Jurisdiction in matters relating to insurance/ Connected claims

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I. Art. 10 ff. Brussels Ia in context

1. Protection of weaker parties

CJEU case C-463/06 – FBTO Schadeverzekeringen/Odenbreit

Mr Jack Odenbreit (O) is domiciled in Aachen (Germany). He was involved in a road traffic accident in the Netherlands with a driver domiciled in the Netherlands and insured with FBTO. As the injured party O brought a direct action against the insurer before the Local Court in Aachen. The Court in Aachen dismissed the action as inadmissible on account of a lack of jurisdiction of German courts. The case went up until finally the Federal Court of Justice referred the question to the CJEU. Where does O have to sue FBTO?

Domicile (Art. 4) or can O benefit from a protective forum under Art. 13(2), 11(1)(b)?

I. Art. 10 ff. Brussels Ia in context
1. Protection of weaker parties

- Recital 18 Brussels Ia
- CJEU case C-412/98 – Group Josi: "in most cases [the insured] is faced with a predetermined contract the clauses of which are no longer negotiable"; he is the "weaker party economically" and "less experienced in legal matters than the other party".
- Purpose: counterbalance this structural imbalance by preferential treatment:
  (1) Weaker party may (inter alia) sue at home, Art. 11(1)(b)
  (2) Insurer may only sue at the weaker party's domicile, Art. 14(1)
  (3) Restrictions on choice-of-court agreements, Art. 15
- Application not restricted to insurance contracts concluded by consumers!
- Restrictions on mandatory character with regard to certain risks that are usually insured only by sophisticated parties (Art. 16).

I. Art. 10 ff. Brussels Ia in context
2. Interplay with other provisions

(1) Art. 26 (jurisdiction by appearance) takes precedence (but see Art. 26(2))

(2) Art. 25 (choice-of-court agreements) is modified (see Art. 15, 16) but takes precedence if still applicable

(3) But: Art. 4 (general jurisdiction at defendant's domicile) as well as Art. 7 and 8 (special jurisdiction) are derogated from (exception: Art.7(5))

I. Art. 10 ff. Brussels Ia in context
3. Overview over the provisions

Art. 10: scope of application

Art. 11: jurisdiction for proceedings against the insurer

Art. 12: additional jurisdiction for proceedings against certain insurers

Art. 13: extension of jurisdictional regime to joinder and direct actions by the injured party

Art. 14: jurisdiction for proceedings initiated by the insurer

Art. 15: limitations upon choice-of-court agreements

Art. 16: risks to which the limitations in Art. 15 do not apply

I. Art. 10 ff. Brussels Ia in context
4. Interpretation

- Autonomous interpretation
- Strict interpretation (reason: exception to the rule provided in Art. 4)
- CJEU case law regarding the Brussels Convention and the Brussels I Regulation can be used for interpreting Brussels Ia (see Recital 34)

II. Scope of application
1. Personal scope of application

- One party: insurer
- Other (weaker) party:
  - Policyholder: the person who originally contracted with the insurer
  - Beneficiary: the person for whose present or future interest the policy is made
  - Insured: the person covered under the insurance policy
  - Extension in Art. 13: injured party
  - Heirs of the persons mentioned in Art. 11, 13
  - No restriction as to sophistication or economic power
  - Not applicable to dispute between insurance company and reinsurance company (CJEU case C-412/98 – Group Josi)
  - Not applicable to third-party proceedings (CJEU case C-77/04 – GIE Réunion Européenne)
  - Not applicable to assignees who are no weaker parties (CJEU case C-347/08 – Vorarlberger Gebietskrankenkasse)

II. Scope of application
2. Matters relating to insurance

- Claims because of an insurance contract (but also actions by persons who are not parties to the insurance contract covered)
- Not covered: social security (see Art. 1(2)(c))
- Not covered: reinsurance

II. Scope of application
3. Territorial scope

General principles apply:

- Defendant must be domiciled in a Member State
- Otherwise national jurisdiction rules (Art. 6 preserved)

One extension with regard to proceedings brought against the insurer:

(1) Art. 11(2):
  - Insurer who is domiciled in a third state but has a branch etc. in a Member State will be deemed to have its domicile in that Member State for disputes arising out of the operation of that branch etc.
  - Consequence: Brussels Ia applies despite domicile in a third State and insurer can be sued in that Member State (or, as the case may be, at the claimant's home)

(2) No general extension to insurers domiciled in a third State in Art. 6(1) (unlike consumer contracts)

III. Proceedings against insurers
1. By policyholder, beneficiary, insured

Claimant may freely choose ("additional option"):

(1) Jurisdiction of the general forum at the insurer's domicile; venue according to national law (Art. 11(1)(a))

(2) Jurisdiction and venue of the courts for the place where the claimant is domiciled where the claimant is a policyholder, beneficiary, insured (Art. 11(1)(b))
  - Protective jurisdiction: "insurer can be sued at home"

(3) Actions against a co-insurer: Jurisdiction and venue of the courts of a Member State where proceedings are brought against a leading insurer, no matter on which provision jurisdiction over the leading insurer is based (Art. 11(1)(c))

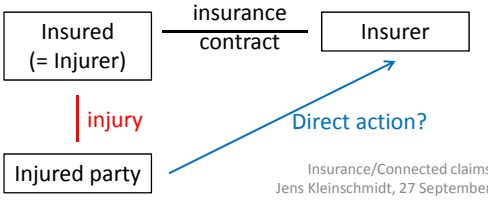
(4) In case of liability insurance or insurance of immovable property: jurisdiction and venue in the place where the harmful event occurred (Art. 12)
  - Interpretation as in Art. 7(2)
  - Underlying idea: Promote concentration of proceedings

III. Proceedings against insurers
2. By the injured party

Art. 13 deals with two different situations:

(1) If an action of the injured party against the insured is pending: May the insurer be joined to these proceedings?
- Art. 13(1) – avoid irreconcilable judgments by subjecting the insurer to the jurisdictional rules that apply to the liability claim of the injured party.
- Regulation leaves the answer to the applicable national law of the court seised. See Art. 65 (details below).

(2) Direct action of the injured party against the insurer.
- Art. 13(2) extends the protective fora of Art. 10-12 to the injured party.
- Main area of application: cross-border road traffic accidents.
- Art. 13(3) on the question whether the policyholder or the insured may be joined.



III. Proceedings against insurers
2. By the injured party

Direct actions frequent in road traffic accidents because of Art. 18 Directive 2009/103/EC:

"Member States shall ensure that any party injured as a result of an accident caused by a vehicle covered by [compulsory] insurance … enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability."

Jurisdiction problem: Where does the injured party have to initiate proceedings against the insurer?

III. Proceedings against insurers
2. By the injured party

Answer by the CJEU (case C-463/06 – FBTO Schadeverzekeringen/Odenbreit):

- Because of the reference in Art. 13(2) the claim is a matter relating to insurance.
- How is the reference to be interpreted? Does it recognize only those courts designated in Art. 11(1)(b), i.e. those at the place of domicile of the policyholder, beneficiary or insured, as having jurisdiction to hear a direct action? Or does the reference allow the rule granting jurisdiction of the courts for the place where claimant is domiciled to be applied to the injured party? The latter reading would extend the group of protected weaker parties.
- Literal interpretation: Wording suggests the latter interpretation.
- Teleological interpretation: The injured party requires protection as much as the persons mentioned in Art. 11(1)(b).
- Systematic interpretation: Later EU legislation confirms this reading.
- Consequence: "the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State."

III. Proceedings against insurers
2. By the injured party

Application of the CJEU finding:

- O may sue FBTO in Germany, if the applicable law permits such an action.
- Which law applies to the question whether a direct action can be brought?
  - If the forum state is a member of the Hague Convention on the Law applicable to Traffic Accidents (available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=81): Art. 9 of this convention.
  - Otherwise Art. 18 Rome II: "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." Two connecting factors; it is sufficient, if one of the laws designated permits a direct action (CJEU case C-240/14 – Prüller-Frey/Brodnig):
    - Law applicable to the non-contractual obligation, Art. 4 Rome II (Dutch)
    - Law applicable to the insurance contract, Art. 7(3) Rome I (Dutch)
    - Because of EU law, both laws will usually provide a direct action in the case of road traffic accidents.
    - Nota bene: For jurisdiction purposes, the claim need not actually be founded.

III. Proceedings against insurers
2. By the injured party

Evaluation of the injured party's *forum actoris*:

- Assessment of damages in cross-border road traffic accidents has to "take into account the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention" (Recital 33 Rome II).
- But: CJEU judgment will usually require the competent court to apply foreign law on the merits.

III. Proceedings against insurers
2. By the injured party

Open questions:

(1) Who may benefit from the *forum actoris*?
- Direct victims (natural and legal persons)
- Heirs of the direct victim (at the domicile of the heir?)
- Indirect victims who sustain injury (eg loss of maintenance, bereavement)? Con: multiplicity of defendants not predictable for defendant. Pro: proper damage should qualify these persons as injured parties in the sense of Art. 18 Rome II and Art. 13(2). (at the domicile of the indirect victim?)
- Not the social security that has paid for medical treatment (CJEU case C-347/08 – Vorarlberger Gebietskrankenkasse).

(2) Can the injurer be sued in the same forum?
- Joinder under Art. 13(3)? Seems to exist for the benefit of the insurer, not the insured.
- Art. 8(1)? Not applicable to insurance matters.
- Consequence: Single action only possible, if the court has jurisdiction over the injurer under Art. 4 or Art. 7(2).

(3) Practical considerations

IV. Connected claims: Art. 8 in context
1. Example

Example (based on CJEU case C-145/10 – Painer):

Ms Painer (P), who is domiciled in Austria, has for many years worked as a freelance photographer, photographing, in particular, children in nurseries and day homes. In the course of that work, she took several photographs of Natascha K. designing the background, deciding the position and facial expression, and producing and developing them ('the contested photographs'). P sold the photographs which she produced, but without conferring on third parties any rights over them and without consenting to their publication.

After Natascha K., then aged 10, was abducted in 1998, the competent security authorities launched a search appeal in which the contested photographs were used. In 2006 Natascha K. managed to escape from her abductor.

Following Natascha K.'s escape and prior to her first public appearance, the defendants in the main proceedings, one newspaper from Austria and three newspapers from Germany, published the contested photographs in newspapers, magazines and websites without indicating P's name as the photographer. P sued all four newspapers in the Austrian courts for copyright infringement. Do the Austrian courts have jurisdiction?

IV. Connected claims: Art. 8 in context
1. Example

- No choice-of-court agreement, protective jurisdiction not applicable.
- Austrian newspaper may be sued in Austria (Art. 4).
- German newspapers may be sued in Germany (Art. 4). Proceedings in Austria (Art. 7(2)) only concerning the damage sustained in Austria.
- Should P be able to sue the German defendants together with the Austrian defendant for the entire damage?
  - Pro: risk of irreconcilable judgments
  - Con: Proceedings in Austria would bring defendants before a court that is not competent and would deprive them of their general forum at the place of domicile (predictability).
- Compromise solution in Art. 8(1): In the case of a **"close connection"**, jurisdiction over the Austrian defendant **("anchor defendant")** sufficient grounds for jurisdiction of Austrian court seised over German defendants.

→Not every connection between claims confers jurisdiction. Connection must be close and the case must fall under the exhaustive list of cases contained in Art. 8 (strict interpretation).

→Art. 8 aims at avoiding diverging or even irreconcilable judgments and at serving procedural economy.

IV. Connected claims: Art. 8 in context
2. Interplay with other provisions

NB: Jurisdiction has to be established individually against each defendant. First the anchor defendant, then the co-defendants.

Art. 8 may not apply if other heads of jurisdiction take precedence vis-à-vis the co-defendant.

- Exclusive jurisdiction, Art. 24
- Choice-of-court agreement, Art. 25
- Protective jurisdiction in matters relating to insurance or in consumer contracts. But Art. 8 may apply to individual employment contracts (Art. 20(1)).

Art. 8 is not needed, if jurisdiction against the co-defendant exists under Art. 4 or Art. 7.

V. Multiple defendants, Art. 8(1)
1. Domicile of the various defendants

First requirement:

Anchor defendant must be sued at his place of domicile.

Jurisdiction of any other court does not suffice.

Second requirement:

Co-defendant must be domiciled in another Member State

(1) Art. 8(1) not applicable, if co-defendant domiciled in a third state (CJEU case C-645/11 – Land Berlin/Sapir).
   - Example: D1 in Brussels, D2 in Paris, D3 in New York. D1 and D2 may be sued in Brussels (or in Paris), but not D3.

(2) Art. 8(1) only applies to co-defendants who are not domiciled in the forum state.
   - Example: D1 in Brussels, D2 in Munich, D3 in Berlin. If D1 is sued in Brussels, D2 and D3 may also be sued there. If D2 is sued in Munich, D1 may also be sued there under Art. 8(1), but not D3 (for whom another ground for jurisdiction and venue is needed). (This issue is controversial and still to be decided by the CJEU.)
   - If applicable, Art. 8(1) provides **jurisdiction and venue**.

V. Multiple defendants, Art. 8(1)
2. Close connection

Key requirement to restrict Art. 8(1):

Anchor claim and claim against co-defendant must be "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

(cf. Art. 30(3) on related proceedings)

It is not sufficient that there be a divergence in the outcome of the dispute, but the divergence must also arise in the **same situation of fact and law** (CJEU case C-539/03 – Roche Nederland).

V. Multiple defendants, Art. 8(1)
2. Close connection

Same situation of fact and law:

- Co-debtors under the same contract
- Joint tortfeasors
- Identical legal basis needed?
  - CJEU case C-98/06 – Freeport: Actions brought against multiple defendants need not have identical legal bases. One claim can be contractual, and the other claim extra-contractual in nature.
  - CJEU case C-645/11 – Land Berlin/Sapir: one claim in unjustified enrichment, one claim in tort law, both "directed at the same material interest"
- Identical applicable law?
  - CJEU case C-145/10 – Painer: divergent national laws will not preclude application of Art. 8(1), but case for close connection will be stronger, if identical
- Factual connection
  - CJEU case C-616/10 – Solvay: identical contracts establish a single factual situation
  - CJEU case C-145/10 – Painer: concerted actions by multiple defendants may be relevant. In the Painer-case, there was unconcerted behaviour by independent infringements of copyright. Art. 8(1) not available.

V. Multiple defendants, Art. 8(1)
3. Admissibility of the anchor claim

Problem: Is Art. 8(1) also available if the anchor claim is inadmissible (eg because of bankruptcy of the anchor defendant)?

- CJEU case C-103/05 – Reisch Montage: Although there is no risk of irreconcilable judgments being entered, Art. 8(1) is available to avoid recourse to national law.
- CJEU case C-352/13 – CDC Hydrogen Peroxide: Art. 8(1) may still be available, "even where the applicant has withdrawn its action against the sole co-defendant domiciled in the same State as the court seised".

V. Multiple defendants, Art. 8(1)
4. Protection against abuse of Art. 8(1)

Unlike Art. 8(2), Art. 8(1) establishes no control to prevent that this head of jurisdiction is invoked solely for the purpose of removing a co-defendant from his general forum.

- CJEU case C-98/06 – Freeport: requirement of a close connection provides sufficient protection against abusive behaviour on the side of the claimant.
- CJEU case C-352/13 – CDC Hydrogen Peroxide: Art. 8(1) is available, "even where the applicant has withdrawn its action against the sole co-defendant domiciled in the same State as the court seised, **unless it is found that, at the time the proceedings were instituted, the applicant and that defendant had colluded to artificially fulfil, or prolong the fulfilment of, that provision's applicability**".

VI. Third-party proceedings, Art. 8(2)
1. General idea

- Procedural background: Ongoing proceedings between claimant and defendant. A third party is to be joined to the proceedings such that it becomes a true and genuine litigant and the court can enter a judgment with full res judicata effect in favour and against the third party.
- Warranty or guarantee claims (mostly in the Romanistic legal family). Example: recourse claim among co-debtors.
- Art. 8(2) allows joinder of this third party who is domiciled **in another Member State** in the court of the main proceedings (jurisdiction and venue).

VI. Third-party proceedings, Art. 8(2)
2. Actions by the third party

CJEU case C-521/14 – SOVAG:

A, a Finnish resident, was severely injured in a road traffic accident in Germany. A brought an action against SOVAG, an insurance company established in Germany, with which the vehicle responsible for the damage was insured, in the Finnish courts. As the traffic accident also constituted a work accident, If, a Finnish insurance company, paid A compensation for the accident. After A had brought the action against SOVAG, If itself sued SOVAG before the same (Finnish) court of first instance. If sought a ruling that SOVAG was obliged to reimburse it all compensation paid to A by If.

- Art. 11(1)(b) does not apply to the claim by If (no weaker party). Without Art. 8(2), SOVAG would have to be sued by If in Germany (Art. 4).
- Language versions differ as to whether a court before which the original proceedings are pending may have jurisdiction under Art. 8(2) to hear and determine an action brought by a third party against one of the parties to the original proceedings.
- Rules of special jurisdiction must be strictly interpreted and may not be extended to cases beyond those expressly envisaged by Brussels Ia.
- Not applying Art. 8(2) would create the risk of irreconcilable judgments.
- Accordingly, Art. 8(2) must be interpreted to the effect that its scope includes the present action, provided that the action was not instituted solely with the object of removing that defendant from the jurisdiction of the court which would be competent in the case.

VI. Third-party proceedings, Art. 8(2)
3. Third-party notice distinguished

- The national procedural law of some Member States does not admit the type of actions envisaged by Art. 8(2) that force a third party to become a litigant in an ongoing lawsuit.
- Rather: third-party notice (*litis denuntiatio*, *Streitverkündung*) to bind the third party to the factual findings of the judgment, giving him an incentive to support the notifying party.
- Examples: Austria, Germany, Hungary.
- List drawn up according to Art. 65, 76 enumerating Member States in which the provisions on third-party proceedings in Art. 8(2) and 13 will not be applied or applied only in accordance with their national law.
- Most recent version of the list to be found in: OJ 2015 C 390, p. 11.

VI. Counterclaims, Art. 8(3)

Counterclaim (autonomous interpretation):

"claims by which the defendants seek a pronouncement of a separate judgment" (CJEU case C-341/93 – Danværn)

Identity of parties required.

Example:

- Claimant domiciled in France, defendant domiciled in Italy. Claimant sues in Italy.
- Under Art. 4, counterclaim against claimant would have to be brought in France. (Jurisdiction under other provisions possible.)
- In order to consolidate proceedings, Art. 8(3) provides for a special jurisdiction (and venue) for reciprocal claims.

But: claims must arise from the same contract or facts.

VI. Counterclaims, Art. 8(3)

Problem: Does Art. 8(3) apply to set-off?

CJEU case C-341/93 – Danværn: No.

- Counterclaim would require that the claimant seek the pronouncement of a separate judgment.
- Set-off is a "situation where a defendant raises, as a pure defence, a claim which he allegedly has against the plaintiff". Raises no issue of jurisdiction.
- Important consequence: no close connection between claims required.
- However: "The defences which may be raised and the conditions under which they may be raised are governed by national law."
- This certainly refers to private international law (Art. 17 Rome I).
- Whether it also refers to national procedural law (so that a jurisdiction requirement could come from national procedural law), is controversial. Such a requirement would probably run counter to the CJEU judgment.