

JUDGMENT OF THE COURT (Fifth Chamber)
24 June 1986 *

In Case 22/85

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 Bundesgerichtshof [Federal Court of Justice] for a preliminary ruling in the proceedings pending before that court between

Rudolf Anterist

appellant,

and

Crédit lyonnais

respondent,

on the interpretation of the third paragraph of Article 17 of that Convention,

THE COURT (Fifth Chamber)

composed of: U. Everling, President of the Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: M. Darmon
Registrar: D. Louberman, Administrator

after considering the observations submitted on behalf of

the appellant, by H. Embacher and G. Holzhauser, Rechtsanwälte, in the written procedure and by H. Embacher, Rechtsanwalt, in the oral procedure,

* Language of the Case: German.

the respondent, by B. Gass, Rechtsanwalt, at the hearing,

the United Kingdom, by S. J. Hay of the Treasury Solicitor's Department, acting as Agent, in the written procedure, and by M. C. L. Carpenter of the Lord Chancellor's Department, acting as Agent, in the oral procedure,

the Government of the Italian Republic, by O. Fiumara, avvocato dello Stato, acting as Agent, in the written procedure,

the Commission of the European Communities, by J. Pipkorn and S. Pieri, acting as Agents, in the written procedure, and by J. Pipkorn, acting as Agent, in the oral procedure,

after hearing the Opinion of the Advocate General delivered at the sitting on 4 February 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

- 1 By order of 20 December 1984, which was received at the Court on 24 January 1985, the Bundesgerichtshof 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 (hereinafter referred to as 'the Convention') a question concerning the interpretation of the third paragraph of Article 17 of the Convention.

- 2 The question arose in a dispute between Crédit lyonnais, a bank, and Mr Anterist concerning the performance of a contract of guarantee.
- 3 By an agreement of 16 May 1967, Mr Anterist, who resides in Saarbrücken (Federal Republic of Germany), stood surety for the liabilities of Anterist & Schneider Sàrl, a company with limited liability whose registered office is in France, to Crédit lyonnais, which was represented by its branch in Forbach, which is within the jurisdiction of the court of Sarreguemines (France). The terms of that agreement, which were set out on a printed form provided by the bank, included a clause providing that: 'the court within whose jurisdiction that branch is situated shall have exclusive jurisdiction to adjudicate upon all matters concerning the performance of this agreement, irrespective of who is the defendant'.
- 4 Since Anterist & Schneider was unable to pay its debt to the bank when it fell due, Crédit lyonnais brought an action against Mr Anterist in the Landgericht [Regional Court] Saarbrücken for performance of the contract of guarantee. Mr Anterist challenged the jurisdiction of the Landgericht on the ground that the guarantee conferred exclusive jurisdiction on the court of Sarreguemines. The Landgericht upheld Mr Anterist's arguments. On appeal by Crédit lyonnais, the Oberlandesgericht [Higher Regional Court] took the view that the clause in question was advantageous only to Crédit lyonnais and was therefore to be regarded as having been agreed for the benefit of that party alone within the meaning of the third paragraph of Article 17 of the Convention. Consequently, the Oberlandesgericht quashed the Landgericht's judgment and remitted the case to that court. Mr Anterist then lodged an appeal on a point of law with the Bundesgerichtshof in which he sought to have the Landgericht's judgment restored.
- 5 The Bundesgerichtshof considers that the Oberlandesgericht's decision is by implication based on the view that any agreement conferring jurisdiction on the courts of the State in which one of the parties is domiciled must be regarded as having been concluded for the benefit of that party alone within the meaning of the third paragraph of Article 17 of the Convention.

- 6 Since an interpretation of the Convention is necessary in order to determine whether that conclusion is well founded, the Bundesgerichtshof has referred the following question to the Court for a preliminary ruling:

'Is an agreement conferring jurisdiction to be regarded as "concluded for the benefit of only one of the parties" within the meaning of the third paragraph of Article 17 of the Convention where all that is established is that the parties have effectively agreed, in accordance with the first paragraph of Article 17, that a court or the courts of the Contracting State in which that party is domiciled are to have international jurisdiction?'

- 7 Mr Anterist takes the view that the question submitted for a preliminary ruling should be answered in the negative. In order to determine whether an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, it is necessary to ascertain the intention of the parties. That intention must be reflected in the wording of the clause. As an example of the kind of clause covered by the third paragraph of Article 17 of the Convention, Mr Anterist refers to a clause entitling one of the parties to sue the other party either in the court of the latter's domicile or in the court of his own domicile whereas he himself may be sued only in the court of his own domicile. Mr Anterist then argues that an affirmative answer to the question submitted would be contrary to the scheme of Article 17 of the Convention. The exception provided for in the third paragraph of Article 17 would then become the rule since in practice most jurisdiction clauses confer jurisdiction on the court of the domicile of one of the parties. Moreover, such a solution would lead to disputes arising from the same contractual relationship being scattered between the courts of different States, which is precisely what the first paragraph of Article 17 of the Convention is meant to avoid. Finally, even if the question submitted were given an affirmative answer in principle, exceptions would have to be permitted since the advantage referred to in the third paragraph of Article 17 must be exclusive. The advantages which the jurisdiction clause might have for the other party would have to be assessed with reference to the applicable national law, which would create considerable uncertainty with regard to the applicability of the third paragraph of Article 17 in each individual case.

- 8 *Crédit lyonnais*, which confined itself to submitting oral argument, takes the view that the question referred to the Court should be answered in the affirmative. From the choice of the court of the domicile of one of the parties it would always be possible to draw the conclusion that the jurisdiction agreement was concluded

for the benefit of that party alone owing to the practical advantages which it gained from that choice (time saved, knowledge of national law, language, choice of lawyer).

9 The United Kingdom considers that the question submitted for a preliminary ruling should be answered in the negative. The opposite solution would render the first paragraph of Article 17 of the Convention wholly ineffective. The most usual jurisdiction clauses confer exclusive jurisdiction on the courts of the State in which one party, but not the other, is domiciled. If proceedings are instituted by the party domiciled in the State on whose courts the jurisdiction clause confers jurisdiction, that party would be able to evade the rule concerning exclusive jurisdiction laid down in the first paragraph of Article 17 by relying on the third paragraph thereof. If it is the other party who institutes proceedings, the first paragraph of Article 17 would admittedly require it to commence them in the court of the defendant's domicile but the application of the general rule in Article 2 of the Convention would lead to the same result. In such cases the jurisdiction clause would be otiose, as would the first paragraph of Article 17, which confers exclusive jurisdiction on the court designated in the clause.

10 The United Kingdom therefore suggests that the third paragraph of Article 17 of the Convention should be interpreted as applying only to clauses indicating the court or courts in which one of the parties must institute proceedings without specifying the court or courts with jurisdiction to hear and determine proceedings instituted by the other party. The third paragraph of Article 17 is precisely intended to prevent proceedings instituted by the latter party from being regarded, as a result of the application of the first paragraph of Article 17, as falling within the exclusive jurisdiction of the court or courts designated to hear and determine proceedings instituted by the other party.

11 The Government of the Italian Republic suggests that the answer to the question submitted for a preliminary ruling should be that the designation of the court of the domicile of one of the parties may be evidence of that party's exclusive interest in the clause conferring jurisdiction but not necessarily conclusive evidence. The national court before which the case is brought must determine, on the basis of all the information available, whether the clause was also agreed in the interests of the other party, even if they are only secondary.

- 12 In the Commission's view, the question referred to the Court should be answered in the affirmative. The third paragraph of Article 17 of the Convention should be interpreted so as to restrict the scope of the first paragraph of that article, which constitutes an exception to the general rules on jurisdiction laid down in Articles 2, 5 and 6 of the Convention. The fact that jurisdiction is conferred on the courts of the place where one of the parties is domiciled allows the presumption to be made that the jurisdiction clause was agreed for the benefit of that party only, within the meaning of the third paragraph of Article 17. Any jurisdiction clause which departs from the general principle laid down in Article 2 of the Convention, which favours the defendant, should be presumed to be for the benefit of the plaintiff within the meaning of the third paragraph of Article 17.
- 13 It should be pointed out in the first place that Article 17 of the Convention, which appears in Section 6 of Title II headed 'Prorogation of jurisdiction', allows the parties, within the limits laid down by the second paragraph of that provision, to choose by mutual agreement a court or the courts of a Contracting State. The parties may thus confer jurisdiction on courts which would not have jurisdiction under the general or special provisions of the Convention or exclude the jurisdiction of courts which would normally have jurisdiction under those rules. According to the first paragraph of Article 17, the jurisdiction of a court or courts designated by a jurisdiction clause is exclusive, whilst the third paragraph of that article maintains the right of the party for whose benefit the clause was agreed to institute proceedings in any other court having jurisdiction under the Convention.
- 14 Since Article 17 of the Convention embodies the principle of the parties' autonomy to determine the court or courts with jurisdiction, the third paragraph of that provision must be interpreted in such a way as to respect the parties' common intention when the contract was concluded. The common intention to confer an advantage on one of the parties must therefore be clear from the terms of the jurisdiction clause or from all the evidence to be found therein or from the circumstances in which the contract was concluded.
- 15 Clauses which expressly state the name of the party for whose benefit they were agreed and those which, whilst specifying the courts in which either party may sue the other, give one of them a wider choice of courts must be regarded as clauses

whose wording shows that they were agreed for the exclusive benefit of one of the parties.

16 The designation of a court or the courts of the Contracting State in which one of the parties is domiciled is not sufficient in itself, having regard to the wide variety of reasons which may have led to the choice of such a clause, to support the conclusion that the common intention of the parties was to confer an advantage on that party.

17 It follows from those considerations that the answer to the question submitted by the Bundesgerichtshof must be that an agreement conferring jurisdiction is not to be regarded as having been concluded for the benefit of only one of the parties, within the meaning of the third paragraph of Article 17 of the Convention, where all that is established is that the parties have agreed that a court or the courts of the Contracting State in which that party is domiciled are to have jurisdiction.

Costs

18 The costs incurred by the United Kingdom, the Government of the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 question referred to it by the Bundesgerichtshof by order of 20 December 1984 hereby rules:

An agreement conferring jurisdiction is not to be regarded as having been concluded for the benefit of only one of the parties, within the meaning of the third paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction

and the Enforcement of Judgments in Civil and Commercial Matters, where all that is established is that the parties have agreed that a court or the courts of the Contracting State in which that party is domiciled are to have jurisdiction.

Everling

Joliet

Due

Galmot

Kakouris

Delivered in open court in Luxembourg on 24 June 1986.

P. Heim

U. Everling

Registrar

President of the Fifth Chamber