JUDGMENT OF THE COURT (First Chamber)

18 May 2006 *

In Case C-343/04,

REFERENCE for a preliminary ruling, pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, from the Oberster Gerichtshof (Austria), made by decision of 21 July 2004, received at the Court on 10 August 2004, in the proceedings

Land Oberösterreich

v

ČEZ a.s.,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann (Rapporteur), N. Colneric, J.N. Cunha Rodrigues and E. Levits, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 13 October 2005,

after considering the observations submitted on behalf of:

— Land Oberösterreich, by J. Hintermayr and C. Hadeyer, Rechtsanwälte,

— ČEZ a.s., by W. Moringer, Rechtsanwalt,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the United Kingdom Government, by M. Bethell, acting as Agent,

— the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended version — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1), and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) ('the Brussels Convention').

2 The reference was made in the course of proceedings between the Land Oberösterreich (Province of Upper Austria) and ČEZ a.s. ('ČEZ') concerning nuisance caused to agricultural land owned by the province in Austria, as a result of the operation by ČEZ of the Temelín nuclear plant, situated on the territory of the Czech Republic.

Legal background

The Brussels Convention

3 In Title II, which concerns the rules of jurisdiction, Section 1, entitled 'General provisions', of the Brussels Convention, the first subparagraph of Article 2 provides:

'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.'

4 Under the first subparagraph of Article 4 of the Brussels Convention:

'If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.'

5 Article 5 of the Brussels Convention, which is in Section 2 of Title II, entitled 'Special jurisdiction', states:

'A person domiciled in a Contracting State may in another Contracting State be sued:

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...'

6 Article 16 of the Brussels Convention, which constitutes Section 5 of Title II, entitled 'Exclusive jurisdiction', states:

'The following courts shall have exclusive jurisdiction, regardless of domicile:

1. (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;

...'

National legislation

7 Paragraph 364(2) of the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch) ('the ABGB') states:

'The owner of land can prohibit his neighbour from producing influences, emanating from the latter's land, by effluent, smoke, gases, heat, odours, noise, vibration and the like, in so far as they exceed normal local levels and significantly interfere with the usual use of the land. Direct transmission, without a specific legal right, is unlawful in all circumstances.'

8 The national court explains that an action brought on the basis of that provision seeks the prohibition of the nuisance, or at least its prevention, by means of appropriate precautions. The action is treated, in accordance with national case-law, as a type of *actio negatoria* ('Eigentumsfreiheitsklage') which asserts a claim based on a property right.

9 Paragraph 364a of the ABGB provides:

'However, if the interference is caused, in excess of that measure, by a mining installation or an officially authorised installation on the neighbouring land, the landowner is entitled only to bring court proceedings for compensation for the damage caused, even where the damage is caused by circumstances which were not taken into account in the official authorisation process.'

10 The national court states that such a right to financial compensation is independent of fault and falls within the law relating to neighbours.

The dispute in the main proceedings and the question referred for a preliminary ruling

11 The Province of Upper Austria is the owner of several pieces of land used for agriculture and agricultural trials, on which there is an agricultural college. The land is situated about 60 km from the Temelín nuclear power station, which was brought into operation on a trial basis on 9 October 2000. That power plant is operated by ČEZ, a Czech energy-supply undertaking in which the Czech State has 70% ownership, on land that it owns.

12 Acting in its capacity as owner of the land, and taking the view that the operation of a nuclear power station does not constitute a form of exercise of public powers but is a private sector activity under the jurisdiction of the civil courts, the Province of Upper Austria brought an action against ČEZ, on 31 July 2001, before the Landesgericht Linz (Regional Court, Linz).

13 That action sought, principally, an order to ČEZ to put an end to the influences on the Province of Upper Austria's land caused by ionising radiation emanating from the Temelín power plant, in so far as they exceeded those to be expected from a nuclear power station operated in accordance with current generally recognised technological standards. Alternatively, the province sought an order to ČEZ to put an end to the risks created by that radiation, in so far as those risks exceeded those to be expected from a nuclear power station operated in accordance with current generally recognised technological standards.

14 The Province of Upper Austria submits that the ionising radiation emitted by the Temelín power station constitutes a nuisance within the meaning of Paragraph 364(2) of the ABGB. The radioactivity generated by that power station during the current trial period or, in any event, the risk of contamination of the soil caused by the normal operation, or more particularly by a malfunction, of the plant exceed the usual local level and cause a lasting interference with the normal use of the land belonging to the province for residential, educational and agricultural purposes. The requirements for bringing an action, possibly preventive, for cessation of a nuisance are therefore satisfied.

15 ČEZ submitted that the Austrian courts lacked jurisdiction, claiming in particular that Article 16(1)(a) of the Brussels Convention is not applicable to an action for prevention of a nuisance. Such an action is compensatory in nature and falls within Article 5(3) of the Brussels Convention. ČEZ further submits that an order to cease committing a nuisance issued against it by an Austrian court would interfere, in violation of international law, with the territorial and judicial sovereignty of the Czech Republic and could not be enforced on the territory of the Czech Republic.

16 By judgment of 17 April 2002, the Landesgericht Linz declined jurisdiction to hear the Province of Upper Austria's application. That judgment was overturned on appeal by the Oberlandesgericht Linz (Higher Regional Court, Linz) which, by judgment of 19 September 2003, held that the Austrian courts had jurisdiction to decide such a dispute under Article 16(1)(a) of the Brussels Convention.

17 The Oberster Gerichtshof (Supreme Court), before which an appeal on a point of law was brought, observes that it is not clear from the file whether the Temelín nuclear power station was the subject of an official authorisation referred to by Paragraph 364a of the ABGB.

18 The Oberster Gerichtshof also considers that the case-law of the Court does not enable it to be established with certainty whether an action of the kind brought on the basis of Paragraph 364(2) of the ABGB is covered by Article 16(1)(a) of the Brussels Convention, or whether it is covered by the case referred to in Article 5(3) of that convention.

19 In those circumstances, the Oberster Gerichtshof decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the expression "*proceedings which have as their object rights in rem in immovable property*" in Article 16(1)(a) of the [Brussels Convention] to be interpreted as including a (preventive) action for an injunction, pursuant to Paragraph 364(2) of the [ABGB], prohibiting emissions from a property located in a neighbouring State — which is not a Member State of the European Union — affecting land owned by the claimant (in this case, the influences of ionising radiation emanating from a nuclear power station in the Czech Republic)?'

The question referred for a preliminary ruling

20 By its question, the national court asks if Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that an action which, like that brought under Paragraph 364(2) of the ABGB in the main proceedings, seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, falls within the category of 'proceedings which have as their object rights in rem in immovable property' within the meaning of that provision.

Preliminary observations

21 It must be observed, as a preliminary point, that, although the Czech Republic was not a party to the Brussels Convention at the date on which the Province of Upper Austria brought the action before the Austrian courts, and the defendant in the main proceedings was not therefore domiciled in a Contracting State at that date, such a circumstance does not prevent the application of Article 16 of the Brussels Convention, as is expressly stated in the first subparagraph of Article 4.

22 Furthermore, it must be recalled that, under the first subparagraph of Article 1 of the Brussels Convention, the Convention is to apply, whatever court is seised, 'in civil and commercial matters' but 'shall not extend, in particular, to revenue, customs or administrative matters'. It is clear from settled case-law that the concept of 'civil and commercial matters' must be regarded as an independent concept which must be interpreted by referring to the objectives and scheme of that convention and the general principles which stem from the corpus of the national legal systems. Therefore, in particular, the scope of the Convention must be essentially determined either by reason of the legal relationships between the parties to the action or of the subject-matter of the action (see, in particular, Case 814/79 *Rüffer* [1980] ECR 3807, paragraphs 7 and 14).

23 The national court, which is responsible for analysing such factors and determining, with reference to the case-law of the Court, whether the Brussels Convention applies to a dispute such as the one before it, did not ask the Court about the interpretation of Article 1 of the Convention. Having regard to that fact, and to the answer given below to the question referred, there is no need to give further consideration to the scope of that provision.

The interpretation of Article 16(1)(a) of the Brussels Convention

24 As is clear from Article 16(1)(a) of the Brussels Convention, the courts of the Contracting State where the property is situated have exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property.

25 In that connection, it must be recalled that in order to ensure that the rights and obligations arising out of the Brussels Convention for the Contracting States and for individuals concerned are as equal and uniform as possible, an independent definition must be given in Community law to the phrase 'in proceedings which have as their object rights in rem in immovable property' (see, in particular, Case C-115/88 *Reichert and Kockler* [1990] ECR I-27, paragraph 8).

26 The case-law of the Court also shows that, in that they introduce an exception to the general rules of jurisdiction set out in the Brussels Convention, the provisions of Article 16 — in particular Article 16(1)(a) — must not be given an interpretation broader than is required by their objective (see, in particular, Case C-73/04 *Klein* [2005] ECR I-8667, paragraph 15 and the case-law cited).

27 It is by way of derogation from the general principle laid down by the first subparagraph of Article 4 of the Brussels Convention, which states that if the defendant is not domiciled in a Contracting State each Contracting State is to apply its own rules of international jurisdiction, that Article 16(1)(a) provides that in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property the courts of the Contracting State where the property is situated are to have exclusive jurisdiction (*Klein*, paragraph 14). Furthermore, the provisions of Article 16 have the effect of depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, result in their being brought before a court which is not that of any of them (see, in particular, *Reichert and Kockler*, paragraph 9).

28 As regards the objective pursued by Article 16(1)(a) of the Brussels Convention, it is clear both from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the consistent case-law of the Court that the essential reason for the exclusive jurisdiction of the courts of the Contracting State where the property is situated is that the court of the place where property is situated is best placed to deal with matters relating to rights in rem in, and tenancies of, immovable property (see, in particular, Case 73/77 *Sanders* [1977] ECR 2383, paragraphs 11 and 12).

29 As regards, in particular, disputes concerning rights in rem in immovable property, they must generally be decided by applying the rules of the State where the property is situated, and the disputes which arise frequently require checks, inquiries and expert assessments which have to be carried out on the spot, so that the assignment of exclusive jurisdiction to the court of the place where the property is situated, which for reasons of proximity is best placed to ascertain the facts satisfactorily, satisfies the need for the proper administration of justice (see, in particular, *Sanders*, paragraph 13, and *Reichert and Kockler*, paragraph 10).

30 It is in the light of the interpretative principles thus recalled that the Court held that Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that the

exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (*Reichert and Kockler*, paragraph 11).

31 Therefore, as ČEZ, the United Kingdom Government and the Commission of the European Communities rightly submit, an action, possibly preventive, for cessation of a nuisance, such as that brought in the dispute in the main proceedings, does not fall within the category of actions as defined in the preceding paragraph.

32 In that connection, it must be observed that the Jenard Report referred to above (pp. 1, 34 and 35) states that a rule of jurisdiction, such as that laid down in Article 16(1)(a) of the Brussels Convention which 'take[s] as [its] criterion the subject-matter of the cases' is applied in 'disputes concerning rights in rem in immovable property'.

33 As regards the Schlosser Report on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, p. 71, point 163), it states, in that connection, that the working party which drew up the report had no difficulty in clarifying that actions for damages based on infringement of rights in rem or on damage to property in which rights in rem exist do not fall within the scope of Article 16(1)(a) since the existence and content of such rights in rem, usually rights of ownership, are of only marginal significance in that context.

34 An action for cessation of a nuisance, possibly preventive in nature, such as that at issue in the main proceedings, does not constitute a dispute having as its object rights in rem in immovable property either. It is true that the basis of such an action is the interference with a right in rem in immovable property, but the real and immovable nature of that right is, in this context, of only marginal significance. As ČEZ and the Commission point out, the real and immovable nature of the right at issue does not have a decisive influence on the issues to be determined in the dispute in the main proceedings, which would not have been raised in substantially different terms if the right whose protection is sought against the alleged nuisance were of a different type, such as, for example, the right to physical integrity or a personal right. Just like the action at issue in the main proceedings, such actions essentially seek an order that the person causing the interference, actual or potential, to a right, for example by failing to comply with current generally recognised technological standards, put an end to it.

35 It must also be stated that the considerations of sound administration of justice which underlie Article 16(1)(a) of the Brussels Convention, as set out in paragraph 29 above, are not applicable in an action for cessation of a nuisance, possibly preventive in nature, such as that at issue in the main proceedings, and do not, therefore, preclude such an action from remaining outside the scope of that provision.

36 First, in a case, such as the present one, concerning two pieces of land situated in two different States, it cannot be considered that an action such as that pending before the national court should in general be decided according to the rules of one State rather than the other.

37 As is illustrated, in that regard, by Paragraph 364(2) of the ABGB, which provides that the nuisance in respect of which an order for cessation can be obtained is that caused by a 'neighbour' which 'exceed[s] normal local levels and significantly interfere[s] with the usual use of the land', an action of that kind generally involves consideration of factors particular to the place where the property concerned is

situated. To that extent it appears difficult to consider that a provision of that type is intended to be exclusive even where the distance between the two properties concerned will potentially submit them to usual local conditions which are different.

38 Second, the examination of an action such as that at issue in the main proceedings does not require an assessment of facts which, being more particularly appropriate to the place where one of the two properties concerned is situated, are likely to justify conferring jurisdiction on the courts of one of the two States to the exclusion of the other. Therefore, in paragraphs 15 and 17 of the judgment in Case 21/76 '*Mines de potasse d'Alsace*' [1976] ECR 1735, delivered in respect of an action for liability for damage caused to property situated in one Member State by toxic waste discharged in a river by an undertaking situated in another Member State, the Court stated that, when faced with this type of situation, the place of the event giving rise to the damage and the place where the damage occurred are both capable, depending on the circumstances, of being particularly helpful from the point of view of the evidence and of the conduct of the proceedings.

39 In the main proceedings, as is apparent from the order for reference, the action brought by the Province of Upper Austria seeks to determine whether the influences caused or likely to be caused by the ionising radiation emanating from the Temelín power station exceed the influences or risks normally associated with the operation of a nuclear power station in accordance with current generally recognised technological standards. As ČEZ, the United Kingdom Government and the Commission rightly pointed out, such an assessment clearly requires verifications which, to a large extent, have to be undertaken at the place where the power station is located.

40 In the light of all the foregoing, the answer to the question referred must be that Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that an action which, like that brought under Paragraph 364(2) of the ABGB in the main

proceedings, seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, does not fall within the scope of that provision.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended most recently by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that an action which, like that brought under Paragraph 364(2) of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code) in the main proceedings, seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, does not fall within the scope of that provision.

[Signatures]