OPINION OF ADVOCATE GENERAL LÉGER

delivered on 5 December 2002 [1]

1. In this case, the Hoge Raad der Nederlanden (Netherlands) refers for a preliminary ruling two questions relating to the scope *rationae materiae* of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. [2]

2. The Court is asked to determine, in essence, whether the Brussels Convention applies to an action for payment of customs debts brought by the Netherlands State against the surety of national associations authorised to issue TIR carnets and to act as guarantors for the payment of import duties and taxes.

I — Legal framework

A — *The Brussels Convention*

3. The scope of the Brussels Convention is defined in Article 1 in the following terms:

'This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. [3]

The Convention shall not apply to:

(1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

1 — Original language: French.

2 — OJ 1978 L 304, p. 36. The Convention 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'). A consolidated version of the Convention is published in the OJ 1990 C 189, p. 2.

3 — The second sentence of the first paragraph of Article 1 was added pursuant to Article 3 of the Convention of 9 October 1978, cited above, at the time of the Accession to the Brussels Convention of the Kingdom of Denmark, Ireland and the United Kingdom.

(2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(3) social security;

(4) arbitration.'

4. If the Brussels Convention applies, the jurisdiction of the court is based on the rules laid down therein. Under Article 2, a defendant shall generally be sued in the courts of the State in which he is domiciled.

5. Article 53 provides that, for the purposes of the Convention, the seat of a company or other legal person shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law.

B — *The TIR Convention*

6. The Customs Convention on the international transport of goods under cover of TIR carnets [4] was signed in Geneva on 14 November 1975. To date, it binds some 60 contracting parties. It was concluded by the Council on behalf of the European Community pursuant to Regulation (EEC) No 2112/78 of 25 July 1978. [5]

7. The TIR Convention seeks to facilitate the international carriage of goods by road vehicle by simplifying and harmonising the customs formalities at frontiers. To that end, it provides *inter alia* that the goods shall not be subjected to the payment or deposit of import or export duties and taxes at customs offices en route. [6]

8. For those facilities to be provided, the TIR Convention requires the goods to be accompanied, throughout the transport operation, by a standard document, the TIR carnet, which shall serve to check the regularity of the operation. It also requires that the transport operations be guaranteed by associations approved by the Contracting Parties in accordance with the provisions of Article 6. [7]

9. In the version which preceded the revision which came into forceon 17 February

4 — Hereinafter 'the TIR Convention'.
5 — OJ 1978 L 252, p. 1.
6 — Article 4.
7 — Article 3.

1999, Article 6(1) of the TIR Convention provided:

'Subject to such conditions and guarantees as it shall determine, each Contracting Party may authorise associations to issue TIR carnets, either directly or through corresponding associations, and to act as guarantors.'

10. In the event of an irregularity in the conduct of the TIR operation, in particular if the TIR carnet has not been discharged, the import duties and taxes become payable. The holder of the TIR carnet — as a rule, the carrier — is directly liable for them. If he does not pay the sums due, the national guaranteeing association shall be required to make the payment as 'jointly and severally' liable.

II — Facts

11. The Netherlands State is a party to the TIR Convention. Under Article 6 of the Convention, the Minister for Finance of that State authorised three national associations of carriers to issue TIR carnets subject to his approval of the guarantee which those associations were required to provide.

12. That guarantee was furnished by the insurance company Préservatrice Foncière TIARD SA,[8] which is established in France. Accordingly, in various documents and declarations, PFA bound itself, as guarantor and joint and several debtor, to pay to the Netherlands State, as its own debt, the import or export duties and taxes imposed, under customs and excise legislation, on the holder of a TIR carnet issued by the national associations of carriers.[9]

13. In 1996, the Netherlands State brought proceedings against the PFA before the Rechtbank te Rotterdam (Netherlands). The action was based on the guarantees granted by PFA in favour of the Netherlands State and sought payment of duties and taxes payable by the three national associations.[10]

14. PFA pleaded the lack of jurisdiction of the Rechtbank te Rotterdam on the ground that the case fell within the scope of the Brussels Convention and that the competent court should be determined in accordance with its provisions.

15. The Rechtbank te Rotterdam and, on appeal, the Gerechtshof te 's-Gravenhage (Netherlands) rejected the plea of lack of jurisdiction. Those courts held that, in

8 — Hereinafter 'PFA'.

9 — Order for reference, p. 4.

10 — Order for reference, pp. 1 and 2.

authorising associations to issue TIR carnets, subject to approval of the guarantee provided by them, the Netherlands State had exercised a public-law power and that the conclusion by the State of the guarantee contract with PFA also formed part of the exercise of that power. They also considered that the debts which PFA had to pay were customs debts.

16. PFA lodged an appeal in cassation against the judgment of the Gerechtshof.

III — The questions referred for a preliminary ruling

17. The Hoge Raad der Nederlanden, doubting the validity of the Gerechtshof's analysis, decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a claim lodged by the State under a private-law guarantee contract which it has concluded in fulfilment of a condition determined by it pursuant to Article 6(1) of the 1975 TIR Convention, and therefore in exercise of its public powers, to be regarded as a civil or commercial matter within the meaning of Article 1 of the Brussels Convention on Jurisdiction and the Enforcement of judgments in Civil and Commerical matters?

(2) Must proceedings which are brought by the State and which have as their subject-matter a private-law guarantee contract be regarded as a customs matter within the meaning of Article 1 of the Brussels Convention on Jurisdiction and the Enforcement of judgments in Civil and Commercial matters on the ground that pleas may be put forward by the defendant which necessitate an investigation into, and a ruling on, the existence and content of the customs debts to which that contract relates?'

IV — Assessment

18. Since Article 1 of the Brussels Convention excludes customs matters from the scope of the Convention and since the second question referred for a preliminary ruling by the national court seeks to ascertain whether the main action concerns such matters, I shall begin my assessment with that question.

19. In the question, the national court starts from the premiss that the main action has as its subject-matter a private-law guarantee contract. It wishes to know whether that action concerns a customs matter on the ground that the defendant may dispute the customs debts to which the contract relates.

20. First of all, in order fully to understand the question, it is necessary to consider the characteristics of the main action.

21. As stated in the order for reference, the action brought by the Netherlands State against PFA seeks an order against it for payment of customs debts and that claim is based on the guarantee contract concluded between the parties in the action. [11]

22. Therefore an order against PFA for payment of those customs debts is the subject-matter of the action and the contract is the cause of the action.

23. It is apparent from the case-law of the Court of Justice that, within the meaning of the Brussels Convention, the concept of 'subject-matter of the action' lies in the purpose of the action, and the contractual relationship or legal rule on which the action is based are covered by the concept of cause. [12]

24. In the light of those considerations, the second question referred for a preliminary ruling must be understood as seeking to ascertain, in essence, whether Article 1 of the Brussels Convention must be interpreted as meaning that an action, brought by a Member State, which has as its subject-matter an order against the defendant to pay customs debts and which is based on a private-law guarantee contract concerns a customs matter.

11 — Point 13 of this Opinion.

12 — Case 144/86 *Gubisch Maschinenfabrik* [1987] ECR 4861, paragraph 11, and Case C-406/92 *Tatry* [1994] ECR I-5439, paragraph 30.

25. By that question, the national court therefore wishes to establish whether the main action concerns a customs matter by reason of its subject-matter or whether it must be regarded as a civil and commercial matter because it is based on a private-law guarantee contract.

26. The Commission maintains that the case is not a customs matter. In support of its analysis, it invokes, first, the reasons for excluding revenue, customs and administrative matters from the scope of the Brussels Convention. The Commission submits that the second sentence of the first paragraph of Article 1 of the Convention, which establishes that exclusion, was added because certain legal relationships which the mainland States consider as falling within the scope of public law are, in Ireland and the United Kingdom, part of civil law. It points out that the legal relationship between the guarantor and the beneficiary of the guarantee is civil in nature. [13]

27. Secondly, the Commission argues that the exclusion constitutes an exception to the principle that the Brussels Convention covers all civil and commercial matters. It infers from that that customs matters include only genuine customs actions, namely those between the State and the principal debtor of the customs duties. It points out that its view is corroborated, *a*

13 — Points 21 to 23 of its written observations.

contrario, by the judgment in *Gourdain*. [14]

28. I do not share the Commission's view. Like the Netherlands Government, I consider that the main action is a customs matter within the meaning of Article 1 of the Brussels Convention and, accordingly, lies outside its scope.

29. I base this assessment, first, on the wording of the first paragraph of Article 1 of the Brussels Convention and, secondly, on the case-law of the Court of Justice. Also, this assessment seems to me to be in accordance with the organisation and objectives of the Brussels Convention.

30. As regards the wording of the first paragraph of Article 1 of the Brussels Convention, it should be pointed out that it expressly excludes customs matters as such from the scope of the Convention. Nothing in the wording of that provision restricts the exclusion to cases between the public authority and the principal debtor of the customs duties.

31. Nor, furthermore, have I found support for such a restriction in thereasons which led the draftsmen of the Convention of 9 October 1978, referred to above, to specify, in the first paragraph of Article 1 of the Brussels Convention, that it shall not extend, in particular, to revenue, customs or administrative matters. It is simply apparent from the commentaries on the Convention of 9 October 1978 that it was considered necessary to specify those matters because the legal systems of the United Kingdom and Ireland do not draw a distinction between public-law and private-law matters. It was such a distinction, which is common to the legal systems of the six original Member States, which formed the basis of the reference, with no further clarification, to the concept of 'civil and commercial matters' used in the first paragraph of Article 1 of the Brussels Convention to define the scope of the Convention. [15]

32. The wording of that article therefore excludes from the scope of the Brussels Convention any case which has as its subject-matter the payment of customs debts, irrespective of the basis on which the case is brought.

33. A study of the case-law of the Court of Justice also leads to that interpretation.

14 — Case 133/78 [1979] ECR 733. Points 24 to 26 of its written observations.

15 — See the report by Professor Schlosser on the Convention 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, pp. 71, 82 and 83).

34. To date, the Court has not been called upon to interpret the concept of customs matters within the meaning of the Brussels Convention. Nevertheless, it is settled case-law that actions between a public authority and a person governed by private law fall outside the scope of the Convention only in so far as that authority is acting in the exercise of public powers. [16]

35. In the judgment in *LTU*, the Court held that the Brussels Convention does not apply to a dispute which concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by that body, in particular where such use is obligatory and exclusive. [17]

36. Similarly, in the judgment in *Rüffer*, cited above, the Court held that the concept of 'civil and commercial matters' within the meaning of the first paragraph of Article 1 of the Brussels Convention does not apply to an action for the recovery of the costs involved in the removal of a wreck in a public waterway, administered by the State responsible in performance of an international obligation and on the basis of provisions of national law which, in the administration of that waterway, confer on it the status of public authority in regard to private persons. [18]

37. It is therefore apparent from the case-law that certain types of dispute must be regarded as excluded from the scope of the Brussels Convention, by reason either of the legal relationship between the parties to the action or of the subject-matter of the action. [19]

38. That case-law seems to me perfectly capable of being applied to the circumstances of the main action. The case brought by the Netherlands State against PFA seeks an order against PFA to pay duties and taxes owing as a result of the non-discharge of TIR carnets. The subject-matter of the proceedings therefore relates to the recovery of customs duties, excise duties and value added tax payable on goods from non-member countries.

39. When implementing the Community legislation concerning customs matters, when fixing the amount of the excise duties and value added tax on goods and services and when recovering the sums payable in

16 — Case 29/76 *LTU* [1976] ECR 1541, paragraph 4; Case 814/79 *Rüffer* [1980] ECR 3807, paragraph 8; Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 20; and Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 26.

17 — Paragraph 4. The case concerned route charges which the European Organisation for the safety of air navigation (Eurocontrol) imposes on the possessors of aircraft for the use of air safety services.

18 — Paragraph 9.

19 — *LTU*, paragraph 4, and *Henkel*, paragraph 29.

respect of those different duties and taxes, Member States unquestionably act in exercise of their public powers.

40. The subject-matter of the proceedings is therefore a manifestation of the exercise of public powers, so the dispute must be excluded from the field of application of the Brussels Convention.

41. I also consider that the fact that the Netherlands State has brought its action against PFA on the basis of a private-law guarantee contract is irrelevant.

42. It is apparent from the case-law that each of the two conditions justifying exclusion of certain kinds of dispute from the field of application of the Brussels Convention, one connected with the nature of the legal relationship between the parties and the other with the subject-matter of the action, is self-sufficient. In other words, since the main action concerns a manifestation of the exercise of public powers, whether in respect of the legal relationship between the parties or of the subject-matter of the action, it does not fall within the ambit of the Brussels Convention.

43. Thus, in *Gourdain*, cited above, the Court held that the ruling for which recognition was sought did not fall within the scope of the Brussels Convention because the action in which the ruling was given was based solely on the provisions of the law of bankruptcy. [20]

44. However, contrary to what the Commission maintains, it cannot be inferred from that judgment that, *a contrario*, an action based on a civil contract must fall within the scope of the Brussels Convention if its subject-matter is excluded.

45. In *Rüffer*, the Court ruled as to whether the fact that recovery of removal costs was sought by the Netherlands State in an action under a right of recourse and not, as required by the national law of other Member States, in administrative proceedings, was enough to bring the dispute within the scope of the Brussels Convention. The Court held that that was not the case. It considered that the fact that, in recovering those costs, the administering agent acts pursuant to a debt which arises from an act of public authority is sufficient for its action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the ambit of the Brussels Convention. [21]

20 — Paragraph 6. That was a decision of the Cour d'appel de Paris (France) ordering the de facto manager of a French company, which had been declared bankrupt, to bear a part of the company's debts pursuant to the current French law on bankruptcy.

21 — Paragraph 15.

46. I think that the approach taken in *Rüffer* is capable of being transposed to a case in which, as in this one, a Member State seeks recovery of customs debts against the guarantor of the principal debtor on the basis of a private-law guarantee contract. The court hearing the case will have to rule on the validity of debts arising from an act of public authority. In that regard, it should be noted that the national court stated that the guarantor could put forward the same grounds of defence relating to the debt as the principal debtor.

47. Furthermore, the view taken in *Rüffer* was confirmed in *Rich*. [22] In that judgment, the Court held that if, by virtue of its subject-matter, a dispute falls outside the scope of the Brussels Convention, reference must be made solely to that subject-matter. [23] It inferred from that that the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention. [24] That view was taken again in the judgment in *Owens Bank*. [25]

48. Finally, the view that it is sufficient, for the main proceedings to be excluded from the ambit of the Brussels Convention, that they relate to a manifestation of the exercise of public powers, either in respect of the legal relationship between the parties or of the subject-matter of the action, was confirmed very recently by the Court of Justice in its judgment in *Baten*. [26]

49. In that case, the Court had to ascertain whether the concept of 'civil matters' in the first paragraph of Article 1 of the Brussels Convention encompasses an action under a right of recourse by which a public body seeks recovery from a private person of sums paid by it by way of social assistance to the divorced spouse and the child of that person. It held that it was necessary to examine the basis and detailed rules governing the bringing of that action. [27]

50. I note that, in that case, the action brought by the public body was an action under a right of recourse against a maintenance debtor for recovery of a civil debt. The subject-matter of the claim was therefore a civil matter and, consequently, fell within the scope of the Brussels Convention. It was therefore logical for the Court to consider whether, in respect of the basis and the detailed rules relating to the bringing of the action, the public authority had rights and powers derogating from the ordinary law in order to decide whether the action was to be regarded as excluded from the scope of the Brussels Convention.

22 — Case C-190/89 [1991] ECR I-3855.

23 — Paragraph 26. The Court was confronted with the question whether the exclusion of arbitration, established in point 4 of the second paragraph of Article 1 of the Brussels Convention, applies to a dispute in which the initial existence of an arbitration agreement is in issue.

24 — Paragraph 28.

25 — Case C-129/92 [1994] ECR I-117, paragraphs 34 and 36.

26 — Case C-271/00 [2002] ECR I-10489, paragraph 28.

27 — Paragraph 30.

In other words, it was necessary to decide whether the dispute, which was not excluded from the Brussels Convention by reason of its subject-matter, should be so by reason of the nature of the legal relationship between the parties.

51. I therefore deduce from studying the case-law of the Court of Justice that the fact that the action for payment of customs debts is brought on the basis of a private-law guarantee contract cannot affect the exclusion of that action from the scope of the Brussels Convention on account of its subject-matter.

52. Finally, this interpretation of Article 1 of the Convention seems to me to be reinforced by its organisation and objectives.

53. We have seen that the Brussels Convention applies to all civil and commercial matters. Nevertheless, certain matters of a civil or commercial nature are excluded. According to the second paragraph of Article 1 of the Convention, they are the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, social security and arbitration. It is interesting to note that those exclusions relate to matters which lie outside the independent will of the parties and concern public policy.[28] Furthermore, those matters should only be excluded from the field of application of the Brussels Convention if they constitute the principal subject-matter of the dispute.[29]

54. I deduce that, in those matters, the draftsmen of the Brussels Convention intended the exclusive legislative competence of a Member State to be matched by the competence of the administrative and judicial authorities of the same State. When those matters constitute the principal subject-matter of the dispute, it is the courts of that State which are regarded as best placed to settle them. The effective protection of legal positions, which is one of the objectives of the Brussels Convention,[30] is therefore guaranteed by the designation of a national system competent in its entirety and does not require recognition of judgments relating to that area.[31]

55. I think that that reasoning should also apply to public-law matters, in which the State exercises its rights and powers of public authority. In my view, the draftsmen of the Convention of 9 October 1978, in excluding customs matters as such, wished to specify that all disputes having those matters as their subject-matter fall within

28 — See the Report on the Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters ('the Jenard Report') (OJ 1979 C 59, p. 1, 10).

29 — Idem.

30 — See the preamble to the Brussels Convention.

31 — See, with regard to social security, the judgment in *Baten*, cited above, paragraph 43.

the jurisdiction of the courts of the State whose law is applicable to the case.

56. Conversely, the argument put forward by the Commission might have the effect, as the Commission itself acknowledges, [32] that an action against the principal debtor and an action against his guarantor would be brought before the courts of different States although they relate to the same customs debt. Admittedly, solutions may be found, in the Brussels Convention, to prevent that situation arising or irreconcilable decisions being delivered. [33] However, the possibility of proceedings being brought concurrently before the courts of different States is one more reason for ruling out an interpretation of Article 1 of the Brussels Convention which does not appear to be justified either by the wording of that provision or by the case-law or the organisation of the Convention.

57. It should be pointed out that the objective of the free movement of decisions, pursued by the Brussels Convention, is above all to reject solutions which might lead to a multiplicity of actions before different courts and the associated risk of irreconcilable decisions. [34]

58. It would therefore be contrary to that objective of the Brussels Convention to give a definition of the scope of the Convention which would have the effect that an action for payment of the same customs debt would follow different rules of jurisdiction according to whether it was brought against the guarantor or the principal debtor. It follows that an action brought against the guarantor must, like an action against the principal debtor, be excluded from the field of application of the Convention.

59. In the light of these considerations, I suggest that the Court reply to the second question raised by the national court that Article 1 of the Brussels Convention must be interpreted as meaning that proceedings which are brought by a Member State, on the basis of a private-law guarantee contract, constitute a customs matter.

60. In view of the reply which I suggest the Court give to the second question referred for a preliminary ruling, the first question, which seeks to ascertain to what extent an action brought by a Member State on the basis of a private-law guarantee contract concluded in fulfilment of a condition determined by that State pursuant to Article 6 of the TIR Convention, may be regarded as an act of public authority, is irrelevant to the resolution of the main proceedings. I therefore suggest that no reply should be given to it.

32 — Points 28 to 30 of its written observations.

33 — In that regard, the Commission cites Article 6(1) of the Brussels Convention which provides that, if there are several defendants, the applicant may sue them in the courts for the place where any one of them is domiciled; in regard to the connection between them, it cites Article 22.

34 — See the Opinion delivered by Advocate General Darmon in *Rich*, cited above, point 1.

V — Conclusion

61. In the light of the foregoing considerations, I propose that the Court give the following reply to the questions raised by the Hoge Raad der Nederlanden:

Article 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 proceedings which are brought by a Member State, on the basis of a private-law guarantee contract, and which have as their subject-matter an order against the defendant for payment of customs debts, constitute a customs matter.