JUDGMENT OF THE COURT (Fifth Chamber)

9 November 2000 *

In Case C-387/98,

REFERENCE to the Court under 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 by the Hoge Raad der Nederlanden, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Coreck Maritime GmbH

and

Handelsveem BV and Others,

on the interpretation of the first paragraph of Article 17 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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 text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting as President of the Fifth Chamber, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Coreck Maritime GmbH, by R.S. Meijer, of the Hague Bar, and G.J.W. Smallegange, of the Rotterdam Bar,

— Handelsveem BV and Others, by J.K. Franx, of the Hague Bar,

— the Netherlands Government, by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent,

— the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and O. Fiumara, Avvocato dello Stato,

— the United Kingdom Government, by R. Magrill, of the Treasury Solicitor's Department, acting as Agent, and L. Persey QC,

— the Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, and P. van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Coreck Maritime GmbH, Handelsveem BV and Others, the United Kingdom Government and the Commission at the hearing on 10 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2000,

gives the following

Judgment

1 By judgment of 23 October 1998, lodged at the Court on 29 October 1998, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred for a preliminary ruling under 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 (hereinafter 'the Protocol') four questions on the interpretation of the first paragraph of Article 17 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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 text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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, hereinafter 'the Convention').

2 Those questions were raised in proceedings relating to the validity of a jurisdiction clause in bills of lading between Coreck Maritime GmbH, a company incorporated according to German law established in Hamburg, Germany, the issuer of the bills of lading (hereinafter 'Coreck') on the one hand, and Handelsveem BV, the holder in due course of the bills of lading, V. Berg and Sons Ltd and Man Producten Rotterdam BV, the owners of the cargo under the bills of lading, and The People's Insurance Company of China, the insurer of that cargo (hereinafter referred to collectively as 'Handelsveem') on the other.

The Convention

3 The first and second paragraphs of Article 17 of the Convention provide:

'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.'

The main proceedings

4 Consignments of groundnut kernels were transported from Qingdao in China to Rotterdam in the Netherlands in 1991 aboard a ship belonging to Sevryba, a company incorporated under Russian law established in Murmansk, Russia, pursuant to a contract of carriage concluded with the shipper by Coreck, the time charterer of the vessel.

5 Various bills of lading were issued by Coreck in respect of the carriage containing, *inter alia*, the following clauses:

'3. Jurisdiction

Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein.

17. Identity of Carrier

The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that the said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.

It is further understood and agreed that as the Line, Company or Agents who has [sic] executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier or bailee of the goods.'

6 The following words appeared on the face of the bills of lading:

'"Coreck" Maritime G.m.b.H. Hamburg'.

7 By a document of 5 March 1993, Handelsveem summoned Sevryba and Coreck, under Article 5(1) of the Convention, to appear before the Rechtbank (District Court) in Rotterdam — being the court for the area where the port of discharge designated in the bills of lading was situated — for an order for payment of compensation for the damage alleged sustained by the cargo during transportation.

8 Coreck, relying on the jurisdiction clause in the bills of lading, claimed that that court did not have jurisdiction. In a judgment of 24 February 1995 the Rechtbank in Rotterdam held the clause to be inapplicable and declared that it did have jurisdiction on the ground that, in order for such a clause to be valid, it must be possible to ascertain the court having jurisdiction without difficulty, which was not the case here. On appeal by Coreck, the Gerechtshof (Regional Court of Appeal) in The Hague, in a judgment of 22 April 1997, upheld the decision given at first instance.

9 Coreck appealed to the Hoge Raad der Nederlanden, which decided to stay the proceedings and refer the following four questions to the Court for a preliminary ruling:

'1. Must the first sentence of Article 17 of the Brussels Convention (in particular, the words "have agreed"), read in conjunction with the case-law of the Court of Justice according to which "the purpose of Article 17 is to ensure that the [consent of the] parties... to such a clause, which derogates from the ordinary jurisdiction rules laid down in Articles 2, 5 and 6 of the Convention,... is *clearly and precisely* demonstrated", be interpreted as meaning:

(a) that, in order for a clause vesting jurisdiction in a given court, as provided for in that article, to be valid as between the parties, it is necessary in each case for that clause to be formulated in such a way that its wording alone makes it quite clear, or at least easy to ascertain, (even) for persons other than the parties — and in particular to the court concerned — which court is to have jurisdiction to settle disputes arising from the legal relationship in the context of which that clause is stipulated; or

(b) that — generally or now, in consequence of or in connection with the progressive relaxation of the rules in Article 17 of the Brussels Convention, together with the case-law of the Court of Justice concerning the circumstances in which such a clause is to be regarded

as having been validly concluded — in order for such a clause to be valid, it is enough that the parties themselves clearly know, on the basis (*inter alia*) of the (other) circumstances of the case, which court is to have jurisdiction to settle such disputes?

2. Does Article 17 of the Brussels Convention also govern the validity, as against a third party holding a bill of lading, of a clause which specifies as the forum having jurisdiction to settle disputes "under this Bill of Lading" the courts of the place where the carrier has his "principal place of business" and which is laid down in a bill of lading also containing an "identity of carrier" clause, that bill of lading being issued for the purposes of the carriage of goods, where

   (a) the shipper and one of the possible carriers are not established in a Contracting State and

   (b) the second possible carrier is indeed established in a Contracting State but it is not certain whether his "principal place of business" is situated in that State or in a State which is not a party to the Convention?

3. If the answer to Question 2 is in the affirmative:

   (a) Does the fact that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper mean that it is also binding on any third party holding the bill of lading, or is that the position only as regards a third party who, upon acquiring the

bill of lading, succeeds by virtue of the applicable national law to the shipper's rights and obligations?

(b) Assuming that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper, does the answer to the question whether it is also binding on a third party holding the bill of lading also possibly depend to some extent on the contents of the bill of lading and/or the particular circumstances of the case, such as the particular state of knowledge of the third party concerned or the fact that the latter has a long-standing business relationship with the carrier and, if so, can the third party be deemed to be aware of the particular circumstances of the case if the contents of the bill of lading do not make it sufficiently clear to him that the clause in question is valid?

4. If the answer to Question 3(a) is as just suggested, which national law governs the decision as to whether the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations, and what is the position if the national law in question has not hitherto provided, either in its legislation or in its case-law, an answer to the question whether the third party, upon acquiring the bill of lading, succeeds to the shipper's rights and obligations?'

The first question

10 As regards the first question, the national court essentially asks whether the words 'have agreed' in the first sentence of the first paragraph of Article 17 of the Convention must be interpreted as meaning that the jurisdiction clause must be formulated in such a way that it is possible to identify the court having jurisdiction on its wording alone.

11 Handelsveem considers that that question must be answered in the affirmative, given the particular need for legal certainty where the choice of forum is concerned. The Italian and Netherlands Governments for their part emphasise how important it is that the court chosen by the parties be identified clearly and precisely, so that the court seised can determine whether it is has jurisdiction.

12 On the other hand, Coreck, the United Kingdom Government and the Commission argue that it is sufficient that the court having jurisdiction be identifiable from the wording of the clause considered in the light of the actual circumstances of the individual case.

13 The Court has held that, by making the validity of a jurisdiction clause subject to the existence of an 'agreement' between the parties, Article 17 of the Convention imposes on the court before which the matter is brought the duty of examining first whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the requirements as to form imposed by Article 17 is to ensure that consensus between the parties is in fact established (Case 24/76 *Estasis Salotti* v *RÜWA* [1976] ECR 1831, paragraph 7, Case 25/76 *Segoura* v *Bonakdarian* [1976] ECR 1851, paragraph 6, and Case C-106/95 *MSG* v *Gravières Rhénanes* [1997] ECR 1-911, paragraph 15).

14 However, if the purpose of Article 17 of the Convention is to protect the wishes of the parties concerned, it must be construed in a manner consistent with those wishes where they are established. Article 17 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the Convention, other than those which are expressly excluded pursuant to the fourth paragraph of Article 17 (Case 23/78 *Meeth* v *Glacetal* [1978] ECR 2133, paragraph 5).

15 It follows that the words 'have agreed' in the first sentence of the first paragraph of Article 17 of the Convention cannot be interpreted as meaning that it is necessary for a jurisdiction clause to be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case.

The second question

16 By its second question, the national court asks about the conditions of application of the first paragraph of Article 17 of the Convention. It essentially asks whether that provision applies if the jurisdiction clause designates the court for the area where one of the parties to the original contract has its principal place of business but it is not proven that that place of business is situated in a Contracting State.

17 As the wording of the first sentence of the first paragraph of Article 17 of the Convention itself makes clear, that provision only applies where the twofold condition is satisfied that, first, at least one of the parties to the contract is domiciled in a Contracting State and, secondly, the jurisdiction clause designates a court or the courts of a Contracting State. So, that rule, which owes its existence to the fact that the Convention is intended to facilitate the mutual recognition and enforcement of judicial decisions, lays down a requirement as to precision which the jurisdiction clause must satisfy.

18 In relation to the first condition, the first paragraph of Article 53 of the Convention provides that the seat of a company is to be treated as its domicile for the purposes of the Convention. Under that provision, the court seised must, in order to determine that seat, apply its rules of private international law. Consequently, the criteria for identifying the seat of a legal person and particularly for determining the significance of the principal place of business in that process must be established by the national law which is applicable under the conflict of laws rules of the court seised.

19 As to the second condition, Article 17 of the Convention does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits (Report by Professor Schlosser on 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 to the Convention on Jurisdiction and the enforcement of judgments in Civil and Commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p. 71, paragraph 176).

20 Furthermore, it is settled case-law that the validity of a jurisdiction clause under Article 17 of the Convention must be assessed by reference to the relationship between the parties to the original contract (see to that end Case 71/83 *Tilly Russ* v *Nova* [1984] ECR 2417, paragraph 24, and Case C-159/97 *Castelletti* v *Trumpy* [1999] ECR I-1597, paragraphs 41 and 42). It follows that it is in relation to those parties, which it is for the national court to identify, that the conditions of application of Article 17 of the Convention must be assessed. The circumstances in which a jurisdiction clause may be enforced against a person who was not privy to the original contract are the subject-matter of the third question, which is considered below.

21 That being so, the reply to the second question must be that the first paragraph of Article 17 of the Convention only applies if, first, at least one of the parties to the original contract is domiciled in a Contracting State and, secondly, the parties agree to submit any disputes to a court or the courts of a Contracting State.

The third question

22 By its third question, the national court essentially asks whether a jurisdiction clause which has been agreed between a carrier and a shipper and appears in a bill of lading is valid as against any third party bearer of the bill of lading or whether it is only valid as against a third party bearer of the bill of lading who succeeded by virtue of the applicable national law to the shipper's rights and obligations when he acquired the bill of lading.

23 It is sufficient to note that the Court has held that, in so far as the jurisdiction clause incorporated in a bill of lading is valid under Article 17 of the Convention as between the shipper and the carrier, it can be pleaded against the third party holding the bill of lading so long as, under the relevant national law, the holder of the bill of lading succeeds to the shipper's rights and obligations (*Tilly Russ*, paragraph 24, and *Castelletti*, paragraph 41).

24 It follows that the question whether a party not privy to the original contract against whom a jurisdiction clause is relied on has succeeded to the rights and obligations of one of the original parties must be determined according to the applicable national law.

25 If he did, there is no need to ascertain whether he accepted the jurisdiction clause in the original contract. In such circumstances, acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it. The third party holding the bill of lading thus becomes vested with all the rights, and at the same time becomes subject to all the obligations, mentioned in the bill of lading, including those relating to the agreement on jurisdiction (*Tilly Russ*, paragraph 25).

26 On the other hand, if, under the applicable national law, the party not privy to the original contract did not succeed to the rights and obligations of one of the original parties, the court seised must ascertain, having regard to the requirements laid down in the first paragraph of Article 17 of the Convention, whether he actually accepted the jurisdiction clause relied on against him.

27 Accordingly, the reply to the third question must be that a jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of Article 17 of the Convention.

The fourth question

28 By its fourth question, the national court is essentially asking what the applicable national law is for the purposes of determining the rights and obligations of a

third party bearer of a bill of lading and, in the event that the relevant national law provides no solution, what are the rules which should be applied.

29 Under Article 1 of the Protocol, the Court has jurisdiction to give rulings on the interpretation of the Convention.

30 The question which national law is applicable for the purposes of determining the rights and obligations of a third party bearer of a bill of lading is not one of interpretation of the Convention; it falls within the jurisdiction of the national court, which must apply its rules of private international law.

31 Similarly, the question how to supply a lacuna in the applicable national law, apart from being hypothetical, is not one of the interpretation of the Convention.

32 It follows that the fourth question is inadmissible.

Costs

33 The costs incurred by the Netherlands, Italian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 23 October 1998, hereby rules:

The first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as follows:

1. **It does not require that a jurisdiction clause be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case.**

2. It applies only if, first, at least one of the parties to the original contract is domiciled in a Contracting State and, secondly, the parties agree to submit any disputes before a court or the courts of a Contracting State.

3. A jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of Article 17 of the Convention, as amended.

Edward Jann Sevón

Delivered in open court in Luxembourg on 9 November 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber