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Solutions

Question 1: From whom might the injured young man consider claiming compensation?

The circle of persons who are potentially liable, or who can be addressed to cover liability, include: (a) the driver/keeper¹ of the Spanish car, domiciled in Spain; (b) the Spanish vehicle's liability insurer, established in Spain; (c) the victim's father, domiciled in Poland; and (d) the father's vehicle liability insurer, established in Poland.

Question 2 (jurisdiction): Where can a claim for damages be brought against:

- (a) the driver of the Spanish car, domiciled in Spain,**
- (b) the Spanish vehicle's liability insurer, established in Spain,**
- (c) the victim's father, domiciled in Poland,**
- (d) the father's vehicle liability insurer, established in Poland?**

For claims against defendants domiciled in an EU Member State, courts in the EU determine *jurisdiction* according to the rules set out in the **Brussels I Regulation (recast)**.² The Regulation applies if the case is within its **material and personal scope of application**. According to **Art. 1(1)**, the Brussels I Regulation applies in civil matters, such as – in our case – a claim for civil liability against the driver or keeper of a motor vehicle or his insurer (material scope). Pursuant to **Arts. 4 and 5**, the Brussels I Regulation applies if the defendant is domiciled in an EU Member State. **Art. 6(1)** confirms that only where this is not the case, the courts of a Member State shall determine jurisdiction by the internal rules of law of that Member State (as opposed to using the Brussels I Regulation).

In the scenario, the driver of the Spanish car, the Spanish vehicle's liability insurer, the victim's father and the father's vehicles' liability insurers were all domiciled in EU Member States so that the case is within the personal scope of application of the regulation. The Brussels I Regulation is consequently applicable for claim against these parties.

(a) For a claim against the driver of the Spanish car, jurisdiction is determined by **Art. 4(1)** according to which “persons domiciled in a Member State shall [...] be sued in the courts of that Member State”. The driver is domiciled in Spain and therefore **Spanish courts** have jurisdiction to hear a claim against

¹ In most European jurisdiction, strict liability for road traffic accidents focuses on the keeper of the car, whereas some jurisdictions (among them Spanish law) focus on the driver instead; compare above, Chapter 4, and e.g. THOMAS KADNER GRAZIANO and CHRISTOPH OERTEL, *ZVglRWiss* 2008, 113 at 123 ff. with numerous references.

² Above, I.1.

him. (Spanish internal rules on jurisdiction will then apply to determine which courts in Spain may hear the claim.)

(b) Regarding a direct claim against the Spanish vehicle's liability insurer, the relevant heads of jurisdictions are to be found in arts. 10 ff. of the Brussels I Regulation. For the purposes of the Brussels I Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its (a) statutory seat, (b) central administration, or (c) principal place of business, comp. Art. 63(1) Brussels I. The injured party has the choice to bring a claim against the car insurer before

- the courts of the Member State in which the insurer is domiciled, **art. 11(1)(a)** Brussels I Regulation (in the example: **Spanish courts**), or
- the courts of the State where the victim is domiciled, **arts. 13(2), 11(1)(b)** Brussels I Regulation (in the example: **Polish courts**).³

The Court of Justice of the European Union confirmed in the *Odenbreit* decision⁴ that a claim before the courts of the victim's own domicile is available not only to claimants specified in art. 11(1)(b) (the policyholder, the insured or a beneficiary) but pursuant to art. 13(2) also to victims benefitting from a direct liability insurance claim against the insurer, such as the young man in our scenario. (The possibility to bring a direct claim against a motor vehicle insurer arises by virtue of the national rules implementing Art. 3 and 18 of the Motor Insurance Directive.)

(c) For a claim against the father, jurisdiction is determined by **art. 4(1)** Brussels I Regulation according to which "persons domiciled in a Member State shall [...] be sued in the courts of that Member State". The father is domiciled in Poland and therefore **Polish courts** have jurisdiction to hear a claim against him. (Polish internal rules on jurisdiction will then apply to determine which courts in Poland may hear the claim.) Alternatively, the claim against the father could be brought before the courts at the "place where the harmful event occurred", pursuant to **Art. 7 n° 2** Brussels I Regulation, that is before **Spanish courts** at the place of the accident.

(d) Regarding a direct claim against the father's vehicle's liability insurer established in Poland, the relevant heads of jurisdictions are to be found arts. 10 ff. of the Brussels I Regulation. The injured young man has the choice to bring a claim against the Polish car insurer before

- the courts of the Member State in which the insurer is domiciled, **Art. 11(1)(a)** Brussels I Regulation (in the example: **Polish courts**), or
- the courts at the place where the accident occurred, **Art. 12 1st sent.** Brussels I Regulation (in the example: **Spanish courts**).⁵

³ Art. 12 1st sent. Brussels I Regulation designating the courts at the place where the accident occurred, would also lead to Spanish courts. Given that, in the scenario, these courts already have jurisdiction under Art. 11(1)(a), art. 12 does not apply here.

⁴ Above, I.2.

⁵ Arts. 13(2), 11(1)(b) Brussels I Regulation would designate the courts for the domicile of the victim, in the example: courts in Poland. In the scenario, Polish courts already have jurisdiction pursuant to art. Art. 11(1)(a) Brussels I Regulation, so that the former provision does not apply here.

Question 3 (applicable law): Before the courts having jurisdiction as identified in question 1, which law applies to determine the liability of

- (a) the driver of the Spanish car, domiciled in Spain,**
- (b) the victim's father, domiciled in Poland?**⁶

In the European Union, questions of applicable law for liability for road traffic accidents are governed either by the Rome II Regulation or the 1971 Hague Traffic Accidents Convention. Pursuant to **Art. 28(1) of the Rome II Regulation** (which applies in all EU Member States except Denmark), the Hague Convention prevails over the Rome II Regulation for claims brought in Contracting States of the Hague Convention. Both Spain and Poland are Member States of the EU and Contracting States to the **1971 Hague Convention on the Law Applicable to Traffic Accidents**.⁷ According to its **Art. 1(1)** this Convention determines “the law applicable to civil non-contractual liability arising from traffic accidents, in whatever kind of proceeding it is sought to enforce this liability”. The courts of both countries would therefore determine the law applicable to a claim against the driver of the Spanish car or against the young man's father respectively according to the rules of the 1971 Hague Convention.

(a) According to **art. 3 of the Hague Convention**, liability following a road traffic accident is, in principle, governed by the law of the country where the accident occurred. **Liability of the driver of the Spanish car**, domiciled in Spain, is thus governed by **Spanish law**.

(b) The **liability of the father** is, according to **art. 3 of the Hague Convention**, again governed, in principle, by the law of the country where the accident occurred (Spanish law). However, according to **art. 4(b) of the Hague Convention**, where several vehicles are involved, the law of the state of registration is applicable if all the vehicles are registered in the same state which is also a state other than that where the accident occurred. The exception to the application of the law of the place of the accident therefore depends on the state of registration of the vehicles involved.

The cars of both father and son were registered in Poland, whereas the Seat was registered in Spain. According to the case law of the Member States to the Hague Convention (such as the Swiss case provided in the materials⁸), if another car (like the Seat in our scenario) was a *potential cause* of the accident, it was involved in the accident. Consequently, not all cars involved in the accident were registered in the same State and, as a result, pursuant to **art. 3 of the Hague Convention** the law of the place of the accident (that is, **Spanish law**) applies before Spanish and Polish courts – even if the injured person and the person claimed to be liable are domiciled in the same State (in our example: father and son, both domiciled in Poland).

⁶ This same law applies if the claim is brought directly against the vehicles' liability insurers.

⁷ Above, II.2.a).

⁸ See e.g. the Swiss case reproduced above, II.2.b), with references also to Austrian court decisions.

Question 4 (applicable law): Imagine that father and son had been living in *Germany*, and their car been registered and insured there. Which law would German courts apply to the claim against the father?

Germany is one of the 15 Member States of the EU that is *not* a Contracting State to the 1971 Hague Convention. According to its **Art. 1(1)**, the Rome II Regulation determines the law to non-contractual obligations in civil and commercial matters. Before **German courts**, the applicable law is thus determined by the **Rome II Regulation**, rather than by the Hague Convention.

According to the Rome II Regulation, liability following a road traffic accident is also in principle governed by the law of the country in which the accident occurred, by virtue of **art. 4(1)** of the Rome II Regulation. However, if the person claimed to be liable and the injured party both had their habitual residence in the same country at the time the damage occurred, **art. 4(2)** of the Rome II Regulation provides for the application of the law of that country instead of the law of the country in which the accident occurred. The reason is that both parties have to live with the consequences of the accident in the same country. The link with this country is thus much closer than with the country of the accident where the parties spent only a relatively short amount of time.

Given that the father and his son (the parties to the claim in our example), had their habitual residence in Germany when the accident occurred, before German courts **German law** would apply (rather than Spanish law) and the son would receive full compensation for the damage suffered, including compensation for his entire lifetime's loss of income.

Question 5 (Variation): In the variation, the injured young man wants to bring a products liability claim against the Swedish manufacturer of his father's car.

a) Where could such a claim be brought according to the Brussels I Regulation (recast)?

(aa) The car was manufactured in Sweden by a company established there. The injured young man may thus bring a claim against the Swedish car manufacturer before the courts of the Member State in which the **defendant manufacturer is domiciled**, **art. 4(1)** Brussels I Regulation (in the scenario: **Swedish courts**).

(bb) The claimant has the choice to bring a claim instead “**in the courts for the place where the harmful event occurred**”, **art. 7 n° 2** Brussels I Regulation. The question is where to locate the “place where the harmful event occurred” in products liability scenarios. According to the CJUE, “[i]t is [...] settled case-law that, in the case where the *place in which the event which may give rise to liability in tort [...] occurs* and the *place where that event results in damage* are not identical, the expression ‘place where the harmful event occurred’ in Article [7(2) of Regulation No 1215/2012] must be understood as being intended to cover *both the place where the damage occurred* and the *place of the event giving rise to it*, with the result that the defendant may be sued, at the option of the claimant, in the courts for either of those places [...]”⁹

⁹ Emphasis added. See the decision of the Court of Justice of the European Union, *Andreas Kainz v Pantherwerke AG*, above, I.2., at no. 23.

(i) The accident occurred in Spain so that the *place where the event giving rise to the damage eventually caused injury* to the young man is Spain. **Spanish courts** thus have jurisdiction pursuant to **art. 7 n° 2 Brussels I Regulation**.¹⁰

(ii) The question then is where the “*place of the event giving rise to [the damage]*” is to be located. According to the CJUE’s decision in the case of “*Kainz v. Pantherwerke*”, “[t]his is, in principle, the place where the product in question was *manufactured*”¹¹ (Sweden). In the scenario, Swedish courts do, however, already have jurisdiction under art. 4(1) Brussels I Regulation (see above), so that art. 7 n° 2 does not apply.

According to the CJUE’s decision in the case of “*Kainz v. Pantherwerke*”, the place of the event giving rise to the damage under art. 7 n° 2 Brussels I is *not* to be located in the country where the product was *marketed* and the victim was domiciled (in our scenario: Poland).¹²

The courts of the State where the *victim is domiciled* (in the scenario: *Poland*; in the variation: *Germany*) would, pursuant to **art. 13(2) Brussels I Regulation**, only have jurisdiction for a claim against the car manufacturer if

- the car manufacturer had contracted liability insurance that covers third party damage (such as the damage suffered by the young man in the scenario),
- and a direct action against the manufacturer were permitted, either under the law applicable to the non-contractual obligation or under the law applicable to the insurance contract.¹³

(b) Before the courts having jurisdiction, what is the applicable law?

As set out above, a liability claim against of the Swedish car manufacturer could be brought before either (a) Spanish or (b) Swedish courts (above a). According to Art. 2 of the 1971 Hague Traffic Accident Convention, this Convention does “not apply to the liability of manufacturers, sellers or repairers of vehicles”. Instead, the applicable law could be determined by the **1973 Hague Convention on the Law Applicable to Products Liability**. According to its **Art. 1(1)** this Convention determines the law applicable to the liability of the manufacturers and other persons specified in Article 3 for damage caused by a product [...]. The Convention is in force in Spain but not in Sweden. In Spanish courts, the 1973 Hague Convention would prevail the Rome II Regulation, pursuant to art. 28(1) Rome II Regulation. Spanish courts would thus determine the applicable products liability law according to the provisions of the 1973 Hague Products Liability Convention, whereas Swedish courts would determine the applicable law according to the Rome II Regulation.

¹⁰ The place of the injury may thus be located in any EU Member State in which the defective product caused personal injury. Note however that the CJUE has not addressed this issue in its leading cases on jurisdiction for products liability claims so far. In *Kainz* (above I.2.) the damage was suffered in the country in which the *defendant* was domiciled.

¹¹ See the CJUE, above I.2., at nos. 26, 29, 33 (emphasis added). For the rationale of this solution, see *ibid.*, nos. 27-28.

¹² See the CJUE, above, at nos. 30-31.

¹³ Art. 13(2) Brussels I Regulation together with art. 18 Rome II Regulation: “The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the *law applicable to the non-contractual obligation* or the *law applicable to the insurance contract* so provides” (emphasis added).

(aa) 1973 Hague Convention on the Law Applicable to Products Liability (applicable before Spanish courts). The Hague Products Liability Convention combines four criteria, of which two generally need to be met in order to find the applicable law. The different combinations of criteria apply in a hierarchical order.

(i) First, the law of the country of habitual residence of the party having suffered the damage applies, provided that the person held to be liable is also established there or the claimant has purchased the product in this country, **art. 5 Hague Products Liability Convention.**

In the above scenario, the victim of the road traffic accident caused by the defective car had his habitual residence in Poland. However, the victim had not purchased the defective product there. In fact, the victim had not purchased the defective product at all, so that art. 5 does not apply.

(ii) Second, the law of the country where the injury occurred, that is where the legally protected interest was initially harmed, applies, provided that this is also ‘a) the place of the habitual residence of the person directly suffering damage, or b) the principal place of business of the person claimed to be liable, or c) the place where the product was acquired by the person directly suffering damage’, **art 4 Hague Products Liability Convention.**

The injury occurred on a Spanish motorway. However, the victim did not have his habitual residence in Spain, nor is Spain the principal place of business of the defendant car manufacturer or did the victim acquire the defective car in Spain. Consequently, art. 5 does not apply either.

(iii) Finally, where the conditions of none of the above rules are met, the law of the country of the principal place of business of the person claimed to be liable applies, but the victim may opt instead for the law of the country where the injury occurred, **art 6 Hague Products Liability Convention.**

The principal place of business of the car manufacturer claimed to be liable is in Sweden. **Swedish law** thus applies to the products liability claim of the young man in our scenario. Given that the injury occurred in Spain, the young man **may opt instead for** the application of **Spanish law.**

(bb) Rome II Regulation (applicable before Swedish courts). In the absence of a choice of the applicable law by the parties (Art. 14 Rome II) and if the parties to a non-contractual claim are not domiciled in the same country (Art. 4(2) Rome II), “the law applicable to a non-contractual obligation arising out of damage caused by a product shall be: (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country”, pursuant to **Art. 5(1)(a) Rome II Regulation.**

In the above scenario, the young man was domiciled in Poland where cars such as the one owned by his father were indeed marketed.¹⁴ Contrary to art. 5 of the Hague Products Liability Convention, **Art. 5(1)(a) Rome II Regulation** does not require that the claimant has purchased the product in this country. Rather, it is sufficient that products such as the one that caused the damage were marketed

¹⁴ According to CJUE case law a product is marketed when it is offered to the public for use or consumption (C-127/04 *Declan O’Byrne v Sanofi Pasteur and others* [2006] ECR I-1313). The CJUE held in relation to the interpretation of the Products Liability Directive that ‘a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed’.

there. This follows in particular from the wording of art. 5(1), 2nd sentence Rome II Regulation ('the marketing of the product, or a product of the same type'). The reason is that if the product was marketed there, it was *foreseeable* for the producer that victims domiciled in this country may be injured should the product be defective.

Given that the young man who was injured in the car accident was domiciled in Poland and that the father's vehicle with the defective autonomous driving device was marketed there, **Polish law** applies to the claim of the young man against the Swedish car manufacturer.

The **1973 Hague Convention on the Law Applicable to Products Liability** would thus designate **Swedish law** (with an option for him to choose Spanish law instead) whereas the **Rome II Regulation** would lead to the application of **Polish law**, that is the law of his country where the young man was domiciled, to the young man's products liability claim.