OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 13 December 1989 *

Mr President,
Members of the Court,

A — The facts

1. The reference for a preliminary ruling submitted to the Court by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) concerns the interpretation of Article 6(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter referred to as 'the Convention' or 'the Brussels Convention' [1]).

2. In 1984 Kongress Agentur Hagen GmbH (hereinafter referred to as 'Hagen'), Düsseldorf, concluded an agreement with Zeehaghe BV for the reservation of hotel rooms in The Hague. Hagen acted in its own name but at the request and on behalf of Garant Schuhgilde e.G. (hereinafter referred to as 'Schuhgilde'), Düsseldorf. When the reservation was cancelled, Zeehaghe BV summoned Hagen to appear before the Arrondissementsrechtbank (District Court), The Hague, and claimed that Hagen should pay damages and interest for breach of contract.

3. In interlocutory proceedings, which concerned primarily the jurisdiction of the Arrondissementsrechtbank, Hagen claimed in the alternative that Schuhgilde, as its principal, should be joined in an action on a warranty or guarantee. The Arrondissementsrechtbank dismissed this application on the ground that it did not have to grant leave for such an action, since neither of the two companies concerned was domiciled in the Netherlands. As procedural difficulties might arise in the proceedings relating to the action on a warranty or guarantee, the main proceedings might be delayed. Zeehaghe did not have to be subjected to such a delay.

4. On appeal, the Gerechtshof (Regional Court of Appeal), The Hague, upheld the decision of the Arrondissementsrechtbank and added that Article 6 of the Convention only provided for the *possibility* of bringing an action on a warranty or guarantee but did not require the court to grant leave to bring such an action.

5. In the appeal on a point of law, the Hoge Raad referred to the Court of Justice three questions for a preliminary ruling in order to enable it to decide on the jurisdiction of the court seised and the admissibility of the action on a warranty or guarantee.

6. In this Opinion I shall discuss the observations submitted by the parties so far as is necessary. For the rest, I would refer to the Report for the Hearing.

* Original language: German.

1 — OJ 1972, L 299, p. 32.

B — Opinion

1. Question A

7. Question A reads as follows:

'If a defendant domiciled in a Contracting State is sued on the basis of Article 5(1) of the Brussels Convention in another Contracting State, may the court in the latter State derive from Article 6(2) of the Brussels Convention jurisdiction to entertain an action on a warranty or guarantee brought by the defendant against a person domiciled in a Contracting State other than that of the court?'

8. In other words, the Hoge Raad wishes to know whether the special jurisdiction provided for in Article 6(2) of the Convention applies even if the court's jurisdiction in the original proceedings is also based on a special rule of jurisdiction (in this case, Article 5(1) of the Convention), or whether it is limited to cases in which the jurisdiction of the court in the original proceedings is based on the general rule of jurisdiction set out in Article 2 of the Convention.

9. In the main proceedings, only Zeehaghe argued in favour of a strict interpretation of the rule of jurisdiction contained in Article 6(2) of the Convention. All the parties who have submitted written observations to the Court, however, support a broad interpretation, whereby the provision on which jurisdiction in the original proceedings is based is irrelevant.

10. No support is to be found in the terms of Article 6(2) of the Convention for a restrictive interpretation of this provision. Article 6(2) permits a person domiciled in a Contracting State to be joined as a third party in an action on a warranty or guarantee in the court seised of the original proceedings, regardless whether jurisdiction in the original proceedings is based on Article 2 or on Article 5 of the Convention. Article 6(2) refers simply to 'the court seised of the original proceedings' and not to 'the court having jurisdiction by virtue of Article 2'; such a formulation would have been necessary, however, to support a restrictive interpretation.

11. As the rule in Article 6 of the Convention is based on the idea of enabling related actions to be heard by a single court in order to avoid conflicting decisions, the existence of a substantive connection between the original proceedings and the action on a warranty or guarantee is of decisive importance for the interpretation of Article 6(2). Therefore the basis on which the court has jurisdiction in the original proceedings is irrelevant.

2. Question B

12. Question B reads as follows:

'Must Article 6(2) of the Brussels Convention be interpreted as meaning that the court is bound to grant leave for the action on a warranty or guarantee to be brought unless the exception provided for in that provision applies?'

13. This question seeks to establish whether the admissibility of an action on a warranty

or guarantee must be assessed solely on the basis of Article 6(2) or whether any additional requirements laid down by national law must also be satisfied.

14. According to Hagen, the French Government and the Government of the Federal Republic of Germany, the admissibility of an action on a warranty or guarantee must be assessed solely in the light of Article 6(2) of the Convention. In their opinion, Article 6(2) must be interpreted independently and not by reference to provisions of national law. This view is supported by considerations of procedural economy and the sound administration of justice. If leave to bring an action on a warranty or guarantee could be refused on grounds other than the intention of disadvantaging the third party which is referred to in Article 6(2), a plaintiff might be forced to bring proceedings in two courts in two different Contracting States, which would give rise to additional expense, delays and risks. If one of its courts has jurisdiction, a Contracting State is bound to guarantee the parties full legal protection. This protection may not be restricted by the application of national procedural rules.

15. For its part, the Commission has put forward two alternative interpretations of Article 6(2) of the Convention. According to the *first interpretation*, the question of jurisdiction is only *one* of the conditions governing the admissibility of an action on a warranty or guarantee. The question of jurisdiction must first be determined in accordance with Article 6(2); subsequently, however, the national court must also establish whether the action satisfies the conditions laid down in the national procedural rules.

16. The Commission's *second*, alternative, interpretation, however, accords with that put forward by Hagen and the French and German Governments.

17. In its written observations, the Commission states that its preference is for the second interpretation. This solution was straightforward, as the national court's discretion was precisely defined by the Convention itself. Furthermore, the second interpretation was more likely to result in the uniform application of Article 6(2) of the Convention.

18. At the hearing, however, the Commission changed its mind and explained why it then preferred the first interpretation.

19. It is true that the Commission's second interpretation, which accords with the observations of the other interested parties, is attractive because of its simplicity. The national court would have to check only whether the express exception in Article 6(2) applied and then decide on the admissibility of the action on a warranty or guarantee solely on the basis of the Convention.

20. On closer inspection, however, this view is untenable. Admittedly, it must be held in the first place that the principle of legal certainty within the Community legal order and the objectives pursued by the Convention under Article 220 of the EEC Treaty, on which the Convention is based, require that the equality and uniformity of

rights and obligations arising from the Convention for the Contracting States and the persons concerned must be ensured, regardless of the rules laid down in that regard in the laws of those States. Consequently, the Convention must override national provisions which are incompatible with it.[2]

21. The Convention can in principle take priority, however, only within the limits of its scope *ratione materiae* or the scope of its individual provisions. In the first place, therefore, it is necessary to determine the scope *ratione materiae* of Article 6(2) of the Convention.

22. Article 6(2) is contained in Title II of the Convention, which governs jurisdiction. Article 6(2) determines the court which has international and territorial jurisdiction to hear an action on a warranty or guarantee. The international and territorial jurisdiction of a court, however, constitutes only one of several factors which may be taken into account in order to determine whether an action is admissible but which are governed only in part by the Convention. In this regard I would refer to the Schlosser Report,[3] which makes the following observations on 'other third-party proceedings'[4] within the meaning of Article 6(2):

'In Article 6(2), the term "third-party proceedings" relates to a legal institution which is common to the legal systems of all the original Member States, with the exception of Germany. However, a jurisdictional basis which rests solely on the capacity of a third party to be joined as such in the proceedings cannot exist by itself. It must necessarily be supplemented by legal criteria which determine which parties may in which capacity and for what purpose be joined in legal proceedings. Thus the provisions already existing in, or which may in future be introduced into, the legal systems of the new Member States with reference to the joining of third parties in legal proceedings, remain unaffected by the 1968 Convention.'

Furthermore, the Court of Justice has acknowledged in its judgments that national procedural rules may be relied upon to supplement the provisions of the Convention.[5]

23. Reference to national procedural rules is also to be found in the protocol to the Convention, which by virtue of Article 65 forms an integral part thereof. Thus Article V of the protocol provides that the jurisdiction specified in Article 6(2) in actions on a warranty or guarantee or in any other third-party proceedings may not be resorted to in the Federal Republic of Germany. In that State, any person domiciled in another Contracting State may be sued in the courts in pursuance of Articles 68, 72, 73 and 74 of the Code of Civil Procedure (Zivilprozeßordnung) concerning third-party notices (Streitverkündung).

2 — See judgment of 15 November 1983 in Case 228/82 *Ferdinand M. J. J. Duijnstee* v *Lodewijk Goderbauer* [1983] ECR 3663, at p. 3674 *et seq.*

3 — Report on the Convention on the association 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 on civil and commercial matters and to the protocol on its interpretation by the Court of Justice (OJ 1979, C 59, p. 71, at p. 111).

4 — The concept of guarantee is covered by the concept of third-party proceedings (see the Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1979, C 59, p. 1, at p. 28).

5 — See judgments of 7 June 1984 in Case 129/83 *Siegfried Zelger* v *Sebastiano Salinitri* [1984] ECR 2397, at p. 2408, of 2 July 1985 in Case 148/84 *Deutsche Genossenschaftsbank* v *Brasserie du Pêcheur SA* [1985] ECR 1981, at p. 1992, and of 4 February 1988 in Case 145/86 *Horst Ludwig Martin Hoffmann* v *Adelheid Krieg* [1988] ECR 645, at p. 670.

24. Article 73 of the German Code of Civil Procedure does, however, contain provisions concerning the form of the Streitverkündung, since it provides that the party must serve a notice setting out the ground for the third-party proceedings and the place of the proceedings.

25. Admittedly, Article V is not directly concerned with actions on a warranty or guarantee but refers merely to the arrangement which takes the place of such actions in the Federal Republic of Germany. Regardless how the reference made in Article V of the protocol is to be categorized for legal purposes, Article V does at least provide an indication that in a type of action comparable to an action on a warranty or guarantee there may be procedural requirements in addition to the rules of jurisdiction laid down in the Convention. This confirms that Article 6(2) cannot be the last word on the admissibility of an action on a warranty or guarantee.[6]

26. Accordingly, it is possible to draw an intermediate conclusion to the effect that it cannot be automatically assumed on the basis of the provisions of Article 6(2) governing international and territorial jurisdiction that an action on a warranty or guarantee is admissible, as there may be in addition national rules which are outside the scope of Article 6(2). These may, for example, include provisions concerning the form of and the time-limit applicable to an action on a warranty or guarantee and substantive rules on the evidential burden to be discharged as regards the alleged relationship between the defendant and the third party.

27. In the section dealing with Question C I shall consider how far such national rules on admissibility must themselves be interpreted and applied in the light of the Convention.

3. *Question C*

28. Question C reads as follows:

'If question B is answered in the negative, may the court apply the procedural rules of its national law in assessing whether the request for leave to bring the action on a warranty or guarantee should be granted or do the provisions of the Brussels Convention mean that the court must consider the request in the light of criteria other than those laid down in its national procedural law and, if so, what are those criteria?'

29. If, as stated above, reference may be made to national procedural rules as regards those conditions governing the admissibility of an action on a warranty or guarantee which do not concern international or territorial jurisdiction, that does not necessarily mean that the possibility of such reference is unlimited. The application of the national procedural rules must not impair the

6 — A similar view was put forward by the Government of the Federal Republic of Germany in the introduction to its observations, where it stated that if a court had jurisdiction under Article 6(2) of the Convention it was bound to admit an action on a warranty or guarantee '*provided moreover that the requirements of national procedural law are satisfied*' From this observation, however, the German Government merely concluded that the Convention did not affect national rules on the *application* of the procedure against a third party, it considered, however, that it was a separate question whether an action on a warranty or a guarantee should be *admitted* where international jurisdiction existed under the Convention. The government nevertheless then answered this question in the affirmative.

practical effectiveness of the rules of the Convention.[7] Consequently, national conditions governing admissibility may not be applied where they affect areas governed by the Convention,[8] expressly or by implication.

30. As I cannot give an exhaustive list of examples here, I would refer to two factors which played a part in the main proceedings. The Arrondissementsrechtbank, The Hague, decided that the action on a guarantee or warranty was inadmissible because the third party to be joined was not domiciled in the State of the court seised and, if it were to be joined, the decision in the original proceedings would be delayed.

31. Even if national procedural rules permitted such circumstances to be taken into account, they would be incompatible with the meaning and purpose of Article 6(2) of the Convention. Since Article 6 refers merely to a person domiciled in a Contracting State, it precludes any difference in treatment between persons domiciled in different Contracting States. A refusal to grant leave to bring an action on a warranty or guarantee therefore may not be based on the fact that the third parties to be joined are established in a Contracting State other than that of the court seised of the original proceedings. Similarly, in order for third parties to be joined to the original proceedings in an action on a warranty or guarantee they need only have their registered office in one of the Contracting States.

32. It also follows that procedural delays which may occur precisely because the parties to the proceedings are established in different Contracting States cannot be taken into consideration when balancing the conflicting interests of the parties to the original proceedings.

C — Conclusion

33. In conclusion, I propose that the Court should reply to the questions submitted to it by the Hoge Raad der Nederlanden as follows:

'(1) If a defendant domiciled in a Contracting State is sued on the basis of Article 5(1) of the Convention in a court of another Contracting State, that court also has jurisdiction under Article 6(2) of the Convention to entertain an action on a warranty or guarantee brought against a person domiciled in a Contracting State other than that of the court seised of the original proceedings.

7 — See the judgment of 4 February 1988 in Case 145/86 *Hoffmann* v *Krieg*, cited above.

8 — See the judgment of 15 November 1983 in Case 288/82 *Duijnstee* v *Goderbauer*, cited above.

(2) Article 6(2) of the Convention must be interpreted as meaning that, when assessing the admissibility of an action on a warranty or guarantee, reference may be made on a supplementary basis to national procedural rules, provided that those rules do not concern the international or territorial jurisdiction of the court seised of the original proceedings.

(3) Supplementary reference made to national procedural rules must not impair the practical effectiveness of the rules laid down in the Convention on the admissibility of an action on a warranty or guarantee; in particular, reliance may not be placed on the fact that the third party to be joined is domiciled in a Contracting State other than that of the court seised of the original proceedings.'