The insurer's liability under insurance against civil liability raises a number of issues, where the road traffic accident takes place in one Member State of the European Union but the damages are claimed in another Member State. The damage is related to tort/delict and the main question concerns the applicable substantive law, i.e. whether it would be the law of the State where the road traffic accident took place or the law of the State in which the persons seeking damages sustained the damage caused by the tort/delict. In the case of tort/delict taking place after 11 January 2009, the applicable law is to be determined in accordance with the rules set out in 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 or Regulation No 864/2007). The general rule is provided in Chapter II, Article 4(1) which reads that, unless otherwise provided for in the Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict is the law of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

An exception is provided for in Article 4(2) of the Rome II Regulation, stating that where a person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

Identifying the country of registration of the motor vehicle where the compulsory civil liability insurance contract was concluded is also relevant to the issue of the applicable law. In accordance with Article 4(3) of the Rome II Regulation, a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question the law applicable to the contract should apply. It is the insurance contract in this case.

At the Community level, the insurance contract should be viewed in the light of the provisions 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) and, more specifically, the provisions of Article 7 thereof. In accordance with Article 7(3) of the Rome I Regulation, the law applicable to insurance contracts is the law of the Member State in which the risk is situated at the time of conclusion of the contract, whereas in accordance with Article 7(6), it is the law of the Member State of registration, where the insurance relates to vehicles of any

CR legal DL 2018. Всички права запазени.

type.

The law applicable to damages in case of damage or injury sustained personally by a family member of a person who dies as a result of a road traffic accident in a Member State other than the one in which the family members sustain the damage. In its judgment of 10 December 2015 in Case C-350/14, the EU Court of Justice replied to a reference for a preliminary ruling on the interpretation of Article 4(1) of the Rome II Regulation. The reference to the Court was made within the framework of the main dispute between Mr Lazar with habitual residence in Romania and the Italian insurance company Allianz SpA concerning the damage and injury that Mr Lazar sustained as a result of the death of his daughter who died in a road traffic accident in Italy. The EU Court of Justice gave the following answer to the question: "[…] where it is possible to identify the occurrence of direct damage, which is usually the case with a road traffic accident, the place where the direct damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of that accident. In the present case, the damage is constituted by the injuries which led to the death of Mr Lazar's daughter, which, according to the referring court, occurred in Italy. The damage sustained by the close relatives of the deceased, must be regarded as indirect consequences of the accident at issue in the main proceedings, within the meaning of Article 4(1) of the Rome II Regulation. […]"

Another equally interesting issue is whether the obligation to pay damages under a civil liability insurance contract where the damage is caused to third parties in a road traffic accident is covered within the scope of the damages occurring on the basis of the civil liability of the insured person.

In its judgment of 24 October 2012 in Case C-22/12, the EU Court of Justice upheld that the compulsory insurance against civil liability in respect of the use of motor vehicles must cover the compensation for non-material damage suffered by the kin of the deceased victims of a road traffic accident, insofar as such compensation is provided for as part of the civil liability of the insured party under the national law applicable in the dispute in the main proceedings.

The liability under an insurance against civil liability is regulated in the EU legislation, whereas the liability of the insured party is regulated in the national laws of EU Member

CR legal DL 2018. Всички права запазени.

States. The EU legislation includes the First Council Directive 72/166/EEC of 24 April 1972, the Second Council Directive 84/5/EEC of 30 December 1983, and the Third Council Directive 90/232/EEC of 14 May 1990. In accordance with Article 1 of the First Directive, Member States remain free to define the scope of the persons entitled to compensation and the damages to be compensated. For this reason, there is no uniform legal framework with regard to civil liability in the European Union.

In the light of the above considerations and the differences from one case to another, it is difficult to draw one-size-fits-all conclusions. Therefore this article will outline a specific enforceable judgment in the case concerning the insurer's liability for damage caused by an insured party.

This is Judgment No 266 of 30 January 2018 in Civil Case No 317/2016 of the Sofia Court of Appeal, awarding a compensation of BGN 98 000 for non-pecuniary damage sustained by a parent due to the death of his child in a road traffic accident which took place within the territory of the Federal Republic of Germany. The court upheld that the German law was applicable to the case, which provides for compensation for non-pecuniary damage only if a real disease was sustained. However, the court invoked arguments that, in accordance with the case law of the EU Court of Justice (Cases C-22/12 and C-277/2012), the national law could exclude damage caused by the insured party from the insurer's liability, stating the minimum amounts of the insurance coverage under Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles. Therefore ultimately the court awarded a compensation of close to BGN 100 000 in accordance with the Bulgarian standards, stating that the compensation was in line with the principle of fairness as set out in Article 52 of the Obligations and Contracts Act as part of the Bulgarian public order that had to be complied with even when another country's law applied.

It might be argued whether the conclusions drawn by the court were in line with the above considerations relating to the EU legislation. The Sofia Court of Appeal applied the German law but came to the conclusion that it did not comply with the EU legislation insofar as it provided for different liability of the delinquent and the insurer. However, the German law

CR legal DL 2018. Всички права запазени.

does not contain such a rule as it provides only different prerequisites for the liability for tort/delict to occur in comparison to the Bulgarian law. These prerequisites apply in an equal measure to both the delinquent and the insurer and thus the principles of the EU law are observed.

Therefore the court gave the additional reasons referring to the principle of fairness. But these reasons could be criticized because fairness would imply a greater compensation for the claimant and a smaller compensation for the defendant. Arguably, it would be unfair for two Bulgarian citizens to receive different compensations for identical road traffic accidents if one of them was in Bulgaria and the other one was it Germany. It would be equally possible to argue that it would be unfair to award different compensations for two road traffic accidents in the same street because of the address of either party involved. The fairness that the court can and must guarantee lies in the precise and equal application of the law, meaning all relevant legislative acts, including the EU Regulations, to identical cases.

Thus Article 52 of the Obligations and Contracts Act which was invoked by the court of appeal makes it explicit that the compensation for non-pecuniary damage is to be awarded on the grounds of fairness. Fairness is the criterion to establish the amount of the compensation but the prerequisites for the occurrence of the right to compensation are prescribed by the law. It is only when all these prerequisites are available that the court may decide on the specific amount of the compensation to be awarded, taking into account the facts, such as the type of non-pecuniary damage, its duration, intensity, etc. But in making this decision the court is bound not only by the law but also by the interpretative judgments of the Supreme Court and the Supreme Court of Cassation. For this reason, the only non-pecuniary damage due to tort/delict that is subject to compensation is the damage relating to pain and suffering as a result of health injury or loss of a close family member and the damage relating to breach of promise to marry. Fairness remains as the criterion to decide on the amount of the compensation but it does not allow the court to decide on compensating for damage in cases other than those prescribed by the law.

Here lies one of the main problems with the court judgment as the German law (in its version until 22 July 2017) provides for one single specific case in which compensation is paid for the death of a family member and it is the case in which the claimant sustained a health injury

CR legal DL 2018. Всички права запазени.

relating to the way in which he or she became aware of the death. That would mean a case in which the claimant suffered a mental disorder as a result of having witnessed the road traffic accident. In other words, the German law does not provide for a lower amount of compensation. What it provides for is an entirely different set of prerequisites for awarding the compensation. This difference could not be overruled on grounds of fairness because fairness plays a very different role relating only to the calculation of the amount of the compensation due.

Another question arises in relation to the reasons for the application of Article 52 of the Obligations and Contracts Act. The court of appeal ruled that its provisions were an integral part of the public policy or public order (*ordre public*) of the Republic of Bulgaria and pursuant to Article 16 of the Rome II Regulation it was overriding and prevailing over the German law that was in contravention to them. The application of Article 16 of the Regulation, however, implies the need for two prerequisites to be available: (i) existence of a provision that is part of the public policy of the Republic of Bulgaria and (ii) a contravening provision of the German law. Public policy (*ordre public*) is a concept which includes rules and principles of fundamental importance for the legal system and, for this reason, these rules and principles are typically set out in the Constitution of the Republic of Bulgaria. Yet, the court ruled that public policy included also the rules on the non-pecuniary damage subject to compensation but, as was seen above, that matter has been settled in the case law. Since the case law can change as was the case with the interpretative judgment which expanded the scope of the persons entitled to compensation due to the death of a family member and it is not set out in the Constitution, it could hardly be recognized as part of the public policy and as grounds for the court to refuse to apply the German law. Furthermore there is no contradiction between the principle of fairness and the German law. On the one hand, the German law provides for different prerequisites needed for the persons to be entitled to compensation, while fairness under the Bulgarian law applies to the amount of the compensation. On the other hand, § 253(2) of the German Civil Law that is applicable in this case reads that a fair compensation is to be awarded in the case of established non-pecuniary damage. Therefore the court of appeal had no grounds to refuse to apply the German law, while the application of the Bulgarian rules on non-pecuniary damages benefited the claimant but affected the defendant’s rights since it contravened the rules on

CR legal DL 2018. Всички права запазени.

the application law as set out in the Rome II Regulation.

These issues do not refer to that judgment of the Sofia Court of Appeal only. On the one hand, the Supreme Court of Cassation did not admit a hearing on the merits of the cassation appeal and, on the other hand, the conclusions were reproduced in other judgments of courts at various levels. But the role of the court is to safeguard not only the application of the German law but also the entire EU law which, in this particular case, means the German law, too, as it is determined to be the applicable law in accordance with the Rome II Regulation. Of course, one could ask why the court should comply with the EU law and the answer is very simple: it is precisely the EU law that guarantees compensation for the victims in any Member State and enforcement of the Bulgarian court judgment. But the EU law has to be applied in its entirety and in an equal manner by all Member States and the Bulgarian court has the challenging task to oversee and guarantee its implementation.

In this context, we could give an example with the judgment of the Sofia City Court of 23 December 2019 in Civil Case No 4857/2017. There the court came to the conclusion that the claim to receive compensation for non-pecuniary damage because of the death of a family member should be rejected. The court decided that there was no evidence to prove a real disease sustained by the claimants and that it could not deviate from the application of the German law since there were no overriding provisions of the EU law or the Bulgarian law in that case. In other words, the court recognized that the EU law guaranteed that the insurer’s liability coincided with the liability of the party that had caused the damage but it did not bring any uniformity in the laws of the Member States as to when compensation was due. Furthermore no arguments were made to claim that Article 52 of the Obligations and Contracts Act had to apply as a component element of the public policy of the Republic of Bulgaria.

CR legal DL 2018. Всички права запазени.