directly injured party.

1 Original language: English.

2 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).

II. **Applicable law**

A. **EU law**

1. ***Regulation No 44/2001***

4. Recitals 11 to 13 of Regulation No 44/2001 state that:

‘(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor …

(12) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.’

5. Article 2(1) of Regulation No 44/2001 provides that: ‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

6. Article 3(1) of Regulation No 44/2001 sets out that: ‘Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.’

7. Pursuant to Article 8 of this regulation, jurisdiction in matters relating to insurance is governed by Section 3 of Chapter II of Regulation No 44/2001.

8. The rules in Article 9(1) of the same regulation determine that an insurer domiciled in a Member State can be sued:

‘(a) in the courts of the Member State where he is domiciled, or

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

…’

9. Article 11(2) provides that ‘Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted’.

10. For the sake of completeness, it might be added that Regulation No 44/2001 has been repealed by Regulation (EU) No 1215/2012, which applies from 10 January 2015 onward.[3] However, as the proceedings in the present case were brought before that date, Regulation No 44/2001 remains the applicable legislation.

3 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).

B. **National law**

11. At the federal level, Paragraph 1358 of the Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)[4] states that: 'A person who pays the debt of another for which he is liable personally or with specific assets shall be subrogated to the rights of the creditor and shall be authorised to demand compensation for the debt which he has paid. ...'

12. Furthermore, Paragraph 67(1) of the Versicherungsvertragsgesetz (Law on insurance contracts)[5] provides that where the policyholder has a claim for damages against a third party, that claim shall pass to the insurer to the extent that it makes good the damage.

13. At the local level, in the Austrian state of Carinthia, Paragraph 2(1) of the Kärntner Landeskrankenanstalten-Betriebsgesetz[6] (Law on the organisation and management of provincial hospitals in Carinthia) establishes 'Landeskrankenanstalten-Betriebsgesellschaft — KABEG', as a public-law institution. Pursuant to Paragraph 3, KABEG shall manage the provincial hospitals as public hospitals of the province. It shall fulfil its duties in the public interest and not operate for profit.

III. **Facts, procedure and questions referred**

14. Landeskrankenanstalten-Betriebsgesellschaft — KABEG ('the Appellant') is a public law body that runs hospitals. It is established in Klagenfurt am Wörthersee, Austria.

15. One of the Appellant's employee's ('the cyclist') suffered various injuries in a road traffic accident that occurred on 26 March 2011 in Italy. At the time of the accident, the cyclist worked and resided in Austria.

16. The driver of the car who allegedly caused the accident had an insurance policy for civil liability with Mutuelles du Mans assurances IARD SA ('the Respondent'), an insurance company established in France.

17. Legal proceedings were commenced by the Appellant against the Respondent before the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria) ('first-instance court'). The Appellant considered the driver of the car to be solely liable for the accident. He asked the Respondent for damages of EUR 15505.64, plus interest and the costs of the proceedings.

18. Based on a statutory obligation to do so, the Appellant continued to pay the cyclist's (its employee's) salary while he was on sick leave because of the injuries sustained in the road traffic accident. By operation of Austrian law, the cyclist's compensation claim passed to the Appellant. The Appellant considers that the salary paid to the cyclist during his sick leave constitutes damage, and that the cyclist's right to claim the compensation for that damage against the Respondent was subrogated to the Appellant.

19. The Appellant further argued that the first-instance court had international jurisdiction to hear the case. It based this argument on Article 9(1)(b), read in conjunction with Article 11(2) of Regulation No 44/2001: an insurer can be sued in a Member State other than in which it is domiciled (in this case, France), if the action is brought before the courts in the place where the claimant is domiciled (here, Austria). The Appellant also pointed out the fact that the same court had already accepted jurisdiction in parallel proceedings brought by the cyclist against the insurer.

4 Law of 1 June 1811, JGS No 946/1811.

5 Law of 2 December 1958, BGBl. 1959/2 as amended.

6 Law of 25 February 1993, LGBl. 1993/44 as amended.

20. The Respondent disagreed about the international jurisdiction of the Austrian court. It drew attention to the purpose of the special rules for jurisdiction in insurance matters: to protect the weaker party. The Respondent suggested that the Appellant was not a weaker party and therefore was not entitled to such protection.

21. The first-instance court found that it did have jurisdiction, and that the Appellant could be seen as a weaker party irrespective of its size, as it had merely asserted a claim derived from that of its employee.

22. On an appeal brought by the Respondent, however, the Oberlandesgeright Graz (Higher Regional Court, Graz, Austria) set aside the first-instance decision and dismissed the original action, finding that there was a lack of international jurisdiction. It held that the Appellant could not be classified as the weaker party.

23. The Appellant appealed that decision before the Oberster Gerichtshof (Supreme Court), the referring court. That court considers it necessary to clarify several provisions of Section 3 of Chapter II of Regulation No 44/2001 in order to assess whether the matter before it can be classified as a matter relating to insurance. It also seeks to ascertain whether the Appellant can be considered as an injured party who can rely on the insurance-related *forum actoris* rule provided for in Article 9(1)(b), in combination with Article 11(2), of Regulation No 44/2001.

24. In these circumstances, the Oberster Gerichtshof (Supreme Court) stayed the proceedings and referred the following questions to the Court:

‘(1) Is the action brought by an employer established in Austria seeking compensation for the damage passed on to that employer as a result of the continued payment of remuneration to its employee domiciled in Austria a – “matter relating to insurance” within the meaning of Article 8 of Regulation (EC) No 44/2001, in the case where

(a) the employee was injured in a road traffic accident in a Member State (Italy),

(b) the action is brought against the civil-liability insurer, domiciled in another Member State (France), of the vehicle at fault, and

(c) the employer is established as a public-law institution with legal personality?

(2) If Question 1 is answered in the affirmative:

Should Article 9(1)(b), in conjunction with Article 11(2), of Regulation (EC) No 44/2001 be interpreted as meaning that the employer which has continued to pay remuneration can, as an – “injured party”, sue the civil-liability insurer of the vehicle at fault in the courts for the place where the employer is domiciled, in so far as such a direct action is permitted?’

25. Written observations were submitted by the Appellant, the Respondent, the Italian Government and by the Commission.

IV. **Assessment**

26. The referring court aims at ascertaining whether the claim of an employer who continued paying a salary to its employee while the latter was on sick leave (as a result of suffering injuries sustained in a road traffic accident), and who asks for damages corresponding to that salary classifies as a 'matter relating to insurance' within the meaning of Regulation No 44/2001 (first question). If this is answered in the affirmative, that court also asks whether such an employer can be considered as an 'injured party' and rely on the insurance-related *forum actoris* when bringing a claim against the driver's civil liability insurer (second question).

27. My answer to those questions is a double 'yes'. In explaining that position, I will first briefly consider the notion of 'matter relating to insurance' (A). Second, I will examine whether and under what conditions a subrogee of an insurance-related claim can be classified as an 'injured party' and rely on the insurance-related *forum actoris* (B).

28. As a preliminary terminological remark common to the entire argument, I wish to stress that in this Opinion, I use the term 'subrogation' in a general, neutral way, as generically referring to all kinds of legal 'substitution'.[7] It simply captures the situation of a person who steps into another person's shoes to enforce rights or assume obligations.

A. **Matters relating to insurance**

29. Pursuant to Article 8 of Regulation No 44/2001, Section 3 of Chapter II thereof contains specific jurisdictional rules applicable in matters relating to insurance. They allow the policyholder, the insured, the beneficiary, and the injured party to bring proceedings against an insurer before the courts of the Member State and in a place where those respective parties are domiciled. By contrast, the insurer is, in principle, left with only one option: to seise the courts of the Member State where the defendant is domiciled.[8]

30. Regulation No 44/2001 does not, however, define the notion of insurance. Neither did its legal predecessor (the Brussels Convention[9]) and nor does its successor (Regulation No 1215/2012[10]).

31. I agree with the Commission that the notion of 'matter relating to insurance' must be interpreted autonomously and uniformly in order to ensure, as far as possible, that the rights and obligations which derive from that regulation for the Member States and the persons to whom it applies are equal and uniform.[11]

32. But, apart from that general observation, indeed there appears to be no EU-specific definition of a 'matter relating to insurance'. So far, the case-law of the Court has provided two types of casuistic guidance in this matter, by inclusion (providing explicit examples of what is in) and by exclusion (what is out).

7 Thereby arguably going back to the original Latin term *surrogare*, which simply means *to substitute* (see, for example, Lewis and Short, *A Latin Dictionary*, Oxford University Press, Oxford, 1996, p. 1818). Used in such a generic way, no distinction is made as to whether the subrogation happened on a statutory or contractual basis, or whether it was partial or full.

8 Judgment of 26 May 2005, *GIE Réunion européenne and Others* (C-77/04, EU:C:2005:327, paragraph 17 and the case-law cited).

9 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, subsequently amended by conventions on the accession to that Convention of new Member States (OJ 1978 L 304, p. 36).

10 See footnote 3.

11 See by analogy (as regards the notion of 'commercial and civil matters'), judgment of 9 March 2017, *Pula Parking* (C-551/15, EU:C:2017:193, paragraph 33 and the case-law cited). Concerning, the necessity to interpret the Brussels Convention independently, see judgment of 15 January 2004, *Blijdenstein* (C-433/01, EU:C:2004:21, paragraph 24 and the case-law cited).

33. Within the first category, the Court observed, by reference to the similarly worded Brussels Convention, that the insurance-related jurisdictional rules apply expressly to certain types of insurance, such as compulsory insurance, liability insurance, insurance of immovable property and aviation or marine insurance. [12]

34. On the side of exclusion, Article 1(2)(c) clearly eliminates social security matters from the scope of Regulation No 44/2001. It might be added that this exclusion is applied to the extent that a given claim does not fall within the notion of 'civil or commercial matter', which delimits the applicability of Regulation No 44/2001 as whole. [13]

35. Furthermore, the Court excluded 'reinsurance' matters from the scope of the insurance-specific jurisdictional rules because reinsurance is not mentioned in what subsequently became Section 3 of Chapter II of Regulation No 44/2001. However, the Court also limited that exclusion to relationships between two professionals acting in the reinsurance sector. It held that the jurisdictional rules concerning insurance were 'fully applicable where, under [the applicable law], the policyholder, the insured or the beneficiary of an insurance contract has the option to approach directly any reinsurer of the insurer in order to assert his rights under that contract as against that reinsurer', given that such a party would be the weaker party vis-à-vis the reinsurer. [14]

36. I do not think that it would be either necessary or wise to attempt to provide a general and exhaustive definition of what is a 'matter relating to insurance' and, hence, what is 'insurance'. That can be left in the hands of legal scholarship. There is, however, one element that emerges from the reviewed case-law, naturally tied to the logic of the Brussels Convention/regulations system: for the purpose of international jurisdiction, the basis for ascertaining what is a 'matter relating to insurance' is essentially 'title-based'. Is the title for which an action is launched against a specific defendant (in other words, the cause of that action) the ascertaining of rights and duties arising out of the insurance relationship? If yes, then the case can be deemed as a matter relating to insurance.

37. In the context of Section 3 of Chapter II of Regulation No 44/2001, a 'matter relating to insurance' then simply concerns the ascertaining of rights and duties of any of the parties referred to in Article 9(1)(b) and Article 11(2) to the extent that these rights and duties are said to arise out of an insurance relationship.

38. It might be added that that conclusion is not altered by the fact that the rationale and historic roots of obligations arising in the context of liability insurance may be, at a very general level, linked to the concept of the extra-contractual liability of the initial tortfeasor that the tortfeasor's insurance is supposed to substitute and cover. [15]

39. Therefore, as my first interim conclusion, I consider that for the purpose of identification of the competent jurisdiction, a subject matter of a claim falls within the scope of the notion of 'matter relating to insurance' within the meaning of Section 3 of Chapter II of Regulation No 44/2001 if it concerns rights and duties arising out of an insurance relationship, with the exception of questions concerning social security pursuant to Article 1(2)(c) of the same regulation.

12 Judgment of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 62). See Articles 10, 13 and 14 of Regulation No 44/2001.

13 Art. (1)(2)(c) of Regulation No. 44/2001 provides that it 'shall not apply to … social security'. On the scope of the equivalent provision of the Brussels Convention, see judgments of 14 November 2002, *Baten* (C-271/00, EU:C:2002:656, paragraph 37), and of 15 January 2004, *Blijdenstein* (C-433/01, EU:C:2004:21, paragraph 21).

14 Judgment of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 75).

15 It might be recalled that that line of reasoning, originally appearing in some parts of the legal scholarship and later on discussed in a case before the German Federal Supreme Court (see the German Federal Supreme Court's order for reference dated 26 September 2006 — VI ZR 200/05) was embraced neither by the German Federal Supreme Court, nor ultimately by the Court of Justice when that case was referred to the Court — see judgment of 13 December 2007, *FBTO Schadeverzekeringen* (C-463/06, EU:C:2007:792, paragraph 30).

40. Applied to the present case, it follows from the order for reference that the claim in the main proceedings is based on an insurance contract that exists between the initial tortfeasor and his insurer, rather than on the alleged extra-contractual liability of the person responsible for the accident. In other words, the reason for which the Respondent is being litigated against in the main proceedings is his alleged obligation arising out of an insurance contract he concluded with the tortfeasor. [16]

B. **Passing on of the *forum actoris* to a subrogee**

41. The second question posed by the referring court aims at ascertaining whether the Appellant can rely as an injured party on the *forum actoris* provided for in Article 11(2), read in combination with Article 9(1)(b) of Regulation No 44/2001, and bring a direct action (which, as such is permitted under the applicable law [17]) against the civil liability insurer of the person allegedly responsible for the initial road accident.

42. That question requires the analysis, first, of whether the Appellant is covered by the notion of 'injured party' (1). Since the answer to that question is, in my view, in the affirmative, the ensuing discussion focuses on the conditions under which the insurance-related *forum actoris* passes on to the subrogee (2).

1. ***Notion and forum actoris of injured person***

43. As held by the Court, the jurisdictional rules contained in Section 3 of Chapter II of Regulation No 44/2001 establish 'an autonomous system for the conferral of jurisdiction in matters of insurance', the purpose of which is 'to protect the weaker party by rules of jurisdiction more favourable to his interests than the general rules provide for'. These rules reflect an underlying concern to protect persons who, in most cases, are faced with a predetermined contract, in which the clauses are no longer negotiable, leading to a status as 'weaker party'. [18]

44. The protection stemming from the insurance-related jurisdictional rules should thus not be extended to persons for whom that protection is not justified. [19]

45. A limited analogy might be drawn from similar protective concerns that also shape the jurisdictional rules provided as regards employees and consumers. [20] Those specific rules of jurisdiction equally depart from the main rule based on the domicile of the defendant. [21]

46. What might be said to be common to all these specific areas is the fact that they are supposed to be the exceptions to the main jurisdictional rules. As such, they cannot result in an interpretation which goes beyond the situations expressly envisaged by the regulation. [22]

16 Naturally, whether such a claim will be considered as eventually covered by the insurance contract relied on is a different matter that concerns the substance of the case and not the determination of the international jurisdiction.

17 In the context of civil liability in respect of the use of motor vehicles, see recital 30 and Article 18 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 (OJ 2009 L 263, p. 11), or 'CMID', providing for such a direct action of injured parties.

18 Recital 13 of Regulation No 44/2001. See judgments of 14 July 1983, *Gerling Konzern Speziale Kreditversicherung and Others* (201/82, EU:C:1983:217, paragraph 17); of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 64); of 12 May 2005, *Société financière et industrielle du Peloux* (C-112/03, EU:C:2005:280, paragraph 37); and of 17 September 2009, *Vorarlberger Gebietskrankenkasse* (C-347/08, EU:C:2009:561, paragraph 40 and the case-law cited).

19 Judgments of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 65 and the case-law cited), and of 17 September 2009, *Vorarlberger Gebietskrankenkasse* (C-347/08, EU:C:2009:561, paragraph 41).

20 See Sections 4 and 5 of Chapter II of Regulation No 44/2001.

21 Article 2(1) of Regulation No 44/2001.

22 Judgment of 17 September 2009, *Vorarlberger Gebietskrankenkasse* (C-347/08, EU:C:2009:561, paragraph 39 and the case-law cited).

47. However, it ought also to be kept in mind that in contrast to the matters relating to employees and consumers, the notion of the 'weaker party' in insurance-related matters is defined rather broadly. It includes four categories of persons: the policyholder, the insured, the beneficiary and the injured party. As a matter of fact, these parties may be economically and legally rather strong entities. That flows from the broad language of the insurance-related provisions of Regulation No 44/2001 as well as from the types of insurance described therein.

48. Thus, contrary to what is foreseen for consumers, the persons protected under Section 3 of Chapter II of Regulation No 44/2001 do not necessarily enter the respective insurance contract outside their trade or profession. This fact and this particularity of special jurisdiction under Section 3 of Chapter II ought to be taken into account when interpreting the notion of injured party.

49. Furthermore, Article 9(1)(b) of the regulation confers *forum actoris* on each of the parties enumerated therein, that is the policyholder, the beneficiary and the insured. This constitutes a change and strengthening of the protection in comparison to the Brussels Convention.[23]

50. In *FBTO Schadeverzekeringen* the Court made it clear that the injured party disposes of its own *forum actoris* as well. That forum does not depend on the fora available to the parties referred to in Article 9(1)(b). The injured party, although referred to separately in Article 11(2), can thus bring a claim in the Member State of her domicile.[24]

51. Finally, the Court held that the purpose of the reference made in Article 11(2) of Regulation No 44/2001 to, inter alia, Article 9, is to add injured parties to the list of plaintiffs contained in Article 9(1)(b), without restricting the category of injured persons to those who suffered *directly*. To illustrate that point, the Court provided the example of the heirs of the persons injured.[25]

52. Il follows from the reasoning exposed in this section, that the *forum actoris* provided for in Article 9(1)(b) and cross-referred to in Article 11(2) of Regulation No 44/2001 can be relied on also by a person who has been injured indirectly. Such a person disposes of her own *forum actoris* which is based on her domicile. In my view, the case-law of the Court thus allows for both, directly as well as indirectly harmed persons to be qualified as an 'injured person'.

53. The final and, in a way, the main question to be considered is whether a subrogee such as the Appellant can be classified as an indirectly injured party and invoke the insurance-related *forum actoris*.

2. *The passing on of the forum actoris to a subrogee*

54. The core of the present case is under what conditions, or rather with what restrictions, the specific forum foreseen in Article 9(1)(b) and Article 11(2) of Regulation No 44/2001 can pass on to an entity that has been subrogated to the directly injured party's rights.

55. This question was considered in the *Vorarlberger* case (a). However, the feasibility of the test developed therein has raised some concerns, as evidenced by the present case (b). I would therefore suggest that the Court takes this opportunity to clarify the *Vorarlberger* approach (c).

23 Judgment of 13 December 2007, *FBTO Schadeverzekeringen* (C-463/06, EU:C:2007:792, paragraph 28 *in fine*). Article 8 of the Brussels Convention provides: 'An insurer domiciled in a Contracting State may be sued, either in the courts of that State, or in another Contracting State in the courts for the place where the policyholder is domiciled …'

24 Judgment of 13 December 2007, *FBTO Schadeverzekeringen* (C-463/06, EU:C:2007:792, paragraphs 26 and 31).

25 Judgment of 17 September 2009, *Vorarlberger Gebietskrankenkasse* (C-347/08, EU:C:2009:561, paragraph 44).

(a) ***Vorarlberger***

56. In the *Vorarlberger* case the Court held that a social security institution, acting as the statutory assignee of the rights of the directly injured party in a motor accident, cannot rely on the special *forum actoris* rule contained in Article 11(2), read in combination with Article 9(1)(b), of Regulation No 44/2001.[26]

57. The *Vorarlberger* case came about as a result of a car accident in Germany. The injured party received compensation from her social security institution which was established in Austria. That institution commenced a claim in Austria against the German insurer of the person responsible for the accident. The social security institution relied on the reference made by Article 11(2) of Regulation No 44/2001 to Article 9 thereof. It claimed the subrogation of the rights that passed to it from the directly injured party.

58. The Court held, however, that such reliance was not possible. It noted that *in casu* it was not argued that a social security institution, such as the one concerned in that case, was an economically weaker party and less experienced legally than a civil liability insurer such as the one involved.[27]

59. The reasoning of the Court embraced in *Vorarlberger* suggested that the possibility to apply the protective rules of Section 3 of Chapter II of Regulation No 44/2001 depends on the concrete balance of the legal and economic strength of the parties in dispute, which would have to be ascertained on the facts of each individual case.

60. Such an approach did not meet with universal acclaim. Although it undisputedly aims at doing justice to the objective pursued by Regulation No 44/2001 to protect the weaker party, it may not score very well on ensuring the necessary degree of predictability of the applicable rules of jurisdiction. These concerns are also apparent in the order for reference in the present case. I will turn to them now.

(b) ***The limits of the Vorarlberger approach***

61. First, as the referring court notes, the concrete criteria for assessing the relative weakness of the statutory assignee's position facing the defendant insurer are absent from the guidance provided in *Vorarlberger*. Especially in the case of a subrogee, such as the one in the main proceedings (a public-law employer), the determination as to whether such a party is 'economically weaker and less experienced legally' than the respondent civil-liability insurer constitutes a rather difficult exercise.

62. Second, the referring court also notes the wide spectrum of entities in respect of which such concrete analysis would have to be carried out. The claimants may range from 'small' sole proprietors via medium-sized undertakings to large corporate groups or public-law institutions as well as territorial authorities. I would add that the respective legal and economic strength of the specific claimants will have to be weighed against 'foreign' insurers based in a different Member State. That brings about the additional difficulty of the assessment of legal forms and factual questions pertaining to a different legal system than that of the court called upon to decide.

26 Judgment of 17 September 2009, *Vorarlberger Gebietskrankenkasse* (C-347/08, EU:C:2009:561, paragraph 47).
27 Ibid., paragraph 42.

63. Third, the test embraced in *Vorarlberger* raises a deeper question of the predictability of its outcome in specific cases. Recalling the concrete *raison d'être* of the test, it ought to be kept in mind that the issues examined here are to be dealt with at the level of the establishment of the international jurisdiction, not at the stage of the merits. Hence, is it really appropriate to require the national courts to engage in a laborious factual and contextual examination in order to make a jurisdictional determination which, as a general matter, ought to be as quick and straightforward as possible?

64. These concerns lead me to suggest that the Court add the following clarifications to the *Vorarlberger* approach.

(c) *Clarification of the Vorarlberger approach*

65. The clarification of the passing on of the *forum actoris* in the present context should aim, first, at reconciling the weaker party logic of Section 3 of Chapter II of Regulation No 44/2001 with the objective to ensure high predictability of the jurisdictional rules.[28] Second, the objective of sound administration of justice[29] militates against any further multiplication of the fora. The subrogee therefore should, as far as possible, find herself in same jurisdiction as the person from whom her rights are derived. After all, that is the very logic of subrogation of claims. They are derived.

66. In my opinion, those objectives are not well served by what appears to be essentially a fragmented, individualised and highly contextual assessment of the economic and legal characteristics and experience of each claimant and its comparison with the legal and economic strength of a specific insurer. By contrast, those objectives would be perhaps better served by an approach that zooms in on the objective characteristics of the type of relationship that gave rise to the subrogation and the reason why the subrogee stepped into the shoes of the directly injured person. For the rest, the test should be blind to the individual person, not requiring any contextual assessment of strength, knowledge or experience.

67. I would thus suggest that the subrogation to the rights of the directly injured party triggers the passing on of the *forum actoris* to any subrogee, including both physical and legal persons, unless (i) that subrogee is herself a professional in the insurance sector, to whom the claim passed on the basis of an insurance relationship she formed with the directly injured party (brought about either by operation of the law or on the basis of an insurance contract[30]), or (ii) the subrogee is an entity regularly involved in the commercial or otherwise professional settlement of insurance-related claims who voluntarily assumed the realisation of the claim as a part of its commercial or otherwise professional activity.

68. In the remainder of this Opinion, I will further explain the proposed test by examining the relevant parameters that should frame the assessment of when the *forum actoris* passes on to a person asserting a derived insurance-related claim (i). I will then consider the advantages of the suggested approach (ii). To round up, I will apply it to the present case (iii).

28 Recital 11 of Regulation No 44/2001. See judgment of 14 July 2016, *Granarolo* (C-196/15, EU:C:2016:559, paragraph 16 and the case-law cited).

29 Recital 12 of Regulation No 44/2001.

30 For the sake of clarity, it might be repeated that as noted above, in point 34 of the present Opinion, a claim relating to a social security matter within the meaning of Article 1(2)(c) of Regulation No 44/2001 is excluded *ratione materiae* by the fact that it would not enter the scope of that regulation.

(i) *The parameters*

69. First, the key element for distinguishing between those indirectly injured persons who can and those who cannot rely on the insurance-related *forum actoris* is the existence of an insurance relationship between the respective subrogee and the directly injured person. The key question to be asked is thus: What was the reason (or the legal cause, the title) for which the subrogee paid out respective amounts to the directly injured party? If that reason was the existence of an insurance relationship of any sort,[31] then the subrogee acts as a professional in the insurance sector. It must therefore be excluded from the benefit of the *forum actoris*.

70. Second, I would also suggest that it is immaterial whether the specific insurance relationship between the directly injured party and the subrogee was entered into because of a private-law engagement (as a private insurance contract) or as a consequence of a public-law obligation (either because the duty to be insured is a statutory obligation or public law itself provides directly for compulsory insurance, as far as, in the latter case, the exclusion clause concerning the social security under Article 2(1)(c) is respected[32]). The key element common to both is that, in the end, the subrogee seeking the repayment of the damage against the insurer is simply another professional active in the sector.

71. Third, following and extending the same logic further, the same exclusion should then also apply to a claimant who is a professional in the trading of insurance-related claims. In other words, the protective *forum actoris* should not be available to a person who became subrogated to the directly injured party's right based on an assignment of an insurance-related claim occurring within the subrogee's trade or professional activity, typically on a contractual basis. The use of the insurance-related *forum actoris* would not be justified in such a context.[33]

72. In sum, the key element is the legal title that led the subrogee to slip into the directly injured party's shoes. The subrogee may rely on the insurance-related *forum actoris* unless the title relied on follows from an insurance contract or a commercial or otherwise professional agreement to assign the claim concluded between the directly injured party and the subrogee.

(ii) *Advantages of the proposed clarification*

73. There are at least three reasons why I believe that the approach just outlined might provide for a more predictable and workable test.

74. First, embracing a more objective, title-based assessment of the indirectly injured party's position for the purpose of determining whether that party can rely on the insurance-related *forum actoris* would represent a more workable solution in the context of deciding on the international jurisdiction of courts. There would be no need to engage in the analysis of the relative strengths of the parties in dispute. Their professional, formal status and the title under which they subrogated to a claim would be enough in terms of the necessary knowledge.

31 As stated above, such a broad reading will also encompass reinsurance, to the extent that the claimant disposes of a title allowing her to file a claim against her insurer's reinsurer. See judgment of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 75).

32 In which case, again, the matter would not be one of insurance to start with — see above, point 34.

33 See, by analogy, judgment of 19 January 1993, *Shearson Lehman Hutton* (C-89/91, EU:C:1993:15). The Court concluded in that case that the Brussels Convention is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party to one of the contracts listed …, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

75. Second, another advantage is that the proposed test would be holistic, embracing both physical as well as legal persons. It ought to be recalled that the text of Regulation No 44/2001 is neutral in this respect [34]. The statement made by the Court in *Vorarlberger* concerning the preserved possibility of heirs to rely on insurance-related *forum actoris* did not distinguish between natural and legal persons. I do not see any reason why legal persons would be excluded from such an option to the extent that they have, under the applicable law, the capacity to inherit. More generally, and as in substance argued by the Italian Government, it might be again recalled that in practical terms, a number of those persons benefiting from special fora in matters relating to insurance are likely to be legal persons.

76. Third and finally, the proposed test is also more likely to allow for substantively related claims to be adjudicated in the same forum, thus limiting the fragmentation of litigation. That fact might be illustrated in the present case.

77. The main proceedings were brought by the cyclist as the directly injured party before the first-instance court, presumably the court of his domicile. Applying the test proposed here, the Appellant will have access to the same national court because it seems to be established within that court's jurisdiction.

78. If, contrary to what I suggest, the Appellant is denied the insurance-related *forum actoris*, he will be obliged to bring proceedings where the civil-liability insurer is established (in France), or before the courts of the Member State where the traffic road accident occurred (in Italy).

79. Thus, when the subrogee and the directly injured party are domiciled within the same Member State, and if they decide to use the *forum actoris*, the suggested approach has the advantage of preventing further multiplication of fora at the level of the international jurisdiction.

80. Nevertheless, I would not go so far as to suggest that the subrogee has the *obligation* to follow the jurisdictional choice made by the directly injured party and seise the same court as the one seised by the directly injured party, essentially for three reasons.

81. First, there is already a multiplicity of fora directly inscribed into the text of Article 9(1)(b) and Article 11(2) of Regulation No 44/2001. Under those provisions and in the light of the interpretation given by the Court as regards the second provision, the policyholder, the beneficiary, the insured and the injured party each have separate *forum actoris* based on their domicile. However, in spite of such extant multiplicity, there is nothing in the text of Regulation No 44/2001 that would set up any 'obligation to follow' in order to reduce that multiplicity. Thus, within this legislative framework, I see little reason (and textual support) for judicially establishing such an obligation just for the subrogee.

82. Second, the language of Article 9(1)(b) would suggest that it provides not just for international but also for local jurisdiction (the *place*, not the *Member State* where the plaintiff is domiciled). Thus, an 'obligation to follow', forcing the subrogee to launch a claim before exactly the same court as the one available to the directly injured party, could potentially mean obliging the subrogee to commence a claim in a court outside of her domicile.

34 To illustrate this point in the context of car insurance, one may refer, for example, to the Higher Regional Court of Celle's judgment of 27 February 2008, 14 U 211/06 2, in which it accepted legal persons as being covered by the notion of 'injured party' under Article 11(2) of Regulation No 44/2001. That was by reference to Council Directive 72/166/EEC of 24 April 1972 (OJ, English Special Edition, Series I 1972 (II), p. 360) (replaced now by the CMID, referred to in footnote 17) that defines the 'injured person' as 'each person having a right to compensation of the damage caused by a vehicle'. The national court also noted that Article 4 of the same directive (now Article 5 of the CMID) refers to both natural and legal persons. In another German case from the Higher Regional Court of Frankfurt am Main (judgment of 23 June 2014, 16 U 224/13) a leasing company was classified as an injured party when it brought a claim against an insurance company. The national court considered that the claimant did not have the same insurance expertise. Finally, for the general proposition that legal persons can rely on insurance-related fora for injured persons, see, for example, Staudinger/Czaplinski, 'Verkehrsopferschutz im Lichte der Rom I-, Rom II- sowie Brüssel I-Verordnung', *NJW* 2009, p. 2249 et seq.

83. Third, the obligation to follow could become heavily dependent on the chronology of events in each case, more specifically on the choice made by the directly injured party as to whether and when to issue a claim. But what would happen if the subrogee issues her claim first? Would the directly injured party then also be obliged to follow the choice exercised by the subrogee? If not, the consistency rule would fall apart. If yes, it would put the entire logic of the claim, which is 'subrogation', on its head. The application of the 'follow-the-other-injured-party' rule could thus only operate in one way: the subrogee would follow the directly injured party but not vice versa. Also, it would only be triggered if the directly injured party happens to issue her claim 'in time' — that is before the subrogee does.

84. Be that as it may, the possibility of such internal inconsistencies within the application of a rule that would be potentially introduced in the name of consistency leads me to the conclusion that such a rule might not be a good one in the first place.

(iii) *The present case*

85. In the present case, it would appear, and it is ultimately for the referring court to verify, that the reason for the introduction of the claim by the Appellant was the continuous payment of the salary imposed by national law, and the statutory passing on of the resulting damage to the Appellant. The reason (the title) for the subrogation thus seems to be the employment contract and the applicable statutory rules. There is no insurance relationship, of any kind, between the Appellant and the cyclist.

86. Therefore, the Appellant does not appear to fall within either of the two exceptions, set out above in point 67 of this Opinion, that would exclude the passing on of the *forum actoris*.

87. For the sake of clarity, I would also add that in general, one can also imagine borderline situations such as a claim brought by an employer that is itself an insurance company. However, the cause of action (or the title) for the claim or part thereof having passed onto the insurance company would not be any insurance contract, but, similar to the situation in the main proceedings, the fact that the injured person was its employee. Would *forum actoris* pass on under those circumstances?

88. Yes, it would. Again, in line with the clarifications suggested in this Opinion, the decisive element would be the specific legal title underlying the action of such an insurer-employer. In such a scenario, that claim would have passed on to the employer not because it was acting as a professional in the insurance sector, but because it had an employee who was injured, and it took on the statutory assignment of an injured employee's rights.

89. I readily acknowledge that the approach I recommend in this Opinion could be seen as, in some situations, such as the one just outlined, over-inclusive. This is because it may provide the benefit of insurance-related *forum actoris* to economically secure and/or legally knowledgeable entities that, as a matter of fact, will not need any protection. Nevertheless, all things considered, I still think that the occasional factual over-inclusion of some entities is a more reasonable solution than in practice problematic case-by-case contextual examination of *rapport des forces* of the parties.

V. **Conclusion**

90. In the light of the above, I propose that the Court respond to the preliminary questions referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

(1) An action, such as the one in the main proceedings, brought by an employer in one Member State seeking compensation for the damage passed on to that employer as a result of the continued payment of remuneration to its employee against the civil-liability insurer domiciled in another Member State for the damage caused by a vehicle insured by that insurer, is a 'matter relating to

insurance' within the meaning of Article 8 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(2) A person, such as a public-law institution in its capacity as an employer, established in one Member State, can rely, as the injured party, on the rule provided for in Article 9(1)(b) and Article 11(2) of Regulation No 44/2001, in order to start proceedings directly (if the direct action is permitted under the respective national law) against the insurer of the person responsible for a traffic accident where the rights to be invoked stem from damage that passed on to that employer, namely the continued payment of remuneration to its employee who was injured in a road traffic accident:

– if the reason for bringing the claim is the existence of an insurance relationship between the party responsible for the accident and her insurer; and

– provided that the claimant did not subrogate to the claim:

(i) because of the existence of an insurance relationship between the claimant and the directly injured party; or

(ii) because the claimant assumed the realisation of the claim as a part of its commercial or otherwise professional activity.