ARTICLES

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https://doi.org/10.33995/wu2024.1.1
date of receipt:05.03.2024
date of acceptance: 23.04.2024

Is an EU Member State a weaker party in the context of the rules of jurisdiction in direct actions against insurers? Comments on the request for a preliminary ruling in the case Mutua Madrileña Automovilista, C-536/23

The request for a preliminary ruling in the case Mutua Madrileña Automovilista, C-536/23, puts to the ultimate test the concept of "weaker party" that underpins the EU rules of special jurisdiction in direct actions against insurers. The referring court asks whether an EU Member State, acting as a statutory subrogee to the rights of its employee injured in a road traffic accident, can rely on the rule of special jurisdiction established by Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation for the benefit of injured parties.

Against this background, first, the preliminary question is based on a premise that the EU Member State may sue the insurer "before the courts for the place where the official […] is domiciled". This premise seems misguided. In fact, a successor in title of a directly injured party may bring the direct action before the court of their own domicile.

Second, it is immaterial that an EU Member State is a subject of public international law. Unless the state acts iure imperii [arg. ex Art 1(1) of the Regulation], it can rely on the rules of jurisdiction provided for in the Regulation, including the rules of special jurisdiction in matters of insurance.

Third, since the rules of special jurisdiction in direct actions against insurers are established for the benefit of weaker parties, they cannot be relied on by the "professionals in the insurance sector". To verify whether a claimant qualifies as such a professional in the insurance sector, a two-tier analysis is proposed. In the first step, an abstract and generalising assessment is carried out in order to verify whether the claimant belongs to the insurance sector or has close ties with that sector as the result of dealing (litigating or settling) regularly with the insurance claims as the inherent aspect

of the commercial activity model they adopted or public mission they were entrusted with. In the second step, an additional check has to be made in order to ascertain whether the direct action brought against the insurer fits within such a general and abstract profile of the claimant or not. If the direct action does not originate in such a commercial activity or public mission, the claimant cannot be considered as a "professional in the insurance sector" in the context of the specific proceedings. In the light of the above, the contention is that an EU Member State, which, in its capacity of an employer continued to pay the remuneration to its official who became unfit for work as a result of a road traffic accident and which subrogated to the official's rights vis-à-vis the insurer that provides the civil liability insurance for the vehicle involved in that accident, may rely on the rule of special jurisdiction set forth in Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation.

Keywords: private international law, injured party, direct action (actio directa)

1. Introduction

Since 1973,[1] the Brussels Convention has been a cornerstone of the EU legal framework for cross-border litigation.[2] It was superseded by the Brussels I Regulation[3] three decades later, which then ceded its place to the Brussels I bis Regulation.[4] All three instruments form parts of the same lineage and share at least some of the solutions. Hence, they can be referred to as "the Brussels regime" or "the Brussels system". The common characteristics of those instruments led also to the establishment of the so-called "continuity principle": insofar as the Brussels I Regulation[5] and the Brussels I bis Regulation[6] replace the Brussels Convention in the relations between Member States, the interpretation provided by the Court of Justice ("Court" or "CJ") in respect of the provisions of that Convention is valid also for those two Regulations whenever the provisions of those instruments may be regarded as equivalent.

1. Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and – amended version – p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) ("the Brussels Convention"). On 1 February 1973, the Convention came into force with respect to the original Member States of the Community. R.C. Reuland, *The Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, Michigan Journal of International Law 1993, vol. 14, issue 4, p. 565.
2. Much ink has been spilled about the history of European integration, including its private international law dimension. Although the European Community officially became the European Union only in 2009, for the purpose of the present paper, I will refer to all the developments made in that process by a common tag ("the EU" or "the Union"), regardless of the era they belong to.
3. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1; "the Brussels I Regulation").
4. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1; "the Brussels I bis Regulation").
5. Judgment of the ECJ of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 27.
6. Recital 34 of the Brussels I bis Regulation.

From its beginnings, the Brussels I regime provided for rules of special jurisdiction in matters relating to insurance, embodying the realization that the general rules are not sufficient to adequately address the repartition of competences amongst the courts in cross-border insurance litigation.

This is hardly surprising. The importance of existence of unified rules on applicable law and jurisdiction in matters of insurance was early recognised as crucial for the functioning of the internal (or, as it was called back then, common) market both by the EU and by its Member States.

However, originally, the EU legislature did not have the competence to adopt uniform rules on applicable law and jurisdiction. It acquired such a competence only after the Treaty of Amsterdam of 1997 (in force since 1999), which referred to such rules under a common tag of "the field of judicial cooperation in civil matters having cross-border implications". Before 1999, the EU legislator tried to fill this lacuna through sectoral instruments and, most notably, insurance directives[7] and the Member States relied on international agreements as the vehicle to uniformise the rules of private international law, which lead to the conclusion of the Brussels Convention in 1968 containing, from the outset, rules of special jurisdiction in insurance matters (Articles 7 – 12).

By the bidding of the Member States (the Brussels Convention) and of the EU legislative (the Brussels I and I bis Regulations), the rules of jurisdiction in matters of insurance are asymmetrical, in the sense that, in principle, more fora are available to a party considered to be in the position of inferiority in comparison to the insurers than to the insurers themselves. Of course, this begs a fundamental question: who, as the weaker party in need of protection, can rely on those rules.

The request for a preliminary ruling lodged at the Court on 22 September 2023 in the case Mutua Madrileña Automovilista, C-536/23 ("the case *MMA*, C-536/23") by the Regional Court, Munich I (Landgericht München I) puts to the ultimate test the concept of "weaker party" that underpins the EU rules of special jurisdiction in matters related to insurance. In essence, it asks whether an EU Member State, acting as a statutory subrogee to the rights of its employee injured in a road traffic accident, can rely on the rule of special jurisdiction established by Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation for the benefit of injured parties.

The present paper is driven by an ambition to reflect upon the legal issue brought up in the request for a preliminary ruling, in anticipation of the future judgment of the Court. More often than not, the preliminary questions are put under scrutiny ex post, after the matter has been thoroughly analysed and decided by the CJ, illuminated in the process by one of its Advocates General. However, with notable exceptions,[8] it is far more rare for the doctrine to address the preliminary matter before it is elucidated by the Court.

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7. E.g. Article 2(d) and Article 7 of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC, OJ L 172, 4.7.1988, p. 1.

8. E.g. M. Margoński, *Anmerkung zum Vorlagebeschluss des Kammergerichts an den EuGH vom 25. Oktober 2016, 6 W 80/16 in der Rs. C-558/16, Mahnkopf*, Zeitschrift für Erbrecht und Vermögensnachfolge, Heft 4, 2017, pp. 212 et seq. (for the comment on the request for a preliminary ruling in the case that led to the judgment of 1 March 2018, *Mahnkopf*, C-558/16, EU:C:2017:965) or A. Kur, *Easy Is Not Always Good – The Fragmented System for Adjudication of Unitary Trade Marks and Designs*, International Review of Intellectual Property and Competition Law 2021, vol. 52, p. 579–595 (for the comment on such a request in the case that led to the judgment of 3 March 2022, Acaia, EU:C:2022:152).

That ambition is accompanied by the awareness of the shortcomings of the present analysis. The Court delivers its judgments after having obtained the written submission of the parties to the main proceedings, the Member States and the European Commission.[9] That shall change in the near future,[10] yet, at present, those documents are not available to the public. Furthermore, in principle,[11] a hearing is held, casting further light on the legal issue brought before the Court.

Despite all that, the paper presents an outline of the factual and legal background of the case, as well as the preliminary question itself (Section 2). It then contemplates upon three legal issues that echo within the request for a preliminary ruling (Section 3). The text concludes with a short summary and a proposal of answer to the preliminary question (Section 4).

2. The background of the case, the questions and the answer

2.1. Factual context of the request for a preliminary ruling

An official resides in Munich and works as a federal civil servant at a higher federal authority, the German Patent and Trade Mark Office in Munich. She passes her holiday in Mallorca. There, she has an accident where her bike collides with a rental car driven by another German national domiciled in France. The rental car involved in the accident is covered by civil liability insurance provided by MMA.

As a result of the accident, the official is unfit to work for several days. In its capacity of an employer, Germany continues to pay the remuneration to the official during the period of her recovery. The State then claims reimbursement from MMA representative in Germany. The claim is met with a refusal on that account that the official had caused the accident.

The State brings an action before a first instance court in Munich seeking payment of the amount transferred to the official during the recovery period. MMA contests the claim and the jurisdiction of the court seised.

The first instance court finds that it lacks jurisdiction and dismisses the action. It considers that its jurisdiction cannot be established on the basis of Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation since, first, the rules of jurisdiction in matters of insurance introduce a derogation from the general principle and, as such, must be interpreted strictly. Second, those rules are established to benefit of parties in need of special protection. Following an abstract assessment of the existence of such a need ("im Rahmen einer abstrakt-typisierenden Schutzbedürftigkeitsprüfung"), the State cannot be considered as being in such a precarious position, particularly since it carries out activities "as a social security institution, for example in the field of pension and sickness insurance schemes".

The State brings an appeal before the second instance court and argues that, in particular in the light of *MMA IARD*[12], no case-by-case analysis is warranted in order to determine whether the claimant can rely on the rules special of jurisdiction in the matters of insurance. In the interests

9. Cf. Article 23 of the Statute of the Court of Justice of the European Union.
10. See detailed analysis of the upcoming reform brought by the curtesy of W.M. Kühn, *The Upcoming Reform of the Judicial System of the European Union*, Europarättslig Tidskrift 2024, No. 1, p. 89.
11. Cf. Article 76 of the Rules of Procedure of the Court of Justice.
12. Judgment of the CJ of 20 July 2017, *MMA IARD*, C-340/16, EU:C:2017:576 ("*MMA IARD*").

of predictability, any person entitled to subrogation who asserts claims not as an insurer or a social security institution, but as a statutory subrogee, can bring – just like a (directly) injured party – an action before the courts for the place where the injured party is domiciled. Hence, acting in its capacity of an employer and as a statutory subrogee of the victim, the State it is authorised to rely on the rule of special jurisdiction laid forth in Articles 11(1)(b) and 13(2) of the Regulation.

MMA opposes. It considers that only the party who is "institutionally weaker than the insurance company" may rely on the rules of special jurisdiction in the proceedings against an insurer. It results from the case law that a social security institution and persons engaged professionally in insurance are not in such a position of inferiority. Nor is an EU Member State, a subject of international law and an entity that provides benefits that, by their nature, correspond to those provided by a social security institution and supervises insurance companies. In the past, an interpretation to that effect has been already endorsed by the Higher Regional Court in Koblenz (Oberlandesgericht Koblenz)[13], which considered that a Land of the Federal Republic of Germany is not weaker or less experienced in legal terms than an insurer and that its position could be compared to that of a social security institution. If the referring court wishes to depart from that interpretation, it needs to refer a preliminary question under Article 267 TFUE to the CJ. And so it did. The second instance court stayed the proceedings and submitted its request for a preliminary ruling.

2.2. Relevant legal framework

By its single question, the Regional Court, Munich I (Landgericht München I), seeks the interpretation of the Brussels I bis Regulation.

The Regulation contains eight chapters, with the second of them being of relevance for the preliminary question.

Chapter II is eponymously titled "Jurisdiction". It is divided into several sections. General provisions are laid down in Section 1. Under the Brussels I regime, the general rule of jurisdiction adheres to the principle *actor sequitur forum rei*. Article 4(1), which can be found in that very Section 1, provides that, "subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

The following sections are devoted to three distinct areas, for which rules special of jurisdiction are provided in. Sections 4 and 5 cover, respectively, jurisdiction over consumer contracts and jurisdiction over individual contracts of employment. Section 3 spans from Article 10 to Article 16 and contains rules of "jurisdiction in matters relating to insurance".

According to Article 13(2) of the Brussels I bis Regulation, selected provisions contained in Section 3 of Chapter II of the Regulation (Articles 10, 11 and 12) shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.[14]

13. Judgment of the Higher Regional Court in Koblenz of 15 October 2012, 12 U 1528/11, openJur 2015, 22417.

14. The question as to whether a direct action against the insurer is "permitted" in the meaning of that provision has to be assessed on the basis of lex contractus (law applicable to the insurance contract) or lex deliciti (law applicable to the non-contractual obligation resulting from the event in which the initial victim was involved), in accordance with Article 18 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40–49). See, recently, A. Paleczna, *Actio directa and Indirect Consequences of Damage in the Conflict-of-law Perspective*, Gdańskie Studia Prawnicze 2023, No. 3, p. 57–59.

Article 11(1)(b) of the Regulation, referred to in the preliminary question, states that "an insurer domiciled in a Member State may be sued in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled".

Since *Odenbreit*,[15] it is clear that the combined effect of Articles 13(2) and 11(1)(b) of the Brussels I bis Regulation renders a *forum actoris* available to the claimant. An 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.[16]

2.3. Preliminary question

The single preliminary question of the Regional Court, Munich I (Landgericht München I) is worded as follows:

"Must Article 13(2) of [the Brussels I bis Regulation] read in conjunction with Article 11(1)(b) of [the Regulation], be interpreted as meaning that a Member State of the European Union itself, in its capacity as an employer which has continued to pay the remuneration of its official who has (temporarily) become unfit for work as a result of a road traffic accident and which is subrogated to the official's rights *vis-à-vis* the company, established in another Member State, that provides the civil liability insurance for the vehicle involved in that accident, may sue the insurance company as an 'injured party' within the meaning of that provision before the courts for the place where the official who is unfit for work is domiciled, where a direct action is permitted?"

3. Consideration of the preliminary question

In the present paper, three aspects of the request for a preliminary ruling are discussed in more detail. First, scrutiny will be directed towards the premise underpinning the preliminary question, which appears not to sit well with the pre-existing case law of the Court (Section 3.1). Second, an analysis will be undertaken concerning the argument that an EU Member State is a subject of public international law and, as such, cannot rely on the rule of special jurisdiction said forth in Articles 11(1)(b) and 13(3) of the Brussels I bis Regulation (Section 3.2). Finally, the last part of the analysis will be devoted to the central issue of preliminary question, namely the scope of application *ratione personae* of that rule of jurisdiction (Section 3.3).

15. Judgment of the CJ of 13 December 2007, *Odenbreit* (also known under as FBTO Schadeverzekeringen), C-463/06, EU:C:2007:792 ("*Odenbreit*").

16. From the outset, the judgment has been viewed as a positive development maintaining coherence with EU insurance directives. See L. Idot, *Compétence en matière d'assurances*, Europe 2008, no 73, p. 23; M. Fras, *Właściwość sądu w zakresie roszczeń z tytułu odpowiedzialności cywilnej za wypadki komunikacyjne. Glosa do wyroku Europejskiego Trybunału Sprawiedliwości z dnia 13 grudnia 2007 r. (C-463/06), FBTO Schadeversekeringen N.V./Jack Odenbreit*, Problemy Prawa Prywatnego Międzynarodowego 2009, vol. 4, p. 173.

3.1. *Forum actoris* and the uncertainty as to the identity of relevant author

The rule of jurisdiction provided for in Articles 13(2) and 11(1)(b) determines not only the (international) jurisdiction of the courts of a selected Member State, but also the venue (local jurisdiction).[17] Hence, under the combined effects of those provisions resulting from *Odenbreit*, a direct action of the injured party can, in fact, be brought against the insurer before the court for the domicile of that injured party.

The provisions introduce a *forum actoris* with regard to the direct actions against the insurers. Traditionally, *forum actoris*, or forum of the actor, refers to the forum in which the claimant ("actor") resides or has domicile.[18]

However, a following dilemma arises: if a right to bring an action against the insurer is transferred from a direct victim to another person, does that person become himself the "injured party" within the meaning of Article 13(2) and can bring the direct action against the insurer before the court of his domicile or he still needs to bring that action before the court of domicile of the direct victim?

The preliminary question in the case *MMA*, C-536/23, adheres to the second interpretation ("before the courts for the place where the official who is unfit for work is domiciled"). While the crux of that request for a preliminary ruling lies in a more general inquiry related to the scope of application *ratione personae* of the rule of jurisdiction provided for in Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation (Section 3.3), in its future judgment, the Court should not neglect the premise upon which the preliminary question is based. Otherwise, it risks handing down a judgment that can potentially be understood as confirming that premise.

It is true that, at least in some scenarios, the domicile of the directly injured party and its successor in title (e.g. assignee) might coincide and the dilemma becomes entirely irrelevant. Nonetheless, that might not be the case. In any event, from the legal viewpoint, there is a difference between the hypothesis in which the successor in title is authorised to sue the insurer before the court of his own domicile and the hypothesis in which he is authorised to sue before the court of the directly injured party's domicile.

Before all else, one should exclude the interpretation according to which a successors in title of the directly injured party can freely choose between those two hypotheses and bring the direct action either before the court for the place of his own domicile or before the court for the place of the directly injured party's domicile. As the Court repeatedly stresses,[19] as an exception to the general rule, Article 11(1)(b) is subject to strict interpretation and, therefore, it should not be understood in the sense that it provides multiple exceptions to the general rule of jurisdiction of the Brussels I regime.

Caution is warranted also with regard to the lecture of the case law discussing Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation. Some judgments of the Court may give a false impression that the dilemma needs to be solved in favour of one of the hypotheses mentioned above.

17. Judgment of the CJ of 30 June 2022, *HW*, C-652/20, EU:C:2022:514 ("*HW*").

18. A.X. Fellmeth, M. Horwitz, *Forum actoris* [in:] Guide to Latin in International Law, Oxford 2009, p. 110.

19. See, recently, judgment of the CJ of 21 October 2021, *T.B. and D.*, C-393/20, EU:C:2021:871 ("*T.B. and D.*"), paragraph 42.

Recently, in *HW*,[20] the Court held that heirs of the victim of a road traffic accident, such as the claimant in the main proceedings in that case, must have the ability to sue in the *forum actoris* as permitted by Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation. However, that judgment cannot contribute to the solution of the dilemma in any meaningful way. In fact, in *HW*, no transfer of rights intervened after the road traffic accident in question since "[the heirs brought an action] in order to obtain compensation for *their* non-material loss".[21]

In a similar vein, a number of requests for a preliminary ruling concerned rather the scope *ratione personae* of Articles 11(1)(b) and 13(2) (*scil*. the question whether a specific claimant can rely on the rule of special jurisdiction in matters of insurance) and not the connecting factor of the injured party's domicile.

In *Vorarlberger Gebietskrankenkasse* ("*VG*"),[22] the Court held that a social security institution, acting as statutory assignee of the right of the directly injured party, may not bring an action directly "in the courts of its Member State of establishment".

However, the interpretation that the Court provided in that judgment alarmingly echoes the wording of the preliminary question ("[may] a social security institution […] bring an action directly […] in the courts of the place in a Member State where [it] is established")[23] and, in my view, by no means implies that the CJ desired to hint that an "economically weaker" and legally inexperienced assignee could bring an action before the court of its Member State of establishment.

In truth, the Court only sought to clarify that such an institution cannot rely on the rule of special jurisdiction laid down in Articles 11(1)(b) and 13(2) of the Regulation. Therefore, the place where an action could have been brought according to that rule of jurisdiction was entirely irrelevant for the outcome of the preliminary proceedings before the Court.

It is only by way of a cryptic *obiter dictum* that the Court added, in *VG*,[24] that the heirs of the person injured in the accident should be able to avail themselves of rule of special jurisdiction laid down in those provisions. That *dictum* was clearly inspired by an argument advanced by the Spanish Government ("as [that] Government states"), which argued that "if the directly injured party dies, his heirs, that is to say, the statutory assignees of his rights, should be able to bring a claim for damages in the court of *their place of domicile* against the insurer".[25] While the *dictum* of the Court seems to affirm the interpretation according to which a successor in title can sue the insurer before the court for the place of his domicile, its true sense and relevance has been discussed in the literature ever since.[26]

20. *HW*, paragraph 51.
21. *HW*, paragraph 13.
22. Judgment of the CJ of 17 September 2009, *Vorarlberger Gebietskrankenkasse*, C-347/08, EU:C:2009:561, paragraph 49.
23. *VG*, paragraph 24.
24. *VG*, paragraph 44.
25. *VG*, paragraph 34.
26. See M. Szpunar, K. Pacuła, *Pojęcie „poszkodowanego" na tle norm rozporządzenia nr 1215/2012 (Bruksela I bis) określających jurysdykcję w sprawach dotyczących ubezpieczenia* [in:] E. Bagińska, W.W. Mogilski, M. Wałachowska (eds.), *O dobre prawo dla ubezpieczeń. Księga jubileuszowa Profesora Eugeniusza Kowalewskiego*, Toruń 2019, p. 616.

MMA IARD seems to be far more helpful in this regard. In this judgment,[27] the Court held that an employer, established in one Member State, which have passed the employee's rights with regard to the company insuring the civil liability resulting from the vehicle involved in an accident, which is established in another Member State, may, in the capacity of "injured party", within the meaning of Article 11(2) of the Brussels I bis Regulation, sue the insurance company before the courts of the Member State of establishment of that employer.

In a similar vein, in *Hofsoe*,[28] while discussing its previous judgments (*VG* and *MMA IARD*), the Court held that the *forum actoris* must be extended respectively to the heirs of an insured party and, under some additional circumstances, to the employer. It seems that the "extension" of the *forum actoris* means that the claimant ("actor") is authorised to bring a direct action against the insurer before the court of his own domicile.

Against this backdrop, the application of the special rule of jurisdiction set forth in Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation is "extended" only to person for whom that protection is justified. A successor in title (e.g. an assignee who has succeeded to the rights of the injured party) should be able to avail himself of that special rule of jurisdiction provided that he may himself be considered the weaker party.[29] To determine whether that this is the case, he must be put under the same test that is applied with regard to the initially and directly injured party. If he passes such a test and indeed has to be presumed to be the weaker party, there is no reason to refuse him the full privilege of that special jurisdictional rule. In short, he should be allowed to bring an *actio directa* against the insurer before the courts for the place of his own domicile.

Lastly, that interpretation is not challenged by the arguments revolving around the foreseeability, for the insurer, of the forum before which it may be sued. In general, the identity or the domicile of the directly injured parties are also not known to the insurer in advance, at the time the contract is concluded.

In the light of the above, the preliminary question is based on a premise that seems misguided. In its judgment, the Court should reformulate the preliminary question in order to avoid an implicit confirmation of that premise in its future judgment. Alternatively, it could at least draw the attention of the referring court to the fact that the preliminary ruling clarifies solely whether a Member State of the EU may at all rely on the rules of special jurisdiction in matters of insurance.

3.2. State is a subject of public international law

In response to the appeal brought before the referring court, MMA argues that the State is a subject of public international law and, as such, cannot enjoy the protection resulting from the rules of special jurisdiction in the matters of insurance.

The argument is not really compelling. The fact that, within the realm of public international law, a state is its subject, does not preclude it from enjoying the capacity of a party that can rely on the rules of jurisdiction laid down in the Brussels I regime, including the rules of special jurisdiction in the matters of insurance.

27. *MMA IARD*, paragraph 40.
28. Judgment of the CJ of 31 January 2018, Hofsoe, C-106/17, EU:C:2018:50, paragraph 38.
29. Cf. *T.B. and D*, paragraph 33.

It is true that if a state – or any other entity for that matter – acts *iure imperii* and the dispute revolves around such an activity, the proceedings do not fall within the ambit of the Brussels I regime. The Regulation is applicable in civil and commercial matters and it does not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority [Article 1(1) of the Regulation].

However, a state acting in its capacity of an employer remains, as a matter of principle and leaving aside some specific relations that fall within the exercise of public powers (i.e. exercise of powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals), a private party to a "civil and commercial matter" within the meaning of Article 1(1) of the Regulation. This is confirmed by *Mahamdia*,[30] where a state (scil. Germany) was sued by an employee of its embassy under the rules of special jurisdiction over individual insurance contracts of employment (Section 5 Chapter II of the Regulation).

The same logic continues to apply if a state brings an action against an insurer after having subrogated to the rights of its employee. In fact, nothing in the request for a preliminary ruling suggests that, under German law, legal position of a subrogee-state manifestly differs from a situation of a private employer subrogating to the rights of his employee in similar circumstances.

Lastly, concerning the reliance on the rule of special jurisdiction in matters of insurance established for the benefit of injured parties, *lege non distinguenta*, public international law subject or not, in order to be authorised to rely on that rule the State needs to meet no other requirements than those that are applied to other entities or individuals.

3.3. Rule of special jurisdiction in matters of insurance established in favour of an injured party

3.3.1. General case law on the rules of special jurisdiction in matters of insurance

As early as 1983, while contemplating upon the influence of a choice-of-court agreement on the legal situation of the insured person in *Gerling*,[31] the Court observed that the purpose of the rules of jurisdiction in the matters of insurance is to protect the insured who has lesser (or non-existent) bargaining power and is in a weaker economic position. Two decades later, in *Peloux*,[32] the Court went so far as to describe the insured as "the economically weakest party within the meaning of [*Gerling*]".

In *Group Josi*,[33] the Court drew a parallel between the rules of special jurisdiction in consumer contracts and the rules of special jurisdiction in matters of insurance and observed that the application of such rules should not be extended to persons from whom that protection is not justified. It then went on to clarify that a reinsurer cannot rely on the rules of special jurisdiction in the proceedings against the insurer: both parties to the reinsurance contract are "professionals in the insurance sector", neither of whom can be presumed to be in a weak position ("economically weaker and less experienced in legal matters") compared with the other party to the contract.[34] That line

30. Judgment of the CJ of 19 July 2012, *Mahamdia*, C-154/11, EU:C:2012:491.
31. Judgment of the CJ of 14 July 1983, *Gerling*, C-201/82, EU:C:1983:217, paragraph 17.
32. Judgment of the CJ of 12 May 2005, *Peloux*, C-112/03, EU:C:2005:280, paragraph 37.
33. Judgment of the CJ of 13 July 2000, *Group Josi*, C-412/98, EU:C:2000:116 ("*Group Josi*"), paragraphs 64 and 65.
34. *Group Josi*, paragraphs 65 and 66.

of thought was followed in *GIE Réunion européenne and Others*[35] and in *SOVAG*,[36] where the Court considered that a dispute between two insurers considers the "professionals in the insurance sector".

3.3.2. Case law on the rationale of Article 13(2)

While Article 11(1)(b) of the Brussels I bis concerns the policyholder, the insured and the beneficiary, Article 13(2) of the Regulation focuses on the "injured party". The interpretation according to which an injured party can bring a direct action against the insurer before the court of a Member State where that party is domiciled results from *Odenbreit* briefly mentioned above.

Remarkably, the reasoning in *Odenbreit* is not focused on the position of inferiority in which an injured party might find itself in relation to the insurer. In this judgment, the Court stressed in the first place that the role of Article 13(2) of the Brussels I bis Regulation is to add injured parties to the list of plaintiffs contained in Article 11(1)(b).[37] It is only in the second place that the Court mentioned that the injured party cannot be denied the right to bring an action before the courts for the place of their domicile as that would deprive them of the same protection as that afforded by the Brussels I regime "to other parties regarded as weak" in insurance-related disputes.[38]

The initial reticence of the Court is understandable. In principle,[39] the injured party does not conclude a contract with the insurer. Hence, the injured party's inferiority should not be based on exactly the same considerations that underpin the protection of the policyholder. Since no contract is concluded, bargaining power seems to be far less relevant. Nonetheless, from that perspective, the position of the injured party is not so much different from that of the insured or the beneficiary and, after all, the economic considerations affect them all (policyholder included) in a similar manner.[40]

Unsurprisingly, an explicit confirmation of the finding that Article 13(2) of the Brussels I bis Regulation applies solely to "weaker parties" came shortly after. In *VG*,[41] the Court admitted that the purpose of the rules of special jurisdiction in matters of insurance, including Articles 11(1)(b) and 13(2), is to protect the weaker party by rules more favourable to their interests than the general rules of jurisdiction. The Court has been faithful to this approach ever since.

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35. Judgment of the CJ of 26 May 2005, *GIE Réunion européenne and Others*, C-77/04, EU:C:2005:113 ("*GIE Réunion européenne and Others*"), paragraph 22.
36. Judgment of the CJ of *SOVAG*, C-521/14, EU:C:2016:41 ("*SOVAG*"), paragraph 30.
37. *Odenbreit*, paragraphs 26 and 27.
38. *Odenbreit*, paragraph 28.
39. E.g. an insured under a civil liability insurance contract may cause damage to the person who concluded that contract with the insurer. Typically, the fact that this person is the policyholder does not prevent them from being also considered the injured party. Cf. the facts in the proceedings that led to the request for a preliminary ruling brought before the CJ by the French Court of Cassation in Matmut, C-236/23.
40. Despite similar vulnerabilities, the legal position of the injured party cannot be approximated to the legal position of the contractual parties to the insurance contract. For discussion on the legal status of the injured party under selected pieces of EU legislation and its non-comparability with the legal status of contractual parties see E. Bagińska, E. Kowalewski, M.P. Ziemiak, *Poszkodowany w wypadku komunikacyjnym a pojęcie z art. 22[1] kodeksu cywilnego*, Prawo Asekuracyjne 2012, No. 71, issue 2, pp. 25–29.
41. *VG*, paragraphs 40 to 42.
    VG, paragraph 40.

3.3.3. Case law on (directly) injured parties and their successors in title

In *VG*,[42] the Court also stated that the notion of "injured party" within the meaning of Article 13(2) of the Regulation is not restricted to persons having directly suffered damage as the result of the event covered by the insurance contract.

In the same judgment,[43] the Court ruled that a social security institution, acting as statutory assignee of the right of the directly injured party, cannot rely on the rule of special jurisdiction laid down in Articles 11(1)(b) and 13(2) of the Regulation, since "it has not been argued" that it is an economically weaker party and less experienced legally than a civil liability insurer. By way of a cryptic *obiter dictum* the Court added, in *VG*,[44] that the heirs of the person injured in the accident should be able to avail themselves of rule of special jurisdiction laid down in those provisions.

In *MMA IARD*,[45] the Court confirmed that line of thought and held that the notion of "injured party" is not restricted to direct victims. It then ruled that the special rule of jurisdiction may be relied on by a public-law institution running private hospitals which, in its capacity of an employer and under a statutory obligation to do so,[46] had continued to pay the salary of its employee during a period of incapacity, and to which the rights of that employee had been passed.

As mentioned in Sections 3.1 and 3.3.1, the application of the special rule of jurisdiction provided for in Articles 11(1)(b) and 13(2) of the Brussels I bis Regulation is "extended" only to persons in need of special protection. A successor in title (e.g. an assignee who has succeeded to the rights of the injured party) should be able to avail themselves of that special rule of jurisdiction provided that they may be considered the weaker party.[47]

However, for the purpose of application of the special rule of jurisdiction in matters of insurance, no individual and case-specific assessment of the parties' potentials is authorised. It is irrelevant whether a claimant is indeed in a position of inferiority in relation to the defendant insurer when it comes to their respective economic capacities, bargaining power, and experience in legal matters. In a way, the case-by-case analysis has been implicitly outlawed already in *Group Josi*,[48] where the Court revealed that the special protection is justified only where parties "may be presumed" to be (as opposed to "are") in a weaker position compared to the other party. Since *MMA IARD*,[49] the CJ stresses the fact that abstract and generalising assessment of the need for protection (as opposed to case-by-case assessment and balancing of structural weaknesses or need for protection) contributes to the predictability of the rules of jurisdiction in matters of insurance.

42. *VG*, paragraph 27.
43. *VG*, paragraphs 42 and 43.
44. *VG*, paragraph 44.
45. *MMA IARD*, paragraph 33.
46. Opinion of AG Bobek in *MMA IARD*, EU:C:2017:396, point 18.
47. Cf. *T.B. and D.*, paragraph 33.
48. Cf. *Group Josi*, C-412/98, EU:C:2000:116, paragraph 66.
49. *MMA IARD*, paragraph 34. See also, most recently, judgment of the CJ of 27 April 2023, *A1 and A2*, C-354/21, EU:C:2023:344, paragraph 53 and case law cited.

3.3.4. The notion of "injured party" within the meaning of Article 13(2)

The following picture emerges from the case law discussed so far: the national applicable law decides whether a party has a claim against the insurer, as a direct victim or his successor in title, while the EU law – through its concept of "injured party" – decides who can bring that claim before a court having jurisdiction on the basis of Articles 11(1)(b) and 13(2).

The notion of "injured party" within the meaning of the Regulation constitutes an autonomous concept of EU law. Both natural and moral persons fit into this concept,[50] including public-law institutions (e.g. as in *MMA IARD*).

That notion covers both direct victims and – at least some of, although that caveat is debatable[51] – successors in title of such a direct victim. Concerning the latter category, due to the autonomous nature of the concept, the intricacies of the specific legal form of substitution resulting from the national law governing the contractual or statutory assignment (*cessio legis*) are not decisive as to whether the assignee can be considered as the "injured party" or not.[52]

Nevertheless, not every party having a claim against the insurer can be considered as "injured party" within the meaning of Article 13(2) of the Regulation and bring that claim before a court having jurisdiction on the basis of Article 11(1)(b).

On the one hand, since the protection resulting from the combined application of those provisions shall not be extended to persons for whom that protection is not justified, only the claimant that can be considered to be the weaker party may avail himself of that jurisdictional privilege. On the other hand, as it results already from the general case law discussed above, a "professional in the insurance sector" cannot be presumed to be in such a weaker position.

The obverse and the reverse of the principle can be operationalised in a following manner: as long as the claimant can be presumed to be in a weaker position than the insurer against whom a direct action is brought, they can rely on the special rule of jurisdiction in matters of insurance. Hence, the presumption operates in favour of the claimant unless they are a "professional in the insurance sector".

Insurer,[53] reinsurer[54] and social security institution[55] fall into that category. That is also the case of a professional running an activity consisting in recovery of insurance indemnity claims against

50. M. Szpunar, K. Pacuła, *Pojęcie*, op.cit., p. 612.

51. That caveat reflects the doctrinal discussion inspired by the judgment of the CJ of 25 January 2018, *Schrems*, C-498/16, EU:C:2018:37, paragraph 48, where the Court held that a contractual assignment of claims cannot provide the basis for a new specific forum for an applicant to whom those claims have been assigned. Cf. M. Szpunar, K. Pacuła, *Pojęcie*, op.cit., p. 617. However, the judgment revolved around the rules of special jurisdiction over consumer contracts. Furthermore, in a recent judgment on the rules of special jurisdiction in matters of insurance, the Court seemed to hint that also a contractual assignee can rely on the special rule set forth in Articles 11(1)(b) and 13(2), provided that he may himself be considered the weaker party. See *T.B. and D.*, paragraph 33. Either way, in the case *MMA* discussed here, no contractual assignment of claimed occurred and therefore the dilemma does not need to be addressed here in detail.

52. *VG*, paragraph 35.

53. *GIE Réunion européenne and Others*, paragraph 22; *SOVAG*, paragraph 30.

54. Judgment of the CJ of 13 July 2000, Group Josi, C-412/98, EU:C:2000:116, paragraphs 64 and 65.

55. *VG*, paragraph 49.

insurances companies in their capacity as contractual assignee of such claims[56] and, for that matter, of any other entity or individual which establishes a business model involving recovery of such claims.[57] In essence, a claimant belonging to the insurance sector (i.e. insurers) or having close ties with that sector ("liens étroits avec le secteur des assurances")[58] as the result of dealing (litigating or settling) regularly with the insurance claims as the inherent aspect of the commercial model they adopted or public mission they were entrusted with, has to be considered as a "professional in the insurance sector".

A similar understanding of the distinction between the "injured parties" in need of special protection and "professionals in the insurance sector" has been already suggested in the literature. The former only occasionally engages into insurance-related disputes, while the latter is a "repeat player", which repeatedly litigates in that area.[59]

Either way, the distinction between the "injured parties" that are in need of protection and the "professionals in insurance sector" still results solely from an abstract and generalising assessment. The fact that the claimant carries out their business on a small scale[60] or has only limited financial resources at their disposal[61] is not capable of saving them for being characterised as a "professional in the insurance sector". And accordingly, the size and legal form of a claimant that is not a professional in that sector is not capable of depriving them of the privilege resulting from the special rule of jurisdiction set forth in Articles 11(1)(b) and 13 of the Brussels I bis Regulation.[62]

All this, however, is not sufficient to address the argument advanced up by the first instance court in the main proceedings and by MMA in its response to the appeal brought by the State before the referring court. Essentially, both consider that an EU Member State provides benefits through a social security system – or at least benefits that are similar in nature to social security benefits – and supervises insurance companies. It is, therefore, a "professional in the insurance sector". As such, even in the context of a direct action on the subrogated claim to which its employee was originally entitled, the State cannot be presumed to be in a weaker position than the insurer against whom that action is brought.

This brings me to the final point of this section of the present analysis, the limits of the abstract and generalising assessment of the need for protection.

3.3.5. Limits of abstract and generalising assessment of the need for protection

Put simply, the preliminary question seeks to ascertain whether the interpretation provided for in by the Court in *MMA IARD* (i.e. subrogee-employer being a public-law institution) can be extended to a scenario in which the employee is subrogated by the employer being a Member State of the EU

56. *Hofsoe*, paragraph 43. See also judgment of the CJ of 20 May 2021, *CNP*, C-913/19, EU:C:2021:399, paragraph 43.
57. Judgment of the CJ of 21 October 2021, *T.B. and D.*, C-393/20, EU:C:2021:871 ("*T.B. and D.*"), paragraphs 37 and 38.
58. Cf. *T.B. and D.*, paragraph 38.
59. See H. Dörner, *One-shotter" versus „repeat player" – Elucidation of Art. 13 para. 2 and Art. 11 para. 1 lit. b of the Regulation (EU) No 1215/2012 (EuGH, S. 196)*, IPRax 2018, No. 2, p. 159 et seq.; D. Stefer, *Zession und Zuständigkeit unter der EuGVO*, Tübingen, p. 196 et seq.
60. *Hofsoe*, paragraph 45.
61. *HW*, paragraph 38.
62. *MMA IARD*, paragraph 35.

or rather that scenario should be approximated to *VG* (i.e. social security institution) or *T.B. and D.* (i.e. entity having close ties with insurance sector).

A priori, following an abstract and generalising assessment of the need for protection, an EU Member State qualifies as a professional in the insurance sector since it not only operates a social security system (or at least provides benefits similar to those provided by a social security institution) but also supervises the commercial (private) insurance sector and, therefore, has close ties with that sector.

However, the abstract and generalising assessment and the ban of case-by-case analysis resulting thereof relates to comparison of the potentials of parties to the proceedings and not to the subject matter of the dispute.

In other terms, the abstract and generalising assessment is merely a first step of the analysis. It aims to verify whether the claimant belongs to the insurance sector or has close ties with that sector as the result of dealing (litigating or settling) regularly with the insurance claims as the inherent aspect of the commercial activity model they adopted or public mission they were entrusted with. If so, they were to be considered as "professional in the insurance sector".

In the second step, an additional check has to be made in order to ascertain whether the direct action brought against the insurer fits within such a general and abstract profile of the claimant or not. If the direct action does not originate in such a commercial activity or public mission, the claimant cannot be considered as a "professional in the insurance sector" in the context of the specific proceedings.

In the light of the above, if a professional regularly dealing with insurance claims (as in *Hofsoe*) has a road traffic accident themselves and wishes to bring a direct action against the insurer of the person responsible for that accident, they shall not be refused the benefits of the special rule of jurisdiction laid down in Articles 11(1)(b) and 13 of the Regulation. Such an outcome is in line with the view that, for the purpose of application of that rule of jurisdiction, both direct victims and their successors in title (indirect victims, if one wishes to endorse that notion) need to pass the same test in order to be considered as a weaker party.

In a similar vein, if the social security institution (as in *VG*) paid the remuneration during the period of recovery of one of its employees and, as the subrogee, brought a direct action against the insurer of a third party, it would not be in a different position to the insurer than the employer in *MMA IARD*.

Logically, a state that provides benefits through a social security system – or at least benefits that are similar in nature to social security benefits – and supervises insurance companies is not a "professional in the insurance sector" in the context of a direct action on the subrogated claim, to which its employee was originally entitled.

Interestingly, such an interpretation is somewhat similar to the approach suggested by AG Bobek in the case that led to MMA IARD. In his Opinion, he emphasised the importance of the legal title that led the subrogee to slip into the directly injured party's shoes: "the subrogee may rely on the insurance-related *forum actoris* unless the title relied on follows from an insurance contract or a commercial or otherwise professional agreement to assign the claim concluded between the directly injured party and the subrogee".[63]

63. Opinion of AG Bobek in *MMA IARD*, EU:C:2017:396, point 72.

4. Conclusion

In view of the analysis carried out in the present paper, it is possible to articulate two general reservations as to the legal problem brought up by the request for a preliminary ruling in the case *MMA*, C-536/23, and propose an answer to the preliminary question.

First, the preliminary question is based on a premise that a state, acting in its capacity of an employer, which continued to pay the remuneration to its official and subrogated to that official's rights *vis-à-vis* the insurer, may rely on the rule of special jurisdiction in matters of insurance set forth in Articles 11(1)(b) and 13(3) of the Brussels I bis Regulation and sue the insurer "before the courts for the place where the official [...] is domiciled". This premise seems misguided. In fact, under the combined effect of those provisions, a successor in title of a directly injured party may bring the direct action before the court of their own domicile.

In its judgment, the Court should reformulate the preliminary question in order to avoid an implicit confirmation of that premise in its future judgment. Alternatively, it could draw the attention of the referring court to that aspect and stress that the preliminary ruling clarifies solely whether a Member State of the EU may rely on the rule of special jurisdiction laid down in Articles 11(1)(b) and 13(3) of the Brussels I bis Regulation and not before which court it can do so.

Second, the argument echoed in the request for a preliminary ruling, according to which an EU Member State is a subject of public international law and, as such, cannot enjoy the protection resulting from the rules of special jurisdiction in the matters of insurance, is not convincing. Public international law subject or not, unless the state acts iure imperii, it can rely on the rules of jurisdiction provided for in the Regulation. In the extension of that reasoning: in order to rely on the rule of special jurisdiction in matters of insurance, it needs to meet the same requirements as any other entity or individual.

Third, the preliminary question could be answered in the sense that Article 11(1)(b) of the Brussels I bis Regulation, read together with Article 13(2) thereof, must be interpreted as meaning that an EU Member State, which, in its capacity of an employer continued to pay the remuneration to its official who (temporarily) became unfit for work as a result of a road traffic accident and which subrogated to the official's rights vis-à-vis the insurer that provides the civil liability insurance for the vehicle involved in that accident, may rely on the rule of special jurisdiction set forth in those provisions.

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Czy państwo członkowskie UE jest słabszą stroną w kontekście przepisów jurysdykcyjnych w sprawach z powództw bezpośrednich przeciwko ubezpieczycielom? Uwagi dotyczące wniosku o wydanie orzeczenia w trybie prejudycjalnym w sprawie Mutua Madrileña Automovilista, C-536/23

Odesłanie prejudycjalne w sprawie Mutua Madrileña Automovilista, C-536/23, poddaje ostatecznej próbie koncepcję „słabszej strony", która leży u podstaw unijnych przepisów dotyczących jurysdykcji szczególnej w sprawach z powództwa bezpośredniego przeciwko ubezpieczycielom. Sąd odsyłający zwraca się bowiem do Trybunału z pytaniem, czy państwo członkowskie UE, który z mocy ustawy wstąpiło w prawa pracownika (urzędnika) poszkodowanego w wypadku drogowym, może powoływać się normę jurysdykcyjną z art. 11 ust. 1 lit. c) i art. 13 ust. 2 rozporządzenia Bruksela I bis.

Pochylając się nad tak sformułowanym pytaniem należy zwrócić uwagę, że, po pierwsze, pytanie to opiera się na założeniu, że państwo członkowskie UE może pozwać ubezpieczyciela „przed sąd miejsca, w którym urzędnik [...] ma miejsce zamieszkania". Założenie to wydaje się błędne. W rzeczywistości następca prawny bezpośrednio poszkodowanego może wytoczyć powództwo bezpośrednie przed sądem swojego miejsca zamieszkania.

Po drugie, nie ma znaczenia, że państwo członkowskie UE jest podmiotem prawa międzynarodowego publicznego. O ile państwo to nie działa iure imperii [arg. ex art. 1 ust. 1 rozporządzenia], może powoływać się na przepisy jurysdykcyjne przewidziane w rozporządzeniu, w tym przepisy o jurysdykcji szczególnej w sprawach ubezpieczeniowych.

Po trzecie, ponieważ przepisy dotyczące jurysdykcji szczególnej w sprawach z powództw bezpośrednich przeciwko ubezpieczycielom zostały ustanowione na korzyść słabszych stron, a w konsekwencji nie mogą na nich polegać „profesjonalnym uczestnikiem obrotu w sektorze ubezpieczeń". Ustalenie, czy powoda należy uznać za tego rodzaju profesjonalistę następować powinno w drodze dwustopniowej analizy. W pierwszym etapie przeprowadza się abstrakcyjną i uogólniającą ocenę w celu zweryfikowania, czy powód należy do sektora ubezpieczeniowego lub ma bliskie powiązania z tym sektorem w wyniku regularnego zajmowania się (prowadzenia sporów lub rozstrzygania) roszczeniami ubezpieczeniowymi jako nieodłącznym aspektem przyjętego przez niego modelu działalności gospodarczej lub powierzonej mu misji publicznej. W drugim etapie należy dokonać dodatkowej kontroli w celu ustalenia, czy powództwo bezpośrednie wniesione przeciwko ubezpieczycielowi mieści się w takim ogólnym i abstrakcyjnym profilu powoda, czy też nie. Jeżeli powództwo bezpośrednie nie wywodzi się z takiej działalności gospodarczej lub misji publicznej, powód nie może być uznany za „profesjonalnego uczestnika obrotu w sektorze ubezpieczeń" w kontekście danego postępowania. W świetle powyższego należy stwierdzić, że państwo członkowskie UE, które jako pracodawca nadal wypłacało wynagrodzenie swojemu urzędnikowi, który stał się niezdolny do pracy w wyniku wypadku drogowego, i które wstąpiło w prawa tego urzędnika może wytoczyć powództwo bezpośrednie przeciwko ubezpieczycielowi sprawcy przed sąd mający jurysdykcję na podstawie art. 11 ust. 1 lit. b) i art. 13 ust. 2 rozporządzenia Bruksela I bis.

Słowa kluczowe: prawo prywatne międzynarodowe, osoba poszkodowania, roszczenie bezpośrednie (actio directa)

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