JUDGMENT OF THE COURT

28 September 1999 *

In Case C-440/97,

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 Cour de Cassation, France, for a preliminary ruling in the proceedings pending before that court between

GIE Groupe Concorde and Others

and

The Master of the vessel *Suhadiwarno Panjan* and Others,

on the interpretation of Article 5(1) of the abovementioned Convention of 27 September 1968 (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) 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: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Rapporteur) (Presidents of Chambers), J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón, M. Wathelet and R. Schintgen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— GIE Groupe Concorde and Others, by Didier Le Prado, *Avocat* before the Conseil d'État and the Cour de Cassation,

— Pro Line Ltd and Sveriges Angarts Assurans Forening, by Jean-Christophe Balat, *Avocat* before the Conseil d'État and the Cour de Cassation,

— the French Government, by Kareen Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédérik Million, Chargé de Mission in that Directorate, acting as Agents,

— the German Government, by Rolf Wagner, Regierungsdirektor in the Federal Ministry of Justice, acting as Agent,

— the Italian Government, by Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and Oscar Fiumara, Avvocato dello Stato,

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Lionel Persey QC,

— the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, and Xavier Lewis, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government, the Italian Government, the United Kingdom Government and the Commission at the hearing on 15 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 March 1999,

gives the following

Judgment

1 By judgment of 9 December 1997, received at the Court on 29 December 1997, the French Cour de Cassation (Court of Cassation) referred to the Court 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 a question on the interpretation of Article 5(1) of that Convention (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) 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 Brussels Convention').

2 That question has arisen in a dispute between seven insurance companies and GIE Groupe Concorde, their lead insurer, which has its registered office in Paris (hereinafter 'the insurers'), on the one hand, and, on the other, the Master of the vessel *Suhadiwarno Panjan*, Pro Line Ltd (hereinafter 'Pro Line'), which has its registered office in Hamburg (Germany), and four other defendants, after a cargo of bottles of wine in cartons was found on delivery to be damaged.

The Brussels Convention

3 Article 5(1) of the Brussels Convention provides that:

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

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work...'

The main proceedings

4 Cartons containing bottles of wine were loaded in containers on board the vessel *Subadiwarno Panjan* in the port of Le Havre (France). They were to be carried by sea to the port of Santos (Brazil) by Pro Line. Upon arrival at their destination, the goods were found to be damaged and short-delivered.

5 The insurers paid compensation to the consignee. Having been subrogated to the latter's rights, the insurers commenced proceedings, by application of 22 September 1991, against, *inter alios*, the Master of the vessel and Pro Line before the Tribunal de Commerce (Commercial Court), Le Havre, which, by a decision of 3 January 1995, declined jurisdiction.

6 On appeal by the insurers, the Cour d'Appel (Court of Appeal), Rouen, by judgment of 24 May 1995, confirmed that the first court lacked jurisdiction on the ground, in particular, that Le Havre was not the place where the contract of carriage was to be performed.

7 The insurers appealed to the Cour de Cassation on a point of law against that judgment on two grounds. Their first ground of appeal was dismissed by the Cour de Cassation. By their second ground of appeal, the insurers claim that the Cour d'Appel, Rouen, was wrong to rule that the place of performance of the obligation at issue was not Le Havre without first investigating which law governed the contract of carriage.

8 The Cour de Cassation found that, in its judgment in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473, the Court of Justice had held that the place of performance of the obligation within the meaning of Article 5(1) of the Brussels Convention is to be determined in accordance with the law which governs the obligation in question according to the conflict rules of the court before which the matter is brought, which may include the provisions of an international convention laying down uniform law (Case C-288/92 *Custom Made Commercial* v *Stawa*

Metallbau [1994] ECR I-2913), unless the parties themselves specify that place by means of a clause which is valid under the law applicable to the contract (Case 56/79 *Zelger* v *Salinitri* [1980] ECR 89). However, the Cour de Cassation considered it appropriate to ask the Court of Justice whether an independent Community solution could be found.

9 It therefore decided to stay proceedings and refer the following question to the Court:

'With a view to the application of Article 5(1) of the Brussels Convention..., must the place of performance of the obligation, within the meaning of that provision, be determined in accordance with the law which, pursuant to the rules on conflicts of laws of the court seised, governs the obligation at issue, or should national courts determine the place of performance of the obligation by seeking to establish, having regard to the nature of the relationship creating the obligation and the circumstances of the case, the place where performance actually took place or should have taken place, without having to refer to the law which, under the rules on conflict of laws, governs the obligation at issue?'

The question submitted for preliminary ruling

10 By its question, the national court is essentially asking whether the expression 'place of performance of the obligation in question' used in Article 5(1) of the Brussels Convention to establish special jurisdiction in contractual matters is to be construed as referring to the substantive law applicable under the conflict rules of the court seised or whether it must be given an independent interpretation.

11 As far as possible, the Court of Justice gives the terms used in the Brussels Convention an autonomous interpretation, rather than by reference to national law, so as to ensure that the Convention is fully effective, having regard to the

objectives of Article 220 of the EC Treaty (now Article 293 EC), in the implementation of which the Convention was adopted (Case C-125/92 *Mulox IBC* v *Geels* [1993] ECR I-4075, paragraph 10).

12 The Court has, however, made it clear that neither option excludes the other, since the appropriate choice can be made only in relation to each of the provisions of the Brussels Convention (*Tessili*, paragraph 11, and Case 144/86 *Gubisch Maschinenfabrik* v *Palumbo* [1987] ECR 4861, paragraph 7).

13 As regards the expression 'place of performance of the obligation in question', the Court has repeatedly ruled that this expression is to be interpreted as referring to the law which governs the obligation in question according to the conflict rules of the court seised (*Tessili*, paragraph 13, and *Custom Made Commercial*, paragraph 26).

14 It is true that, in the case of contracts of employment, the Court has ruled that the place of performance of the relevant obligation should be determined by reference, not to the applicable national law in accordance with the conflict rules of the court seised, but to uniform criteria which it is for the Court to lay down on the basis of the scheme and the objectives of the Brussels Convention (*Mulox IBC*, paragraph 16). These criteria lead to the choice of the place where the employee actually performs the work covered by the contract with his employer (*Mulox IBC*, paragraph 20).

15 The German and United Kingdom Governments and the Commission advocate that the approach adopted in *Mulox IBC* should be extended to cover all types of contract. They submit that the objectives of the Brussels Convention, which are to enable potential litigants to foresee which courts will have jurisdiction and to provide legal certainty and equal treatment, favour the establishment of uniform criteria so that, for each type of contractual obligation, or at least for each type of contract, the place of performance for the purposes of Article 5(1) of the Brussels Convention could be determined independently.

16 The French and Italian Governments, however, argue that the Court's present case-law should not be changed. They accept that recourse to conflict rules to determine the place of performance may cause difficulties of implementation and lead to unsatisfactory results. But they point out that an autonomous interpretation of place of performance could work only in the case of a few simple contracts and that this solution would be incompatible with the constant evolution of contractual practice in international trade. Given the diversity of the alternative proposals, it is for the Contracting States, should they consider it expedient, to make a choice in the context of the review of the Brussels Convention.

17 It should be noted that in paragraph 14 of *Tessili* the Court, in explaining its reasons for determining the place of performance of contractual obligations by reference to the law applicable to the contract, pointed out that determination of the place of performance depends on the contractual context of the obligations in question and that the contract laws of the Contracting States had very divergent views of the place of performance.

18 In the case of contracts of employment, however, abandonment of the criterion of reference to the law applicable to the contract for the purpose of determining the place of performance and preferring the place where the acts constituting performance of the relevant obligation were localised could be justified by the particular characteristics of this type of contract (see *Mulox IBC*, paragraph 15). These had already led the Court to hold that, in the case of such contracts, the obligation to be taken into consideration for the purpose of applying Article 5(1) of the Brussels Convention is always the obligation which characterises the contract, namely the employee's obligation to carry out the work stipulated (see, in particular, Case 133/81 *Ivenel* v *Schwab* [1982] ECR 1891, paragraph 20, and *Mulox IBC*, paragraph 14).

19 The Court has confirmed that, where no such particular features exist, it is neither necessary nor appropriate to identify the obligation which characterises the contract and to centralise at its place of performance a jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract (Case 266/85 *Shenavai* v *Kreischer* [1987] ECR 239, paragraph 17).

20 That interpretation, as regards both maintenance of the general rule applicable to all contracts and the special rule laid down for contracts of employment, was corroborated by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic to the Brussels Convention, which gave to Article 5(1) of the Brussels Convention the version at present in force.

21 Moreover, a review of the Brussels Convention is at present being carried out, in which the difficulties associated with the application of Article 5(1), in its present version as hitherto interpreted by the Court, have been raised. Several proposals for reforming this provision have been submitted and examined.

22 Argument before the Court in the present case has also highlighted, not only the contradictory positions of, on the one hand, two governments which submitted observations in favour of keeping the present case-law and, on the other, two other governments and the Commission, which advocate a new approach, but also substantial differences between the alternative proposals put forward.

23 In these circumstances, it must be stressed that the principle of legal certainty is one of the objectives of the Brussels Convention (see, in particular, Case C-129/92 *Owens Bank* v *Fulvio Bracco and Bracco Industria Chimica* [1994] ECR I-117, paragraph 32).

24 This principle requires, in particular, that the jurisdictional rules which derogate from the basic principle of the Brussels Convention, such as Article 5(1), should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which

he is domiciled, he may be sued (Case C-26/91 *Handte* v *Traitements Mécano-chimiques des Surfaces* [1992] ECR I-3967, paragraph 18).

25 Determination of the place of performance by reference to the nature of the relationship of obligation and the circumstances of the case, as suggested by the national court, would, as Article 5(1) of the Brussels Convention stands at present, be insufficient to resolve all questions linked to application of that provision.

26 Some of the questions which might arise in this context, such as identification of the contractual obligation forming the basis of proceedings, as well as the principal obligation where there are several obligations, could hardly be resolved without reference to the applicable law.

27 It follows that adoption of the criteria proposed by the national court would not make it entirely unnecessary for the court seised to determine the law governing the obligation in dispute, in order to rule on its jurisdiction under Article 5(1) of the Brussels Convention.

28 Moreover, bearing in mind the important position generally accorded by national contract law to the intention of the parties, the Court has held that, if the parties to the contract are permitted by the applicable law, subject to the conditions it lays down, to specify the place of performance of an obligation without satisfying any special condition of form, that agreement on the place of performance of the obligation is sufficient to found jurisdiction in that place within the meaning of

Article 5(1) of the Brussels Convention (*Zelger*, paragraph 5), on condition that this place has a real connection with the true substance of the contract (Case C-106/95 *MSG* v *Gravières Rhénanes* [1997] ECR I-911, paragraphs 30 and 31).

29 In these circumstances, it does not appear justified to substitute the criteria proposed by the national court for the interpretation previously given by the Court, to the effect that the place of performance must be determined in accordance with the law which governs the obligation at issue. That solution also has the advantage that the competent court is the court of the place where the obligation in question is to be performed in accordance with the law applicable to it. Indeed, it was because the place of performance usually constitutes the closest connecting factor between the dispute and the court of competent jurisdiction that, with a view to efficient organisation of procedure, the rule of special jurisdiction provided for by Article 5(1) of the Brussels Convention in contractual matters was adopted (*Shenavai*, paragraph 18, and *Custom Made Commercial*, paragraphs 12 and 13).

30 It should be added that there is no risk that the law applicable to the determination of the place of performance will vary depending on the court seised, since the conflict rules enabling the law applicable to the contract to be determined have been standardised in the Contracting States by the Convention of 19 June 1980 on the Law applicable to Contractual Obligations (OJ 1980 L 266, p. 1), as amended by the Convention of 10 April 1984 on the Accession of the Hellenic Republic (OJ 1984 L 146, p. 1), by the Convention of 18 May 1992 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1992 L 333, 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. 10).

31 It is for the national legislature, which has exclusive competence in this field, to define a place of performance which takes fairly into account both the interests of the sound administration of justice and the interests of adequate protection for individuals. It may well be that, in so far as national law allows, the national court will have to determine the place of performance by reference to the criteria suggested by the referring court — i.e. by identifying, by reference to the nature

of the obligations undertaken and the circumstances of the case, the place where the thing or service contracted for was, or should have been, provided.

32 It follows from all of the foregoing considerations that, on a proper construction of Article 5(1) of the Brussels Convention, the place of performance of the obligation, within the meaning of that provision, is to be determined in accordance with the law governing the obligation in question according to the conflict rules of the court seised.

Costs

33 The costs incurred by the French, German, 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,

in answer to the question referred to it by the Cour de Cassation by judgment of 9 December 1997, hereby rules:

On a proper construction of Article 5(1) 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, the place of performance of the obligation, within the meaning of that provision, is to be determined in accordance with the law governing the obligation in question according to the conflict rules of the court seised.

Rodríguez Iglesias	Kapteyn	Puissochet	Hirsch
Jann	Moitinho de Almeida		Gulmann
Murray	Edward		Ragnemalm
Sevón	Wathelet		Schintgen

Delivered in open court in Luxembourg on 28 September 1999.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President