JUDGMENT OF THE COURT (SIXTH CHAMBER)
15 February 1989 *

In Case 32/88

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 (Court of Cassation) of the French Republic for a preliminary ruling in the proceedings pending before that court between

Six Constructions Ltd, Brussels (Belgium),

and

Paul Humbert, residing in Labrède (Gironde, France),

on the interpretation of Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978, L 304, p. 36)

THE COURT (Sixth Chamber)

composed of: T. Koopmans, President of Chamber, T. F. O'Higgins, G. F. Mancini, F. A. Schockweiler and M. Díez de Velasco, Judges,

Advocate General: G. Tesauro
Registrar: J.-G. Giraud

After considering the observations submitted on behalf of:

P. Humbert, the respondent in the main proceedings, by H. Masse-Dessen and B. Georges, avocats au conseil d'Etat et á la Cour de cassation, Paris,

* Language of the case: French.

the Government of the Federal Republic of Germany, by Ch. Böhmer, acting as Agent,

the Government of the French Republic, by R. de Gouttes and C. Chavance, acting as Agents,

the Government of the Italian Republic, by L. Ferrari Bravo, Head of the Servizio del Contenzioso Diplomatico, acting as Agent, assisted by O. Fiumara, avvocato dello Stato,

the United Kingdom, by S. J. Hay, acting as Agent, assisted by C. L. Carpenter,

the Commission of the European Communities, by Georgios Kremlis, acting as Agent, assisted by G. Cherubini,

having regard to the Report for the Hearing and further to the hearing on 19 October 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 December 1988,

gives the following

Judgment

1 By judgment dated 14 January 1988, which was received at the Court on 28 January 1988, the French Cour de cassation referred to the Court 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, two questions on the interpretation of Article 5 (1) of that Convention.

2 Those questions arose in proceedings between Paul Humbert, residing in Labrède, France, and Six Constructions Ltd, established in Brussels, concerning a breach of a contract of employment which gave rise to an application for the payment of several amounts by way of payment in lieu of notice, damages, gratuities and various amounts by way of compensation and arrears of salary.

3 It is apparent from the documents before the Court that Six Constructions Ltd is a company incorporated under the law of Sharjah, one of the United Arab Emirates, which has a branch in Brussels. During the main proceedings, it asserted that its registered office was in Brussels. That assertion was accepted by the French courts because it was not contested at the proper time.

4 Two problems of jurisdiction arose before the conseil de prud'hommes (Labour Conciliation Tribunal), Bordeaux, before which the application was brought, and before the cour d'appel (Court of Appeal). On the one hand, Six Constructions Ltd invoked a term of the contract of employment according to which disputes concerning the performance of the contract were subject to the jurisdiction of the Brussels courts. However, the written instrument containing the terms of the contract had never been signed by Mr Humbert. On the other hand, Six Constructions Ltd contested the jurisdiction of the French courts on the ground that the contract of employment was performed not in France but in several countries outside the territory of the Community, since between March 1979, when he was taken on as a deputy project manager and December 1979, when he was dismissed, Mr Humbert had been sent to Libya, Zaïre and Abu Dhabi, one of the United Arab Emirates.

5 The Cour de cassation considered the two submissions mentioned above. It decided in regard to the first that the term attributing jurisdiction did not fulfil the conditions for validity under Article 17 of the Convention. With regard to the second, the Cour de cassation pointed out that, under Article 5(1) of the Convention, in matters relating to a contract, a person may be sued in the courts of the place of performance of the obligation in question and it is clear from the previous decisions of the Court of Justice that the obligation to be taken into account in the case of a contract of employment is the obligation which characterizes the contract, in particular the obligation to carry out the agreed work. However, the Cour de cassation considered that the question of which obligation was to be taken into account where the work was performed outside the territory of the Community raised a problem of interpretation.

6 In those circumstances, the Cour de cassation stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) What is the obligation to be taken into account for the purposes of the application of Article 5 (1) of the Brussels Convention of 27 September 1968 where the court is hearing an action based on obligations arising under a contract of employment binding an employee residing in France to a company having its registered office in Belgium which posted him to several countries ouside Community territory?

(2) Must the characteristic obligation be considered as being performed in the establishment which engaged him, or must jurisdiction be determined pursuant to Article 2 of the Brussels Convention?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the written observations submitted to the Court which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 It should be observed at the outset that the main proceedings were brought before 1 November 1986, the date on which the version of the Convention amended as a result of the accession of new Member States came into effect. The provisions to be interpreted are therefore those of the Convention in the form in which it existed in 1971.

First question

9 The first question covers the case in which, as in the main proceedings, proceedings have been brought before a court on the basis of several obligations arising under a single contract of employment. For the purposes of applying Article 5 (1) of the Convention, it must be determined, in that situation, where the 'place of performance of the obligation in question' is situated.

10 According to the Court's case-law, as the national court rightly pointed out, the obligation to be taken into consideration for the purposes of applying Article 5 (1)

of the Convention to contracts of employment is the obligation which characterizes such a contract, in particular, the obligation to carry out the agreed work (judgments of 26 May 1982 in Case 133/81 *Ivenel* v *Schwab* [1982] ECR 1891, and of 15 January 1987 in Case 266/85 *Shenavai* v *Kreischer* [1987] ECR 239). In that regard, the Court based its decision on the finding that contracts of employment, and more generally contracts for the performance of work other than work on a self-employed basis differ from other contracts by virtue of certain particularities inasmuch as they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements.

11 On the basis that in this case the employee carried out work not in Brussels where, according to the documents before the Court, he regularly returned to make reports, but only in African and Arab countries to which he was posted to take part there in certain construction work, the national court asked how it should apply the criterion of the place where the work is carried out in order to determine which courts have jurisdiction.

12 In that regard, the French Government, the German Government and the United Kingdom argued that if an employed person does not normally perform his work in a single country, it must be the courts for the place in which the business which engaged the employee is situated that have jurisdiction under Article 5 (1) of the Convention for disputes arising under the contract of employment. That interpretation is in accordance with the solution envisaged in such situations by the Rome Convention on the Law Applicable to Contractual Obligations (Official Journal 1980, L 266, p. 1) and with the wording chosen in the draft Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to be concluded by the Member States of the Community and the Member States of the European Free Trade Association (the 'parallel' convention to the Brussels Convention). After the observations had been submitted in this case, that Convention was concluded in Lugano on 16 September 1988 (Official Journal L 319, p. 9). Article 5 (1) thereof provides that in matters relating to a contract of employment, the place of performance of the obligation is the place 'where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged'.

13 That argument was contested by the Italian Government and the Commission. According to the latter, the interpretation put forward by those three governments

has the twofold weakness of departing significantly from the actual terms of Article 5(1) of the Convention and of not taking account of the need to ensure adequate protection to the socially weaker contracting party, namely the employee. In that regard, the Commission argues that the effect of the criterion of the place of business through which the employee was engaged is to give jurisdiction to the courts for the place where the employer's registered office is located, even if the employer is the plaintiff, and to establish thereby a *forum actoris*, whereas the underlying idea of the Convention, as is clearly stated in Articles 2 and 3, is precisely to limit the number of cases in which a person may be sued in the courts of the plaintiff's domicile.

14 The Commission's arguments on that point must be accepted. As the Court held in its judgments of 26 March 1982 and 15 January 1987, cited above, on account of the particularities of contracts of employment, it is the courts of the place in which the work is to be carried out which are best suited to resolving disputes to which one or more obligations under such contracts may give rise. Those particularities of contracts of employment do not justify an interpretation of Article 5 (1) of the Convention which would permit account to be taken of the place of business through which the employee was engaged if it is difficult or impossible to determine in which State the work was performed.

15 The reply to the first question should therefore be that Article 5 (1) of the Convention must be interpreted as meaning that, as regards contracts of employment, the obligation to be taken into consideration is that which characterizes such contracts, in particular the obligation to carry out the agreed work.

Second question

16 The second question concerns how to apply, in regard to contracts of employment, the criterion of the characteristic obligation when the employee carries out all his work outside the territory of the Community. It asks in particular whether, in such a case, jurisdiction is determined by reference to the

place of business in which the employee was engaged or whether it must be determined pursuant to Article 2 of the Convention.

17 The possible choice of the criterion of the place of business in which the employee was engaged has already been considered in regard to the first question.

18 It should be added in that regard that, as the Court pointed out in its judgment of 27 September 1988 in Case 189/87 *Kalfelis* v *HEMA* [1988] ECR 5565, the provisions on 'special jurisdiction' in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State of the defendant's domicile, laid down in the general provisions of Articles 2 and 3 and, therefore, those provisions on special jurisdiction must be interpreted restrictively.

19 In those circumstances when a court finds that claims made before it are based on obligations arising from a contract of employment and that the employee's obligation to carry out the agreed work was and must be fulfilled outside the territory of the Contracting States, it has no choice but to conclude that the place provided for in Article 5 (1) of the Convention cannot serve as a basis for attributing jurisdiction to a court within that territory and that Article 5 (1) cannot therefore be applicable.

20 Although there are indeed some disadvantages in the alternative jurisdiction envisaged by the Convention in contract matters being precluded by the manner in which the parties to the contract have agreed that it is to be performed, it should be observed that the plaintiff is always entitled to bring his action before the courts of the place of the defendant's domicile in accordance with Article 2 of the Convention, which thereby provides a certain and reliable criterion.

21 It should also be noted that that interpretation corresponds to the system laid down by the laws of the Contracting States in regard to jurisdiction in disputes arising out of contracts of employment. A comparative study of those laws shows

that the criteria most often applied are those of the defendant's domicile and the place where the work is performed. In most case, those laws give the plaintiff the choice between those two places.

22 The reply to the second question should therefore be that where, in the case of a contract of employment, the obligation of the employee to carry out the agreed work was performed and has to be performed outside the territory of the Contracting States, Article 5(1) of the Convention is not applicable and that in such a case jurisdiction is determined on the basis of the place of the defendant's domicile in accordance with Article 2 of the Convention.

Costs

23 The costs incurred by the Governments of the Federal Republic of Germany, the French Republic, the Italian Republic, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Cour de cassation, by judgment of 14 January 1988, hereby rules:

(1) Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that, as regards contracts of employment, the obligation to be taken into consideration is that which characterizes such contracts, in particular the obligation to carry out the agreed work.

(2) Where, in the case of a contract of employment, the obligation of the employee to carry out the agreed work was performed and has to be performed outside the territory of the Contracting States, Article 5 (1) of the Convention is not applicable; in such a case jurisdiction is to be determined on the basis of the place of the defendant's domicile in accordance with Article 2 of the Convention.

Koopmans O'Higgins

Mancini Schockweiler Díez de Velasco

Delivered in open court in Luxembourg on 15 February 1989.

J.-G. Giraud
Registrar

T. Koopmans
President of the Sixth Chamber