Opinion of AG Campos Sánchez-Bordona in the case CNP, C-913/19: Brussels I bis Regulation and notion of “branch, agency or other establishment” in the insurance context

This Thursday, Advocate General Campos Sánchez-Bordona presented his Opinion in the case CNP, C-913/19. In this case, a Polish court asks the Court of Justice to interpret the special jurisdictional rules in matters relating to insurance contained in Section 3 of Chapter II of the Brussels I bis Regulation, in conjunction with Article 7(2) and (5) of that Regulation.

At the request of the Court, the Opinion focuses on the interpretation of the notion of “branch, agency or other establishment” within the meaning of Article 7(5) of the Regulation. However, as it results from point 3 of the Opinion, the future judgment of the Court will supplement its case-law pertaining to the aforementioned Section 3, complementing in particular the judgment in Hofsoe.

Context of the request for a preliminary ruling

In the judgment in Hofsoe, the Court of Justice answered the question of a Polish referring court by stating, in essence, that Articles 11 and 13(2) of the Brussels I bis Regulation cannot be relied on by a natural person, whose professional activity consists, inter alia, in recovering claims for damages from insurers and who relies on a contract for the assignment of a claim concluded with the victim of a road accident, to bring before a court of the Member State in which the injured party is domiciled a civil liability action against the insurer of the person responsible for that accident.

The judgment in Hofsoe clarified the issue of great relevance (not only) for Polish legal practice and scholars. In Poland, at least since 2011, in the wake of the Supreme Court case-law, the number of disputes pertaining to the recovery of an

amount corresponding to the rental payment for a replacement vehicle from the insurer covering the civil liability of the person responsible for a road accident has been increasing. This case-law clarified, in essence, that the insurance coverage provided under a compulsory motor insurance policy covers purposeful and economically justified expenses pertaining to the rental of a replacement vehicle.

The market reacted. In practice, the owner of a damaged vehicle who rented a replacement vehicle for the duration of the vehicle repair period could quite commonly, instead of making the rental payment, assign a claim against the insurer of the person responsible for the accident to a professional (automobile repair workshop, vehicle rental company or professional whose activity consists in recovering claims for damages from insurers etc.). The professional would claim an amount corresponding to the rental payment from the insurer and the owner could use the replacement vehicle without having to make any payment.

In the European Single Insurance Market it was only a question of time before the national courts had to settle similar disputes in cross-border context. In fact, the request for a preliminary ruling in the case Hofsoe originated from one of such disputes. Here, the preliminary question resulted from the fact the Section 3 ("Jurisdiction in matters relating to insurance") aims to guarantee more protection to the weaker party (policyholder, insured, beneficiary and – where a direct action is permitted – injured party) than the general rules of jurisdiction provide for. It was, thus, necessary to establish whether an assignee being a professional in the insurance sector can be considered as a weaker party.

Unsurprisingly, the case CNP, C-913/19 also derives from proceedings before a Polish court, where the applicant relies on a contract for the assignment to bring an action against the insurer of the person responsible for a road accident.

Facts in the main proceedings

A vehicle owned by an individual is damaged in a road accident provoked by another person insured against civil liability in respect of the use of motors vehicles under a contract concluded with an insurer established in Denmark. As we learn from point 17 of the Opinion, the road accident occurs in Poland.

For the duration of the vehicle repair period, its owner concludes a contract with

an automobile repair workshop under which a replacement vehicle is rented in return for payment. Instead of making the rental payment, the owner assigns to the automobile repair workshop the future claim against the aforementioned insurer.

Subsequently, the automobile repair workshop assigns that claim to CNP, a liability limited company established in Poland.

CNP sends a request for payment of the rental amount to a limited liability company ("Polins") established in Zychlin, Poland, which represents the interests of the Danish insurer as a foreign insurance undertaking in Poland. The adjustment of the insurance claims is supposed to be dealt with by another Polish limited liability company ("Crawford Polska"), acting on behalf of the insurer. Crawford Polska informs CNP that an action against the Danish insurer can be brought "either pursuant to provisions on general jurisdiction or before a court competent for the place of residence or seat of the policyholder, insured party, beneficiary or another person entitled under the insurance contract".

Failing to obtain full payment of the rental amount, CNP brings an action against the Danish insurer before a Polish court. It argues that this court has jurisdiction to hear the case because, according to the information made public by the insurer, its main representative in Poland (Polins) has its seat in Zychlin.

The insurer argues that the claim should be rejected due to the lack of jurisdiction of the Polish court. This court decides to refer three question for a preliminary ruling.

Considerations of the referring court on the preliminary questions

Distinguishing the present case from the case Hofsoe

The referring court indicates that some factual elements distinguish its request for a preliminary ruling from that previously referred in the case Hofsoe. It notes that, in the present case, the defendant engages in insurance activity in Poland, while the case Hofsoe concerned a German insurance undertaking which was liable for the damage caused by a German national, and the road traffic incident in question occurred in Germany. It does not explicitly state how these differences

should affect the interpretation of the Brussels I bis Regulation.

Regardless, in the case Hofsoe, the owner of the damaged vehicle seemingly assigned the claim against the insurer directly to the applicant in the main proceedings, who the Court characterised as "professional in the insurance sector" (see points 42 and 43 of the judgment in Hofsoe). In the present case, the claim was first assigned to the repair workshop and then by this repair workshop to CNP. Against this background, it stems from the request for a preliminary ruling that the applicant argues that the refusal to recognise jurisdiction of the Polish courts will result in automobile repair workshops refusing to carry out repairs or in customers having to cover the costs themselves. It seems that this argument is based on the assumption that "repair" costs cover also the expenses pertaining to the rental of a replacement vehicle and that the assignment of insurance-related claims offers additional protection to the persons considered as weaker parties in matters relating to insurance. However, in the wording of the preliminary questions, this twofold assignment is not explicitly mentioned – the first question concerns "a [professional] having acquired [a claim] from an injured party".

In its request for a preliminary ruling, the referring court also points out that while Denmark did not take part in the adoption of the Brussels I bis Regulation, it notified its decision to apply the content of the Regulation.

Interplay between first and second question

As mentioned above, in his Opinion, AG Campos Sánchez-Bordona addresses the second preliminary question pertaining to the interpretation of Article 7(5) of the Brussels I bis Regulation.

The referring court considers that the second question should be analysed only if the first question is answered in the affirmative.

By its first question, the referring court is asking, in essence, whether – taking into account Articles 10 and 13(2) of the Brussels I bis Regulation – the applicant in the main proceedings is not barred from relying on Article 7(2) and Article 7(5) of the Regulation.

It seems that, by this question, the referring court seeks to establish whether an action can, as to its substance, fall within the scope of the Section 3 ("matters

relating to insurance"), yet the applicant bringing that action and being a professional could be barred from relying on the rules on jurisdiction provided for in Articles 10 and 13(2) of that Section (as he is not a "weaker party") and also from relying on the rules on jurisdiction of the Section 2 (because an action in matters relating to insurance is covered exclusively by the Section 3).

In fact, while the referring court seems not to entertain that interpretation, it notes that wording of Article 10 of the Brussels I bis Regulation could support it ("in matters relating to insurance, jurisdiction shall be determined by the Section 3, without prejudice to Article 6 and aforementioned Article 7(5)"). This reference could be read in the light of the terms of Article 13(2), according to which Article 10 shall apply to actions brought (only) by the "injured party" directly against the insurer.

The referring court notes that its doubts are also inspired by Article 12 of the Regulation ("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"). This court wonders whether this provision would not be superfluous if Section 2 and its Article 7(2) were applied in parallel with it.

Opinion of AG

By the second question, addressed by AG at the request of the Court, the referring court is asking whether a company operating in a Member State which adjusts losses under compulsory insurance against civil liability in respect of the use of motor vehicles pursuant to a contract with an insurer established in another Member State is this insurer's "branch, agency or other establishment" within the meaning of Article 7(5) of the Brussels I bis Regulation.

At the outset is it worth observing that, regardless of the applicant's position, the referring court seems to consider that Crawford Polska (and not Polins) is the relevant entity for the purposes of Article 7(5) of the Regulation. At points 53 – 58 of his Opinion, AG clarifies the issue and proceeds on that premise.

Next, at points 59 – 68, AG analyses whether the criteria established by the Court in its case-law and required to consider that the relevant entity is a "branch, agency or other establishment" are met.

Finally, at points 69 – 112, AG delves into the relation between Article 7(5) of the

Regulation, on the one hand, and the Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), on the other hand.

Ultimately, at point 113, AG proposes to answer the second question by considering:

> *"Article 7(5) of [the Brussels I bis Regulation] must be interpreted as meaning that a commercial company established in a Member State which operates under a contract with an insurance undertaking established in another Member State may be classified as a 'branch, agency or other establishment' of that undertaking if, cumulatively:*
>
> *it operates in a Member State by providing compensation for material damage on the basis of insurance against civil liability arising from the use of motor vehicles the risks connected with which are covered by the insurance undertaking;*
>
> *it has the appearance of an extension of the insurance undertaking; and*
>
> *it has a management body and material facilities such as to enable it to transact business with third parties, so that the latter, although knowing that there will if necessary be a legal link with the insurance undertaking, do not have to deal directly with that undertaking."*

Instead of presenting an extensive synthesis of the Opinion, it is best to recommend giving it an attentive lecture. As it stems from 36 of the Opinion, it provides guidance not only in the insurance-related contexts, but also in other instances where the application of Article 7(5) of the Brussels I bis Regulation comes into question.