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FOREIGN COURT PRACTICE

JUDGMENT OF THE EUROPEAN COURT OF JUSTICE IN THE CASE "AAS BALTA" v. "UAB GRIFS AG"

1. Introductory Provisions

The legal issue dealt with by the European Court in the case no. C803/18 "AAS Balta" v. "UAB Grifs AG" (judgment made on 27 February 2020) was placed in the context of the application of Regulation 1215/2012 of 12 December 2012 on jurisdiction, recognition and enforcement of court decisions in civil and commercial matters (so-called Brussels I). In this specific case, the matter related to the dispute between the insurance company "AAS Balta" based in Latvia and the security company "UAB Grifs AG" based in Lithuania. The dispute concerned the request for payment of insurance indemnity.

In the relevant dispute, the question arose as to whether the prorogation clause under the insurance contract concluded between the parent company as the Policyholder (the company subsidiaries are the Insured) and the insurance company binds the subsidiaries of the company as the Insured, or whether the subsidiaries retain the right to choose the competent court, as guaranteed by Article 11 of Regulation 1215/2012.

2. Legal Framework

The relevant regulation governing the above-mentioned legal matter is the Regulation 1215/2012 EC of December 28, 2012 on jurisdiction, recognition and enforcement of court decisions in civil and commercial matters (the so-called Brussels I Regulation).

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According to the preamble (more precisely, the item 15 thereof), the rules on jurisdiction should be as predictable as possible and jurisdiction should be based on the defendant's domicile, as a general principle.

The item 18 of the preamble foresees a deviation from the general rule of jurisdiction for insurance contracts, in which the weaker party should be protected by special rules on jurisdiction that would be more favourable (for the weaker party and its interests) than the general rules on jurisdiction.

The item 19 stipulates the following: "The autonomy of the contracting parties should be respected, except in the case of insurance contracts, consumer contracts and employment contracts, where the autonomy regarding the jurisdiction of the courts is allowed to a smaller extent, in order to protect the interests of the weaker party".

According to the Article 4, paragraph 1 of the Regulation, "persons domiciled in a member state, regardless of their citizenship, shall be sued before the courts of the relevant member state."

In the Article 11, paragraph 1, item (b) of the Regulation, it is stipulated that if the claim is filed by either Policyholder or the Insured or the Beneficiary, the Insurer domiciled in a member state may be sued in another member state, more precisely, before a court located in the plaintiff's domicile (jurisdiction according to the headquarters/domicile of the plaintiff).

Moreover, the Article 12 provides that, under the liability insurance or immovable property insurance, the Insurer may also be sued before a court of law located in the place of the occurrence.

According to the Article 15, the jurisdiction provisions can only be deviated from by agreement which has:

1. been concluded after the dispute arose;

2. allowed the Policyholder, the Insured or the Beneficiary to initiate proceedings before a court different from the court specified in the section of the Regulation that governs the matter of jurisdiction;

3. been concluded between the Policyholder and the Insurer, both of whom at the time of conclusion of the contract have had their domicile or habitual residence in the same member state, where such agreement aims to transfer jurisdiction to the court of such member state even if the event occurred in another member state, provided that the agreement is not contrary to the law of that other member state;

4. concluded with a Policyholder who is not domiciled in a member state, unless the insurance cover is mandatory or relates to real estate in a member state, or

5. referred to the insurance contract covering some of the "major risks", defined by Directive 2009/138 (Solvency II) and to the risks provided for in Article 16 of the Regulation.

According to the Article 25, if the parties have agreed (independently of their domiciles) that a court of a member state shall have jurisdiction to resolve the disputes arisen or that may arise in connection with a particular legal relationship, such court shall have an exclusive jurisdiction, unless the parties agree otherwise or the agreement becomes void under the law of such member state.

3. Subject-Matter of Dispute and Legal Issues

The "Grifs" company delivers the security services to facilities. The owner of 100% of the shares in this company is "Grifs AG SIA", a company registered in Latvia.

On 31July 2012, the "Grifs AG" (parent company) and the insurance company "AAS Balta" (headquartered in Latvia) concluded a contract on general civil liability insurance, also covering the civil liability of subsidiary companies, including the facility security company, "Griffs".

According to the insurance general terms and conditions, all disputes related to the insurance contract must be resolved amicably and if the parties fail to do so, the competence of the Latvian court and the application law and regulations in force in the Republic of Latvia is agreed.

The facility security company "Grifs" concluded an agreement with UAB "Jaunystės romantika" on providing technical security services of facilities. On August 21, 2012, a theft of jewellery and cash was committed in one of the jewellery stores belonging to the UAB "Jaunystės romantika" company in Lithuania.

After the conclusion of the proceedings between the "Jaunystės romantika" company and the "Grifs" company before the Lithuanian court (competent court according to the place of occurrence), the "Jaunystės romantika" company and their insurance company "ERGO Insurance SE" were awarded compensation for damages with the accrued interest and reimbursement of legal expenses. The verdict established the gross negligence on the part of the "Grifs" company and the existence of a direct causal link between the resulting damage and the omission (failure to act) of the "Grifs" company.

Thereafter, in the next step, the "Grifs" company filed a lawsuit against the "AAS Balta" insurance company before the District Court in Vilnius, Lithuania. They requested the compensation for the damage sustained in the capacity of the Insured under the insurance contract concluded between the "Grifs AG" as the parent company and "AAS Balta" as the Insurer that covered all subsidiary companies under their insurance policy.

However, by judgment dated 21 November 2017, the District Court in Vilnius declared they were not competent to proceed with the lawsuit, pointing out that based on the General Terms and Conditions of the insurance contract, all

disputes related to the contract should be resolved by the Latvian court, following the Latvian law. Furthermore, since the company that concluded the insurance contract - "Grifs AG" - was the owner of the "Grifs" company, the District Court in Vilnius found it undisputed that the "Grifs" company had consented with all the provisions of the insurance contract, including those on jurisdiction, although there had not been an express consent.

The "Grifs" company appealed against the aforementioned judgment to the Lithuanian Court of Appeal, and the said court annulled the judgment and returned the case to the District Court for a new decision regarding the admissibility of the claim. The appellate court found their reasons for cancelling the judgment in the status of the "Grifs" company as the Insured under the disputed insurance contract. According to Article 11 of Regulation 1215/2012, the Insurer could be sued before the court of law a member state of the Insurer's domicile (general jurisdiction according to the headquarters of the defendant). As regards the claims filed by the Policyholder, Insured or Beneficiary, the Insurer may also be sued in a member state of the plaintiff's domicile. This means that the status of the "Grifs" company as the Insured allowed them to choose another jurisdiction, provided for under the Article 11 of the Regulation. Therefore, the provision on the extension of jurisdiction of the Latvian court could not exclude this right of the Insured.

The "SAA Balta" insurance company appealed to the Supreme Court of Lithuania against the above verdict. In the complaint, they stated that the relevant contract met the criterion of "high risks" under the Article 16 and that therefore one should have assumed that the parties to the insurance contract were economically strong enough and were allowed to deviate, by the autonomy of will, from the provisions on jurisdiction under the Regulation

As the boundary between contractual autonomy and the need to protect the weaker party is not completely clear, the Supreme Court of Lithuania referred the previous matter to the European Court of Justice:

"Should Article 15 (item 5) and Article 16 (item 5) of the Regulation 1215/2012 be interpreted in such a way that in the case of high risk insurance, the agreement on prorogation of jurisdiction included in the insurance contract concluded between the Policyholder and the Insurer could be applied against the Insured under such contract even though has not consented to such agreement and has a regular residence or place of business in a member state other than the member state of the policyholder and the Insurer?"

3.1. Attitude of European Court of Justice

When making considerations, the court started from the general provisions of the Regulation that govern the jurisdiction, specifically stating that a special

regime of jurisdiction is applied to the insurance contracts, intending to protect the weaker contracting party. An Insurer domiciled in one member state may be sued in another member state where the claimant is domiciled, if the claim is filed by the Policyholder, Insured or Beneficiary. The Insurer, on the other hand, may also be sued in the member state of the insured occurrence (in the case of liability insurance and immovable property insurance).

The purpose of those rules was to enable the weaker party that wish to initiate legal proceedings against the stronger party to do so before a court of a member state easily accessible to the weaker party.

However, the Regulation also allows deviation from this regime of jurisdiction on the basis of an agreement concluded in accordance with the Article 15 (more particularly, the item 5). Since it is an insurance contract that covers "major risks", the court observes the grammatical structure of Article 15, item 5 simultaneously with the objective of the provisions of the Regulation.

In the first step, the court started from linguistic interpretation, that is, the wording of the item 5, Article 15, which did not specify the parties to the agreement (as opposed to items points 3 and 4 of the same article). The Court consequentially stated that a legally valid agreement on the prorogation of jurisdiction could also be applied against a third party - the Insured, i.e. that such an agreement could be invoked by any person who wants to exercise his rights under the contract.

In the next step, the Court took into account the goal of the provisions of the Regulation and stated that, based on the Article 11, the Insured was granted special rights regarding the choice of forum, without any distinction regarding the type of risk covered (therefore, it was a general right of the Insured). The Court concluded that the protection thus granted to the Insured would have not been effective (that is, their aim would not be met) if, with regard to contracts for "major risks" insurance and following the agreement on the prorogation, the competent court would have established the jurisdiction with which the Insured had not consented.

Finally, the Court concluded that, in the event of a dispute arising under the insurance contract concluded to the benefit of a third party, it would be possible to invoke on the agreement on prorogation of jurisdiction with which the third party did not agree only if such agreement did not jeopardize the target of protecting the economically weaker party.

The Court thus focused on the issue of economic strength and concluded that the need for the additional protection of the weaker party in the relationship between the Policyholder and the Insurance company was not justified, since the relevant insurance covered the "major risks" and the parties were powerful companies. These subjects, therefore, were allowed to agree on the jurisdiction of the court within the framework of the autonomy of their will.

However, with regard to the economic strength of the Insured, the court took a slightly more ambivalent position. Namely, the Court, considered that one couldn't automatically draw a conclusion about the Insured's economic strength based only on the fact that the Insured is covered by an insurance contract against "major risk". Despite the fact that the Policyholder and insurance company were deemed economically strong enough parties that may extend the jurisdiction within the concluded insurance contract by autonomy of will, this could not have applied to the Insured under the relevant contract.

The court's conclusion was that the agreement on the extension of jurisdiction under the insurance contract against "major risks" concluded by and between the Policyholder and Insurer could not be applied to the Insured under the same contract, if he:

- is not a professional entity transacting in the insurance sector,
- did not consent to such agreement,
- has its regular residence or business unit in a member state that is not a member state of the Policyholder and Insurer.

4. Brief Overview of Judgment

In making the relevant judgment, the Court was essentially concerned with the scope of application of the insurance contract provisions (general insurance terms and conditions) upon the Insured who did not give their explicit consent and/or were not familiar with the provisions of the contract or general insurance terms and conditions. We believe that three specificities should be singled out from considerations of the Court.

The court was of an attitude that the economic strength of the Insured should not be assessed on a case-by-case basis, because such an assessment required consideration of a few criteria that should be evaluated together and whose application could not always be systematic. Therefore, the assessment of a party's economic strength on a case-by-case basis would lead to potential legal uncertainty, which would be contrary to the legislator's intention to make the jurisdiction rules as predictable as possible. Instead, the Court applied the "professional subject in the insurance sector" criterion, excluding the possibility of prorogation for any Insured other than the one who was considered a "professional subject in the insurance sector" (*a contrario* to the disposition of the judgement).

No conclusion on compliance with the provisions of the contract / insurance terms and conditions could be made based only on the ownership structure of the Insured. The fact that the Insured is a wholly-owned subsidiary (100% owned by the parent company) is not sufficient to consider that the Insured is aware of or has

consented to the provisions of the insurance contract that deprive them of certain rights, concluded by the parent company.

Finally, it is interesting to highlight that the disputed agreement between the Policyholder and the insurance company, in addition to the prorogation provision, also contained a provision on the choice of applicable law, but that the court did not engage in the assessment of the validity of the provision on the choice of applicable law and the obligation of the Insured under this provision. The rules of the Regulation 593/2008 (Rome I) would apply to the said provision. In this sense, the legal issue remains open whether the said provision (on the choice of governing law) could apply to the Insured who did not give his consent to the insurance contract, in the light of the rules under the Rome I Regulation.

Translated by: ***Bojana Papović***