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ANALYSIS

Litigation and arbitration

An insurer may be sued by way of a direct action under Spanish law even if the law governing the insurance contract does not allow such an action

(Supreme Court Judgment of 21 May 2026, ECLI:ES:TS:2026:2204)

The Supreme Court clarifies the rules governing direct actions in international cases and the limits of the law governing insurance contracts

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1. The judgment

The Supreme Court rejected the appeal lodged by Allianz, a company domiciled in Germany, against the appellate court ruling that ordered it, as insurer of Alamedics (also domiciled in Germany), to pay compensation to the claimant, an individual domiciled in Spain. The claimant filed a product liability claim against Alamedics and brought a direct action against Allianz for the latter to be ordered to pay, jointly and severally, compensation for the harm caused by a product manufactured by Alamedics that turned out to be defective (specifically, a batch of the medical device used on the claimant's eye during surgical treatment for a retinal detachment performed in Spain, resulting in vision loss).

In the first ground of the 'cassation' appeal, the appellant claims a violation of Article 7 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation) and of Article 73 of the Insurance Contract Act (LCS), and further claims an erroneous application of Articles 5 and 18 of 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 Regulation). The appellant argues primarily that, since the insurance contract between Allianz and Alamedics contained a choice-of-German-law clause, German law must also apply to the direct action; and since the conditions required by that legal system (acknowledgment of debt by the insured or an enforceable instrument) are not met in this case, the direct action does not lie.

The Supreme Court rejects this ground because it finds that the issue must be analysed in light of the provisions of Article 18 of the Rome II Regulation, which provides that "[t]he person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides" .

The judgment notes that debates regarding the contractual or non-contractual nature of an injured party's direct action in respect of liability insurance have been superseded by the Court's own case law, which characterises it as a special and autonomous action derived from the law. This irrelevance of the characterisation has also been emphasised by the Court of Justice of the European Union when interpreting Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) and, therefore, from the perspective of international jurisdiction rather than that of applicable law. Along the same lines, Article 18 of the Rome II Regulation opts for a pragmatic solution, setting aside specific characterisations, with the aim of protecting the injured party.

With regard to the first of the connecting factors referred to in Article 18, the law applicable to non-contractual liability, the Supreme Court concludes that it is Spanish law, as provided for in Article 5 of the Rome II Regulation ("1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) | the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country [...]").

That being the case, Spanish law also governs the injured party's ability to bring a direct action against the insurer. Article 76 of the Insurance Contract Act provides for the injured party's direct action against the insurer in the following terms:

> The injured party or his or her heirs shall have a direct action against the insurer to demand fulfilment of the obligation to indemnify, without prejudice to the insurer's right of recourse against the insured, in the event that the damage or loss caused to a third party is due to the insured's wilful misconduct. The direct action is immune to any defences the insurer may have against the insured. The insurer may, however, raise the exclusive fault of the injured party and any personal defences it has against the injured party. For the purposes of bringing the direct action, the insured is required to disclose to the injured third party or his or her heirs the existence of the insurance contract and its contents.

Since, pursuant to Article 18 of the Rome II Regulation, it is sufficient that the direct action may be brought under either of the two laws it specifies, it is irrelevant that such an action was not possible under German law governing the contract.

However, the Supreme Court adds that the appellant's argument regarding the choice of German law in the contract cannot be accepted because the "right of the person who has suffered damage to bring a claim directly against the insurer of the person liable to provide compensation does not affect the contractual obligations of the parties to the insurance contract concerned. Similarly, the choice, made by those parties, of the law applicable to that contract does not affect the right of the person who has suffered damage to bring a direct action in accordance with the law applicable to the non-contractual obligation" (Judgment of the Court of Justice of the European Union, C-240/14). Thus, the fact that Allianz and Alamedics agreed that their contract was subject to German law cannot limit the rights of the injured party. That clause is effective only between the insurer and the insured, but not vis-à-vis the injured third party.

2. Some issues regarding applicable law

Although the Supreme Court correctly analyses Article 18 of the Rome II Regulation, it errs in determining the relevant instrument for deciding which law applies to non-contractual liability in this case, which is not Article 5 of the Rome II Regulation, but rather the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability (Convention), to which Spain is a party. The applicability of this instrument is recognised by Article 28(1) of the Rome II Regulation ("This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations").

It is true that, in this case, Article 5 of the Convention also leads to the application of Spanish law, since it is the law of the State

of the person directly injured and the State in whose territory that person acquired the product (assuming that the fact that the defective product was supplied to the injured party could be considered equivalent to its acquisition; otherwise, Article 4, which applies if the connections provided for in Article 5 do not exist, would also lead to the application of Spanish law). However, the correct determination of the applicable law is relevant because it requires clarification of another issue: the Convention makes no reference whatsoever to direct action in these situations, which can be interpreted either as a rejection of such action or as a mere gap that can be filled by other instruments. This second interpretation has been defended in Spanish scholarly writings (Espiniella), which considers Article 18 of the Rome II Regulation applicable to the case.

On the other hand, given the clarity of the literal wording of Article 18 of the Rome II Regulation and its intent to protect the injured party seeking to bring a direct action by allowing them to do so if such an action is permitted under either of the two laws it mentions, references to the consequences of the choice-of-law clause in the insurance contract on the injured party would be unnecessary. Nevertheless, since this argument formed the basis of the insurer's appeal, the Supreme Court cannot fail to address it; however, even under these circumstances, the fact that the contract contained a clause providing for German law to apply is irrelevant, given that the law applicable to that contract in the absence of a choice would be that same legal system, as provided by Article 7 of the Rome I Regulation. The issue is not so much whether the law was chosen by the parties, but rather that the insurer's expectations at the time the contract was concluded — based on the governing law — should not be the only factors it takes into account when assessing the risks that a potential injured party might decide to bring a direct action.