JUDGMENT OF THE COURT (Fifth Chamber)

15 May 2003 *

In Case C-266/01,

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 Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Préservatrice foncière TIARD SA

and

Staat der Nederlanden,

on the interpretation of Article 1 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 United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1,

* Language of the case: Dutch.

and — amended text — 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 (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and A. Rosas, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by A.-M. Rouchaud and H. van Vliet, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Préservatrice foncière TIARD SA, represented by R.S. Meijer, advocaat, of the Netherlands Government, repre-

sented by N.A.J. Bel, acting as Agent, and of the Commission, represented by A.-M. Rouchaud and H. van Vliet, at the hearing on 17 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2002,

gives the following

Judgment

1 By judgment of 18 May 2001, received at the Court on 5 July 2001, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) 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 two questions on the interpretation of Article 1 of that convention (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 United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — 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 Brussels Convention').

2 Those questions were raised in the context of proceedings between the Netherlands State and Préservatrice foncière TIARD SA ('PFA'), an insurance company governed by French law, concerning the enforcement of a guarantee

contract (borgtochtovereenkomst) under which PFA agreed to pay the customs duties owed by the Netherlands associations of carriers authorised by the Netherlands State to issue TIR carnets.

Legal context

The Brussels Convention

3 The first paragraph of Article 1 of the Brussels Convention provides:

'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.'

The TIR Convention

4 The Customs Convention on the international transport of goods under cover of TIR carnets ('the TIR Convention') was signed at Geneva on 14 November 1975. The Kingdom of the Netherlands is a party to that convention. It was also approved on behalf of the European Community by Council Regulation (EEC) No 2112/78 of 25 July 1978 (OJ 1978 L 252, p. 1).

5 The TIR Convention provides, in particular, that goods carried under the TIR procedure, which it lays down, are not to be subject to the payment or deposit of import or export duties and taxes at customs offices en route.

6 For those facilities to be applied, the TIR Convention requires that the goods be accompanied, throughout the transport operations, by a standard document, the TIR carnet, which serves 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 of the Convention.

7 Article 6(1) of the TIR Convention, which forms part of Chapter II, entitled 'Issue of TIR carnets — Liability of guaranteeing associations', states in the version applicable at the material time:

'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.'

8 Where there is an irregularity in the conduct of the TIR operation, in particular where the TIR carnet has not been discharged, import or export duties and taxes become payable. They are due directly from the holder of the TIR carnet — generally the carrier. Where he does not pay the sums owed, the national guaranteeing association is 'jointly and severally' liable for payment, under Article 8(1) of the TIR Convention.

The main proceedings

9 By order of 5 March 1991, in accordance with Article 6 of the TIR Convention, the Netherlands State Secretary for Finance authorised three Netherlands associations of carriers to issue TIR carnets ('the authorised Netherlands associations'). Under Article 1 of that order, those associations undertake unconditionally to pay the duties and taxes due from the holders of the TIR carnets issued, for which they become jointly and severally liable. Article 5 states that the authorised Netherlands associations must provide a guarantee covering fulfilment of their obligations. That article states that the person who provides the guarantee must undertake to pay all the sums claimed by the Netherlands Minister for Finance from the authorised Netherlands associations. Article 19 states that the order will enter into force only when the Netherlands Minister for Finance has accepted the guarantee referred to in Article 5.

10 That guarantee was provided by PFA. By various documents, PFA bound itself *vis-à-vis* the Netherlands State, as guarantor and joint debtor, to pay as its own debt the import or export duties and taxes imposed under customs and excise legislation on the holders of TIR carnets issued by the national associations of carriers.

11 On 20 November 1996, the Netherlands State brought proceedings against PFA before the Rechtbank te Rotterdam (District Court, Rotterdam) (Netherlands), claiming that PFA should be ordered to pay it the sum of NLG 41 917 063 together with statutory interest. That action was based on the guarantee commitments undertaken by PFA *vis-à-vis* the Netherlands State and sought payment of the import or export duties and taxes owed by the authorised Netherlands associations.

12 PFA pleaded the lack of jurisdiction of the Rechtbank te Rotterdam on the ground that the dispute fell within the scope of the Brussels Convention and that the court with jurisdiction was to be determined in accordance with the provisions thereof.

13 The Rechtbank te Rotterdam and, on appeal, the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) (Netherlands) rejected the plea of lack of jurisdiction. The appellate court held that, in authorising associations of carriers to issue TIR carnets subject to the acceptance of the guarantee furnished by them, the Netherlands State had exercised a public-law power and that the conclusion by that State of the guarantee contract with PFA also formed part of the exercise of that power. It also found that the debts payable by PFA were customs debts.

14 Since it doubted the validity of that analysis, the Hoge Raad der Nederlanden, to which PFA had appealed, decided to stay proceedings and to refer the following questions to the Court:

'(1) Is a claim lodged by the State under a private-law guarantee contract (borgtochtovereenkomst) 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 Commercial 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?'

The first question referred for a preliminary ruling

15 By this question, the national court seeks essentially to ascertain whether the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that 'civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State.

Observations submitted to the Court

16 PFA, the Netherlands Government and the Commission all acknowledge that 'civil and commercial matters' within the meaning of Article 1 of the Brussels Convention must be defined independently. Similarly, they all point out that proceedings between public administrative authorities and an individual may come within the scope of the Brussels Convention, in so far as those authorities have not acted in the exercise of their public powers.

17 However, their observations differ in respect of the application of those principles to the main proceedings.

18 The Netherlands Government adopts the analysis of the Gerechtshof te 's-Gravenhage. In its submission, there is a link between the act of guarantee and the system of taxes and duties whose payment it seeks to ensure, which is shown by the fact that the guarantee was a condition without whose fulfilment

the public-law relationship between the State and the authorised Netherlands associations would not have arisen. The content of the act of guarantee flows directly from rules of public law, as is demonstrated by the fact that its clauses reproduce almost literally the provisions of the order of 5 March 1991 approving national associations of carriers. In concluding that act, PFA undertook to take part in the public-law system for collecting duties and taxes which was put in place by the TIR Convention. In the light of those factors, the fact that the act took the form of a private-law guarantee contract is immaterial.

19 By contrast, according to PFA and the Commission, the Netherlands State has not, in its relationship with PFA, acted in the exercise of its public powers. The Netherlands State has not imposed any obligation on PFA, which concluded the guarantee contract of its own free will and is at liberty to terminate it subject to a period of notice. The Netherlands State's claim against PFA is founded solely in the guarantee contract, which is governed by private law.

The reply of the Court

20 It is settled case-law that, since Article 1 of the Brussels Convention serves to indicate the area of application of the Convention, it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. 'Civil and commercial matters' must therefore be regarded as an independent concept to be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the national legal systems as a whole (Case 29/76 *LTU* [1976] ECR 1541, paragraph 3; Case 133/78 *Gourdain* [1979]

ECR 733, paragraph 3; Case 814/79 *Rüffer* [1980] ECR 3807, paragraph 7; Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 18, and Case C-271/00 *Baten* [2002] ECR I-10489, paragraph 28).

21 The Court has made it clear that that interpretation results in the exclusion of certain judicial decisions from the scope of the Brussels Convention, owing either to the legal relationships between the parties to the action or to its subject-matter (*LTU*, paragraph 4, and *Baten*, paragraph 29).

22 Thus the Court has held that, although certain judgments in actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (*LTU*, paragraph 4; *Rüffer*, paragraph 8, and *Baten*, paragraph 30).

23 In order to apply those principles in a case such as that in the main proceedings, it is therefore necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action (see, to that effect, *Baten*, paragraph 31).

24 As a preliminary point, it should be observed that, as the Netherlands Government submits, PFA has not bound itself solely as guarantor, but also as joint debtor liable to pay as its own debt the duties and taxes owed.

25 The question whether a stipulation of joint and several liability alters the nature of a guarantee undertaking, or modifies only some of its effects, is a question governed by national law.

26 In any event, in the present case the national court, which is responsible for analysing the nature of the relationship between PFA and the Netherlands State, has referred in the questions which it has submitted to the Court for a preliminary ruling only to a 'guarantee' contract. Accordingly, in order to answer those questions, the Court must proceed on the basis of the hypothesis that proceedings have been brought against PFA only in its capacity as guarantor, and not as joint debtor.

27 According to the general principles which stem from the legal systems of the contracting States, a guarantee contract represents a triangular process, by which the guarantor gives an undertaking to the creditor that he will fulfil the obligations assumed by the principal debtor if the debtor fails to fulfil them himself.

28 Such a contract creates a new obligation, assumed by the guarantor, to guarantee the performance of the principal obligation imposed on the debtor. The guarantor does not take the place of the debtor, but guarantees only to pay his debt, according to the conditions specified in the guarantee contract or laid down by legislation.

29 The obligation thus created is accessory, in the sense that, first, the creditor cannot bring proceedings against the guarantor unless the debt covered by the guarantor is payable and, second, the obligation assumed by the guarantor cannot be more extensive than that of the principal debtor. The accessory nature of the obligation does not however mean that the legal rules applicable to the obligation assumed by the guarantor must be in every particular identical to the

legal rules applicable to the principal obligation (see, to that effect, Case C-208/98 *Berliner Kindl Brauerei* [2000] ECR I-1741).

30 In order to answer the first question, it is therefore necessary to examine whether the legal relationship between the Netherlands State and PFA, under the guarantee contract, is characterised by an exercise of public powers on the part of the State to which the debt is owed, in that it entails the exercise of powers going beyond those existing under the rules applicable to relations between private individuals (on that criterion, see *Sonntag*, paragraph 22).

31 Although it is for the national court to make that assessment, it seems none the less helpful for the Court to provide, in the light of the observations lodged before it, some guidelines as to the factors to be taken into consideration.

32 In the first place, the legal relationship between the Netherlands State and PFA is not governed by the TIR Convention. Although Chapter II of that convention defines the obligations of a national guaranteeing association authorised by a contracting State under Article 6 thereof, in the version applicable at the material time the TIR Convention does not contain any provisions defining the extent of the possible undertakings imposed on a guarantor by a State as a condition for a decision authorising national guaranteeing associations.

33 In the second place, account must be taken of the circumstances surrounding the conclusion of the contract. In the main proceedings, the case file shows that PFA's undertaking *vis-à-vis* the Netherlands State was freely given. According to the information relied on by the Commission, without being contradicted by the Netherlands Government, PFA freely determined with the principal debtors, that

is, the authorised Netherlands associations, the amount of its remuneration for providing the guarantee. PFA and the Commission also stated, at the hearing, that PFA is free to terminate the guarantee contract at any moment, subject to 30 days' notice.

34 In the third place, it is necessary to take into consideration the terms of the contract defining the extent of the guarantor's undertaking. In that respect, the identity, noted in the main proceedings by the Netherlands Government, between the provisions of the order of 5 March 1991 approving national associations of carriers, on the one hand, and the clauses of the contract defining the guarantee obligation assumed by PFA, on the other, cannot be regarded as proof that the Netherlands State exercised its public powers in respect of the guarantor. The fact that the principal obligation and the guarantor's undertaking are the same in fact results from the accessory nature of the guarantee contract. In the main proceedings, it is hardly material that the extent of PFA's undertaking is determined by reference to the obligations of the authorised Netherlands associations, since it is common ground that that undertaking was not imposed on PFA, but is the result of an expression of its free will.

35 As regards the fact, asserted by the Netherlands Government, that PFA waived the right to rely on certain provisions of the Netherlands Civil Code, such as those providing for the defence of set-off and the 'benefits of discussion and division' (permitting the claim of a preliminary distraint on the principal debtor's assets and the guarantor's right to limit its liability in the event of a plurality of guarantors), it should be noted that such stipulations are common practice in commercial relationships. They could constitute an exercise of its public powers by the Netherlands State *vis-à-vis* the guarantor only if they exceeded the limits of the freedom conferred on the parties by the legislation applicable to the contract, which is for the national court to determine.

36 In the light of all these considerations, the answer to the first question must be that the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that 'civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State

seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals.

The second question referred for a preliminary ruling

37 By this question, the national court seeks essentially to ascertain whether the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that 'customs matters', within the meaning of the second sentence of that provision, covers a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

38 In that regard, it should be recalled that the second sentence of the first paragraph of Article 1 of the Brussels Convention was added 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 to the Brussels Convention in order to clarify, by means of examples, which matters do not fall within the scope of the Brussels Convention (see report on that convention submitted by Mr Schlosser, OJ 1979 C 59, p. 71, point 23). That sentence seeks only to draw attention to the fact that 'customs matters' are not covered by the concept of 'civil and commercial matters'. That clarification did not however have the effect of either limiting or modifying the scope of the latter concept.

39 It follows that the criterion for fixing the limits of the concept of 'customs matters' must be analogous to that applied to the concept of 'civil and commercial matters'.

40 As indicated in paragraph 36 above, 'civil and commercial matters' must therefore cover a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to guarantee the payment of a customs debt owed by a third person to that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise of powers going beyond those existing under the rules applicable to relations between private individuals.

41 This analysis applies even if the guarantor may raise pleas in defence which necessitate an investigation into whether the customs debt, whose payment the guarantee contract guarantees, is owed.

42 In order to determine whether an action falls within the scope of the Brussels Convention, only the subject-matter of that action must be taken into account. It would be contrary to the principle of legal certainty, which is one of the objectives pursued by that convention, for its applicability to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties (see, to that effect, Case C-190/89 *Rich* [1991] ECR I-3855, paragraphs 26 and 27, and Case C-129/92 *Owens Bank* [1994] ECR I-117, paragraph 34).

43 Where the subject-matter of an action is the enforcement of a guarantee obligation owed by a guarantor in circumstances which permit the inference that that obligation falls within the scope of the Brussels Convention, the fact that the guarantor may raise pleas in defence relating to whether the guaranteed debt is owed, based on matters excluded from the scope of the Brussels Convention, has no bearing on whether the action itself is included in the scope of that convention.

44 It follows from all the foregoing considerations that the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that 'customs matters', within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the legal relationship between the State and the guarantor, under that contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals, even if the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

Costs

45 The costs incurred by the Netherlands Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 18 May 2001, hereby rules:

The first paragraph of Article 1 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, must be interpreted as follows:

— 'civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals;

— 'customs matters', within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the legal relationship between the State and the guarantor, under that contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals, even if the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

Wathelet Edward La Pergola

Jann Rosas

Delivered in open court in Luxembourg on 15 May 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber