



Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

28 June 2017 ^{*} ^{*}

(^{Reference} for a preliminary ruling — Judicial cooperation in civil matters — Jurisdiction and the enforcement of judgments in civil and commercial matters — Regulation (EC) No 44/2001 — Article 23 — Jurisdiction clause — Jurisdiction clause in a contract between two companies — Action for damages — Joint and several liability of representatives of one of those companies for tortious acts — Ability of the representatives to rely upon that clause)

In Case C-436/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Areios Pagos (Supreme Court of Cassation, Greece), made by decision of 7 July 2016, received at the Court on 4 August 2016, in the proceedings

Georgios Leventis,

Nikolaos Vafeias

v

Malcon Navigation Co. Ltd.,

Brave Bulk Transport Ltd.,

THE COURT (Seventh Chamber),

composed of A. Prechal, President of the Chamber, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Greek Government, by A. Magrippi and S. Charitaki, acting as Agents,
- the Spanish Government, initially by A. Rubio González, and subsequently by A. Gavela Llopis, acting as Agents,
- the European Commission, by M. Konstantinidis and M. Heller, acting as Agents,

^{*} Language of the case: Greek.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 23(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) ('the Brussels I Regulation').
- 2 The request has been made in proceedings between Mr Georgios Leventis and Mr Nikolaos Vafeias, representatives of Brave Bulk Transport Ltd., a maritime chartering company, and Malcon Navigation Co. Ltd. ('Malcon Navigation') concerning an application by Malcon Navigation for damages against, jointly and severally, Brave Bulk Transport, Mr Leventis and Mr Vafeias, an application in respect of which the jurisdiction of the Greek courts is contested.

Legal context

EU law

- 3 According to recital 11 of the Brussels I Regulation:

‘The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. ...’
- 4 In Chapter II of that regulation, entitled ‘Jurisdiction’, Article 2, which is in Section 1 entitled ‘General provisions’, states in paragraph 1:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’
- 5 Article 6 of that regulation, which is in Section 2, entitled ‘Special jurisdiction’, of Chapter II, states:

‘A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

...’

- 6 Section 7 of that chapter, entitled ‘Prorogation of jurisdiction’, includes Article 23, which reads as follows:

‘1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member 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 jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing, or
- (b) in a form which accords with practices which the parties have established between themselves; or
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

...’

- 7 Section 9 of Chapter II, entitled ‘*Lis pendens* — related actions’, includes, inter alia, Articles 27 and 28. Article 27 provides:

‘1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.’

- 8 According to Article 28 of the Brussels I Regulation:

‘1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.’

- 9 Articles 33 to 37 of the Brussels I Regulation deal with the recognition of judgments. Article 33 of that regulation establishes the principle that judgments given in a Member State are to be recognised without any special procedure being required. Articles 34 and 35 of that regulation set out the reasons for which a judgment given in a Member State may exceptionally not be recognised in another Member State.

- 10 In that regard, Article 34 of that regulation provides:

‘A judgment shall not be recognised:

...

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.'

Greek law

- 11 According to Article 71 of the Civil Code:

'A legal person shall be liable for the acts or omissions of the organs which represent it where the act or omission has taken place in the course of the performance of the duties entrusted to the organs and gives rise to an obligation to pay compensation. In addition the person responsible shall be liable jointly and severally.'

- 12 In Chapter 39 of that code, entitled 'Torts', Article 926, entitled 'Loss caused by several persons', provides:

'If a joint act of several persons has caused a loss or if several persons are responsible in parallel for one and the same loss, each of them shall be jointly and severally liable. The same rule shall also apply if several persons have acted concurrently or successively and it is not possible to ascertain whose act has caused the loss.'

The dispute in the main proceedings and the question referred for a preliminary ruling

- 13 It is apparent from the information before the Court that Malcon Navigation, a company with its registered office in Malta and its actual seat in Maroussi (Greece), is the owner of the ship *Sea Pride* flying under the Maltese flag and operated by Hellenic Star Shipping Company SA whose seat is in Panama and which also has offices in Maroussi.
- 14 The referring court also states that Brave Bulk Transport has its registered office in Malta and its actual seat in Maroussi, that Mr Leventis is the only member of the board and the legal representative of that company, and that Mr Vafeias is its sole managing director and the actual representative. Mr Leventis and Mr Vafeias ('the representatives of Brave Bulk Transport') reside, respectively, in Piraeus and Kifissia (Greece).
- 15 A charter agreement was entered into on 9 June 2006 between Malcon Navigation and Brave Bulk Transport, pursuant to which Malcon Navigation chartered the ship *Sea Pride* to Brave Bulk Transport. Brave Bulk Transport subsequently sub-chartered the ship to the Iraqi Ministry of Trade to transport a cargo of wheat from Hamburg (Germany) to Iraq.
- 16 The ship was returned five months later than the date agreed in the charter contract.
- 17 On 17 February 2007 Malcon Navigation initiated arbitration proceedings in London (United Kingdom) against Brave Bulk Transport with the aim of recovering compensation for demurrage and accrued freight charges.
- 18 Brave Bulk Transport brought an action for damages against the Iraqi State, as it was the Iraqi State's delay in returning the ship that caused the delay in Brave Bulk Transport returning the ship to Malcon Navigation.

- 19 A privately-executed agreement was signed by Malcon Navigation and Brave Bulk Transport on 14 November 2007. That agreement provided that the pending arbitration proceedings would be stayed for six months, that Brave Bulk Transport would inform Malcon Navigation about the course of proceedings against the Iraqi State and that, if a settlement with the Iraqi State were reached, Malcon Navigation would receive at least 20% of the amount paid by the Iraqi State to Brave Bulk Transport. Article 10 of the agreement provided that it was ‘governed by English law’ and was subject to ‘English jurisdiction’ and that ‘any dispute arising from or in connection with it [would] be subject to the exclusive jurisdiction of the High Court of England and Wales’.
- 20 In November 2008 Malcon Navigation learnt that an amicable settlement had been agreed by Brave Bulk Transport with the Iraqi State on 20 May 2008 and that Brave Bulk Transport had received the amount of the settlement. Malcon Navigation then continued the arbitration proceedings and an arbitration award was delivered on 29 September 2009, ordering compensation to be paid to it.
- 21 Malcon Navigation also submits that the representatives of Brave Bulk Transport deprived the latter of its assets, thereby preventing Malcon Navigation from receiving its compensation.
- 22 On 22 September 2010 Malcon Navigation brought an action for damages before the Polymeles Protodikeio Peiraios (Court of First Instance, Piraeus, Greece) against Brave Bulk Transport and the representatives of Brave Bulk Transport on the basis of Articles 71 and 926 of the Civil Code, with the aim of rendering them jointly and severally liable for having committed tortious acts. By reason of the jurisdiction clause included in the agreement of 14 November 2007, the court dismissed the action so far as concerns Brave Bulk Transport. However, as regards the representatives of Brave Bulk Transport, the court found that it had jurisdiction and upheld the application as to the substance.
- 23 The Efeteio Peiraios (Court of Appeal, Piraeus, Greece), before which the representatives of Brave Bulk Transport brought an appeal against the decision of the Polymeles Protodikeio Peiraios (Court of First Instance, Piraeus), confirmed the position adopted by the latter with regard to matters of jurisdiction.
- 24 By application of 31 July 2014, the representatives of Brave Bulk Transport appealed on a point of law to the Areios Pagos (Supreme Court of Cassation, Greece).
- 25 The referring court points out that the courts at first instance and on appeal declared that they had jurisdiction to hear and determine the case before them as regards the representatives of Brave Bulk Transport on the ground that, from their point of view, those representatives, who were not party to the agreement of 14 November 2007, were not bound by the jurisdiction clause it contains.
- 26 The referring court takes the view that it follows from Article 23 of the Brussels I Regulation and from the case-law of the Court that an agreement conferring jurisdiction applies in principle only between the parties who have entered into it, but, exceptionally, it is possible for it to be relied upon by or against a party to the dispute who was a third party at the time when it was signed.
- 27 The referring court also notes that, where there are a number of defendants, Article 6(1) of that regulation provides that a person domiciled in a Member State may also be sued in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The referring court takes the view that a similar risk exists in a situation where one of a number of defendants has agreed to a jurisdiction clause.
- 28 Having regard to the above, the referring court harbours doubts as to the validity of the assessment made by the courts with jurisdiction over the substance as to the scope of the jurisdiction clause included in the agreement of 14 November 2007.

- 29 In those circumstances, the Areios Pagos (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does the jurisdiction clause which has been agreed pursuant to Article 23 of the Brussels I Regulation between companies and in the present case is included in the privately-executed agreement of 14 November 2007 between Malcon Navigation and Brave Bulk Transport, Article 10 of which provides that “the present agreement shall be governed by English law, it shall be subject to English jurisdiction and any dispute arising from or in connection with it shall be subject to the exclusive jurisdiction of the High Court of England and Wales”, also encompass, as regards acts and omissions of the organs of Brave Bulk Transport, who represent it and give rise to liability on its part pursuant to Article 71 of the Greek Civil Code, the persons responsible who acted in the performance of their duties and are liable under that article, in conjunction with Article 926 of the Greek Civil Code, jointly and severally with the company, a legal person?’

Consideration of the question referred

- 30 By its question, the referring court asks, in essence, whether Article 23 of the Brussels I Regulation must be interpreted as meaning that a jurisdiction clause in a contract between two companies can be relied upon by the representatives of one of them to dispute the jurisdiction of a court over an action for damages which aims to render them jointly and severally liable for supposedly tortious acts carried out in the performance of their duties.
- 31 A preliminary point to note is that, in so far as the Brussels I Regulation replaces, in the relations between Member States, the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), as amended by the successive accession conventions for the new Member States, the interpretation provided by the Court in respect of the provisions of that convention is also valid for those of the regulation whenever the provisions of those instruments may be regarded as equivalent, which is the case as regards Article 23 of the Brussels I Regulation, which succeeded the first paragraph of Article 17 of the convention (see, to that effect, judgment of 7 July 2016, *Hőszig*, C-222/15, EU:C:2016:525, paragraphs 30 and 31 and the case-law cited).
- 32 Given that, in the general scheme of the Brussels I Regulation, the general principle laid down in Article 2(1) thereof is that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, the rules on jurisdiction derogating from the general principle, such as those set out in Article 23 of the regulation, cannot result in an interpretation which goes beyond the situations expressly envisaged by that regulation (see, to that effect, judgment of 17 September 2009, *Vorarlberger Gebietskrankenkasse*, C-347/08, EU:C:2009:561, paragraphs 37 and 39 and the case-law cited).
- 33 Article 23 of the Brussels I Regulation clearly indicates that its scope is limited to cases in which the parties have ‘agreed’ on a court. As is apparent from recital 11 of the Brussels I Regulation, it is that consensus between the parties which justifies the primacy granted, in the name of the principle of the freedom of choice, to the choice of a court other than that which may have had jurisdiction under that regulation (judgments of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 26 and the case-law cited, and of 20 April 2016, *Profit Investment SIM*, C-366/13, EU:C:2016:282, paragraph 24 and case-law cited).
- 34 The Court has thus stated that the court before which the matter is brought has the duty of examining, *in limine litis*, whether the jurisdiction clause was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, the purpose of the requirements as to form imposed by Article 23(1) of the Brussels I Regulation being, in that regard, to ensure that consensus between the parties is in fact established (judgment of 7 July 2016 *Hőszig*, C-222/15, EU:C:2016:525, paragraph 37 and the case-law cited).

- 35 Thus, a jurisdiction clause in a contract may, in principle, produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract (judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 64 and the case-law cited).
- 36 In this instance, the jurisdiction clause at issue in the main proceedings is not being put forward by one of the parties to the contract in which it appears, but by third parties to the contract.
- 37 Not only have the representatives of Brave Bulk Transport not expressed their intent to enter into an agreement conferring jurisdiction, but Malcon Navigation has also no more consented to be bound to these persons by such an agreement.
- 38 Furthermore, neither the parties to the main proceedings nor the referring court have set out details or evidence to justify the view that the representatives of Brave Bulk Transport and Malcon Navigation have entered into an agreement in one of the forms envisaged in Article 23(1)(b) and (c) of the Brussels I Regulation containing a jurisdiction clause, such as the one at issue in the main proceedings.
- 39 With regard to Article 6 of the Brussels I Regulation, which deals with jurisdiction in instances where there is more than one defendant, it should be noted that the requirements laid down by Article 23 of the Brussels I Regulation must be strictly interpreted since they exclude both jurisdiction as determined by the general principle of the courts of the Member State in which the defendant is domiciled laid down in Article 2 thereof, and the special jurisdiction provided for in Articles 5 to 7 of that regulation (judgment of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, paragraph 25 and the case-law cited).
- 40 In particular, by entering into an agreement conferring jurisdiction in accordance with Article 23(1) of the Brussels I Regulation, the parties may derogate not only from the general jurisdiction under Article 2 thereof but also from the special jurisdiction laid down in Articles 5 and 6. Thus, the court seised of a matter can, in principle, be bound by a jurisdiction clause derogating from the rules of jurisdiction laid down in Articles 5 and 6 which was concluded by the parties under Article 23(1) (see, to that effect, judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraphs 59 and 61).
- 41 Finally, to respond to the concerns raised by the referring court with regard to the potential risk of contradictory decisions, it is to be noted that the Brussels I Regulation includes various mechanisms aimed at preventing such situations.
- 42 This is particularly so in the case of Articles 27 and 28 of the regulation concerning, respectively, situations of *lis pendens* and related actions, which prevent contradictory judgments from arising, and in the case of Article 34(3) and (4) of the regulation, which allow them to be remedied.
- 43 Having regard to the preceding considerations, Article 23(1) of the Brussels I Regulation must be interpreted as meaning that a jurisdiction clause in a contract between two companies cannot be relied upon by the representatives of one of them to dispute the jurisdiction of a court over an action for damages which aims to render them jointly and severally liable for supposedly tortious acts carried out in the performance of their duties.

Costs

- 44 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 23(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a jurisdiction clause in a contract between two companies cannot be relied upon by the representatives of one of them to dispute the jurisdiction of a court over an action for damages which aims to render them jointly and severally liable for supposedly tortious acts carried out in the performance of their duties.

[Signatures]