IN THE HIGH COURT OF JUSTICE 11 January 2016

LAUQE KINGDOM

Order for Reference to the Court of Justice of the European Union pursuant to Article 267 TFEU

RIAF

Applicant

v

SAIB INSURANCE LTD

Respondent

1. The dispute between the parties arises out of certain standard clauses contained in motor vehicle insurance contracts marketed over the Internet, also in the Lauqe Kingdom, by Saib Insurance Ltd ("Saib") which use the sex of the principal registered driver of the insured vehicle as a determining factor in the calculation of premiums and benefits. The precise conditions also depend on the size of the car's engine in relation to its weight, as well as the value and age of the car, but on average a male driver is quoted a price of about 20% more than a female driver under Saib's standard terms. Furthermore, male drivers do not have the option of reducing the excess to be borne by the insured in the case of an accident below 1 000 euros. Female drivers are able to purchase this additional protection in return for a 5% increase in the premium. Saib has its seat and main place of business in the Principality of Lanoitidart and all its standard insurance policies contain, in their clause 12, a general choice of law in favour of the laws of Lanoitidart.

2. Lauqe is a Member State of the European Union. Lanoitidart is a Member State of the European Free Trade Association ("EFTA") and party to the Agreement on the European Economic Area ("EEA Agreement"), which enables its parties to participate fully in the European internal (or single) market. Lanoitidart is well known for its welcoming people, good weather, excellent skiing and friendly business climate. Lanoitidart is also the only EEA State which, notwithstanding the judgment of the Court of Justice of the European Union ("CJEU") in C-236/09 Test-Achats, maintains a derogation from the principle of equal treatment between men and women in the field of insurance as originally provided for by Article 5(2) of Directive 2004/113. According to the line consistently defended by the Government of Lanoitidart, the fact that the CJEU declared Article 5(2) to be invalid as from 21 December 2012 has no effect for the purposes of the applicability of that provision in its territory, or that of other EEA States which are not Member States of the European Union.

3. Directive 2004/113 was incorporated into the EEA Agreement by a Joint Committee Decision No 147/2009 of 4 December 2009, which entered into force on 1 November 2012. The time limit for the EEA EFTA States to transpose it expired on the same date, and Lanoitidart duly transposed it, invoking at the same time the derogation provided for in Article 5(2) in respect of motor vehicle insurance. Lanoitidart had compiled large amounts of actuarial and statistical data showing that male drivers are in any given year 10% more likely to be involved in an accident than female drivers and that the damage caused in an accident involving a male driver is on average 9% higher than in an accident involving female drivers only. On that basis, the Lanoitidart Insurance Act ("LIA") permits insurers to use sex as a determining factor in pricing their motor vehicle policies.

4. Lanoitidart did not see a reason to modify LIA in the wake of the Test-Achats judgment of the CJEU as it takes the position that that judgment has no effect on the wording of Directive 2004/113 as incorporated into the Annexes to the EEA Agreement by Joint Committee Decision No 147/2009, and as duly implemented in Lanoitidart as foreseen by Article 7 EEA. Lanoitidart has further noted that the Test-Achats judgment resulted not in an annulment of Article 5(2), but merely in a declaration that that provision is invalid. There is a difference in that respect between judgments of the CJEU delivered, like Test-Achats, as a consequence of a preliminary reference on validity pursuant to Article 267(1)(b) TFEU, and judgments resulting from an action for annulment pursuant to Article 263 TFEU. Article 5(2) thus continues to exist even in the EU, even if it is in practice unenforceable in the courts which are bound by the ruling of the CJEU. The CJEU's judgment however does not have any binding effect outside the EU. Finally, while Article 6 EEA provides that CJEU rulings given prior to 2 May 1992 – when the EEA Agreement was signed – are binding within all EEA States, the same does not apply to rulings given thereafter

according to the wording of 6 EEA, although it seems that the EFTA Court in its judgments makes no distinction between CJEU rulings given before or after that date.

5. Riaf is an association authorised under Lauqe law to bring actions for injunctions within the meaning of Directive 2009/22. It challenged the use of the standard terms in Saib's contracts (1) relying on sex as a determining factor and (2) designating Lanoitidart law as the applicable law. It alleges that those terms infringe legal prohibitions or accepted principles of morality. Riaf seeks both an injunction and the publication of the corresponding judgment, as well as its costs in respect of these proceedings.

6. This reference for a preliminary ruling concerns, on the one hand, the question whether the terms challenged must be assessed in accordance with Lauqe or Lanoitidart law, which in turn depends on the respective scope of application of the Rome I and II regulations as well as the question of whether a choice of law clause such as clause 12 is contrary to Directive 93/13. On the other hand, if Lanoitidart law were to be held applicable, further questions concerning the interaction between EU and EEA law arise, notably the question of whether it is compatible with EEA law for an insurer to continue to use sex as a determining factor in pricing motor vehicle insurance policies notwithstanding the Test-Achats judgment and whether the national legislation of an EEA State to that effect may or must be enforced in a Member State of the European Union.

7. Directives 93/13 and 2009/22 were incorporated into the Annexes to the EEA Agreement by Joint Committee Decisions No 007/1994 of 21 March 1994 and No 35/2010 of 12 March 2010, respectively.

Rome I or Rome II

8. On the question of which law is applicable, Riaf contends that it is irrelevant whether the Rome I or the Rome II Regulation is applicable as neither regulation allows for the exclusion of conflict-of-law rules. It notes that, pursuant to Article 6(2) of the Rome I Regulation, the mandatory provisions of Lauqe consumer protection law apply to contracts concluded by the Saib with consumers resident in Lauqe. In its view, in dealings with consumers, this includes all conflict-of-laws rules.

9. However, clause 12 of Saib's general terms and conditions aims to ensure the exclusive application of Lanoitidart law regardless of the possibility that in an individual case more favourable Lauqe rules may provide for greater protection, of which, pursuant to Article 6(2) of the Rome I Regulation, a consumer may not be deprived. Moreover, Riaf contends that the choice

of law cannot be regarded as reasonable for the purposes of Article 10(2) of the Rome I Regulation as it would result in the factual impossibility of cross-border litigation by an association to protect a collective interest.

10. As between traders and consumers, Article 14(1) of the Rome II Regulation limits the parties' freedom of choice simply to an agreement entered into after the event giving rise to the damage occurred. Article 14(2) of the same regulation provides for further limitations on that freedom. Riaf contends the choice of law specified in clause 12 is not premised on the timing of the event giving rise to the damage and contravenes Article 14(1) of the Rome II Regulation.

11. According to the case-law of the CJEU, the rules on jurisdiction laid down in the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention (judgment in C-167/00 Henkel, paragraph 50). According to the CJEU, the consumer protection organisation and the trader are not linked by any contractual relationship and consequently, an action of that kind cannot be regarded as a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention.

12. The referring court tends towards the view, on the basis of the case-law cited, that the law applicable to the action for an injunction at issue here must be determined in accordance with the Rome II Regulation. Based on the finding of the CJEU that a preventive action for an injunction of that kind does not concern matters relating to a contract, application of the Rome I Regulation must, as a consequence, be rejected, as that regulation applies only to contractual obligations (Article 1(1) of the Rome I Regulation). Recitals 7 and 11 in the preamble to the Rome II Regulation appear to suggest that the notion of (non-)contractual obligations should be given a uniform and autonomous interpretation in the area of private international law and of international civil procedural law.

13. An action for an injunction for the protection of consumers' interests can accordingly be brought in one Member State against a trader based in another Member State, where consumers from the first Member State are harmed by relevant statutory breaches committed by that trader, and, in such a case, Article 4 of the Rome II Regulation would apply.

14. Saib, on the other hand argues that, on the basis of the valid choice of law set out in clause 12, the remaining terms must be assessed according to Lanoitidart law. In its view, pursuant to

Article 6(2) of the Rome I Regulation, it is legitimate to specify a choice of law in general terms and conditions.

15. Under the private international law of both Lauqe and Lanoitidart, the parties to insurance contracts can freely determine the applicable law, which allows Saib to argue that at least Article 7(3) *in fine* of the Rome I Regulation does not preclude such a choice of law.

16. Saib further contends that the choice of law clause has no connection whatsoever with non-contractual obligations and, for that reason, Article 14(1) of the Rome II Regulation does not apply. Nor does clause 12 lack transparency.

17. In the case of a preventive action for an injunction brought by a consumer protection association, international jurisdiction and the law applicable do not necessarily coincide according to this view, which may find some support in C-26/91 Handte, paras 13-21, and C-265/02 Frahuil v Assitalia.

18. In the case of an action for an injunction seeking to prohibit the use of certain terms, the applicable law would then have to be determined in accordance with Article 6 of the Rome I Regulation. Given the fact that the terms of Saib in the present proceedings are directed towards the conclusion of a contract, application of the Rome I Regulation does not appear completely unarguable, which is why the referring court has decided to request an advisory opinion on Question 1 below.

Unfair choice of law

19. According to the case-law of the CJEU in the area of private international law, it follows that where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (C-240/98 to C-244/98 Oceano Grupo Editorial, para 24).

20. In the referring court's view, where a term is included in standard clauses specifying that a contract concluded over the Internet between a consumer and a trader established in another EEA

State shall be governed by the law of the country in which that trader is resident, the configuration of interests is certainly comparable to that of the decided case.

21. On the other hand, it can be argued based on Recital 11 of the Rome I Regulation, as well as its Article 3(1), that the free choice of law of the parties is a cornerstone of that Regulation, which also applies in principle to consumer contracts. This makes it unlikely that the legislator would have considered all choice of law clauses in consumer contracts suspicious per se. In this regard it may merely need to be ensured that the consumer is not left under the impression that provisions of his national law which cannot be derogated from are no longer applicable as a consequence of the choice of law. If that were to be the case, the choice of law itself might be contrary to Article 6(2) of the Rome I Regulation. The judgments in C-226/12 Constructora Principado SA, seems helpful in this context.

22. The referring court is also confused by different approaches to the "consumer" concept in the case law of the CJEU, on the one hand (notably C-49/11 Content Services) and the jurisprudence of the EFTA Court on the other hand (E-4/09 Inconsult and E-25/13 Engilbertsson being examples). Whereas the EFTA Court seems to take as a basis for its judgments the idea of a rather circumspect consumer, the CJEU appears to take as its point of departure the idea that consumers are inherently vulnerable and require more protection. This gives rise to the question of whether the unfairness of a term should be interpreted by reference to the law – and the consumer concept applicable under that law – which would normally govern the contract, or by reference to the consumer concept of the *lex fori*.

23. In any event, amongst legal commentators the issue of whether Directive 93/13 also imposes limitations on the unfair use of choice of law clauses in consumer contracts is regarded as unresolved and it is thus appropriate to seek clarification by way of Question 2 below.

Jurisdiction of the CJEU

24 The referring court is also confused by different approaches to the "consumer" If the answers to the first and second questions were to lead to the conclusion that the Rome I Regulation applies and that the choice of law clause designating Lanoitidart law is applicable and enforceable, the referring court would like to obtain some clarification as to whether the provisions of Lanoitidart law permitting the use of sex as a determining factor are compatible with the EEA Agreement and thus enforceable in the case at hand. The referring court however wonders whether, in the light of the case law established in the Foglia v Novello cases (Case 104/79 Foglia v Novello I; Case 244/80 Foglia v Novello II) and developed in Case C-318/00 Bacardi-Martini

and Cellier des Dauphins, it is actually permissible for the courts of an EU Member State to seek an interpretation of the EEA Agreement from the CJEU for the purposes of determining the compatibility with that agreement of the national legislation of another State party to the EEA Agreement. It seems certainly arguable that the EFTA Court would be a more appropriate forum for determining this sort of matter, and any State would enjoy a rather better procedural position in a reference being made from one of its own courts. Furthermore, if a Member State of the EU takes issue with the way in which EEA Law is implemented in a non-EEA State, it may be that the appropriate way of proceeding is via diplomatic channels rather than litigation. The referring court therefore has decided to refer question 3a) to the CJEU.

Applicability of derogations based on Article 5(2) of Directive 2004/113

25. As Lanoitidart clearly insists on preserving a derogation based on Article 5(2) of Directive 2004/113 as part of its national law, the referring court wonders whether that course of action is compatible with EEA Law and, if so, whether Lauqe legislation prohibiting sex discrimination may or has to be applied nevertheless, as overriding mandatory provisions for the purposes of Article 9 of the Rome I Regulation, by virtue of Article 5(1) of Directive 2004/113, or as a consequence of the general prohibition of discrimination on the basis of sex. This prompts the referring court to refer questions 3b) and 3c), respectively.

Compatibility of derogations based on Article 5(2) with EEA Law

26. As mentioned above, Lanoitidart law provides for an exemption from the rule of "unisex" premiums and benefits enshrined in Article 5(1) of Directive 2004/113. The application of the derogation at issue is not limited in time by any other national provision.

27. The principle of equal treatment and non-discrimination between men and women was recognised early by the Court of Justice as a general principle of EU law (see 43/75 Defrenne, para 12) and is now specifically laid down as a fundamental right in Articles 21(1) and 23(1) of the Charter.

28. Under EU law direct discrimination on grounds of sex is – with the exception of specific incentive measures to benefit members of a disadvantaged group ("*affirmative action*") – only permissible if it can be established with certainty that there are relevant differences between men and women which necessitate such discrimination.

29. As regards, in particular, the principle of equal treatment between men and women and the use of statistical and actuarial factors where the basis for distinction is sex, there is a range of relevant CJEU case law.

30. In its judgments in C-152/91 Neath and C-200/91 Coloroll Pension Trustees, the CJEU examined the compatibility of the actuarial factor that women live on average longer than men, on which the financing of the pension systems at issue in those cases was based, with the current Article 157 TFEU under which each Member State must ensure that the principle of equal pay for men and women for equal work or work of equal value is applied.

31. The Court did not comment on the compatibility of that factor with the prohibition of discrimination on grounds of sex under EU law and held that the principle of equal pay under the current Article 157 TFEU was not applicable because the pension contributions paid by the employers under defined-benefit schemes which ensured the adequacy of the funds necessary to cover the costs of the pensions promised did not constitute "*pay*" within the meaning of this Article.

32. The contributions paid by the employees into the occupational pensions' schemes however had to be the same for all employees, male and female, because they were an element of their pay (Neath, paras 31-32, Coloroll Pension Trustees, paras 80-81).

33. These seminal judgments suggest that the prohibition of discrimination on grounds of sex under EU law precludes purely statistical differences between men and women from being taken into consideration with regard to insurance risks.

34. In Lindorfer the question at issue was the possibility to use the statistical and actuarial factor that women live on average longer than men when transferring to the EU scheme the pension rights of an EU staff member which were acquired under a national scheme. Since actuarial values for women were higher they received fewer years of pensionable service than men in the case of transfer.

35. The CJEU noted in its judgment that the current Article 157 TFEU and the various provisions of secondary legislation, as well as Article 1a(1) of the Staff Regulations of officials of the European Communities, are the specific expression of the general principle of equality of the sexes (para 50).

36. When the EU legislature lays down rules on the transfer to the EU scheme of pension rights acquired by EU officials under a national scheme, it must comply with the principle of equal treatment. It must therefore avoid laying down rules under which officials are treated differently, unless the circumstances of the persons concerned at the time when they entered the service of the EU justify differences in treatment in view of the particular characteristics of the scheme under which the pension rights were acquired or in view of the fact that they have no such rights. The CJEU allowed the appeal of Ms Lindorfer against the judgment of the Court of First Instance as regards the unequal treatment on ground of sex.

37. According to the CJEU, the Court of First Instance did not explain why the situations of men and women officials are not comparable in the context of the determination as to the possibility of discrimination based on sex on the occasion of a transfer of pension rights. Moreover, the Court of First Instance did not explain on what criteria, other than that of sex, it intended to base a distinction between the treatment of men and that of women transferring their pension rights to the EU scheme, despite the fact that there is no such distinction as regards the contributions levied on the salaries of male and female officials.

38. The CJEU observed that the difference in treatment between men and women cannot be justified by the need for sound financial management of the pension scheme. In that regard, the identical level of contributions from the remuneration of male and female officials did not adversely affect such management. In addition, the fact that the same equilibrium can be attained with “unisex” actuarial values is also shown by the fact that, subsequently to the facts of this case the EU Institutions decided to use such values.

39. In its judgment in Lindorfer the CJEU followed two Opinions of Advocates General who both suggested to uphold Ms Lindorfer’s plea of illegality on this ground. As noted by Advocate General Jacobs, discrimination of the kind in issue involved ascribing to individuals average characteristics of a class to which they belong. In relation to the individual, such average characteristics cannot in any way be described as “objective”. What is objectionable (and thus prohibited) in such discrimination is the reliance on characteristics extrapolated from the class to the individual, as opposed to the use of characteristics which genuinely distinguish the individual from others and which may justify a difference in treatment. In order to see such discrimination in perspective, it may be helpful to imagine a situation in which (as is perfectly plausible) statistics might show that members of one ethnic group lived on average longer than those of another. To take those differences into account when determining the correlation between contributions and entitlements under the Community pension scheme would be wholly unacceptable, and the use of the criterion of sex rather than ethnic origin cannot be more acceptable.

40. Finally, Case C-318/13 X concerned a statutory pension scheme and Directive 79/7/EEC and, in particular, the method of calculation of the amount of compensation due in respect of harm resulting from an accident at work, which is paid as a single payment in the form of a lump sum. That calculation had to be carried out on the basis, *inter alia*, of the age of the worker and his remaining average life expectancy. In order to determine the latter factor, the worker's sex was taken into account. By virtue of that method a woman in an analogous situation was entitled to a higher lump-sum compensation than that paid to a man.

41. The Finnish Government argued in the case that women and men were not in comparable situations. The method of calculating the compensation paid as a single payment for the compensation for long-term harm was intended to set the amount thereof at a level equivalent to the overall amount of that compensation were it to be paid as a life-long pension. Given that the life expectancy period of men and women is different, the application of an identical mortality coefficient for both sexes would mean that the compensation paid as a single payment to an injured female worker would no longer correspond to the remaining average life expectancy of its recipient. The differentiation on account of sex was therefore necessary to avoid placing women at a disadvantage compared to men. Since women have a statistically longer life expectancy than men, the lump-sum compensation to remedy the harm suffered for the remainder of the injured person's life must be higher for women than for men. Thus, in the Finnish Government view, the provisions did not discriminate between men and women.

42. The CJEU rejected the arguments by the Finnish Government by stating that, despite the fact that the lump-sum compensation is provided for in a scheme which also lays down the benefits for harm due to an accident at work which are paid for the remainder of the lifetime of the person injured, the calculation of that compensation cannot be made on the basis of a generalisation as regards the average life expectancy of men and women. Such a generalisation is likely to lead to discriminatory treatment of male insured persons as compared to female insured persons. Among other things, when account is taken of general statistical data, according to sex, there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation.

43. EU law precludes therefore national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation.

44. In the view of the referring court, the cases described above, as well as the CJEU's judgment in Test-Achats confirm that, first, in the current stage of development of EU law, the principle of equal treatment and non-discrimination between men and women as a general principle of EU law comprises also the prohibition on the use of statistical and actuarial factors where the basis for distinction is, solely, or at least essentially, the sex of the subject. Second, this prohibition is based on the assumption that the situations of men and women in the assessment of risk based on actuarial and statistical data are comparable and the use of statistics regarding, for example, average life expectancy of men and women is merely a generalisation. Third, in the judgment in Test-Achats the prohibition on the use of statistical and actuarial factors where the basis for distinction is, solely, or at least essentially, sex was confirmed specifically for the insurance and related financial services.

45. It is the referring court's view that the same conclusion should apply for the EEA.

46. First, the provisions on which the CJEU founded its interpretation of the principle of equal treatment between men and women in the case law described above find their counterparts under EEA law. In particular, Article 69(1) EEA reproduces in principle Article 157(1) TFEU and Article 70 EEA provides that the Contracting Parties shall promote the principle of equal treatment for men and women by implementing the provisions specified in Annex XVIII, i.e. by implementing the EU legislation adopted on the basis of Article 19(1) TFEU to combat discrimination based on sex.

47. Furthermore, according to established case law of the EFTA Court the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights and the provisions of the ECHR and the judgments of the European Court of Human Rights are important sources for determining the scope of these rights (see e.g. Case E-2/03 Ákæruvaldið (Public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson, para 23). As regards discrimination on the grounds of sex, Article 14 of the ECHR corresponds to that in Article 21 of the Charter. Article 23 of the Charter establishes that equality between women and men must be ensured in all areas, including employment, work and pay. The principle that men and women should receive equal pay for equal work is enshrined in Article 69(1) EEA. Furthermore, the Preamble to the EEA Agreement notes the importance of the development of the social dimension, including equal treatment of men and women, in the EEA.

48. Moreover and more specifically, the EFTA Court has established that, in the light of the homogeneity objective underlying the EEA Agreement, the concept of discrimination on grounds of sex cannot be redefined for the EEA compared with the same concept, as established by the

CJEU. The EFTA Court has moreover recognised the right to equal treatment, including equal treatment between men and women, as a fundamental right of the individual.

49. The lack, within the EEA, of the legal value of the Charter should not be an obstacle to recognising that the principle of equal treatment between men and women lies at the heart of the EEA Agreement and that its content coincides with that in the EU.

50. The principle of equal treatment and non discrimination between men and women finds it specific expression as regards the use of sex in the calculation of premiums and benefits which leads to different premiums and benefits for women and men in the field of insurance and related financial services in Article 5(1) of Directive 2004/113/EC.

51. A national provision allowing in the field of insurance and related financial services the use of sex in the calculation of premiums and benefits which leads to different premiums and benefits for women and men is thus not compatible with the principle of equal treatment and non discrimination between men and women as implemented in Article 5(1) of Directive 2004/113/EC.

52. Alternatively, such a provision is not compatible with the principle of equal treatment and non-discrimination between men and women as a general principle of EEA law.

53. Saib has however been able to point to a number of statements of the Lanoitidart Government which claims that it is allowed to maintain the derogation based on Article 5(2) of Directive 2004/113, as incorporated in Annex XVIII point 21c of the EEA Agreement, as the EEA Agreement does not foresee that Article 5(2) of Directive 2004/113 is invalid nor that the provision in Article 5(2) of Directive 2004/113 should be limited in time.

54. Saib further argues in general that case law of the CJEU delivered after the signing of the EEA Agreement (thus after 2 May 1992) is not binding on the EEA EFTA States (see Article 6 EEA).

55. Moreover, as it does not appear that the EFTA Court possesses jurisdiction to rule on the validity of any legislation – and even less so EU legislation such as Article 5(2) of Directive 2004/113 – it would within the scheme of the EEA Agreement and the SCA established thereunder fall to the Joint Committee to act if any of the contracting parties considered that the effects of the Test-Achats judgment should also apply in non-EU EEA States. The referring court wonders whether the Commission, which is represented by its External Action Service in the Joint Committee, is in breach of its duties under the TEU, the TFEU or the EEA Agreement by failing

to formally take the matter up in the Joint Committee and ensure that the judgment of the CJEU in Test-Achats is given effect to throughout the EEA.

An overriding prohibition of sex discrimination

56. Riaf further and in the alternative argues that even if EEA Law does not preclude the application in Lanoitidart of a derogation from the unisex premium principle, then however the Lauqe national prohibition of all kinds of sex discrimination, as well as the specific provision implemented to transpose into Lauqe law the principle contained in Article 5(1) of Directive 2004/113 would nevertheless displace Lanoitidart law pursuant to Article 9 of the Rome I Regulation.

57. Saib responds in this regard that Article 9 of the Rome I Regulation cannot possibly be interpreted as leading to the disapplication of provisions of the laws of an EEA State which are, *ex hypothesi*, specifically sanctioned by EEA Law.

58. In those circumstances, the High Court (Chancery Division) of Lauqe decided to stay the proceedings pending in front of it and refer the following questions to the CJEU pursuant to Article 267 TFEU:

1. In an action for an injunction within the meaning of Directive 2009/22 on injunctions for the protection of consumers' interests, where the action is directed against the use of unfair contract terms by an insurer established in a Member State of the EEA that concludes contracts with consumers resident in an EU Member State, must the law applicable be determined in accordance with Article 4 of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), or in accordance with Articles 6(2) and 7(3) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I)?

2. Must a term included in standard contractual clauses specifying that a contract concluded over the Internet between a consumer and an insurer established in another EEA State shall be governed by the law of the country in which that insurer is established be regarded as unfair within the meaning of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?

3. If the answers to the first and second questions lead to the conclusion that the Rome I Regulation applies and the applicable law is Lanoitidart law:

a) Does the CJEU in a reference from a court of an EU Member State have jurisdiction to interpret the EEA Agreement for the purposes of establishing the compatibility with that agreement of the legislation of a non-EU EEA State?

b) Must Article 5(1) of Directive 2004/113 and/or general principles of EEA law be interpreted as precluding legislation of a non-EU EEA State from purporting to authorise an insurer to use the sex of the principal registered driver of the insured vehicle as a determining factor in the calculation of premiums and benefits in circumstances such as those of the present case and notwithstanding the status of Article 5(2) of Directive 2004/113 in non-EU EEA States?

c) If it is in principle permissible for a non-EU EEA State to derogate from the unisex principle in circumstances such as those of the present case, may or must the courts of a Member State of the European Union refuse to have regard to national legislation of a non-EU EEA State on the basis that:

(i) Article 9 of Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I);

(ii) Article 5(1) of Directive 2004/113; or

(iii) the general prohibition on sex discrimination permit or require this?