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How can insurers react to the ECJ's decision that a 3rd party victim can sue the insurer where the damage occurred or where domiciled ?

Is there any way out ?

Steven Berry QC, Essex Court Chambers

The context

1. This is an issue of liability insurance. In shipping cases this will usually but not always be the cover provided by P&I Clubs.
2. The context is liability insurance by the insurer of an insured tortfeasor ("tortfeasor") which by tort or delict has damaged a third party ("victim / injured party") where there is a direct action statute.
3. By the laws of many relevant EU member states a victim / injured party has a direct right of action against the insurer. In motor vehicle cases all EU member states must ensure that "injured parties" enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability: EU Directives 2000/26 [3]; 2009/103 [18]. Most of the cases are motor insurance, but the principles are general.
4. The cases reveal two main and different formats of action:
 - 4.1. The victim / injured party itself uses the direct action statute to sue the insurer. It chooses its own domicile or the place where the harmful event occurred. In these cases there are three relevant entities: victim / injured party, tortfeasor and insurer.

- 4.2. A transferee of the victim / injured party's rights, such as its insurer, social security provider, claim farmer, or an heir or successor ("transferee"), uses the direct action statute to sue the insurer in its own name. It chooses the transferee's own domicile or the place where the harmful event occurred. In these cases there are four relevant entities: victim / injured party, transferee, tortfeasor and insurer.
5. There may be a hybrid where, because of the law or procedure of the forum, the victim / injured party is the named plaintiff, but the action is in fact and commercial reality wholly or partly brought by its subrogated insurer.

The Brussels Regulation Recast: Regulation 1215/2012

6. Jurisdiction in "matters relating to insurance" is governed by Section 3 Articles 10-16 of Regulation 1215/2012. This recasts the Brussels Regulation 44/2001. It made no substantive changes to this party but renumbered the Articles: Article 11 used to be Article 9, and so on. A copy of Section 3 as a whole is appended.
7. Recital (18) is that "In relation to insurance ... the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules" (more on "the weaker party" anon).
8. Section 3 overrides in general the normal rules on jurisdiction in the Regulation: Article 10 ("shall").
9. It could be said that a victim's action is a matter relating to tort or delict, not a matter relating to insurance, and retains this character even if brought under a direct action statute against an insurer. But Article 13.2, as applied in **FBTO v Odenbreit** [2008] Lloyd's Rep I&R 354, [2008]

ECR I-1132, Case C-463/06, applies the rules in Articles 10, 11 and 12 to direct actions by “the injured party” against the insurer (more on “injured party” anon).

10. The essence of Articles 10, 11 and 12 for present purposes is that, in addition to actions against the insurer in its domicile:

10.1. “The policyholder, the insured or a beneficiary” may sue the insurer in, among other places, the courts where “the claimant” is domiciled: Article 11.1(b);

10.2. In respect of liability insurance the insurer may “in addition be sued in the courts for the place where the harmful event occurred”: Article 12.

European Court decisions

11. The words of Article 11.1(b) confer jurisdictional benefits on “The policyholder, the insured or a beneficiary”. This may, however, be confined to persons within that description who are “weaker parties”: **Aspen v Kairos, the “Atlantik Confidence”** [2017] 2 Lloyd’s Rep 295 [72]-[74]; a Bank cannot rely on Article 14 because not, on the facts, a “weaker party”; applicable by analogy to Article 11.1(b) ?).

12. But this is very controversial in view of *inter alia* **New Hampshire v Strabag Bau** [1992] Lloyd’s Rep I&R 325, per CA 328, 330-332 and **KABEG v MMA IARD** [2017] I.L.Pr.31, Case C-340/16 per ECJ at [34], AG at [59]-[66], and is going to the Court of Appeal.

13. A victim / injured party is not a “policyholder, the insured or a beneficiary” under Article 11.1(b).

14. But, even so, at least some “injured parties” can directly sue in their own domicile under Article 11.1(b) (then called 9.1(b)): **FBTO v Odenbreit** [2008] Lloyd’s Rep I&R 354, [2008] ECR I-

1132, Case C-463/06 (motor vehicle accident), esp. [28]-[31]. The reasoning was not that the victim was a “beneficiary” [27]. It was that the victim was “regarded as weak in disputes in matters relating to insurance” and to deprive it of the same protection afforded to the weak would be “contrary to the spirit of the Regulation” [28]. It could also have been said that Article 13.2 would have little content if the “injured party” could not sue in its own domicile.

15. The “injured parties” who can thus directly sue in their own domicile include at least some transferees of the victim’s rights: such as heirs, **Vorarlberger v WGV** [2010] Lloyd’s Rep I&R 77, Case C-347/08 at [44] obiter; and employers paying sick pay to the incapacitated victim: **KABEG v MMA IARD** [2017] I.L.Pr.31, Case C-340/16. The reasoning seems to be that such transferees are “indirectly injured parties”: **KABEG** [20], [29], [37].

16. But not all transferees, even if “indirectly injured parties”, can directly sue in their own domicile, only those which are a “weaker party” within the meaning of recital (18):

16.1. **Vorarlberger v WGV** [2010] Lloyd’s Rep I&R 77, Case C-347/08 at [44] (social security benefits provider and thereby statutory assignee of the victim’s rights: not “weaker party”; cannot directly sue in its own domicile);

16.2. **SOVAG v If** [2016] QB 780, Case C-521/14), EU:C:2016:41 (accident at work insurer and thereby transferee of some of the victim’s rights: not “weaker party”; cannot directly sue in its own domicile);

16.3. **KABEG v MMA IARD** [2017] I.L.Pr.31, Case C-340/16 [31]-[37] (employer paying sick pay and thereby statutory assignee of victim’s rights: “regarded as weaker” party; can sue in its own domicile);

- 16.4. **Hofsoe v LVM** [2018] EU:C:2018:50 [41]-[47] (professional claim farmer and contractual assignee of victim's rights: not "weaker party"; cannot sue in its own domicile).
17. What, then, is the test for a "weaker party" ? It may be someone who is on the facts of the case "weaker", thus excluding eg. banks (**Atlantik Confidence**). Or it may be anyone deemed, or regarded, as weaker than an insurer, which may be everyone (eg. the Bank of England, the employer in **KABEG**) other than "professionals in the insurance sector" (such as social security entities like **Vorarlberger**, insurers like **If**, and insurance claim farmers like **Hofsoe**).
18. A third party "victim" has been held entitled directly to sue the liability insurer in the place where the harmful event occurred (despite an English exclusive jurisdiction clause in the policy): **Assens Havn v Navigators** [2018] 2 WLR 250, Case C-368/16, EU:C:2017:546 (charterers' liability insurance for damage caused by an insured tug to a Danish port), esp. [31]. Presumably, by analogy, the cases (above) apply equally by analogy where the claimant chooses the place of the harmful event.
19. Unusually, and strikingly, a court in a member state asked to enforce judgement of a court in another members state must refuse to recognise the judgment if the jurisdiction of the original court conflicted with the provisions for matters relating to insurance in Section 3: Article 45.1(e)(i).
20. A suggested annotation of Articles 11-14 to reflect the authorities is appended.

Is there any way out ?

21. Brexit ?

22. If not, the strongly purposive approach of the European Court and the loyalty of the English Judges thereto is likely to mean that, except when sued by fellow professionals in the insurance industry, a direct action claimant against a liability insurer will be able to choose the courts of its own domicile, or the place of the harmful event, at its election.
23. Possible ways out include:
24. “Weaker party” arguments ?
- 24.1. If the **Atlantik Confidence** is right the provisions of the Section 3 are not available to a direct action claimant if, on the facts, it is not a “weaker party” than the insurer. But this is under appeal.
- 24.2. Even if the **Atlantik Confidence** is wrong, if the action, albeit in the name of the victim injured party, is in fact and commercial reality brought by a subrogated insurer there may be an argument in EU law that the claimant is in reality an insurance professional, not a weaker party, and not entitled to the benefit of Article 11 or 12.
25. Exclusive jurisdiction clauses ?
- 25.1. The insurer only has a contract with the insured tortfeasor. The victim / injured party and, no doubt, a transferee of its rights is not in EU law bound by a jurisdiction clause in the insurance contract to which it is not an original party: **Assens Havn v Navigators** [2018] 2 WLR 250, Case C-368/16, EU:C:2017:546 [40]. EU law does not apply the concept that it is a condition of the insurer’s promise to indemnify that it be sued only according to the terms of the insurance.
- 25.2. In principle a policy could be written explicitly to confine the insurance to indemnity against a judgment of the chosen court, so there is no cause of action without a judgement

of that court, or settlement. By analogy with *Scott v Avery* clauses this would probably be valid in principle at English common law. But it would not be surprising if this was precluded somewhere in the mass of EU and other regulation or legislation on insurance, or in the terms of particular direct action statutes.

26. Arbitration clauses ?

26.1. By Article 2(d) “The Regulation shall not apply to ... (d) arbitration”. This is reinforced by recital (12).

26.2. A victim injured party will not be party to the arbitration agreement in the insurance contract. But in English law a claimant under a direct action statute against a liability insurer is bound to sue only in accordance with an arbitration clause in the policy: **McGillivray on Insurance Law** 13th Ed. [30-020] at p.971 (on the Third Parties (Rights Against Insurers) Act 1930).

26.3. If, however, a victim / injured party or transferee sues in another member state, there are however notorious difficulties in enforcing a right to English arbitration, which are beyond the scope of this talk. These are likely to be more acute when the claimant in the courts of the other member state was not party to the arbitration agreement itself.

26.4. A policy could be written with a *Scott v Avery* clause, so there is no cause of action without an award from the chosen tribunal, or settlement. See above as to the possibility of regulatory or legislative control in this area.

Steven Berry QC

February 2018

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****(recast)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 67(4) and points (a), (c) and (e) of Article 81(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) On 21 April 2009, the Commission adopted a report on the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ⁽³⁾. The report concluded that, in general, the operation of that Regulation is satisfactory, but that it is desirable to improve the application of certain of its provisions, to further facilitate the free circulation of judgments and to further enhance access to justice. Since a number of amendments are to be made to that Regulation it should, in the interests of clarity, be recast.
- (2) At its meeting in Brussels on 10 and 11 December 2009, the European Council adopted a new multiannual programme entitled 'The Stockholm Programme – an open and secure Europe serving and protecting citizens' ⁽⁴⁾. In the Stockholm Programme the European Council considered that the process of abolishing all intermediate measures (the exequatur) should be continued during the period covered by that Programme. At the same time the abolition of the exequatur should also be accompanied by a series of safeguards.
- (3) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.
- (4) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and

enforcement of judgments given in a Member State, are essential.

- (5) Such provisions fall within the area of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty on the Functioning of the European Union (TFEU).
- (6) In order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.
- (7) On 27 September 1968, the then Member States of the European Communities, acting under Article 220, fourth indent, of the Treaty establishing the European Economic Community, concluded the 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 ⁽⁵⁾ ('the 1968 Brussels Convention'). On 16 September 1988, the then Member States of the European Communities and certain EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ⁽⁶⁾ ('the 1988 Lugano Convention'), which is a parallel convention to the 1968 Brussels Convention. The 1988 Lugano Convention became applicable to Poland on 1 February 2000.
- (8) On 22 December 2000, the Council adopted Regulation (EC) No 44/2001, which replaces the 1968 Brussels Convention with regard to the territories of the Member States covered by the TFEU, as between the Member States except Denmark. By Council Decision 2006/325/EC ⁽⁷⁾, the Community concluded an agreement with Denmark ensuring the application of the provisions of Regulation (EC) No 44/2001 in Denmark. The 1988 Lugano Convention was revised by the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ⁽⁸⁾, signed at Lugano on 30 October 2007 by the Community, Denmark, Iceland, Norway and Switzerland ('the 2007 Lugano Convention').
- (9) The 1968 Brussels Convention continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.
- (10) The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters, in particular maintenance obligations, which should be excluded from the scope of this Regulation following the adoption of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ⁽⁹⁾.
- (11) For the purposes of this Regulation, courts or tribunals of the Member States should include courts or tribunals common to several Member States, such as the Benelux Court of Justice when it exercises jurisdiction on matters falling within the scope of this Regulation. Therefore, judgments given by such courts should be recognised and enforced in accordance with this Regulation.
- (12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national

law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

- (13) There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.
- (14) A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

- (15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
- (16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.
- (17) The owner of a cultural object as defined in Article 1(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a

SECTION 3

Jurisdiction in matters relating to insurance

Article 10

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.

Article 11

1. An insurer domiciled in a Member State may be sued:
 - (a) in the courts of the Member State in which he is domiciled;
 - (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 claimant is domiciled; or
 - (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.
2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 12

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 13

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.
3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 14

1. Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.
2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after the dispute has arisen;
- (2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section;
- (3) which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State;
- (4) which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State; or
- (5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16.

Article 16

The following are the risks referred to in point 5 of Article 15:

- (1) any loss of or damage to:
 - (a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;
 - (b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;
- (2) any liability, other than for bodily injury to passengers or loss of or damage to their baggage:
 - (a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;
 - (b) for loss or damage caused by goods in transit as described in point 1(b);
- (3) any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;
- (4) any risk or interest connected with any of those referred to in points 1 to 3;
- (5) notwithstanding points 1 to 4, all 'large risks' as defined in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) ⁽¹⁴⁾.

SECTION 4

Jurisdiction over consumer contracts

Article 17

Proposed annotation of the Articles 11-14 of the Brussels Regulation Recast

Steven Berry QC

Essex Court Chambers

February 2018

Article 11

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled;

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary [**or an injured party within the meaning of Article 13.2¹**], [**if a weaker party²**], in the courts for the place where the claimant is domiciled; or

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 12

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued [**by a policyholder, the insured or a beneficiary or an injured party³**]

¹ **FBTO v Odenbreit** [2008] Lloyd's Rep I&R 354, [2008] ECR I-1132, Case C-463/06 [28]-[31].

² By analogy with **Aspen v Kairos, the "Atlantik Confidence"** [2017] 2 Lloyd's Rep 295 [72]-[74], subject to the appeal.

³ **Assens Havn v Navigators** [2018] 2 WLR 250, Case C-368/16, EU:C:2017:546 [31].

within the meaning of Article 13.2⁴], [if a weaker party⁵], in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 13

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 10, 11 and 12 shall apply to actions brought by the injured party **[including an indirectly injured party who is transferee of the rights of a victim⁶], [if a weaker party⁷]** directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 14

1. Without prejudice to Article 13(3), an insurer may bring proceedings **[against a weaker party⁸]** only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

⁴ By analogy with **FBTO v Odenbreit** [2008] Lloyd's Rep I&R 354, [2008] ECR I-1132, Case C-463/06 (motor vehicle accident), esp. [28]-[31].

⁵ By analogy with **Aspen v Kairos, the "Atlantik Confidence"** [2017] 2 Lloyd's Rep 295 [72]-[74], subject to the appeal.

⁶ By analogy with **Vorarlberger v WGV** [2010] Lloyd's Rep I&R 77, Case C-347/08 at [44]; **KABEG v MMA IARD** [2017] I.L.Pr.31, Case C-340/16 **KABEG** [20], [29], [37].

⁷ **Vorarlberger v WGV** [2010] Lloyd's Rep I&R 77, Case C-347/08 at [44]; **SOVAG v If** [2016] QB 780, Case C-521/14), EU:C:2016:41; **KABEG v MMA IARD** [2017] I.L.Pr.31, Case C-340/16 [31]-[37]; **Hofsoe v LVM** [2018] EU:C:2018:50 [41]-[47].

⁸ **Aspen v Kairos, the "Atlantik Confidence"** [2017] 2 Lloyd's Rep 295 [72]-[74]: subject to the appeal.