

JUDGMENT OF THE COURT

17 September 2002 *

In Case C-334/00,

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 Corte suprema di cassazione (Italy) for a preliminary ruling in the proceedings pending before that court between

Fonderie Officine Meccaniche Tacconi SpA

and

Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS),

on the interpretation of Article 5(1) and (3) 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

* Language of the case: Italian.

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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissechet, M. Wathelet, R. Schintgen, J.N. Cunha Rodrigues (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Fonderie Officine Meccaniche Tacconi SpA, by F. Franchi, avvocato,

— Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), by M.P. Ginelli, avvocato, and R. Rudek, Rechtsanwalt,

— the Commission of the European Communities, by A.-M. Rouchaud and G. Bisogni, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following

Judgment

- 1 By order of 9 June 2000, received at the Court on 11 September 2000, the Corte suprema di cassazione (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 (OJ 1978 L 304, p. 36) three questions on the interpretation of Article 5(1) and (3) of that 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’).

- 2 Those questions were raised in proceedings between Fonderie Officine Meccaniche Tacconi SpA ('Tacconi'), a company incorporated under Italian law, established in Perugia (Italy), and Heinrich Wagner Sinto Maschinenfabrik GmbH ('HWS'), a company incorporated under German law, established in the Federal Republic of Germany, concerning compensation claimed from HWS by Tacconi to make good the damage allegedly caused to Tacconi by HWS's breach of its duty to act honestly and in good faith on the occasion of negotiations with a view to the formation of a contract.

Legal background

The Brussels Convention

- 3 The first paragraph of Article 2 of the Brussels Convention provides:

'Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.'

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

‘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;...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred’.

National law

5 Article 1337 of the Italian Codice Civile (Civil Code) provides that, in the context of the negotiation and formation of a contract, the parties must act in good faith.

The main proceedings and the questions referred for a preliminary ruling

- 6 On 23 January 1996 Tacconi brought an action against HWS in the Tribunale di Perugia (District Court, Perugia) for a declaration that a contract between HWS and a leasing company B.N. Commercio e Finanza SpA ('BN') for the sale of a moulding plant, in respect of which BN and Tacconi had already, with the agreement of HWS, concluded a leasing contract, had not been concluded because of HWS's unjustified refusal to carry out the sale, and hence its breach of its duty to act honestly and in good faith. HWS thereby infringed the legitimate expectations of Tacconi, which had relied on the contract of sale being concluded. Tacconi therefore asked the court to order HWS to make good all the damage allegedly caused, which was calculated at ITL 3 000 000 000.

- 7 In its defence, HWS pleaded that the Italian court lacked jurisdiction because of the existence of an arbitration clause and, in the alternative, because Article 5(1) of the Brussels Convention was applicable. On the substance, it contended that Tacconi's claim should be dismissed and, 'strictly in the alternative and as a counterclaim', that Tacconi should be ordered to pay it DEM 450 248.36.

- 8 By application served on 16 March 1999, Tacconi applied, pursuant to Article 41 of the Italian Codice di Procedura Civile (Code of Civil Procedure) concerning preliminary decisions on jurisdiction, to the Corte suprema di cassazione for a declaration that the Italian courts had jurisdiction over the main proceedings. Tacconi claimed that no agreement had been reached between it and HWS because its proposals had all been met by counter-proposals. It therefore relied on

the pre-contractual liability of HWS on the basis of Article 1337 of the Italian Civil Code and submitted that under Article 5(3) of the Brussels Convention the ‘place where the harmful event occurred’ must also be understood as the place where the person claiming to have been harmed has sustained loss. The loss at issue in the main proceedings was incurred in Perugia, where Tacconi has its office.

- 9 In its order for reference, the national court considered that the criterion for special jurisdiction in Article 5(1) of the Brussels Convention does not appear to apply to pre-contractual liability, which does not result from the non-performance of a contractual obligation. No such obligation existed in the case at issue in the main proceedings, since no contract was concluded.

- 10 Since it considered that an interpretation of the Brussels Convention was thus needed in order to decide the issue of jurisdiction, the Corte suprema di cassazione decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

- ‘1. Does an action against a defendant seeking to establish pre-contractual liability fall within the scope of matters relating to tort, delict or quasi-delict (Article 5(3) of the Brussels Convention)?

2. If not, does it fall within the scope of matters relating to a contract (Article 5(1) of the Brussels Convention), and if it does, what is “the obligation in question”?

3. If not, is the general criterion of the domicile of the defendant the only criterion applicable?’

Question 1

- 11 By its first question the national court asks whether an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Observations submitted to the Court

- 12 Tacconi and the Commission submit, citing the case-law of the Court (Case 189/87 *Kalfelis* [1988] ECR 5565, Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, and Case C-26/91 *Handte* [1992] ECR I-3967), that since pre-contractual liability does not derive from obligations freely assumed by one party towards another, it is a matter relating to tort, delict or quasi-delict.
- 13 According to Tacconi, it is quite plain that at the pre-contractual stage, since the contract has not yet been concluded, there is no contractual link which could bind the parties to each other.

- 14 The Commission submits that, on the basis of the Court's case-law, it is possible to state a general principle that all claims referred to by the Brussels Convention seeking to establish the liability of a defendant give rise, in any event, to the application of one of the two criteria of special jurisdiction in Article 5(1) and (3) of the convention.
- 15 The Commission concludes that disputes concerning pre-contractual liability fall within the scope of Article 5(3) of the Brussels Convention, since, first, an action founded on the defendant's pre-contractual liability is by definition a claim seeking to establish liability on the part of the defendant and, second, that liability is not based on obligations-freely assumed by the defendant towards the claimant, but on duties as to conduct imposed, more or less specifically, by a source external to the parties involved in the pre-contractual relationship.
- 16 HWS submits, on the other hand, that pre-contractual liability is of a different nature from liability in tort, delict or quasi-delict. The latter applies to any person who breaches the general rule against causing harm to others and infringes 'absolute' rights.
- 17 Pre-contractual liability, however, may be imputed only to a person who has a special relationship with the person who has suffered harm, namely that resulting from the negotiation of a contract. Consequently, by contrast with the principles applicable to matters relating to tort, delict or quasi-delict, pre-contractual liability cannot be assessed except by reference to the content of the negotiations.

- 18 Moreover, submitting that Article 5(1) of the Brussels Convention cannot be applied either in this case, since Tacconi's claim rests on the hypothesis that no contract was concluded, HWS argues that pre-contractual liability is neither liability in tort, delict or quasi-delict nor liability in contract, and that the German courts therefore have jurisdiction to hear the case in accordance with the general provision in Article 2 of the Convention.

Findings of the Court

- 19 It should be observed at the outset that the Court has consistently held (see Case 34/82 *Martin Peters Bauunternehmung* [1983] ECR 987, paragraphs 9 and 10, *Reichert and Kockler*, paragraph 15, and *Handte*, paragraph 10) that the expressions 'matters relating to a contract' and 'matters relating to tort, delict or quasi-delict' in Article 5(1) and (3) of the Brussels Convention are to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention. Those expressions cannot therefore be taken as simple references to the national law of one or the other of the Contracting States concerned.
- 20 Only such an interpretation is capable of ensuring the uniform application of the Brussels Convention, which is intended in particular to lay down common rules on jurisdiction for the courts of the Contracting States and to strengthen the legal protection of persons established in the Community by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued (see Case C-295/95 *Farrell* [1997] ECR I-1683, paragraph 13, and Case C-256/00 *Besix* [2002] ECR I-1737, paragraphs 25 and 26).

- 21 As the Court has held, the concept of ‘matters relating to tort, delict or quasi-delict’ within the meaning of Article 5(3) of the Brussels Convention covers all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of Article 5(1) of the Convention (*Kalfelis*, paragraph 18, *Reichert and Kockler*, paragraph 16, and Case C-51/97 *Réunion Européenne and Others* [1998] ECR I-6511, paragraph 22).
- 22 Moreover, while Article 5(1) of the Brussels Convention does not require a contract to have been concluded, it is nevertheless essential, for that provision to apply, to identify an obligation, since the jurisdiction of the national court is determined, in matters relating to a contract, by the place of performance of the obligation in question.
- 23 Furthermore, it should be noted that, according to the Court’s case-law, the expression ‘matters relating to contract’ within the meaning of Article 5(1) of the Brussels Convention is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (*Handte*, paragraph 15, and *Réunion Européenne and Others*, paragraph 17).
- 24 It does not appear from the documents in the case that there was any obligation freely assumed by HWS towards Tacconi.
- 25 In view of the circumstances of the main proceedings, the obligation to make good the damage allegedly caused by the unjustified breaking off of negotiations

could derive only from breach of rules of law, in particular the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract.

26 In those circumstances, it is clear that any liability which may follow from the failure to conclude the contract referred to in the main proceedings cannot be contractual.

27 In the light of all the foregoing, the answer to the first question must be that, in circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Questions 2 and 3

28 As the first question has been answered in the affirmative, there is no need to answer the other questions put by the national court.

Costs

- 29 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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,

in answer to the questions referred to it by the Corte suprema di cassazione by order of 9 June 2000, hereby rules:

In circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to

act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) 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.

Rodríguez Iglesias	Colneric	von Bahr	
Gulmann	Edward	La Pergola	Puissochet
Wathelet	Schintgen	Cunha Rodrigues	Timmermans

Delivered in open court in Luxembourg on 17 September 2002.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President