CJEU rules on the opposability of a choice-of-court clause contained in a large-risk insurance contract in relation to the insured: Case C-803/18, BALTA

The case concerns the question whether the Lithuanian courts have jurisdiction under the Brussels I bis Regulation to deal with a case involving an insurance payment claimed by a company established in Lithuania and covered by a civil liability insurance contract concluded between the policyholder and the insurer, both of whom are established in Latvia.

The insurance contract in question contained a clause providing that any dispute relating to this contract should be brought before the Latvian courts. Following the wording of the preliminary question, the claimant is a 'person insured under that contract who has not expressly subscribed to that clause'.

Similarly to the preliminary question referred in Case C-112/03, Société financière and industrielle du Peloux, the referring court seeks to establish whether the choice-of-court clause contained in the insurance contract may be invoked against the insured who has not expressly subscribed to that clause and who is established in a Member State other than that of the policyholder and the insurer.

The particularity of the present case stems from the fact the insurance contract covered a 'large risk' referred to in Articles 15(5) and 16(5) of the Brussels I bis Regulation. Following the wording of these Articles, concerning the large-risk insurances, the rules on jurisdiction in matters relating to insurance may be departed from by an agreement with no further conditions. It was the impact of Articles 15(5) and 16 of the Brussels I bis Regulation on the opposability of the choice-of-court clause against the insured that inspired the referring court to request for a preliminary ruling.

In its Judgment delivered today without Advocate General's Opinion, **the Court ruled that the choice-of-court clause contained in a large-risk insurance cannot be invoked against an insured who has not subscribed to that clause and who is established in a Member State other than that of the policyholder and the insurer.**

At the outset the Court observed that when contrasted with Article 15(3) and (4) of the Brussels I bis Regulation, the wording of Article 15(5) of the Regulation may suggest that a choice-of-court clause contained in a large-risk insurance contract could be invoked not only against the parties to the contract but also against an insured. In fact, Article 15(3) and (4) of the Regulation refers to the policyholder and to the insurer as the parties to the choice-of-court clause. No such reference is to be found in Article 15(5) (paragraph 33 of the Judgment).

However, after having presented a series of arguments with respect to the history of this provision, the scheme of the rules on jurisdiction in matters relating to insurance and their objectives (paragraphs 34 to 36 of the Judgment), the Court held, on the one hand, that **the prorogation of jurisdiction is strictly circumscribed by the aim of protecting the economically weaker party and it cannot be inferred from the nature of large-risk insurance that an insured (not being a party to this contract) is not a 'weaker party'** (paragraphs 37 to 41 of the Judgment). On the other hand, the application of the special rules of jurisdiction in matters relating to insurance is not to be extended to persons for whom that protection is not justified. No special protection is justified where the parties concerned are professionals in the insurance sector (paragraphs 44 and 45 of the Judgment).

The Court **rejected a case-by-case assessment of the question whether an insured covered by a large-risk insurance may be regarded as a 'weaker party'/professional in the insurance sector** (paragraph 43 of the Judgment). This interpretation is of course in line with the pre-existing case-law, in particular the judgments in Cases C-340/16, MMA IARD, paragraph 34 and C-106/17, Hofsoe, paragraph 45. It seems that a similar approach was also followed in paragraph 109 of the judgment in Case Aspen Underwriting v Credit Europe [2018] EWCA 2590 Civ, where the Court of Appeal held in relation to large-risk insurance that while the case-law of the CJEU excludes an individual factual

assessment of the strength of the economic position, it is still possible to decide on the application of the protective rules on jurisdiction in matters relating to insurance by having regard to the class of business conducted by the party in question.

It is, as Court clarifies, common ground that the insured acting as a claimant in the procedure before the national courts is not considered as a professional in the insurance sector (paragraph 45 of the Judgment). It follows that the choice-of-court clause cannot be invoked against the insured who has not subscribed to that clause and who is established in a Member State other than that of the policyholder and the insurer.

The Judgment can be found here (no English version yet). For those wishing to study the case more extensively, the request for a preliminary ruling is available here.

On a side note…

It might be interesting to note a few points that may be inspirational for the discussion on EU private international law in contexts other than those of the present request for a preliminary ruling and in relation to the issues not covered by this request:

- Article 15(5) of the Brussels I bis Regulation allows to deviate from the protective rules on jurisdiction by a choice-of-court clause in relation to insurance contracts covering one or more of the risks set out in Article 16 of this Regulation, including those referred to in Article 16(5) as 'large risks'. As the Court observes in its Judgment, even the large-risk insurances alone encompass the contracts covering risks of varied nature. Some risks are deemed large due to the subject of insurance cover (i.e. marine and aviation risks), while other have to meet the specific criteria that relate to the policyholder in order to be considered as large. It may be interesting to see in the future developments **whether, in different contexts relating to the contracts that are considered as large-risk insurances solely due to the subject of insurance cover (the reference to various conditions in paragraph 43 of the Judgment seems to hint the fact that this was not the case here), the nature**

of risk is equally irrelevant and, if so, whether the nature of risk may be for instance used by national courts as an indication that the insured parties are professionals in the insurance sector.

- The insured acting as **the claimant in the proceedings before the Lithuanian courts is a company which shares are held exclusively by the policyholder** (paragraph 15 of the Judgment). **In the national proceedings that led to the request for a preliminary ruling, the first instance court considered that, due to the fact that the insured is a company owned by the policyholder, this insured must have consented, even if only indirectly, to the choice-of-court clause** (paragraph 18 of the Judgment). In its Judgment, the Court held in particular that the choice-of-court clause cannot be invoked against an insured who has not subscribed to that clause, without further distinction between express and implicit consent ('la personne assurée par ce contrat […] qui n'a pas consenti à cette clause'). It is to be noted that the wording of the preliminary question refers solely to an insured who has not expressly subscribed to that clause. **The referring court seemingly did not consider it necessary to inquire the Court on this particular aspect of the case. If anything, it is yet to be seen whether any definitive conclusion in relation to the aforementioned aspect (that the Court was not directly asked to address) may be inferred from the Judgment.**

- The large-risk insurance contract in question did not only contain a clause conferring jurisdiction to the Latvian courts but apparently also a choice-of-law clause in favour of the laws in force in this Member State (paragraph 16 of the Judgment). It can be argued that in the context of choice-of-law clauses made in relation to insurance contracts in general (and not solely large-risk insurances), the Rome I Regulation approaches the protection of the 'weaker parties' in a different manner than the Brussels I bis Regulation. **Having in mind the concept of consistency between these Regulations, it is likewise yet to be seen whether the solution adopted in relation to the Brussels I bis Regulation may be transposed to the realm of conflict of laws.**