

Book Review of

ESPINIELLA MENENDEZ, A.: *Las reclamaciones derivadas de accidentes de circulación por carretera transfronterizos (Claims from cross-border road traffic accidents)*, Fundación MAPFRE Instituto de Ciencias del Seguro, Madrid, 2012, 287 pp.

(ISBN: 978-84-9844-374-5)

Recensão crítica a

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ABSTRACT: Book Review of ESPINIELLA MENENDEZ, A.: *Las reclamaciones derivadas de accidentes de circulación por carretera transfronterizos (Claims from cross-border road traffic accidents)*, Fundación MAPFRE Instituto de Ciencias del Seguro, Madrid, 2012, 287 pp. (ISBN: 978-84-9844-374-5)

KEY WORDS: Insurance claims, cross-border traffic accidents, free movement of persons, victims and injuries, insurers, responsibilities

RESUMO: Recensão crítica a ESPINIELLA MENENDEZ, A.: *Las reclamaciones derivadas de accidentes de circulación por carretera transfronterizos (Claims from cross-border road traffic accidents)*, Fundación MAPFRE Instituto de Ciencias del Seguro, Madrid, 2012, 287 pp. (ISBN: 978-84-9844-374-5)

PALAVRAS-CHAVE: Reclamações de seguros, acidentes de tráfico transfronteiriços, livre circulação de pessoas, vítimas e feridos, seguradoras, responsabilidades

1. The aim of this book is to clarify the legal obligations and responsibilities arising from cross-border road traffic accidents' claims. Cross-border road accidents have increased as a result of the free movement of persons in the EU. In this sense, any European citizen travelling to another Member State may become a potential victim of a road traffic accident. However, the legal system for cross-border road traffic accidents is very complex. That is because it is determined by many responsibilities from the participants involved in the accident (either linked to the affected vehicle, to the transport operation or to the place where the accident occurred) and by the compensation cover from very different insurers. The topic is also influenced by Brussels I Regulation (Regulation 44/2001), which shall be replaced by the Brussels I bis Regulation (Regulation 1215/2012) from 10th of January 2015.

Moreover, the differences between the existing laws setting the time limits to claim compensation in any court of the EU Member States may create an obstacle for victims of cross-border road accidents to obtain compensation for damages. As a result, victims of cross-border accidents risk receiving no compensation for harm suffered due to short limitation or prescription periods applicable in the Member State where the accident occurred or a lack of knowledge regarding the commencement or the possibilities to suspend the running of these periods. That was the main conclusion of a resolution of the European Parliament of 1st of February 2007 on limitation periods in cross-border disputes involving personal injuries and fatal accidents. Such resolution pointed out that the existing divergence in the EU Member States in respect of limitation periods, the commencement of the running of time, the date of knowledge, the ability to interrupt or stop the running of time, the presentation of evidence and the assertion of the defence of the expiry of the limitation period *"may give rise to undesirable consequences for the victims of accidents in cross-border litigation, placing obstacles in the way of injured individuals when they are exercising their rights in Member States other than their own, and in some cases potentially also their own State, and are required to rely upon foreign law"*¹.

Aiming to analyse and clarify the obligations of each debtor in relation to each creditor, the book ***Las reclamaciones derivadas de accidentes de circulación por carretera transfronterizos (Claims from cross-border road traffic accidents)*** presents a casuistic and comprehensive approach about who claims and against whom. Thus, the book is composed of three chapters plus a final section containing the conclusions. On the one hand, chapter I deals with the cross-border claims of injured parties against liable persons. On the other hand, chapter II is about cross-border claims of injured parties against insurers and other providers of economic cover. Last but not least, chapter III explores the cross-border claims of reimbursement among liable persons. Despite the differentiated content of each chapter, all of them are inter-dependant since Chapter II depends on Chapter I and Chapter III rests on the two previous ones.

¹ European Parliament resolution with recommendations to the Commission on limitation periods in cross-border disputes involving personal injuries and fatal accidents (2006/2014(INI)). Official Journal of the European Union, C 250 E/48, 25 of October 2007.

2. As mentioned before, **Chapter I** deals with the cross-border claims of injured parties against liable persons. Thus, it makes a distinction between the claims without previous relationship between the parties and those claims based on a previous relationship between them. Amongst the first category the book differentiates between the following relationships:

A) Victims outside the vehicle and drivers. The author is clearly in favour of bringing actions in the court of the place where the accident occurred, as it is established in both Brussels I Regulation and Lugano Convention. In comparison with other possible places where to bring legal actions, the book advocates the efficiency of the ground of the place where the accident occurred. Those benefits are explained from the point of view of both the procedural Law and the Law of obligations. Concerning the law applicable, the author also declares himself in favour of the Rome II Regulation (Regulation 864/2007). According to him, the application of the Rome II Regulation instead of the Hague Convention of 1971 would avoid forum shopping practices.

B) Victims and persons claimed to be indirectly liable (i.e. the manufacturer of motor vehicles or the owner and/or the manager of the road). After explaining all the grounds on jurisdiction, the author shows a clear preference for the Rome II Regulation instead of the Hague Convention of 1971 in terms of Law applicable. According to him, the reason behind such preference lies in the fact that article 14 of the Rome II Regulation stipulates the freedom of choice of law. As the owner of the road is usually a public body, the book points out that the jurisdiction belongs to the courts of the State where the accident occurred which will apply the *lex fori*. However, it also explains that Private International Law rules must be applied in the case of bringing actions against a road concessionary. The book also illustrates very well the situation where joint actions are brought against both the public body owning the road and the concessionary; as the public body may invoke immunity from jurisdiction of the courts of the concessionary's domicile, the courts of the State where the accident occurred have exclusive jurisdiction and the law applicable is the law of that public body.

C) Victims and third parties linked to the tortfeasor. Those third parties could be the parents, the employer or the vehicle's owner of the tortfeasor. In that case, the book explains that legal actions may be brought before the court of the State where the third party has the domicile, where the accident occurred or even before the court of the original proceeding against the tortfeasor due to the fact that such third party is a warrantor of the driver's liability. However, the most interesting part comes when the author refers to the law applicable (the Hague Convention of 1971 and the Rome II Regulation) and states that those rules fail to consider the case of the liability of the vehicle's owner when the vehicle is stolen because the courts of the State where the accident occurred have jurisdiction but the theft is an unforeseen circumstance for the owner. In this sense, the author is clearly in favour of allowing courts to refuse jurisdiction when there is a more appropriate forum available as well as to apply the law of the State where the vehicle is usually based to the owner's liability. Nevertheless, he also admits the procedural difficulty of his suggestions since none of them are stipulated in the legal instruments.

On the category of claims based on a previous relationship between the parties, the book makes the following distinction between:

A) Passengers and carrier. After pointing out the jurisdiction, the book explains that the law applicable should be based on the common habitual residence of passenger and carriers or, whenever such connection does not exist, on the passenger's place of residence if either departure or destination are in that country. The author proposes to apply the law of the carrier's country of habitual residence. However, he also considers some problems to put his suggestion into practice. Those problems have to do with the fact that the Brussels I Regulation and the Rome I and II Regulations do not state whether those obligations are contractual or non-contractual and because of a lack of regulation in the Hague Convention about the problems of characterization.

B) Passengers and driver. The author clearly exposes why the rules of the Rome II Regulation are better for the driver's liability instead of the ones contained in the Hague Convention of 1971. Furthermore, he also dismisses the application of his proposal to apply the law of the carrier's country of habitual residence (mentioned before on the relation between passengers and carrier) because the obligations of driver and carrier towards passengers are different.

C) Users and transferors of the vehicle. This is mainly in cases of rental cars. In this sense, the book describes the jurisdiction for the user's claims based on damages caused by the poor conditions of the vehicle and for the transferor's claims based on the damages to the vehicle caused by the user. The author points out that the law applicable will be determined by agreement between the parties and/or the law of the transferor's State of residence if there is not such agreement.

D) Employer and injured worker. The book explains that this situation is governed by the rules about individual employment contracts; but the author insists that some minimal rules are needed due to the fact that there are many different vehicle accidents in the workplace. Despite the fact that neither the Brussels I Regulation nor the Lugano Convention consider it, the author points out that Rome Regulation I provides for the jurisdiction and law applicable of the country where the worker starts his activity in the case of accidents of chauffeurs in cross-border transport. The author also believes that the *forum loci laboris* and the *lex loci laboris* are the most suitable rules for employees who cross the border very day when going to work. For posted workers who have an accident in either the host or transit country, jurisdiction may be possible for the courts of the State where the worker has been posted or the courts of the State where the work is carried out. In this case, articles 3.7 and 6 of the Posting of Workers Directive (Directive 96/71/EC) lay out that the law applicable is the most favourable one to the worker between the State of origin and State of host's laws.

3. Cross-border claims of injured party against insurers and other providers of economic cover is the topic addressed in **chapter II**. The chapter is composed of three subsections. The first subsection is aimed at identifying the insurers, whereas the second one is dealing with the settlement of claims and the last one focuses on the insurance cover.

When identifying the insurers, the author differentiates between those who are obliged to provide coverage (insurance undertakings, guarantee funds and compensation bodies) and claims representatives and correspondents. For the author, the EU Motor Insurance Directive (Directive 2009/103) establishes very efficient ways to obtain information about the insurers. However, he points out that such ways only benefit itinerant injured parties. Thus, he suggests that Directive 2009/103 should allow local injured parties (i.e. injured parties resulting from accidents occurred in their Member State of residence) to benefit from those ways to obtain information about the insurers. The author also calls for a much simpler legal regime for the cross-border intervention of compensation bodies different from insurance undertakings. In that situation, there are currently two legal regimes to be applicable depending on whether the accident occurs in a Member State where the injured party resides (in this case, the rules to follow are the ones from the Internal Regulations of the Council of Bureaux) or not (then Directive 2009/103 is applied). The author raises the attention to problems arising from risks of double cover and to the fact that Directive 2009/103 does not provide any cover for accidents occurred in the European Economic Area involving uninsured vehicles from third countries. The author also identifies those claims representatives and correspondents who are better entitled to manage the claim in the State where the injured party resides in the following three situations: a) when an itinerant vehicle causes damage to local victims, the Internal Regulations of the Council of Bureaux provides the intervention of a correspondent on behalf of the Bureau of the State where the accident occurred; b) when an itinerant victim is involved, Directive 2009/103 provides the intervention of the claims representative in the State where the victim reside and on behalf of the insurer, and; c) when an itinerant insurer operates in a State where a local vehicle causes an accident to local victims, the Solvency II Directive 2009/138 provides the intervention of the insurer in that State. Notwithstanding, the author explains that there is a problem if all vehicle, victim and insurer involved in the accident are itinerants. In that case, the previous identification is not valid because the injured party can only claim in the State where the accident occurred.

Chapter II also tackles the settlement of claims and it distinguishes between the extrajudicial compensation procedure and judicial actions. The extrajudicial procedure is regulated by Directive 2009/103 and it determines the law applicable for the presentation of the claim, the offer or refusal of compensation, and the periods for the answers; nevertheless, the compensation is calculated based on the Private International Law rules of the State where the vehicle is normally based, where the accident occurred or where the compensation bodies or the guarantee funds' rules have been incorporated. If the dispute is submitted to international arbitration, the book explains that it must be accepted by the injured party after a proposal by the insurance undertaking contained either in the reasoned offer or refusal of compensation or in another specific document. Such acceptance is required for the

arbitration agreement to be effective, unless both injured party and insurer agree on applying the arbitration clause or the carrier acts on behalf of the insurer. The arbitration shall be governed by the law chosen by the parties or, if there is no agreement, by the law governing the cover established by the Private International Law rules of the State which requires the mandatory insurance. Besides, the author highlights that Directive 2009/13 only regulates partially the extrajudicial procedure before the European claims representative or the correspondent in the Bureau. According to him, such partial regulation leads to several loopholes.

Judicial action -which can be directly brought against the insurer or include the insured person- is regulated by Directive 2009/103 in domestic cases and cross-border cases provided that they concern vehicles which are usually based in a Member State but the accident occurred in another Member State. Nevertheless, the author explains that the Directive does not govern either the direct right of action's limitation period or the lack of effectiveness of judicial decisions against other third parties different from the insurer. Beyond the situations covered by Directive 2009/103, the direct right of action is regulated by the rules of conflict of laws. For those cases, the author argues in favour of the application of the Rome II Regulation instead of the Hague Convention of 1971. From his point of view, the Rome II Regulation is more coherent, it is more in line with the freedom of choice and it is clearer than the Hague Convention because the alternative connections provided by the Rome II Regulation seem better than the subsidiary connections established by the Convention. The author has also a positive opinion on the possibility that the insurer might be joined in proceedings against the insured. In addition, the author clarifies that claims representatives appointed on the basis of Directive 2009/13 have more powers when representing the insurance undertakings in judicial proceedings than the correspondents of the Bureaux.

The final subsection of chapter II deals with the insurance cover. When analysing the law applicable to the cover, the author calls for more and better harmonization of the European legislation. As he points out, no provision at all is provided in the EU Bus and Coach Passenger Rights Regulation (Regulation 181/2011) and the distinction between vehicles based in a Member State or in a third country established by Directive 2009/103 is no longer justified nowadays. For the author, such distinction leads to discriminations amongst the injured parties based on the State of origin of the vehicle. On top of that, he also highlights the existence of discriminations in cases of vehicles usually based in Member States. On the scope of the law applicable to the cover, the book explains that such law will determine the grounds for exception or limitation for providing the cover, the period to bring the action against the insurer in joint actions against the insured, and the percentage of compensation covered by the insurance. Nevertheless, such law is not applicable for the basis, extent, exemption or limitation of liability of the driver since that is governed by the law applicable to the liability of the driver. The author also illustrates that the dissociation between the law governing the insurance cover and the one regulating the civil liability cause some dysfunctions.

4. Chapter III focuses on the claims among liable persons by making a distinction between:

A) Claims of insurers against debtors. Whereas the subrogation of the insurer in contracts is governed by Rome I Regulation and the rules on jurisdiction concerning international contracts -except for the rules on consumers since they are *intuitu personae*, the Rome II Regulation and the rules relating to tort provides the insurer's subrogation in non-contractual obligations. However, the law ruling the tortfeasor's obligation determines the object and amount of the subrogation in both cases. The Brussels I Regulation and the Lugano Convention provide the jurisdiction rules for the actions of the insurer against policyholders and insured persons. Notwithstanding, the author considers the policyholders and the insured persons as weaker parties in comparison with the insurance undertaking; thus, he does not consider such rules as appropriate to apply against them. Since there are not European conflict of laws rules for the actions of insurers against policyholders and insured persons, he describes the benefits of extending *mutatis mutandis* the provision of the Rome II Regulation about subrogation to those actions.

B) Claims among tortfeasors. The author welcomes the extension to third parties domiciled in third countries of the court seized in the original proceeding's jurisdiction in order to join other tortfeasor and his insurance undertaking as third parties by the Brussels I bis Regulation. The book also elaborates on the cases of multiple liability (i.e. more than one debtor).

C) Claims among providers of economic cover. It is interesting to read how the book explains the differences on claims between such different providers: Bureaux, compensation bodies and funds; insurers, and; insurers and their representatives.

5. Once having made the evaluation of the book, I think the author succeeds in showing that the rules established by the Rome II Regulation are preferable to the rules of the Hague Convention of 1971 when it comes to direct actions by the plaintiff against the insurer. In this sense, the arguments provided by the author seem very convincing since the Rome II Regulation allows the freedom of choice of law, The Hague Convention of 1971 does not resolve some issues and the Convention ends up being overprotective by establishing three potential laws. Furthermore, the author makes a good point when arguing that the Brussels I Regulation allows that the injured party is entitled to bring direct action before the court of the place where the plaintiff has the domicile. Last but not least, the author proves his point on the fact that the application of different acts in relation with the insured (Rome II Regulation or The Hague Convention of 1971) and the insurer (Directive 2009/103) provoke some dysfunctions. Because of that, the law governing the liability may establish an amount

minor than the premium guaranteed by the law governing the cover of insurance. It is also interesting to note that the author manages to show that the law governing the cover is the more closely connected law with the case.