German Annotation on Referring Decision in FBTO Schadeverzekeringen N.V. v Jack Odenbreit (C-463/06)

An interesting annotation by *Angelika Fuchs* on the decision of the German Federal Supreme Court asking the European Court of Justice for a preliminary ruling on the interpretation of Article 11 (2) and Article 9 (1) (b) of Regulation No 44/2001/EC has been published in the latest issue of the German legal journal Praxis des Internationalen Privat- und Verfahrensrechts (IPRax 2007, 302 et seq.).

The facts of the case are as follows: The claimant, who is habitually resident in Germany, suffered an accident in the Netherlands and brought a direct action in Germany against the other party's insurer the latter of which is domiciled in the Netherlands. Here the question arose whether German courts have international jurisdiction for this claim on the basis of Articles 11(2), 9 (1) (b) Brussels I Regulation.

This question was answered in the negative by the first instance court (*Amtsgericht Aachen*) dismissing the action on the grounds that German courts lacked international jurisdiction. However, the court of appeal (*Oberlandesgericht Köln*) held in an interim judgment that the action was admissible. The case was subsequently referred to the Federal Supreme Court (*Bundesgerichtshof*) which pointed out that the crucial question was whether the injured party can be regarded as a "beneficiary" in terms of Article 9 (1) (b) Brussels I Regulation or whether the term "beneficiary" refers only to the beneficiary of the insurance contract (this has been so far the point of view of the prevailing opinion in German doctrine). In the latter case, the injured party could not sue the insurer at his/her (i.e. the injured party's) domicile.

One of the main arguments in favour of the jurisdiction of the courts at the injured party's domicile is Recital 16a of Directive 2000/26/EC which has been suggested in Directive 2005/14/EC and reads as follows:

> *Under Article 11(2) read in conjunction with Article 9(1)(b) 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, injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled.*

Even though the Supreme Court attached some importance to this recital, the Court had nevertheless doubts whether an autonomous and uniform interpretation of the rules in question was possible on this basis. Thus, the Federal Supreme Court referred with judgment of 26 September 2006 the following question – its first on the Brussels I Regulation – to the ECJ:

> ***Is the reference in Article 11 (2) 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 to Article 9 (1) (b) of that regulation to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?***

Fuchs examines in her annotation whether the well-established methods of interpretation militate in favour of the jurisdiction of the courts in the State where the injured party is domiciled and argues that the wording of Articles 11(2), 9 (1) (b) Brussels I Regulation does not support the assumption of jurisdiction since – while the injured party is referred to in Article 11 (2) – this is not the case in Article 9 (1) (b) Brussels I Regulation. In her opinion also a historic interpretation does not lead to another result since the Jenard Report illustrated that a *forum actoris* of the injured party was not intended. This situation had not been altered in the course of the communitarisation of the Brussels Convention. With regard to teleologic arguments, *Fuchs* states first that there was no need to protect the injured party by admitting direct actions before the courts of his/her domicle and secondly that this additional head of jurisdiction might have undesirable consequences such as forum shopping or a race to the court. With regard to a systematic interpretation she refers *inter alia*, in addition to the mentioned Recital 16a of Directive 2000/26/EC (which, however, is not regarded as a conclusive argument), to the Rome II Regulation. Here a special rule for traffic

accidents had been discussed – but not been accepted (see for the adopted version of Rome II our older post which can be found here). Thus, according to *Fuchs* only the systematic argument which is based on an analogous application of Article 9 (1) (b) Brussels I Regulation might be used – notwithstanding substantial reservations – in favour of admitting direct actions before the courts of the injured party's domicile.

The referring decision can be found (in German) at the Federal Supreme Court's website. See with regard to the reference also our older post which can be found here.