JUDGMENT OF THE COURT (First Chamber)

16 July 2009 *

In Case C-189/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 4 April 2008, received at the Court on 8 May 2008, in the proceedings

Zuid-Chemie BV

v

Philippo's Mineralenfabriek NV/SA,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

* Language of the case: Dutch.

Advocate General: J. Mazák,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 23 April 2009,

after considering the observations submitted on behalf of:

— Zuid-Chemie BV, by P. Knijp, advocaat,

— Philippo's Mineralenfabriek NV/SA, by M. Polak, advocaat,

— the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,

— the Commission of the European Communities, by A.-M. Rouchaud-Joët and P. van Nuffel, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(3) 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).

2 The reference has been made in the course of a dispute between Zuid-Chemie BV ('Zuid-Chemie'), an undertaking manufacturing fertiliser and having its registered office in Sas van Gent (Netherlands), and Philippo's Mineralenfabriek NV/SA ('Philippo's'), established in Essen (Belgium), concerning the delivery by the latter to Zuid-Chemie of a contaminated product used for the manufacture of fertiliser.

Legal background

3 Article 2(1) of Regulation No 44/2001, which features in Section 1 ('General provisions') of Chapter II thereof, provides as follows:

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

4 Article 3(1) of Regulation No 44/2001 provides:

‘Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.’

5 Article 5 of Regulation No 44/2001, which features in Section 2 (‘Special jurisdiction’) of Chapter II, provides:

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

…

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

…’

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

6 Zuid-Chemie is an undertaking manufacturing fertiliser which, in July 2000, purchased two consignments of a product called 'micromix' from HCI Chemicals Benelux BV ('HCI'), an undertaking established in Rotterdam (Netherlands).

7 HCI, which is itself unable to manufacture micromix, ordered it from Philippo's and provided the latter with all the raw materials — except for one — necessary for the manufacture of that product. In consultation with HCI, Philippo's purchased the outstanding raw material, namely zinc sulphate, from G.J. de Poorter, trading under the name Poortershaven, in Rotterdam.

8 Philippo's manufactured the micromix in its factory in Belgium, to which Zuid-Chemie came to take delivery of that product.

9 Zuid-Chemie processed the micromix in its factory in the Netherlands in order to produce various consignments of fertiliser. It sold and dispatched a number of those consignments to its customers.

10 It subsequently transpired that the cadmium content of the zinc sulphate purchased from Poortershaven was too high, with the result that the fertiliser was rendered unusable or of limited utility. Zuid-Chemie claims that this has caused it to suffer loss.

11 On 17 January 2003, Zuid-Chemie instituted proceedings against Philippo's before the Rechtbank (Local Court) Middleburg (Netherlands) in which it sought a declaration that Philippo's was liable for the damage which Zuid-Chemie had sustained and an

order requiring that undertaking to pay it various sums in respect of the loss which it claimed to have suffered, in addition to payment of compensation plus interest and costs.

12 By decision of 10 December 2003, the Rechbank Middelburg declined jurisdiction to deal with the dispute before it on the ground that, for the purposes of the application of Article 5(3) of Regulation No 44/2001, the concept of the 'place where the harmful event occurred' covers both the place of the event giving rise to the damage ('Handlungsort') and the place where the initial damage occurred ('Erfolgsort'). As regards the place where the damage occurred, that court held that the initial damage suffered by Zuid-Chemie occurred in Essen, since that is the place where Zuid-Chemie took delivery of the contaminated product.

13 Before the Gerechtshof te 's-Gravenhage (Court of Appeal, The Hague) none of the parties challenged the fact that Essen was the place of the event giving rise to the damage, as the contaminated micromix had been manufactured there. As regards the place where the damage had occurred, the Gerechtshof upheld the judgment at first instance. In that connection, it found that the crucial factor was the allegedly wrongful conduct on the part of Philippo's, and not the fact that the contaminated micromix resulted in contamination of the fertiliser manufactured by Zuid-Chemie in the Netherlands. Thus, the (initial) damage sustained by Zuid-Chemie occurred in Essen, inasmuch as the contaminated product had been delivered 'ex factory'.

14 Zuid-Chemie appealed on a point of law to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against the judgment of the Gerechtshof te 's-Gravenhage. In the view of the Hoge Raad, the argument revolved around the concept of 'the place where the harmful event occurred' within the meaning of Article 5(3) of Regulation No 44/2001, and that an interpretation of that concept was necessary in order to make possible a resolution of the dispute before it.

15 Against that background, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Which damage is, in the case of unlawful conduct such as that which forms the basis for Zuid-Chemie's claim, to be treated as the initial damage resulting from that conduct: the damage which arises by virtue of the delivery of the defective product or the damage which arises when normal use is made of the product for the purpose for which it was intended?

2. If the latter is the case, can then the place where that damage occurred be treated as "the place where the harmful event occurred" within the meaning of Article 5(3) of … Regulation … No 44/2001 … only if that damage consists of physical damage to persons or goods, or is this also possible if (initially) only financial damage has been incurred?'

The questions referred for a preliminary ruling

The first question

16 By its first question, the referring court seeks essentially to ascertain whether Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the context of a dispute such as that in the main proceedings, the words 'place where the harmful event occurred' designate the place where the defective product was delivered to the purchaser or whether they refer to the place where the initial damage occurred following normal use of the product for the purpose for which it was intended.

17 In order to answer that question, it should be borne in mind, first, that, according to settled case-law, the provisions of Regulation No 44/2001 must be interpreted independently, by reference to its scheme and purpose (see, inter alia, Case C-372/07 *Hassett and Doherty* [2008] ECR I-7403, paragraph 17, and Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 19).

18 Second, in so far as Regulation No 44/2001 now 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 conventions relating to the accession of new Member States to that convention ('the Brussels Convention'), the interpretation provided by the Court in respect of the provisions of the Brussels Convention is also valid for those of Regulation No 44/2001 whenever the provisions of those Community instruments may be regarded as equivalent.

19 The provisions of Regulation No 44/2001 relevant to this case reflect the same system as those of the Brussels Convention and are, moreover, drafted in almost identical terms. In the light of such similarity, it is necessary to ensure, in accordance with Recital 19 in the preamble to Regulation No 44/2001, continuity in the interpretation of those two instruments (see *Draka NK Cables and Others*, paragraph 20, and Case C-180/06 *Ilsinger* [2009] ECR I-3961, paragraph 58).

20 Thus, it is necessary to bear in mind that the Court has already held, when interpreting Article 5(3) of the Brussels Convention, that the system of common rules of conferment of jurisdiction laid down in Title II of that convention is based on the general rule, set out in the first paragraph of Article 2, that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective of the nationality of the parties (Case C-168/02 *Kronhofer* [2004] ECR I-6009, paragraph 12).

21 It is only by way of derogation from that fundamental principle attributing jurisdiction to the courts of the defendant's domicile that Section 2 of Title II of the Brussels Convention makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of the Convention (*Kronhofer*, paragraph 13).

22 The Court has also held that those rules of special jurisdiction must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by that convention (see Case 189/87 *Kalfelis* [1988] ECR 5565, paragraph 19; Case C-433/01 *Blijdenstein* [2004] ECR I-981, paragraph 25; and *Kronhofer*, paragraph 14).

23 Nevertheless, it is settled case-law that, where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in Article 5(3) of the Brussels Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the claimant, in the courts for either of those places (see, inter alia, Case 21/76 *Bier* ('*Mines de potasse d'Alsace)*' [1976] ECR 1735, paragraphs 24 and 25; Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 44; Case C-18/02 *DFDS Torline* [2004] ECR I-1417, paragraph 40; and *Kronhofer*, paragraph 16).

24 In that connection, the Court has stated that the rule of special jurisdiction laid down in Article 5(3) of the Brussels Convention is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see to that effect, inter alia, *Mines de Potasse d'Alsace*, paragraph 11; Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 17; Case C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 19; and Case C-364/93 *Marinari* [1995] ECR I-2719, paragraph 10). The courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence (see *Henkel*, paragraph 46).

25 Although it is common ground between the parties to the main proceedings, as stated in paragraph 13 of the present judgment, that Essen is the place of the event giving rise to the damage ('Handlungsort'), they disagree as regards the determination of the place where the damage occurred ('Erfolgsort').

26 The place where the damage occurred is, according to the case-law cited in paragraph 23 of the present judgment, the place where the event which may give rise to liability in tort, delict or quasi-delict resulted in damage.

27 The place where the damage occurred must not, however, be confused with the place where the event which damaged the product itself occurred, the latter being the place of the event giving rise to the damage. By contrast, the 'place where the damage occurred' (see *Mines de potasse d'Alsace*, paragraph 15, and *Shevill and Others*, paragraph 21) is the place where the event which gave rise to the damage produces its harmful effects, that is to say, the place where the damage caused by the defective product actually manifests itself.

28 It must be recalled that the case-law distinguishes clearly between the damage and the event which is the cause of that damage, stating, in that connection, that liability in tort, delict or quasi-delict can arise only on condition that a causal connection can be established between those two elements (see *Mines de potasse d'Alsace*, paragraph 16).

29 Regard being had to the foregoing, the place where the damage occurred cannot be any other than Zuid-Chemie's factory in the Netherlands where the micromix, which is the defective product, was processed into fertiliser, causing substantial damage to that fertiliser which was suffered by Zuid-Chemie and which went beyond the damage to the micromix itself.

30 It must also be observed that the choice of the Netherlands courts which is thereby available to Zuid-Chemie makes it possible, in particular for the reasons laid down in paragraph 24 of the present judgment, for the court which is most appropriate to deal with the case and, therefore, enables the rule of special jurisdiction laid down in Article 5(3) of Regulation No 44/2001 to have practical effect.

31 In that connection, it is worth pointing out that the Court has held, by its interpretation of Article 5(3) of the Brussels Convention to the effect that that provision covers not only the place of the event giving rise to the damage, but also the place where the damage occurred, and that to decide in favour only of the place of the event giving rise to the damage would, in a significant number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of that convention, with the result that the latter provision would, to that extent, lose its effectiveness (see *Mines de potasse d'Alsace*, paragraphs 15 and 20, and *Shevill and Others*, paragraph 22). Such a consideration relating to confusion between the heads of jurisdiction is likely to apply in the same way with regard to the failure to take account, where appropriate, of a place where damage occurred which differs from the place of the event which gave rise to that damage.

32 It follows from the foregoing that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the context of a dispute such as that in the main proceedings, the words 'place where the harmful event occurred' designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended.

The second question

33 In the event that the answer to the first question should be that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that the words 'place where the harmful event occurred' refer to the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended, the referring court asks, further, whether that damage must consist of physical damage to persons or goods, or whether it may consist (at that stage) of purely financial damage.

34 In that connection, it must be recalled, as stated in paragraphs 9 and 10 of the present judgment, that the processing by Zuid-Chemie of the contaminated micromix into fertiliser caused that fertiliser to be of limited utility or even rendered it unusable, which, according to Zuid-Chemie, caused it to suffer loss.

35 As the initial damage suffered by Zuid-Chemie consisted therefore in physical damage to goods, the necessary conclusion is that the question whether purely financial damage would, at that stage, have been sufficient to lead to the interpretation set out in paragraph 32 of the present judgment is hypothetical.

36 Taking account of that finding, and in the light of the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (Case C-62/06 *ZF Zefeser* [2007] ECR I-11995, paragraph 15), there is no need to reply to the second question.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the nation 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 (First Chamber) hereby rules:

Article 5(3) 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, in the context of a

dispute such as that in the main proceedings, the words 'place where the harmful event occurred' designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended.

[Signatures]