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PROTECTION OF THE INSURED AGAINST CHOICE OF COURT AGREEMENTS IN INTERNATIONAL INSURANCE CONTRACTS COVERING "LARGE RISKS" [A1 AND A2 (ASSURANCE D'UN BATEAU DE PLAISANCE), C-352/21]*

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1. Two citizens domiciled in Denmark bought a sailboat and took out civil liability and hull insurance with an insurer domiciled in the Netherlands. The insurance application form stated that the sailboat would only be used for private and recreational purposes. The insurance contract included a jurisdiction clause to the courts of the Netherlands[1]. As a result of an accident, the sailboat suffered a series of damages and the insurer refused to pay for them. The insured brought an action before the courts of Denmark claiming for the damages. The insurer raised an objection arguing that the claim should have been brought before Dutch courts due to the jurisdiction clause included in the contract. The Danish court upheld the objection. The insured appealed against this decision to the Østre Landsret, which referred a preliminary ruling to the CJEU concerning the jurisdiction clause and asking for the correct interpretation of Articles 15 and 16 of Regulation 1215/2012. Whether the Danish courts (as the insured claimed) or the Dutch courts (as the insurer claimed) had jurisdiction depended on this. The issue has been stated by the CJUE (Sixth Chamber) on 27 April 2023, case A1 and A2 (Assurance d'un bateau de plaisance), C-352/2.

2. It is useful to recall the legal framework in order to understand the debate. The legal basis in this case is Regulation (EU) No 1215/2012 of the European Parliament and of

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[1] The wording of the clause as reflected in paragraph 16 gives rise to doubts (also in other language versions). It may not be literal. In any case, it is not the subject of the debate.

the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[2]. Chapter II of Regulation provides general rules on international jurisdiction as well as three special regimes in case of a contracts with a weaker party. These three cases are: jurisdiction in matters relating to insurance (Section 3), jurisdiction over consumer contracts (Section 4), and jurisdiction over individual contracts of employment (Section 5).[3]

The special rules for insurance contracts are regulated in Chapter II, Section 3 of Regulation, Articles 10-16. Basically[4], the Regulation corrects the contractual imbalance, first, by establishing a special protection *forum*: the general *forum* -the defendant's domicile- remains but, in the case of a claim against insurers brought by the policyholder, the insured or a beneficiary, the *forum* of the plaintiff's domicile is also enabled, which promotes access to justice for the weaker party. This *forum actoris* -usually considered as exorbitant- is very useful in cases like this, where it pursues a protection objective. And second, the Regulation corrects the contractual imbalance by admitting the choice of *forum* but subject to conditions and limits that neutralize the imbalance and prevent amy harm to the weaker party. On this point, the special rules prevails over the general rule regulated in Article 25 of Regulation, although it retains the same privileged position in the system.

3. Let's get back to the case. Jurisdiction clauses in insurance contracts are regulated by Articles 15 and 16 of Regulation. According to Article 15 of Regulation, jurisdiction clauses are allowed but they are subject to conditions in order to protect the weaker party. The one at issue is provided for in paragraph 5: "which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16". And, according to Article 16, paragraph 5, one of the risks foreseen is: "notwithstanding points 1 to 4, all 'large risks' as defined in Directive 2009/138/EC..."[5]. In summary, if the insurance taken out in the present case (hull insurance for recreational craft for non-commercial purposes) is considered to fall within the concept of "large risks" within the meaning of Article 16.5, in accordance with Article 15.5 choice of court agreement is feasible and the jurisdiction of the agreed Dutch courts would be sustained; but if it is not, the agreement

[2] OJ L 351, 20.12.2012. With regard to the application of the Regulation by Denmark, Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 299, 16.11.2005.
[3] See recital 18 Regulation 1215/2012, expressly invoked in the grounds of the Judgment, paragraph 48.
[4] In addition, the protection rules involves the refusal of recognition and enforcement if the judgment conflicts with Section 3 where the policyholder, the insured or a beneficiary of the insurance contract was the defendant (Article 45(1)(e)(i) Regulation 1215/2012).
[5] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009.

is not allowed and we should return to the general forum -the defendant's domicile- that is to say, the Danish courts.

This is the interpretative doubt and the Court of Appeal sends it to the CJEU in the following terms: "Must Article 15(5) of Regulation [No 1215/2012], in conjunction with Article 16(5) thereof, be interpreted as meaning that hull insurance for pleasure craft that are not used for commercial purposes falls within the exception laid down in Article 16(5) of that regulation, and is, therefore, an insurance contract which contains a choice of court agreement departing from the rule laid down in Article 11 of that regulation valid under Article 15(5) of that regulation?".

4. In order to answer this preliminary ruling, the Court begins with a literal interpretation of Articles 15 and 16 of Regulation and Directive 2009/138. The wording of Article 13(27) of Directive suggests that the concept of large risks covers damage to inland waterway, lake and maritime vehicles, whether or not they are used for commercial purposes. It then makes a contextual interpretation of paragraph 5 within Article 16 in order to conclude that, as the Commission pointed out, if all damage suffered by maritime vehicles, whatever their use, were accepted as major risks, the other paragraphs of the provision would be deprived of their content. That understanding is supported by other arguments: the historical criterion, the restrictive interpretation given its exceptional nature or the consistency with the application by the European Union of the Hague Convention on Choice of Court Agreements, in respect of which the European Union has made a declaration on the application of the Convention in such cases. In particular, the Court focuses on the finalist argument and on the legal objective of protection of the weaker party to which Section 3 is oriented: these special rules are intended to correct an imbalance, which is not the same when contracting between professionals and, as in the case, when hiring a pleasure boat for use for private and not for commercial purposes. And the Court adds that there is no need to make a weakness case-by-case analysis in the interests of the predictability of jurisdiction rules[6].

5. This is not the first time that the CJEU has been confronted with the scope of Section 3 in cases of large risks. The way in which the rules are constructed is a fertile ground for interpretative doubts; in the present case, by reference to another provision, Directive 2009/138, which is not necessarily adapted to that Section. In the Balta case, the CJEU established that a jurisdiction clause contained in a large risks insurance contract concluded between the policyholder and the insurer is not enforceable against the insured

[6] Perhaps the wording of Article 16.5 can also be argued in this sense insofar as it refers to "all major *industrial and commercial* risks as listed in the Directive".

who is not a professional in the insurance sector and who has not accepted it[7]. Then, the Court also focused on the underlying objective of protection, together with the historical and systematic interpretation with which it converges. Balta draws on a precedent, the Société Financière et Industrielle du Peloux case, which had already established that a choice of court agreement cannot be invoked against an insured who has not expressly accepted it[8]. In the present case, it is not a question of the enforceability of the clause against a third party (the insured are parties to the contract), but of clarifying the concept and the exception. The Judgment establishes that choice of court agreements in an insurance contract are exceptionally permissible when they relate to an insurance contract covering (so far, according to Article 15.5) all major industrial or commercial risks, as listed in the Directive (so far, according to Article 16.5), but provided that protection of the weaker party is respected (as clarified by the Court). In short, finalist logic as a primary hermeneutical criterion.

[7] Judgment of 27 February 2020, Balta, C-803/18.
[8] Judgment of 12 May 2005, Société Financière et Industrielle du Peloux, C-112/03.