

OPINION OF MR ADVOCATE GENERAL MANCINI
DELIVERED ON 8 JUNE 1983¹

*Mr President,
Members of the Court,*

1. In this reference for a preliminary ruling the Court is called upon to interpret certain aspects of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Court has first of all to decide the scope of the requirement of writing in Article 17 as regards a clause in a contract of insurance in which there is a jurisdiction clause for the benefit of the insured who is not a party to the contract. Then it is necessary to decide whether pursuant to Article 18 a party who pleads that the national court has no jurisdiction may at the same time and in the alternative deliver a defence on the substance of the case. Whilst the Court has already given a ruling on the second issue (judgment of 22 October 1981 in Case 27/81 *Robr v Ossberger* [1981] ECR 2341), there is no precedent on the first.

2. In order better to understand the problems of interpretation raised by this case it is worthwhile at this stage calling to mind all the circumstances and the background to the case. That requires a reference to the provisions which govern international road transport and the special forms of insurance which apply to the sector in question.

Certain important aspects of the case are governed by the Customs Convention on the International Transport of Goods adopted in Geneva on 15 January 1959 and brought into force in Italy by Law No 1517 of 12 August 1962. The Convention lays down that vehicles which (a) are provided with a special document (a TIR carnet) issued in the State of departure by authorized associations affiliated to the International Road Transport Union (hereinafter referred to as "the Union") and which (b) have been sealed by the customs office of departure, may cross frontiers *en route* without examination and without paying import or export duties or taxes. The payment is made in the country where it is due by the national organizations which issue the TIR carnet even if they are from another State. For that purpose they give a guarantee.

The said organizations are covered in turn by a guarantee given by an international pool of insurers comprising seven banks, represented in the main proceedings by Gerling Konzern Speziale Kreditversicherungs-AG whose registered office is in Cologne in the Federal Republic of Germany. Article 8 of the contract in question made in 1961 in Geneva by the Union on its own behalf and on behalf of those affiliated to it provides that "in case of a dispute between the pool and one of the national associations the latter shall be entitled to insist on proceedings before the Court

¹ — Translated from the Italian.

having jurisdiction in the country in which it has its registered office for the application of the law of that country". In Italy the organization authorized to issue TIR carnets was at the material time the Ente Autotrasporti Merci [Bureau for Motor Transport of Goods], hereinafter referred to as "the Bureau"; it was subsequently put into liquidation and its activities continued in accordance with the law by the Ministry of the Treasury.

3. Against that background I can now summarize the facts. The case goes back to a claim by the Italian customs administration against the Ministry of the Treasury in its capacity as liquidator of the Bureau for the payment of pecuniary penalties, taxes, duties and incidental fees in connection with a series of infractions committed in Italy in the course of transport operations under the TIR system. Subsequently the Ministry brought an action before the Tribunale di Roma [District Court, Rome] on 17 July 1974 against the banks guaranteeing the national organizations, of which the Bureau was one, claiming that they should be ordered to pay jointly, or at least severally as regards their respective shares, a sum equal to the amount of the claim against them by the customs administration (some LIT 812 000 000).

In the proceedings the defendants objected that the Italian court lacked jurisdiction but in the alternative put forward a defence on the substance of the case. In the course of the proceedings they applied to the Sezioni Unite [Combined Sections] of the Corte di Cassazione [Court of Cassation] pursuant to Article 41 of the Italian Code of Civil Procedure for a preliminary ruling on jurisdiction. By order of 28 July 1982 the Sezioni Unite stayed the proceedings and referred the fol-

lowing questions to the Court pursuant to the Protocol on the Interpretation of the Brussels Convention:

"1. Where a contract has been duly signed by the contracting parties and there has been included by one of those parties, on its own behalf and in the interests of other beneficiaries under the contract, the jurisdiction clause agreed upon therein with reference to proceedings which may be brought by the said beneficiaries, does the requirement as to written form laid down by Article 17 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters also apply in favour of those beneficiaries?

2. Is the effect of confirming the jurisdiction of the court before which an action is brought — which comes about, under Article 18 of the said Convention, as a result of the entry of an appearance by the defendant — also produced when the defendant, in entering an appearance, besides lodging a preliminary objection to the court's jurisdiction, sets out, purely in the alternative, a defence on the substance of the case?"

4. The case submitted to the Corte di Cassazione concerns a contract of insurance made between an international insurance group and the International Road Transport Union. Its special feature lies in the fact, as the Court of reference clearly points out, that the Union entered into the contract in its own name but in favour of the national organizations affiliated to it: the latter are thus not parties to the contract. Let us suppose that the parties to such a contract insert a jurisdiction clause, as the Pool and the Union have done in

Article 8, can the insured claim the benefit of it even though, since it is a *res inter alios acta*, he has not approved it in writing? To answer that question requires the precise scope of Article 17 of the Brussels Convention to be determined.

As the Court is aware, according to that provision, if the parties 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"; it stipulates however, and that is the issue, that the agreement in question must be in writing or, if oral, evidenced in writing. I think that in the case of a contract for the benefit of a third person that requirement is satisfied when the parties have agreed or confirmed the jurisdiction clauses in writing. The written agreement of the third person is not necessary.

I come to that conclusion on the basis of various arguments. First of all there is the purpose of the requirement in question. As the Jenard report states (Official Journal, C 59, 5. 3. 1979, p. 1), that requirement is intended to ensure legal certainty that is to say, as Mr Advocate General Capotorti observed, what is required is "clear proof that the parties were *ad idem* on the clause specifying the Court having jurisdiction" (Opinion in Case 24/76 *Estasis Salotti v RUWA* [1976] ECR 1845). *A fortiori* that requirement applies where one of the parties is weaker as in the case of contracts the terms of which are not negotiable but drawn up unilaterally by

one party and merely accepted by the other.

The Court has repeatedly recognized that reality. Thus the first of two judgments of 14 December 1976 states that where "a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing ... is fulfilled only if the contract ... contains an express reference to those general conditions" (Case 24/76 above) and the second states that "in the case of an orally concluded contract" the same requirement is satisfied "only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser" (Case 25/76 *Segoura v Bonakdarian* [1976] ECR 1851). In brief, the requirement of writing serves to draw the attention of the parties to the risks involved in the jurisdiction clause. It will not be forgotten that the latter excludes both the general jurisdiction provided for in Article 2 of the Convention (which refers to the domicile of the defendant) and the special jurisdiction provided for in Articles 5 and 6, unless the clause conferring jurisdiction is concluded for the benefit of only one of the parties, in which case — though this merely increases the risks — that party retains the right to bring proceedings in any other court having jurisdiction by virtue of the Convention (third paragraph of Article 17).

It is necessary, however, to be careful. All I have said so far applies to the parties. Third parties who benefit from the contract without incurring the obligations and running any risks need no protection; to subject the validity of

the clause to their signature would therefore make no sense. Moreover there is no legal system which requires such a measure especially in written form unless to avoid revocation of the stipulation (cf. the second paragraph of Article 1411 of the Italian Civil Code); in any event the very wording of Article 17 excludes the need in the present case. When its opening words are read "If *the parties*, ... have, by agreement in writing or by an oral agreement confirmed in writing ..." it is difficult not to find it decisive. It is not possible for an article of that kind to use an expression — "the parties" — otherwise than in a technical sense. Any first year law student would be ready to swear that it is not possible to include the concept of third party in that expression. By "parties" the Convention thus means "the promisee" and the "promisor", that is to say the parties who have agreed to bring the contract into being, the one by requiring and the other by assuming the obligation as against the third party.

On that subject Articles 7 to 12 lay down *ad hoc* rules of jurisdiction. Their object is to give the policy-holder, the insured and the beneficiary, namely the persons regarded as weaker, greater protection than that given by the general rules. Thus it is provided that the insurer may be sued in the courts "for the place where the policy-holder is domiciled" (Article 8 (1)) or "in respect of liability insurance or insurance of immovable property, ... in the courts for the place where the harmful event occurred" (Article 9); to the same end it is provided that "an insurer may bring proceedings only in the courts of the Contracting State in which the defendant is domiciled" (Article 11). In my view however the most significant provision is that of Article 12. It deals with derogations from the principles governing jurisdiction in relation to insurance and provides *inter alia*: "The provisions of this section" (namely that appertaining to insurance) "may be departed from only by an agreement: ... which allows the policy-holder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this section".

5. The purpose and wording of Article 17 however are not alone in demonstrating that the requirement of writing binds only such persons and that therefore a third party may rely on the clause conferring jurisdiction without having fulfilled the said condition. The provisions of the Brussels Convention on contracts of insurance provide additional arguments to the same effect.

The fact that the article expressly contemplates clauses giving rights to third parties such as the insured, even though not a party, and a beneficiary implies that such clauses are valid and effective even if such persons have not approved them in writing. Moreover Article 17 (second paragraph) itself

supports that interpretation in so far as it provides that agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 (2). Obviously the needs to which Article 12 relates have been regarded by the draftsmen of the Convention as special and as prevailing over those protected by Article 17.

Brussels Convention allowed an insurer, the promisor, not to respect the undertaking which he has assumed with regard to third parties in agreeing the jurisdiction clause with the promisee, that would amount to rewarding deliberately unfair conduct and bad faith, which would be absurd. The observation seems to me pertinent (even though I should have based it on the principle *pacta sunt servanda*) and supports the interpretation of Article 17 which I have proposed.

Counsel for Gerling ultimately recognizes the force of that observation and, to find an escape, it is forced to deny that the agreement made in 1961 between the Union and the Pool is one of insurance thus preventing the possibility of applying Article 12 to it. That point of view, however, (which in any event does not answer the arguments I have put forward at point 4) is far from convincing. The fact, put forward, moreover, vaguely, that the organizations associated with the Union have sometimes issued TIR carnets after events have taken place to give rise to liability on the part of the insurer, is part, or so it seems to me, of the pathology of the relationship. In view of its probably marginal nature it cannot affect the character of the transaction, which is one of insurance in so far as the issue of carnets implies the acceptance of a risk — namely the one which the national organizations will pass on to the Pool under the aforesaid contract.

7. In its second question the Corte di Cassazione puts the case of a defendant who in entering appearance does not confine himself to challenging the jurisdiction of the Court but in the alternative puts forward a defence on the substance of the case and asks whether in the light of Article 18 of the Brussels Convention such conduct may imply tacit acknowledgement of the jurisdiction of the court before which the matter has been brought.

6. In support of my contentions the Commission derives a final argument from the principle of good faith governing the making and performance of contracts. It observes that if the

As I said at the beginning, that problem is not new. Two years ago the Court settled it by stating that Article 18 “allows the defendant not only to contest the jurisdiction but to submit at the same time in the alternative a defence on the substance of the action without ... losing his right to raise an objection of lack of jurisdiction” (judgment of 22 October 1981 in Case 27/81 *Rohr v Ossberger* [1981] ECR 2431). There is no reason, and it seems to me that the parties have not put forward any, to depart from that view.

8. For all the reasons set out I propose that the Court should give the following answer to the questions referred to it for a preliminary ruling by the Italian Corte di Cassazione by order of 28 July 1982 in the case brought by the Ministero del Tesoro in its capacity as liquidator of Ente Auto-trasporti Merci against Gerling Konzern Speziale Kreditversicherungs-AG, Cologne, and others:

1. *First question:* the first paragraph of Article 17 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that in the case of a contract made by a party for himself and for the benefit of third parties and containing a jurisdiction clause relating to actions likely to be brought by the said third parties the latter may rely on application of the clause provided that the parties to the contract have made it or approved it in writing.
2. *Second question:* Article 18 of the above-mentioned Convention must be interpreted as meaning that it allows the defendant not only to claim a lack of jurisdiction but also to submit at the same time in the alternative a defence on the substance of the action without losing his right to raise the objection of lack of jurisdiction.