EUROPEAN CASE LAW ON THE JUDGMENTS CONVENTION

Edited by

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L319/9), which came into force according to the Federal Law (BGBl.) (1996) 448 on 1 September 1996, and which is almost identical to the Brussels Convention amended according to the Spanish/Portuguese Accession Convention of 1989.

A special internal implementing law was not enacted in Austria: scholars and courts qualify it as a self-executing State Treaty.

In its legal rules on international procedure (Art. 79, ss EO), the national Austrian Law on Execution had already largely been adapted to the procedure of recognition and execution of Title III (Recognition and Enforcement) of the Lugano Convention by an amendment of 1995.

Brussels Convention 1968

In fulfilment of its obligation as a member of the European Union according to Art. 220 of the E.C. Treaty, Austria will also become party to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 in accordance with the Austria/Finland/Sweden Accession Convention of 1996 (AB1 EG (1997) C15/1 ss).

The internal ratification will be prepared for winter 1997–98. Thus, it is most likely that the Brussels Convention will enter into force in Austria in the year 1998.

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BELGIUM

Marta Pertegás Sender and Patrick Wautelet*

A. LEGAL SYSTEM

Courts

The judicial system is organized according to the law of 10 October 1967, enacting the new Code of Civil Procedure. Within the judicial system, there are four levels of ordinary Courts.

Belgium is divided into over 200 cantons, 26 judicial districts and 10 provinces. In each canton there is a Justice of the Peace and a Police Court. These are the so-called 'inferior Courts'. The Justice of the Peace has *general* jurisdiction for small civil and commercial claims not exceeding 75000 Belgian francs. This general jurisdiction is residuary, in that it does not encompass the specific grounds of jurisdiction granted to higher courts. The Justice of the Peace also has *exclusive* jurisdiction over a variety of specific cases regardless of the amounts involved, for example, disputes concerning real property and maintenance.

The 'intermediate Courts' are to be found in each of the 26 judicial districts: the Court of First Instance, the Commercial Court, the Labour Court and the District Court. The Court of First Instance has *general* jurisdiction. This court may hear all claims which have not been specifically reserved to other courts. In addition, the Court of First Instance has *exclusive* jurisdiction in several specific areas, for example, *enforcement of foreign court decisions and awards*. In case of urgency, the president of the court can grant *provisional measures*

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in summary proceedings. Finally, the Court of First Instance may hear cases which are brought to it on appeal from a Justice of the Peace. A decision of the Court of First Instance in first resort can be challenged before the Court of Appeal.

The Commercial Court has *general* jurisdiction in matters relating to commercial litigation. When the dispute concerns the so-called 'acts of trades' between merchants (defined as individuals or companies who earn a living through acts of trade), this court can exercise jurisdiction. The Commercial Court has *exclusive* jurisdiction in some cases, irrespective of whether the above mentioned conditions are fulfilled (maritime disputes, bankruptcy proceedings, claims relating to bills of exchange and promissory notes). The Commercial Court may also hear appeals against decisions by the Justice of the Peace when both claimant and defendant are merchants.

The president of the court has the same power as the president of the Court of First Instance, to grant provisional measures in cases deemed to be urgent.

The Labour Court has jurisdiction for matters relating to individual labour law and to disputes on social security legislation. The president of the court also has jurisdiction in summary proceedings. One may appeal against the decisions of the Labour Court to the Labour Court of Appeal.

The District Court adjudicates jurisdiction conflicts between the intermediate courts.

At a higher level one finds the appellate courts: the Court of Appeal and the Labour Court of Appeal. Appeals against decisions by the Court of First Instance or the Commercial Court may be brought before the (general) Court of Appeal. Appeals against decisions by the Labour Courts must be brought before the Labour Court of Appeal.

At the top of the hierarchy there is one supreme Court, the Court of Cassation. This court reviews decisions rendered in last instance. The Court of Cassation only deals with the correct application of the law. It does not reconsider the facts that have been established in earlier proceedings. The court may reject the request for review, or it may quash the lower court decision if it finds that the court improperly applied the law. In this case, the Court of Cassation will refer the case back to another court of the same level as the court which rendered the decision on appeal. The lower court is free not to follow the Court of Cassation, but its decision can then be brought again before the Court of Cassation. After a second review, the decision of the Court of Cassation is binding.

As a general rule, Belgian courts are not bound by decisions rendered by other, even superior, courts. Even the judgments of the Court of Cassation do not possess legal binding power. However, because of the prestige and expertise of the Court of Cassation, judges in practice most often apply the law as it is stated by that court. Appellate decisions are equally often taken into consideration.

B. IMPLEMENTATION OF THE CONVENTIONS

The Belgian legal order is a monist system. Once an international treaty has been approved by Parliament, it becomes part of Belgian law, without there being any need to implement it. The treaty's provisions will be directly applicable in the Belgian legal order. Since 1971, treaties even prevail over national legislation, the Constitution included. Therefore, in the event of a conflict between national statutory provisions and a treaty, the provisions of the treaty will prevail and the courts will have to apply the treaty provisions.

The European Judgments Convention was first approved by the Act of 16 February 1971, which entered into force on 1 February 1973. Subsequent changes to the Judgments Convention were only gradually approved in Belgium. The text, as amended by the Convention of 9 October 1978 on the accession of the United Kingdom and by the Convention of 25 October 1982 on the accession of Greece, was ratified by the Act of 21 August 1986. The latest version, resulting from the accession of Spain and Portugal (Convention of 26 May 1989) was finally accepted by the Parliament in January 1997 and entered into force on 1 October 1997. At the same time, Belgium ratified the Lugano Convention. These two treaties entered into force on 1 October 1997. Belgium has a particularly bad record of implementing international treaties. The Ministry of Foreign Affairs should realize the importance of keeping up with the obligations deriving from being a member of the international legal community.

C. OVERVIEW OF CONVENTION CASE LAW

Belgian Courts apply the Convention almost on a daily basis. More than 300 decisions have been published, and this probably represents only the tip of the iceberg. Most of these decisions were rendered by lower courts or courts at the appellate level. The Court of Cassation has only been called on in a limited way to control the application of the Convention by the lower courts. This does not mean, however, that all these decisions are equally important. In many cases, they only apply the Convention's basic principles as interpreted by the European Court of Justice. Arts 5(1) and 17 are among the provisions the courts most frequently apply. One striking conclusion from the compiling of the case law is that Belgian courts are generally eager to assert their jurisdiction over cases. To that end, they will eventually stretch the meaning of some of the Convention's rules, or even disregard a valid foreign jurisdiction clause.

Reports on Belgian case law based on the Convention are regularly published. The most important one is written by M. Fallon and H. Born.

D. CASES

ARTICLE 1

"1. . . . rights in property arising out of a matrimonial relationship . . . "

Case principle

Maintenance is not excluded.

Case

1 Court of Appeal of Brussels, 19 September 1995, Actualités Divorce (1996) 57

Facts

Both parties, husband and wife, were French nationals domiciled in Belgium. The husband brought divorce proceedings before the 'Tribunal de Grande Instance' of Paris. Some months later, while the divorce proceedings were still pending in France, his wife made a request to the Belgian judge for a provisional sum from her husband for her maintenance and that of their son. The judge of first instance declared that he had jurisdiction to grant provisional measures. On appeal, the husband claimed that the Belgian judge had no jurisdiction.

Judgment

The Court of Appeal, referring to the judgment of the Court of Justice in *De Cavel II*, reminded that maintenance obligations fell within the scope of 'civil matters' as understood under Art. 1 of the Convention. More specifically, the Convention was applicable to provisional measures with respect to maintenance, even when those were requested in the framework of divorce proceedings which were themselves excluded from the material scope of the Convention. In short, the applicability of the Convention had to be determined with respect to the specific action introduced before the judge, even when it was accessory to an action excluded from the Convention under Art. 1, para. 2(1).

Comment

Another judgment of the Court of Liège (23 March 1981, Revue Trimestrielle Droit Familial (1982) 450) wrongly stated that provisional measures relating to maintenance claims in the framework of divorce proceedings did not fall within the scope of the Convention.

Owing to the limited scope of the Convention, a problem will arise when the measures requested by the plaintiff have a mixed nature: some of them relate to property rights and others are closely linked to the status of the persons (for example, custody of children). This occurred before the Court of First Instance of Verviers (7 May 1986, Revue Trimestrielle Droit Familial (1988) 467), where the judge stated that the Convention was not applicable at all.

ARTICLE 1, PARAGRAPH 2(2)

" . . . proceedings relating to the winding-up of insolvent companies . . . "

Case principle

A debt claimed following bankruptcy, solely for the purpose of claiming against the bankrupt's estate, held to derive directly from the bankruptcy.

Case

Court of Cassation, 5 October 1982, Pasicrisie Belge (1982) I 183 2

Facts

The Court of Cassation upheld the judgment appealed from the Labour Court of Antwerp, on 19 February 1980. One party worked as commercial manager for the Belgian subsidiary of a Dutch company, which was declared bankrupt by the judge of Arnhem (The Netherlands), where the corporate seat of the company was located. The ex-worker then sued the trustee in bankruptcy before the Belgian judge to claim payment of arrears and compensation for termination of contract.

Judgment

The judge considered that the action as formulated by the plaintiff derived directly from the bankruptcy proceedings. The action had been introduced after the bankruptcy had been declared and the bankruptcy trustee appointed, for the sole purpose of having it accepted as a claim against the company's assets. The action was therefore considered a direct result of the declaration of bankruptcy and accordingly excluded from the scope of application of the Convention. On the basis of the bilateral Convention between The Netherlands and Belgium, the Dutch judge had exclusive jurisdiction to deal with the case.

ARTICLE 1, PARAGRAPH 2(3)

"Social security . . ."

Case principle

Convention inapplicable to social security authorities' actions to recover.

Case

3 Court of Cassation, 30 December 1985, Pasicrisie Belge (1985) 76

Facts

In a conflict between the Belgian Social Security authorities and two ex-workers, the legal problem at hand was whether the service abroad of the appealed judgment had been effected correctly in relation to the workers residing in The Netherlands. According to the writ, the judgment was served in accordance with Art. IV of the Protocol annexed to the Convention.

Judgment

The court recalled that the Convention was not applicable to social security matters. Applying Art. 10 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extra-judicial documents in civil or commercial matters, the court concluded that service by registered letter to the foreign residence of the person was a valid way of serving abroad, as The Netherlands had not made a reservation to this method of service abroad.

ARTICLE 5(1)

" . . . obligation in question . . . "

Case principle

1. For determination of place of performance, the court must first determine whether the obligation of compensation sued on is independent or replaces a broken contractual promise.

Case

4 Court of Cassation, 19 January 1984, Journal des Tribunaux (1984) 637

Facts

The dispute concerned the alleged wrongful termination of a contract whereby a German manufacturer granted an exclusive concession to a Belgian distributor. On the basis of the Belgian 1961 Act on the unilateral termination of contracts of distribution, the plaintiff claimed fair compensation in the absence of reasonable notice of termination, and additional compensation on the basis of Art. 3 of the Act. The German manufacturer contested the jurisdiction of the Belgian court.

Judgment

The Court of Cassation explicitly referred to the European Court's ruling in the case *de Bloos v Bouyer*. The court held that the two compensations were separate claims and that jurisdiction therefore had to be decided distinctly for the two. The first compensation was not an autonomous obligation, but under Belgian law an obligation replacing the unperformed contractual obligation. This compensation claim, which only arose if the requisite notice was not given, was intended to make good the loss arising from the *omission to give sufficient notice*. Since the obligation to give a period of notice was a manifestation of the defendant's fundamental obligation to respect the plaintiff's right in the area of the exclusive distributorship, the obligation must be located at the place where the unperformed obligation had to be performed. The Court of Cassation held further that the second obligation *was* an independent contractual obligation. While Belgian law classified the first of those two obligations as merely replacing the unperformed contractual obligation, the second obligation was seen as an independent contractual obligation. The place of performance of this independent obligation determined jurisdiction.

Comment

The Court of Cassation followed exactly the reasoning prescribed by the Court of Justice (for a similar ruling: *Knauer & Co. Machinenfabrik v Callens*, Court of Cassation, 6 April 1978, Pasicrisie Belge (1978) I 871). As a consequence, the place of performance of the two obligations can be located in two different places, giving rise to two different jurisdictions. To avoid this problem, one Court of Appeal (Appeal Court of Mons, 3 May 1977, Pasicrisie Belge (1978) II 8, dealing with the aftermath of the *de Bloos v Bouyer* case after the European Court gave its ruling) advocated that Art. 22 should be used to grant Belgian courts' jurisdiction over the two kinds of compensation. The Court of Appeal held that the court which has jurisdiction to decide on the first compensation also had jurisdiction to decide on the second, independent compensation because the two were related actions within the meaning of Art. 22 of the Convention. This course of action cannot be followed, however, because Art. 22 does not *confer* jurisdiction over related actions.

See, for other instances where the multiplicity of obligations led to a multiplicity of jurisdictions and hence to a division of the claims: Court of Appeal of Mons, 3 May 1977, Pasicrisie Belge (1978) II 8; Court of Appeal of Brussels, 21 June 1978, Journal des Tribunaux (1978) 685; Court of Appeal of Brussels, 25 June 1982, Tijdschrift voor Belgisch Handelsrecht (1982) 66; Commercial Court of Liège, 22 November 1984, Jurisprudence de Liège (1985) 111; and Commercial Court of Liège, 6 January 1986, Annales de Droit de Liège (1986) 275. This problem does not occur when the different obligations must be performed in the same country: Labour Court of Appeal, 5 January 1982, Jurisprudence de Liège (1983) 241.

Case

5 Court of Appeal of Brussels, 30 April 1987, Annales de Droit de Liège (1988) 90

Facts

A Belgian contractor which had been chosen to build a dam, ordered four turbines from a German manufacturer. One of the turbines delivered appeared to be defective. The contractor claimed damages for the repair works he had to carry out on the fourth turbine.

Judgment

The court held that it had jurisdiction on the basis of Art. 5(1) of the Convention. The contractual obligation on which the proceedings were based was not the obligation to pay damages, but the obligation it replaced, *i.e.* the duty to deliver goods conforming to the contract. The place of performance of this obligation was determined pursuant to the law governing the obligation at issue and in accordance with the rules on the conflict of laws of the court seised. The court applied the Hague Convention of 1955, which led to the application of the Uniform Sales Law of 1964, as the law of Germany, the country of the seller. As the parties had not presented any arguments on the Uniform Sales Law, the court stayed the proceedings to give them that possibility.

Comment

This judgment is part of a long line of case law where Belgian Courts use the provisions of other international instruments (the 1955 Hague Convention and the 1964 Uniform Sales Law, or, alternatively, the 1980 UN Convention on the International Sale of Goods) to interpret Art. 5(1) of the Convention. See Court of Appeal of Mons, 9 March 1983, Tijdschrift voor Belgisch Handelsrecht (1985) 386; Court of Appeal of Mons, 14 May 1987, Tijdschrift voor Belgisch Handelsrecht (1988) 303; Court of Appeal of Mons, 2 March 1994, Tijdschrift voor Belgisch Burgerlijk Recht (1996) 134; Commercial Court of Brussels, 2 September 1981, Belgisch Rechtspraak in Handelszaken (1982) 546; Commercial Court of Gent, 22 November 1985, Tijdschrift voor

Gentse Rechtspraak (1986) 10; Commercial Court of Liège, 17 April 1986, Tijdschrift voor Belgisch Handelsrecht (1988) 311; Commercial Court of Hasselt, 21 December 1993, Rechtskundig Weekblad (1995–96) 1350. Sometimes, the Convention is applied together with the Rome Convention on the law applicable to contractual obligations: Commercial Court of Antwerpen, 29 June 1994, Tijdschrift voor Belgisch Handelsrecht (1995) 429 (documentary credit).

Case principle

2. **If more than one obligation is in issue, the principal obligation is the one to be taken for place of performance (*Shenavai* Case 266/85 applied).**

Case

Court of Appeal of Brussels, 16 October 1987, Jurisprudence de Liège, Mons, Bruxelles (1988) 50 **6**

Facts

The plaintiff (defendant in appeal) brought an action concerning the unilateral termination of a contract whereby the defendant had appointed the plaintiff to be exclusive distributor of his products in Belgium. The plaintiff claimed damages for the alleged wrongful breach of the contract by the defendant. Further the plaintiff asked for payment of sales commission which he claimed the defendant owed him.

Judgment

Faced with two different obligations (payment of damages and of commission), each performable in different states, the court decided that the obligation forming the subject matter of the dispute was the obligation to pay the commission. The other obligation, *i.e.* to pay damages for wrongful breach of contract, was only 'the logical consequence of the main obligation arising out of the contract', being the obligation concerning the payment of commission.

Comment

When multiple obligations form the subject matter of the plaintiff's claim, the place of performance of each separate obligation may differ. To concentrate and rationalize jurisdiction, the national court should, according to the *Shenavai v Kreischer* ruling, be guided by the maxim *accessorium sequitur principale* (see for an application of this doctrine: Commercial Court of Brussels, 29 March 1988, Tijdschrift voor Belgisch Handelsrecht (1990) 800). It is sometimes difficult to appraise which obligation is to be considered as the main obligation. The Court of Appeal held that the obligation to pay commission was the main obligation. This can be criticized, for the obligation to pay damages is, as such, *independent* of the obligation concerning the payment

of commission. See for similar problems: Court of Appeal of Brussels, 30 June 1987, Tijdschrift voor Belgisch Burgerlijk Recht (1988) 557.

It can also be regretted that the court did not bother to inquire upon the applicable law, and assumed that the main obligation was to be performed in Brussels. See, for other instances where courts neglected to establish which national law was applicable to determine the place of performance of the obligation: Commercial Court of Antwerpen, 30 June 1987, Rechtspraak van Haven van Antwerpen (1987) 57; Court of First Instance of Brussels, 28 January 1993, Revue Régionale de Droit (1995) 79; Court of Appeal of Antwerpen, 3 January 1995, Tijdschrift voor Belgisch Handelsrecht (1995) 391 (application of the Convention's rules while the defendant was a Monaco-based company, Monaco not being a Contracting State!).

" . . . the place of performance . . . "

Case principle

1. Agreed place of performance is sufficient and is not subject to Art. 17 formalities.

Case

7 Court of Cassation, 13 November 1981, Arresten Van Het Hof Van Cassatie (1981–82) I 336

Facts

A German had bought, on many occasions, products from a Belgian company. The German buyer had always paid the price into the Belgian bank account of the seller, as required in the seller's invoice. A problem occurred with one of the transactions. The buyer refused to pay. The seller sued him before a Belgian court. The German buyer contested the jurisdiction of the court.

Judgment

The lower court held that it had jurisdiction. The Court of Cassation saw no reason not to uphold this judgment. The court stated that the parties had agreed that the buyer would pay the price directly into the seller's bank account. Referring to the ruling of the European Court in the case *Zelger v Salinitri*, the Court of Cassation held that where parties agreed on the place of performance of a contractual obligation, that agreement would give rise to jurisdiction under Art. 5(1) of the Convention if it was valid according to the national law applicable to the contract by virtue of private international law rules. The court added that such an agreement did not have to fulfil the formal requirements laid down in Art. 17.

Comment

The same reasoning has been followed in a great number of Belgian judgments. See, *inter alia*: Court of Appeal of Liège, 6 November 1982, Tijdschrift voor Belgisch Handelsrecht (1984) 25; Court of Appeal of Gent, 9 June 1988, Tijdschrift voor Gentse Rechtspraak (1988) 105; Court of Appeal of Brussels, 26 March 1991, Jurisprudence de Liège, Mons et Bruxelles (1992) 1389; Court of Appeal of Antwerp, 3 January 1995, Tijdschrift voor Belgisch Handelsrecht (1995) 387; Commercial Court of Liège, 22 November 1984, Jurisprudence de Liège (1985) 111; Commercial Court of Brussels, 22 February 1985, Journal des Tribunaux (1985) 491; Commercial Court of Brussels, 13 April 1989, Tijdschrift voor Belgisch Handelsrecht (1991) 430.

However, if the performance agreement is purely for jurisdiction, Article 17 must be satisfied: *MSG v Les Gravières*, Case C–106/95 (ECJ).

ARTICLE 5(3)

" . . . the place where the harmful event occurred."

Case principle

1. Harmful event occurs in place of causative event or damage.

Case

Court of First Instance of Brussels, 14 April 1978, Rechtspraak Van Haven Van Antwerpen (1979–80) 276 **8**

Facts

A Russian ship was sailing on the Escaut with a Belgian pilot on board, as prescribed by Belgian law, when it collided with a Liberian ship, which was also guided by a Belgian pilot. The collision occurred in the Dutch part of the Escaut. The Liberian company claimed damages from the Belgian state, arguing that the collision was the fault of the pilots.

Judgment

The court held that it had jurisdiction on the basis of Art. 5(3) of the Convention, even though it acknowledged that the harmful event occurred in the territory of The Netherlands. The court argued that both parties had not objected to the jurisdiction of the court.

Case principle

2. Harmful event, in purchase of goods in breach of copyright, occurs where the buyer is subsequently prevented from marketing the goods.

Case

9 Commercial Court of Liège, 4 January 1983, Journal des Tribunaux (1983) 557

Facts

The plaintiff, a Belgian company, bought a large quantity of toys from the defendant, a Dutch company. The toys proved to be illegal copies of a trade mark-protected toy. The rightful owner of the trade mark, a German company, asked the plaintiff to stop selling the counterfeited toys in Belgium. The plaintiff sued the defendant, claiming that the latter had failed to fulfil its contractual duty to provide merchantable goods, and had breached its duty of care towards the plaintiff.

Judgment

The court examined the two claims separately. Concerning the tortious breach of duty of care, the court decided that the place of occurrence of the causal event was located in Belgium, since it was there that the plaintiff was prevented from selling the products.

Comment

It would have been more simple to locate the place where the damage occurred than arbitrarily to pinpoint Belgium as the place of the causal event. The decision to sell the goods had, after all, been taken in The Netherlands. Further, an action based on tort cannot be related to a contract between the same parties.

Case principle

3. Wrongful interference with contract held to occur both where interference took place as causative act and where effects occurred as damage.

Case

10 Commercial Court of Brussels, 4 June 1985, Tijdschrift Voor Belgisch Handelsrecht (1986) 393

Facts

A German company had appointed a Belgian company by contract to be its exclusive distributor in Belgium. When the contract was terminated, the parties agreed that the claims of the Belgian distributor against its customers would be transferred to the German manufacturer. The latter omitted to notify the customers that it had become their creditor. A year later, the Belgian distributor concluded another agreement with a Belgian factoring company, whereby the distributor assigned once again all its rights against the

customers. When the factoring company started collecting money from the Belgian customers, the German company notified the customers that they were to pay it and not the Belgian factor. The customers stopped all payments pending the trial. The Belgian factor sued the German company.

Judgment

The court decided that the problem was one of tortious liability, and that both the causal event (the notification by the German company to the customers) and the damage (the fact that the customers refused to pay the factor) took place in Belgium.

Comment

The court located the harmful event in Belgium where the notification was sent from Germany. In respect of damage, this is too wide an interpretation of the concept of 'harmful event' *i.e.* the non-payment by the customers, occurred in Belgium, but it can be questioned whether the damage could be located at the central office of the Belgian company? Should the damage not be located at the place where the customers refused to pay, *i.e.* at their offices?

ARTICLE 5(5)

" . . . branch, agency or other establishment . . : "

Case principle

A mere contact point for negotiating parties for a short duration is not a branch, agency or other establishment within the meaning of Art. 5(5).

Case

Court of Appeal of Mons, 21 February 1995, Revue Régionale de Droit (1995) 556 11

Facts

C.M.I., a Belgian undertaking, had asked a French company to clean-up an industrial plant in Belgium. The French company, which had an office in Belgium, sub-contracted part of the work to the plaintiff, a company based in Belgium. The subcontract was concluded after an exchange of telexes between the plaintiff, the Belgian office of the French company and the French company. The plaintiff billed the Belgian office for the works it performed, but the French company refused to pay.

Judgment

The court held that it had no jurisdiction to decide the case. It based its reasoning on Art. 5(1) and (5) of the Convention. Concerning Art. 5(5), the court proceeded to a detailed analysis of the factual situation. Referring to the definition given by the Court of Justice in the case of *Somafer v Saar-Ferngas*, the court indicated first of all that the French company had rented an office in Belgium for a very short period of time (three months), that during this time it used office equipment of the owner of the building, that the Belgian 'place of business' was at most a contact point for possible commercial partners and that third parties could in no way confuse the outlet with a branch, agency or establishment. Furthermore, the court held that the dispute was in no way related to the exploitation of the alleged 'branch'. No commitments had been undertaken by the Belgian office on behalf of the French parent body since the French company had directly accepted the offer of the Belgian plaintiff.

ARTICLE 6(1)

" . . . one of a number of defendants . . . "

Case principle

There must be required connection between claims.

Case

12 Court of First Instance, 11 October 1991, Tijdschrift Voor Belgisch Burgerlijk Recht (1992) 531

Facts

The plaintiff travel agency sued three defendants. Two of them, domiciled in Belgium, had booked a cruise through the travel agency and paid an advance of approximately one sixth of the total price. The third defendant was the shipping company which had organized the cruise and whose corporate seat was in France.

As a result of a fire during the cruise, many activities were cancelled. The two passengers refused to pay the total amount of the cruise price. This resulted in losses for the travel agency which had already paid the whole amount invoiced by the shipping company for the two passengers.

Judgment

The French company questioned the jurisdiction of the Belgian judge, arguing that Art. 6(1) could only be applied when there was a connection between the

co-defendants. The judge considered that each judge must determine on the basis of his national law whether this connection existed. The actions against the different defendants were based on the same legal fact, that is, the cruise booked by the two customers. Furthermore, there was a contractual link between the three defendant parties because the travel agency had booked the cruise on behalf of its customers and the latter refused to pay due to faults which could be attributed in the first place to the shipping company. Art. 6(1) was therefore applicable.

Comment

Although the judge wrongly stated that the notion of co-defendant had to be interpreted in accordance with the *lex fori*, the requirements he applied seem to correspond to those defined by the Court of Justice in the *Kalfelis* case.

ARTICLE 6(2)

" . . . unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case."

Case principle

1. **Article 6(2) governs third party international jurisdiction even where the main action is non-international and the Convention consequently inapplicable thereto.**

Case

Commercial Court of Antwerpen, 17 January 1995, Tijdschrift Voor Belgisch Handelsrecht (1995) 521 **13**

Facts

A Dutch company (A) had ordered a fork-lift truck from an English company. The fork-lift truck did not fulfil the expectations of A, who decided to sell it to a Belgian company with its corporate seat in Genk (B). Although the contract provided the possibility for A to revoke the sale, B had in the meantime sold the truck to C, which was negotiating the truck's sale to a company located in Brussels. A repossessed the truck and C sued B for compensation for loss through non-delivery of the truck. B then brought an action on a guarantee against A, as an attempt to join the Dutch company in the proceedings.

Judgment

The judge examined the forum clause contained in the general conditions to which the agreement between A and B vaguely referred. The conditions of Art. 17 were not met. The judge considered whether he could accept jurisdiction on the basis of Art. 6(2). Having found that the proceedings in Antwerpen against B had not been instituted solely with the object of removing the third party A from the jurisdiction of the court which would be competent in this case (the action of C against B had no international element and was therefore submitted to the Belgian rules of territorial jurisdiction), the judge held that Art. 6(2) was applicable to attract A to the Belgian courts.

Case principle

2. Article 17 agreements between *plaintiff* and third party held to prevail over Art. 6(2).

Case

14 Commercial Court of Liège, 10 March 1993, Tijdschrift Voor Belgisch Burgerlijk Recht (1995) 216

Facts

The defendant Belgian company had signed a contract with a French company (the contractor) with its corporate seat in Mulhouse. The contractor had to build an automatic installation to feed two high ovens with coal. Some works were subcontracted to another French company (the subcontractor).

A dispute arose between the defendant and the French companies as to payment and proper performance of the work. In a claim by the French subcontractor against the defendant Belgian company for payment for work carried out and compensation for delay, the defendant sought to bring in the French contractor as a third party under Art. 6(2). The French contractor resisted Belgian Art. 6(2) jurisdiction on the ground of a French jurisdiction agreement between it and the plaintiff French subcontractor.

Judgment

The judge investigated the formal conditions of validity of the forum clause. He held that the clause was valid and therefore declared that he had no jurisdiction over the claim between the two French companies. On the other hand, the judge accepted jurisdiction in the action between the subcontractor and the Belgian company and, before deciding on merits, waited for the report of the expert who had already been designated in interlocutory proceedings.

Comment

The judge confirmed that Art. 17 prevailed over Art. 6(2) whenever the formal conditions for the existence of a valid forum clause were fulfilled. In his observations on the judgment, Wauters observes that this solution might lead to

undesirable results in some circumstances. For instance, in the present case, it was evident that the judge of the place where the works had been conducted was the best located to decide on the several actions. There was, furthermore, connexity between the action between the subcontractor and the Belgian company (which was decided by the judge in Liège) and the action between the subcontractor and the contractor (which had to be brought before the judge in Mulhouse).

ARTICLE 8, PARAGRAPH 2

" . . . arising out of the operations of the branch, agency or establishment . . . "

Case principle

'Operations' means something more than mere handling of claims.

Case

District Court of Tournai, 18 February 1980, Journal des Tribunaux (1980) 391 **15**

Facts

A car accident had occurred in France between a French citizen, insured by the defendant, a French insurance company, and a Belgian driver. The Belgian driver sued the insurer before the Court of First Instance of Tournai. The French company operated in Belgium through a branch. The French driver had been insured directly by the French company. This company argued that the Court of First Instance had no jurisdiction. The matter was submitted to the District Court.

Judgment

The District Court held that the Court of First Instance had no jurisdiction as the defendant's branch was located in Brussels and not in Tournai. The court applied Art. 8, para. 2 of the Convention and held that the insurer had a branch in Belgium. The decisive element according to the court was that the plaintiff's claim had been handled directly by the Brussels branch, without any intervention of the French insurer.

Comment

This judgment is clearly defective in a number of respects. Article 8, para. 2 is only meant for insurers who are not established in any Contracting State,

which was clearly not the case. It is true that Art. 7 refers to Art. 5(5). The injured party can therefore sue the insurer before the court of the place where the branch, agency or establishment is situated, provided the dispute arises out of the operation of the branch. This will only be the case when the insurance was directly bought from the branch. The fact that the branch was responsible for the processing of the injured party's claim does not mean that the dispute concerns the operation of that branch.

ARTICLE 16(1)(a)

" . . . have as their object . . . "

Case principle

1. Action for authorization to sell an interest in foreign land on behalf of a minor held to fall within exclusive jurisdiction.

Case

16 Court of First Instance of Kortrijk, 20 March 1983, Tijdschrift Voor Notarissen (1983) 174

Facts

A group of Belgian citizens had bought a piece of land in France. One of them died. His part of the property went to his children, who were at that time minors. They all agreed to sell the land. Since minors were involved, parties had to ask a court for authorization to sell without having recourse to a public auction.

Judgment

The court held that it had no jurisdiction since the matter concerned immovable property located in France.

Comment

It can be questioned whether Art. 16 was properly applicable to the dispute. Indeed, the subject matter concerned the specific authorization which was required and not the sale as such. That authorization formed part of the rules protecting minors, something which actually fell outside the Convention's scope.

Case principle

2. Claims for compensation for damage under a lease are included in Art. 16(1).

Case

Court of First Instance of Marche-en-Famenne, 26 February 1987, Tijdschrift Voor Belgisch Burgerlijk Recht (1989) 387 **17**

Facts

A Dutch citizen, owner of a vacation home in Belgium, had rented it to two Dutch persons. During the vacation the house burnt down. The owner was reimbursed by his insurer, who claimed the amount back from the negligent holidaymakers.

Judgment

The court, referring to the European Court's ruling in *Sanders v Van der Putte*, held that disputes between lessors and tenants as to compensation for damage caused by the tenant, were covered by Art. 16. The court saw no reason to make an exception to the rule of Art. 16 on the sole ground that the dispute concerned a lease concluded for a short letting, as had been advocated by the Schlosser Report (but now see Art. 16(1)(b)).

Case principle

3. Contractual aspects of sale of immovables fall outside Art. 16(1).

Case

Court of First Instance of Charleroi, 8 November 1991, Revue Régionale de Droit (1992) 146 **18**

Facts

The plaintiff, a businessman living in Belgium, had sold an office located in Brussels to a Luxembourg company. Following a series of unsuccessful transactions, the buyer was unable to pay the price. In the course of negotiations, the parties agreed to terminate the sale. The plaintiff sued the defendant and claimed damages for the aborted transaction.

Judgment

The court held Art. 16 to be inapplicable. The action was not, as such, concerned with a right *in rem*, but with the termination of a sales contract.

ARTICLE 17, PARAGRAPH 1

" If the parties . . . have agreed that . . . "

Case principle

1. A jurisdiction clause in general conditions is not binding if written in a language which the other party does not understand.

Case

19 Commercial Court of Kortrijk, 26 November 1985, Tijdschrift Voor Belgisch Handelsrecht (1986) 716

Facts

The parties had concluded many contracts of sale in English. Two of those contracts referred to general conditions of sale which were written in Dutch. A dispute arose concerning those two contracts. The general conditions contained a jurisdiction clause.

Judgment

The court decided that a jurisdiction clause appearing in the general purchase conditions of the buyer was not valid if it was written in a language which the seller did not understand. The court underlined that the two contracts had been written in a different language to the conditions.

Comment

The Commercial Court of Verviers followed the same reasoning (Commercial Court of Verviers, 8 March 1984, Jurisprudence de Liège (1984) 310), which is also to be found in the writings of Gothot et Holleaux (*La Convention de Bruxelles*, p. 105, no. 177). The validity of the agreement must be examined exclusively under the conditions of Art. 17. These strict requirements guarantee that parties have agreed on the clause. A court should therefore only disregard a jurisdiction clause when it is sufficiently proven that no agreement was possible due to the language barrier.

Case principle

2. A third party transferee of the business of a party to a jurisdiction agreement is bound by the jurisdiction agreement (extending *Tilly Russ* contracts assignment to transfer of business).

Case

20 Commercial Court of Brussels, 23 January 1986, Tijdschrift Voor Belgisch Handelsrecht (1988) 779

Facts

A Belgian company had ordered some goods from another Belgian company. The order form contained an express reference to the general conditions of sale of the buyer, printed on the back of the order form. One of those

conditions was a jurisdiction clause in favour of Belgian courts. The seller signed and returned the order form. During the performance of the contract, the seller was bought by a French company, which undertook to deliver the goods. During a dispute, the question arose whether the French company was bound by the jurisdiction clause. The defendant argued that since it had not signed the jurisdiction clause, it could not be said to have agreed to it.

Judgment

The court held that according to Belgian law, the defendant French company had succeeded to the rights and obligations of the original seller. The jurisdiction clause was valid between the two original parties, and therefore the third party to the jurisdiction agreement was bound by the jurisdiction clause.

Comment

See also Court of Appeal of Mons, 16 May 1989, Tijdschrift voor Belgisch Handelsrecht (1990) 783. Compare with Commercial Court of Liège, 10 March 1993, Tijdschrift voor Belgisch Handelsrecht (1995) 395—a jurisdiction clause in a contract between the subcontractor and the contractor is a *res inter alios acta* for the prime contractor and this party cannot therefore rely on the clause.

Case principle

3. Application of jurisdiction agreement to transferee is subject to applicable national law on succession of rights and obligations (*Tilly Russ*).

Case

Court of Cassation, 18 September 1987, Tijdschrift Voor Belgisch Handelsrecht (1988) 377 **21**

Facts

A Belgian plaintiff was the holder of a bill of lading issued by the defendant German carrier to a shipper, from whom the plaintiff had purchased goods. Those goods arrived at their destination in a damaged condition. The plaintiff claimed damages before a lower Belgian court. That court, and the appeal Court (Court of Appeal of Gent, 24 June 1985, Tijdschrift voor Belgisch Handelsrecht (1986) 444) declared that they had no jurisdiction on the ground of the jurisdiction clause in favour of German courts contained in the bill of lading. The plaintiff lodged an appeal in Cassation.

Judgment

The Court of Cassation referred to the ruling of the European Court in the case *Tilly Russ* and held that the succession to the shipper's rights and obligations under the bill of lading was governed by Belgian law. Article 91 of the

Zee- en Binnenvaartwet (Law of Maritime and Inland Transport) provides that the rights and obligations of the holder of the bill of lading are not those of the shipper, but are exclusively determined by the actual content of the bill of lading. Since there was no real succession, the defendant could not rely on the jurisdiction clause against the holder.

Comment

This is one of the numerous cases where the question arose whether a jurisdiction clause appearing in the bill of lading can be relied on against the holder of the bill of lading. (See also: Court of Cassation, 15 June 1988, Rechtskundig Weekblad (1988–89) 302; Court of Appeal of Antwerpen, 21 November 1979, Rechtskundig Weekblad (1980–81) 1674; 302; Court of Appeal of Antwerpen, 14 March 1990, Rechtspraak Haven Antwerpen (1991) 120; Court of Appeal of Antwerpen, 28 March 1990, Rechtspraak Haven Antwerpen (1994) 160; Court of Appeal of Antwerpen, 26 September 1995, Rechtspraak Haven Antwerpen (1996) 3; Commercial Court of Antwerpen, 24 June 1980, Rechtspraak Haven Antwerpen (1980–81) 475; Commercial Court of Antwerpen, 16 May 1983, European Transport Law (1985) 82; Commercial Court of Antwerpen, 7 May 1984, European Transport Law (1984) 397; Commercial Court of Antwerpen, 26 February 1985, European Transport Law (1987) 40; Commercial Court of Antwerpen, 30 June 1987, Rechtspraak Haven Antwerpen (1987) 57; Commercial Court of Antwerpen, 23 February 1993, Rechtspraak Haven Antwerpen (1995) 165; Commercial Court of Antwerpen, 16 February 1994, Rechtspraak Haven Antwerpen (1994) 367.) Before the ruling of the European Court in the case *Tilly Russ*, Belgian courts had refused to acknowledge that a jurisdiction clause appearing in a bill of lading could be valid in the relationship between the carrier and the holder of the bill (Commercial Court of Antwerpen, 29 May 1973, Rechtspraak Haven Antwerpen (1973) 250; Commercial Court of Antwerpen, 15 April 1975, Rechtspraak Haven Antwerpen (1975–76) 84). Those courts refused to recognize the supremacy of Art. 17 and held that jurisdiction clauses in favour of foreign courts were not valid. To put an end to this heresy, the Court of Cassation referred the matter to the European Court. This court held that reliance on the jurisdiction clause against the holder is possible under two conditions: first, the jurisdiction clause must be valid as between the carrier and the shipper; and secondly, by virtue of the applicable law, the third party, upon acquiring the bill of lading, must have succeeded to the shipper's rights and obligations. The question of the law applicable to this succession falls outside the scope of the Convention and must therefore be determined by the court seised in accordance with its conflict of law rules. Belgian courts invariably hold that the problem must be solved according to Belgian law. Generally they invoke the public policy character of Art. 91 of the above mentioned Maritime Transport law, which is applicable as soon as the ship sailed from or to Belgium. This provision is meant to give the holder of the bill autonomous rights, in order to protect him against agreements between the shipper and the

carrier. It can be questioned, however, whether Art. 91 excludes the application of any other law with respect to the problem of the succession. Belgian courts do not even bother to examine whether foreign law, the application of which is excluded by the public policy exception, offers the same protection to the holder of the bill of lading. Accordingly, it is submitted that Belgian courts should preferably qualify this provision as being a mandatory provision rather than invoke its public policy character.

" . . . a court or the courts of a Contracting State . . . "

Case principle

It must be clear from the contract that a particular Contracting State's courts have been chosen if Art. 17 is to apply.

Case

Commercial Court of Antwerpen, 12 June 1984, European Transport Law (1986) 238 **22**

Facts

The Belgian plaintiff was the holder of a bill of lading issued by the defendant, an Indian carrier. The ship had been temporarily chartered by the owner to another company. A conflict arose between the owner and the time charterer. The owner ordered the captain to leave the goods at Sharjah instead of Damman, where they should have been delivered. The plaintiff claimed damages because he had to pay another carrier to deliver the goods to Damman. The defendant objected to the court's jurisdiction on the basis of the jurisdiction clause contained in the bill of lading.

Judgment

The court held that the jurisdiction clause could not be upheld on a number of grounds, one of which was that the clause was too vague. The clause read that jurisdiction was given to the court of the 'principal place of business' of the carrier. The court found that it was not clear who was the carrier (the owner or the charterer) and that it was even less clear where the carrier had its principal place of business.

Comment

This illustrates how Belgian courts will assert jurisdiction whenever a dispute involves a ship sailing from or to a Belgian port, even if it means disregarding a valid jurisdiction clause. The principal place of business can indeed easily be

located in most cases. This argument should not be used to torpedo a jurisdiction agreement.

> *" . . . shall have exclusive jurisdiction . . . "*

Case principle

Article 17 excludes national laws on effects of jurisdiction agreements.

Case

23 Commercial Court of Brussels, 20 July 1984, Tijdschrift Voor Belgisch Handelsrecht (1985) 415

Facts

The parties had agreed to submit all litigation to the Courts of Hamburg, Germany. The dispute concerned the alleged wrongful termination of a contract of exclusive distributorship. The defendant argued that Art. 4 of the 1961 Act, which provided that Belgian courts would have exclusive jurisdiction over all litigation concerning the unilateral termination of distribution agreements when the exclusivity covered at least partly the Belgian territory, must yield to a jurisdiction clause.

Judgment

The court decided that the jurisdiction clause prevailed over the Act of 1961: the Act could not prevail over the Convention, which was part of European law and as such enjoyed supremacy.

ARTICLE 17, PARAGRAPH 1(a)

> *" . . . in writing . . . "*

Case principle

1. There is no agreement in writing where both parties contract on their own general conditions containing conflicting jurisdiction clauses.

Case

24 Court of Appeal of Liège, 30 April 1987, Annales de Droit de Liège (1988) 90

Facts

A German seller had sent an offer to the Belgian plaintiff. The latter accepted the offer and referred to his general conditions of sale in his acceptance. The

seller replied and confirmed the sale. The confirmation referred to his own general conditions. The plaintiff finally confirmed his order and referred once again to his conditions. Both sets of conditions contained a jurisdiction clause, one for the German, the other for Belgian courts.

Judgment

The court held that neither of the two jurisdiction clauses were valid. Neither the seller nor the buyer had accepted the other party's general conditions in writing. There was no possibility of tacit acceptance as this was the first time the parties had done business together.

Comment

See also Commercial Court of Liège, 22 November 1988, Tijdschrift voor Belgisch Handelsrecht (1991) 424. In another instance, the Commercial Court of Brussels decided that two jurisdiction clauses eliminated each other. This may be true according to the general *Battle of forms* doctrine of Belgian commercial law. But under the Convention, one has to examine whether one of the two jurisdiction clauses has been the object of an agreement, and this *can* be the case even though both parties work with general conditions of their own (Commercial Court of Brussels, 20 December 1991, Tijdschrift voor Belgisch Handelsrecht (1992) 919).

Case principle

2. Express reference in the contract to general conditions containing a jurisdiction clause on the back satisfies the 'in writing' formalities in Art. 17 (*Salotti* Case 24/76 applied).

Case

Court of Appeal of Liège, 3 December 1990, Pasicrisie Belge (1990) II 84 **25**

Facts

A Belgian citizen had bought a car in Belgium from the local distributor of a French company. The car was defective. The buyer claimed damages from the seller, which lodged an 'action in guarantee' against the French company. The defendant in guarantee invoked a jurisdiction clause in favour of French courts, appearing on the back of the order form used by the buyer.

Judgment

The court held that the jurisdiction clause was valid. The buyer had signed the order form which contained an express reference to the general conditions appearing on the back. The court held that when a jurisdiction clause is contained in general conditions of sale, the clause will be regarded as being part of the contract when the document signed by both parties contains an express reference to the general conditions including a clause conferring jurisdiction.

Comment

An express reference to the jurisdiction clause contained in the general conditions need not appear in the document signed by the parties. A general, but explicit, reference to the conditions will suffice. This has been clearly stated by the European Court in *Estasis Salotti*, but some commentators still require an express reference to the jurisdiction clause as such.

In one case, the Commercial Court of Liège held that a *general* reference to the sales conditions appearing on the back of the order form did not establish that parties had agreed upon the jurisdiction clause contained in these conditions: Commercial Court of Liège, 12 February 1987, Jurisprudence de Liège, Mons et Bruxelles (1987) 933; see for a similar view: Commercial Court of Kortrijk, 26 November 1985, Tijdschrift voor Belgisch Handelsrecht (1986) 717.

In other instances Belgian courts have held that no *specific* reference to the jurisdiction clause is needed: Court of Appeal of Antwerpen, 21 February 1994, Pasicrisie Belge (1993) II 62; Court of Appeal of Gent, 14 September 1994, Tijdschrift voor Belgisch Handelsrecht (1995) 382 (applied the Convention's rules to an arbitration clause); Commercial Court of Brussels, 23 January 1986, Tijdschrift voor Belgisch Handelsrecht (1988) 779; Commercial Court of Liège, 10 February 1994, Tijdschrift voor Belgisch Handelsrecht (1995) 402.

See also cases where the general conditions containing the jurisdiction clause were not communicated to the other party: Commercial Court of Brussels, 13 April 1989, Tijdschrift voor Belgisch Handelsrecht (1991) 431; Commercial Court of Liège, 10 February 1994, Tijdschrift voor Belgisch Handelsrecht (1995) 402.

" . . . evidenced in writing . . . "

Case principle

Failure to object to a jurisdiction clause in general conditions sent subsequent to oral conclusion of contract is not evidence in writing unless so as part of a continuing business relationship.

Case

26 Commercial Court of Antwerpen, 10 November 1993, Rechtskundig Weekblad (1994–95) 442

Facts

A Dutch company had sold goods to a Belgian company. The seller had billed the buyer after the goods had been shipped and received. The invoice referred

to the general conditions of sale which appeared on the back of the document. Those conditions contained a jurisdiction clause in favour of Dutch courts. The buyer sued the seller before a Belgian court. The defendant claimed that the court seised had no jurisdiction.

Judgment

The court decided that the jurisdiction clause was not valid. The contract had been concluded orally, without any reference to general conditions. The buyer had not agreed in writing to the invoice. The mere fact that he had not objected to the general conditions appearing on the back of the invoice was not such as to establish a jurisdiction agreement, since there existed no continuing business relationship between the parties.

Comment

Under Art. 25 of the Belgian Commercial Code, an invoice can be tacitly accepted between merchants if one of them does not object to it. Belgian courts, however, hold that tacit consent to documents containing jurisdiction clauses is not allowed, unless the absence of objection to the document containing the jurisdiction clause is part of a continuous business relationship: Court of Appeal of Antwerpen, 21 February 1994, Pasicrisie Belge (1993) II 62; Court of Appeal of Antwerpen, 3 January 1995, Tijdschrift voor Belgisch Handelsrecht (1995) 387; Commercial Court of Liège, 6 January 1986, Annales de Droit de Liège (1986) 275 (express objection lacking against the invoice); Commercial Court of Liège, 17 April 1986, Tijdschrift voor Belgisch Handelsrecht (1988) 310 (no continuing business relationship); Commercial Court of Liège, 2 December 1988, Tijdschrift voor Belgisch Handelsrecht (1990) 179 (no continuous business relationship); Commercial Court of Hasselt, 3 February 1993, Limburgs Rechtsleven (1993) 234.

In the absence of a current business relationship, one court has tried to save a jurisdiction clause appearing in an invoice by using the other possibility offered in Art. 17(1)(c), *i.e.* that of the jurisdiction agreement in a form which accords with a usage of international commerce: Commercial Court of Gent, 26 April 1995, Tijdschrift voor Gentse Rechtspraak (1995) 178. The court held that general conditions appearing on the back of invoices bind merchants if they have not objected to them within a reasonable time. The court considered in fact that the rule of Art. 25 of the Commercial Code itself had the status of a usage. This is very questionable because Art. 25 is a Belgian legal provision, which is not necessarily observed by parties in international contracts.

Some courts have held that a jurisdiction clause appearing in an invoice cannot be valid, since invoices are generally sent after the contract has been concluded. The invoice would then, they argue, amount to a unilateral change of the contract provisions by one party. This neglects the fact, however, that a jurisdiction clause can be added to an existing contract, provided parties agree on the clause. Such an agreement can then take the form of absence of objection to a document containing such a clause, when parties have in the past contracted under the same clause. See Kaye, *Civil Jurisdiction* pp. 1045 *et seq.*

ARTICLE 17, PARAGRAPH 1(b)

" . . . practices which the parties have established between themselves . . . "

Case principle

Agreement may be according to a practice between parties whereby general conditions containing a jurisdiction clause are sent by a party following contract and not objected to by the recipient.

Case

27 Court of Appeal of Gent, 30 June 1995, Algemeen Juridisch Tijdschrift (1995–96) 262

Facts

A lower court had decided to hear a case, notwithstanding the existence of a jurisdiction clause in favour of Dutch courts, which appeared in the general conditions of one party. This party appealed against the decision, arguing that the lower court had neglected the jurisdiction clause.

Judgment

The Court of Appeal held that the jurisdiction clause was valid between the parties. The jurisdiction clause appeared on the back of the order form, amongst other general conditions of purchase and sale. Although the order form had not been explicitly accepted in writing by the other party, the court decided, however, that since the order form was part of a continuing business relationship between the parties, and since all preceding contracts had been concluded in the same way, *i.e.* with the mere sending of an order form, the parties had created between themselves a practice, according to which written confirmation of an oral agreement need not be accepted explicitly or in writing. The absence of objection to the general conditions was enough to incorporate them into the contract.

Comment

The Court of Appeal apparently referred in its ruling to the latest version of Art. 17, which mentions explicitly practices which the parties have established between themselves. At the time of the judgment, however, the 1982-version was still applicable in Belgium. In this version, no mention is made of 'individual' practices.

Nonetheless the outcome of the case would not have been different under the previous version. Since the ruling of the European Court in the case of *Segoura v Bonakdarian*, it was common knowledge that if the two parties were in a continuing business relationship governed by general conditions containing a jurisdiction clause, the mere written confirmation of the agreement by one party was enough to establish a jurisdiction agreement, provided that the other party did not object to that written confirmation.

See, for other cases where the existence of a continuing business relationship was at stake (application of the *Segoura v Bonakdarian* principles): Court of Appeal of Gent, 14 September 1994, Tijdschrift voor Belgisch Handelsrecht (1995) 382 (the court applied the Convention's rules to an arbitration clause); Court of Appeal of Antwerpen, 11 October 1994, Tijdschrift voor Belgisch Handelsrecht (1995) 385 (business relationship insufficiently long); Commercial Court of Brussels, 12 December 1985, Tijdschrift voor Belgisch Handelsrecht (1987) 381; Commercial Court of Gent, 26 April 1995, Tijdschrift voor Gentse Rechtspraak (1995) 178.

ARTICLE 18

" . . . solely to contest . . . "

Case principle

Bringing a counterclaim is as much of a submission as a defence on the merits.

Case

Commercial Court of Antwerpen, 28 January 1986, Tijdschrift Voor Belgisch Handelsrecht (1987) 124 **28**

Facts

The defendant had bought a machine from the plaintiff in 1978. In 1980, it ordered several parts which needed to be replaced. After delivery, those parts were never paid for. The plaintiff was declared bankrupt and the trustee sought payment for the parts delivered. The defendant appeared and contested the jurisdiction of the court. It also introduced a claim of its own.

Judgment

The court held that it had jurisdiction. The defendant did not simply formally acknowledge the substance of the action launched by the plaintiff. It also sought to have the plaintiff's action declared unfounded and it claimed damages from the plaintiff. The court held that the defendant had gone further

than mere contestation of jurisdiction over the claim of the plaintiff and had therefore accepted the court's jurisdiction.

Comment

The court followed Droz (*Compétence judiciaire et effets des jugements dans le Marché Commun*, Paris, Dalloz, 1972, no. 222–B–139). Gothot and Holleaux, on the other hand, argued that the launching by the defendant of its own action does not necessarily imply that he has accepted the court's jurisdiction (*La Convention de Bruxelles du 27 Septembre 1968*, Paris, Jupiter, 1985, no. 195). See also Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano*, Paris, L.G.D.J., 1996, no. 148. A final answer to this question can only be given by the European Court.

ARTICLE 21

" . . . same cause of action . . . "

Case principle

1. Actions for contractual enforcement and annulment involve the same cause of action (*Gubisch*).

Case

29 Commercial Court of Brussels, 31 March 1994, Tijdschrift Voor Belgisch Handelsrecht (1995) 418

Facts

An Italian supplier granted exclusive distribution rights for Belgium and Luxembourg to a Belgian company. The distribution agreement was terminated by the Italian supplier and its French subsidiary which had taken over the contract. The Belgian distributor sued both companies before the Brussels court. A month earlier, the Italian supplier and its French subsidiary had requested a judge in Udine (Italy) to declare that the agreement had been terminated as a result of unsatisfactory performances by the distributor and that no damages were due.

Judgment

The Belgian judge considered that there was the same cause of action in the Italian and Belgian proceedings. Both claims were based on the same distribution contract and, although they were not worded identically, they both concerned the validity of the agreement. The judge also took into consideration

that, if he did not stay the proceedings, his judgment would never be recognized in Italy, on the basis of Art. 27(3).

As the jurisdiction of the Italian judge had been contested by the Belgian distributor, the judge stayed its proceedings until the jurisdiction of the Italian judge was established.

Case principle

2. Copyright actions relating to different territories do not involve the same cause of action.

Case

Court of First Instance of Brussels, 20 March 1992, Journal des Tribunaux (1992) 48 **30**

Facts

The plaintiff, the copyright owner of a record, sued an alleged copyright infringer, requesting an injunction prohibiting the reproduction of the record by the defendant in Belgium and compensation from the alleged infringer. The same claims had previously been introduced in France, where the injunction was to cover the French territory. The defendant questioned the jurisdiction of the Belgian judge and asked him to stay the proceedings on the basis of Art. 21.

Judgment

The judge considered that there was not the same 'cause of action' between the two proceedings. He stated that, because of the principle of territoriality in copyright law, a judge is not allowed to issue a judgment with cross-border effects. Furthermore, the amount of money claimed in each country differed considerably (750000 French francs in France and 1000000 Belgian francs in Belgium).

Comment

Although the conditions of *lis pendens* seemed to have been fulfilled, the judge decided not to stay the proceedings, on the basis of a substantive issue: the inability of Belgian judges to adjudicate on foreign copyrights (but see Case 397 *infra*).

" . . . shall of its own motion stay its proceedings . . . "

Case principle

Article 21 held inapplicable to ancillary, provisional measures.

Case

31 Court of First Instance of Brussels, 28 December 1994, Actualités Divorce (1995) 76

Facts

A Greek woman requested provisional maintenance from her husband, also of Greek nationality. Prior to the Belgian proceedings, the husband had started divorce proceedings and had requested provisional measures before the Court of Grand Instance of Athens, both of which were still pending.

Judgment

Before considering whether the *lis pendens* exception applied, the judge examined his own jurisdiction to hear the case. Although the status, legal capacity and rights in property arising out of a matrimonial relationship are excluded from the Convention, ancillary provisional measures requested in the framework of proceedings dealing principally with those issues (*i.e.* divorce proceedings) may fall within the scope of application of the Convention (see *supra*, *Comment* on Art. 1(2), para. 1). Indeed, the judge considered that he had jurisdiction to decide upon urgent provisional measures with respect to the provisional maintenance and other claims on status matters and matrimonial property. It has to be stressed that the Belgian judge could adjudicate on the basis of the Convention only with respect to the maintenance claim. The judge did not apply Art. 21 to the ancillary provisional measures.

Comment

The Belgian judge should have applied the *lis pendens* rule contained in the Convention to proceedings which were ancillary, not merely provisional. As the Greek court had been seised prior to his Belgian colleague, the latter had to decline jurisdiction in favour of the Greek court.

ARTICLE 22, PARAGRAPH 2

" . . . court first seised has jurisdiction over both actions."

Case principle

Article 22, para. 2 does not *confer* jurisdiction.

Case

32 Commercial Court of Antwerpen, 29 June 1994, Tijdschrift Voor Belgisch Handelsrecht (1995) 429

Facts

The plaintiff sued two defendants for an amount of money, corresponding to the price which had to be paid for the shipping of goods from Antwerp to Damman and Dubai. The shipping order was given by one of the defendants, acting as maritime agent of an English company. The agent, whose domicile was located in Germany, paid only part of the agreed price and issued a documentary credit to guarantee the payment of the rest. This amount was never paid and the issuing bank (the second defendant), whose corporate seat was also in Germany, refused to pay it because, according to the bank, the conditions agreed upon in the documentary credit had not been met.

Judgment

The defendants challenged the jurisdiction of the Belgian courts. With respect to the first defendant, the Belgian judge had jurisdiction on the basis of Art. 5(1), because the parties had agreed that the shipping price would be paid in Antwerp.

With respect to the bank, it was difficult to determine the place of performance of the obligation arising out of the documentary credit. The bank's decision to grant a documentary credit was a unilateral act. This did not imply that Art. 5(1) was inapplicable, because, according to the judge, one had to locate the unilateral act within the framework of the different contractual relationships. Thus, it was the court in Germany, where the corporate seat of the bank was located, which would be competent on the basis of Art. 5(1).

Incidentally, the judge also investigated whether he might have jurisdiction with respect to the bank on the basis of Art. 22. Unlike the equivalent head of jurisdiction in Belgian law, Art. 22 did not *grant* jurisdiction, as the European Court of Justice stated in *Elefanten Schuh*, and only applied to cases where the judge had jurisdiction on other grounds with respect to both claims. The judge concluded, therefore, that he lacked jurisdiction with respect to the bank.

ARTICLE 22, PARAGRAPH 3

" . . . so closely connected . . . "

Case principle

Article 6a limitation proceedings are related to a liability action.

Case

Commercial Court of Antwerpen, 9 March 1989, Rechtspraak Van de Haven Van Antwerpen (1989) 285 **33**

Facts

After a ship collision in the port of Antwerp, one shipowner brought a liability claim before the German judge against the other shipowner. The latter applied for limitation of liability in the courts of Antwerp.

Judgment

The Belgian judge, seised under Art. 6a, decided to stay the proceedings on the basis of Art. 22 until the jurisdiction of the German judge was established. He considered that the mere existence of Art. 6a as a head of jurisdiction was sufficient to prove that there was a close connection between the two proceedings and that there was a risk of irreconcilable judgments if the actions were not brought before the same judge.

ARTICLE 24

" . . . as may be available under the law of that State . . . "

Case principle

Requirements of grant, such as urgency, are for applicable law of the forum.

Case

34 Commercial Court of Hasselt, 20 September 1996, Tijdschrift Voor Belgisch Handelsrecht (1997) 323

Facts

The plaintiff, a Belgium company, applied under Art. 24 for appointment of an expert. The expert had to evaluate the quality of the wall mounting systems for radiators. Those systems were supplied by the defendant, a German company, to the plaintiff, who claimed that the wall mounting system was defective and caused the radiators to fall off the walls.

Judgment

The judge considered that the plaintiff had sufficiently proven the urgent nature of the request and therefore based his jurisdiction on Art. 24. He designated an expert who had to accomplish the above mentioned tasks and to help the parties to reach an agreement on due compensation.

Comment

Belgian judges frequently require urgency in order to admit jurisdiction on the basis of Art. 24 (see, for another example, Court of Appeal of Mons,

2 February 1988, Tijdschrift voor Belgisch Handelsrecht (1989) 198). Although Art. 24 does not impose an 'urgency condition', Belgian judges seem to understand that such condition, which would apply in an internal situation on the basis of Art. 584 of the Belgian Code of Civil Procedure, is also necessary in the framework of the Convention.

Case

Court of Appeal of Gent, 8 December 1994, Algemeen Juridisch Tijdschrift **35** (1995–96) 151

Facts

Parties were bound by an agreement which referred to the 'General Conditions of the Metal and Electromechanical Industry'. An arbitration clause was contained in these General Conditions.

A dispute arose between the parties and the plaintiff, at first instance, asked the Belgian judge to designate an expert on the basis of Art. 24 of the Convention. The judge decided that he had no jurisdiction to hear the case.

Judgment

On appeal, the court confirmed the first judge's opinion. According to the court, the designation of an expert generally falls within the scope of application of Art. 24, even when the merits of the case are submitted to arbitration. Nevertheless, two essential elements were missing in the present case: the urgency requirement (see previous judgment) and the territoriality principle. The judge declared that he had no jurisdiction to designate an expert whose functions would be performed exclusively outside Belgian territory.

Comment

In the light of the judgment of the European Court of Justice in *Denilauler*, the Belgian judge might have applied the principle of territoriality too strictly. In *Denilauler*, the French judge was allowed to issue an order authorizing the creditor to freeze the account of the debtor in German territory. By way of analogy, the Belgian judge could have designated an expert whose work was to be performed in other countries.

ARTICLE 26

" . . . shall be recognized . . . "

Case principle

Judgment-State effects must be implemented in the recognition-State.

Case

36 Commercial Court of Liège, 8 March 1984, Jurisprudence de Liège (1984) 289

Facts

A French company, A, had sold an industrial machine to a Belgian company, C. The seller had bought the machine from another French company, B, which it represented in Belgium. The machine appeared not to work as had been promised. C refused to pay the remainder of the price and asked a French court to declare the contract void and to award him damages for breach of contract. A asked the same court to order payment. It also sued B on a guarantee. The French court found that A was responsible for the breach of contract. It declared the contract void, awarded C damages and held B liable as guarantor for the damages owed by A to C. However, B had contractually limited his liability to 5 per cent of any damages. A lodged an appeal in Cassation against this judgment. B brought a new action in Belgium, claiming the price it had charged A, minus what it owed him, *i.e.* 5 per cent of the damages awarded to C.

Judgment

The court held that B was prevented from suing A in Belgium. The French decision was to be automatically recognized in Belgium. This meant that the foreign judgment must in principle have the same effects in the state in which enforcement was sought as it did in the state in which judgment was given. The Court decided that the actual effects of this recognition lay outside the Convention's sphere and within that of the applicable national law. As it was impossible to give an autonomous definition of these effects on a European level, the court held that the national law of the country of origin had to be applied in order to determine those effects. Applying the national law of the state in which recognition was sought could lead to giving more effects to a foreign judgment than the judgment-State's law would.

Comment

Note *Hoffmann v Krieg*, Case 145/86 in the European Court. See too: Court of First Instance of Brussels, 31 October 1973, Rechtskundig Weekblad (1973–74) 881; Court of First Instance of Brussels, 28 April 1987, Pasicrisie Belge (1987) III 80; Court of First Instance of Brussels, 3 April 1995, Actualités du Droit (1996) 173.

ARTICLE 27

"A judgment shall not be recognized . . . "

Case principle

The onus of proof is upon the opponent of enforcement to establish one of the refusal grounds, not upon the applicant for enforcement to disprove these once raised.

Case

Court of Cassation, 16 June 1988, Journal des Tribunaux (1989) 277 **37**

Facts

One party sought enforcement of a foreign judgment in Belgium. A lower court granted leave to enforce. The other party appealed its decision. Before the Court of Appeal this party simply argued that the foreign decision did not meet the test of Art. 27(4), without specifying why. The party seeking enforcement did not bother to prove that this allegation was wrong. The Court of Appeal held that enforcement could not be granted because the party seeking enforcement had not shown that the decision of the State of origin did not conflict with a rule of Belgian private international law. This party lodged an appeal in Cassation.

Judgment

The Court of Cassation quashed the appeal judgment. The court held that the grounds of refusal of the Convention were to operate in a negative way: enforcement was the Convention rule and refusal thereof the exception, to be established against the applicant. The Court of Appeal had in fact done the contrary and rejected the appeal because the party seeking enforcement had not established that the conditions for enforcement were fulfilled.

Comment

For a similar statement as to the onus of proof that conditions for enforcement are met, see Court of First Instance, 12 April 1988, Tijdschrift voor Belgisch Burgerlijk Recht (1989) 422.

ARTICLE 27(1)

" . . . contrary to public policy . . . "

Case principle

1. Attachment of maintenance amount to variations in minimum wage scale held not contrary to Belgian public policy.

Case

38 Court of Appeal of Liège, 17 May 1984, Jurisprudence de Liège (1984) 381

Facts

A French court had divorced two people and granted maintenance to one of them in 1969. In 1977, another French court changed the maintenance order. The maintenance-creditor sought enforcement of those two decisions in Belgium. The debtor argued that the revised order was contrary to Belgian public policy in that the amount granted could vary according to the legal minimum wage.

Judgment

The court held that the maintenance order was in no way contrary to Belgian public policy. The first court had decided that the debtor owed maintenance. The only variable element was the amount, and no arbitrary increases were to be feared, as an objective point of reference had been established.

Case principle

2. **Stay of an enforcement action pending criminal proceedings on same facts held to be limited to domestic Belgian proceedings, and not to extend to foreign civil proceedings.**

Case

39 Court of Cassation, 14 June 1985, Pasicrisie Belge (1985) I 1323

Facts

The applicant had been ordered by the Landgericht of Duisburg in Germany to pay the German state damages in the sum of 240000 German DM. The acts at the basis of the action were also a criminal offence according to Belgian law. The criminal case was still pending before a Belgian criminal court. The German government asked the Court of First Instance of Antwerp to grant leave of enforcement, which the court did. The plaintiff applied to Cassation to set aside the order of the lower court. He argued that the German decision was contrary to Belgian public policy in that it violated the principle *le criminel tient le civil en état*, whereby civil trials concerning facts that were at the same time criminal offences, are to be stayed until the criminal court decides on the criminal case.

Judgment

The Court of Cassation held that this particular aspect of public policy was limited to the Belgian legal order. The judgment did not violate public policy interpreted in this way.

Case principle

3. **Awards of lawyers' costs is not against Belgian public policy, even though Belgian courts would be unable to make such an order.**

Case

Court of Appeal of Gent, 22 December 1988, Pasicrisie Belge (1989) II 162 **40**

Facts

A German party successfully sued a Belgian citizen in Germany. As is customary in Germany, the German court awarded the German plaintiff the right to recover the lawyers' costs from the defendant. The German party sought enforcement of this decision in Belgium. The Belgian defendant claimed that it would be contrary to Belgian public policy to grant a plaintiff this relief, since Belgian courts cannot order reimbursement of lawyers' fees and costs, according to Art. 1018 Code of Civil Procedure.

Judgment

The court held that enforcement would not violate Belgian public policy. This would not even discriminate between Belgian and German citizens since all parties, including Belgian nationals, who instituted proceedings in Germany, could recover their costs.

Case principle

4. ***Effects* of foreign judgment, not mere *content*, must be against public policy in the recognition-State for recognition to be refused.**

Case

Court of First Instance of Liège, 9 October 1995, Actualités du Droit (1996) 80 **41**

Facts

The parties concluded a contract in 1970 whereby a German manufacturer granted exclusive distribution rights to a Belgian company. In 1989, the German manufacturer decided to rescind the contract. The Belgian distributor refused to pay for goods which had already been delivered. The German party sued in Germany. The defendant claimed that the Belgian Act of 1961 was applicable and asked to be compensated for the insufficient notice of termination. The German court gave judgment in favour of the German company, upheld on appeal. The German company applied for enforcement in Belgium.

Judgment

The court held that there was nothing contrary to public policy in enforcing the German judgment. The concept of public policy should, according to the

court, be a matter for the national legal order of the state where recognition or enforcement was sought. The court added that the concept of public policy must, under the Convention, be interpreted very strictly in the light of the mutual trust between the different Member states. This was reinforced by the fact that the Convention was only applicable in civil and commercial matters, where the Member States were linked by common fundamental legal conceptions. According to the judges, the public policy ground ought only to operate 'in the most exceptional cases'. The court held finally that the fact that the German court did not apply the Belgian Act of 1961 was not as such a violation of Belgian public policy. This was because the serious inconsistency with public policy must result, not from the *content* of the decision and the rules applied therein, but from the *effects* which it would have in Belgian territory as a result of its enforcement there.

Comment

See, for other cases on the public policy exception: Court of First Instance of Brussels, 28 April 1987, Pasicrisie Belge (1987) III 80; Court of First Instance of Brussels, 2 June 1988, Jurisprudence de Liège, Mons et Bruxelles (1988) 1365. The due process requirement is sometimes held to be part of the public policy test: Commercial Court of Liège, 8 March 1984, Jurisprudence de Liège (1984) 289.

ARTICLE 27(3)

" . . . irreconcilable . . . "

Case principle

Irreconcilability for Art. 27(3) entails mutually exclusive legal consequences.

Case

42 Court of First Instance of Brussels, 12 April 1988, Tijdschrift Voor Belgisch Burgerlijk Recht (1989) 422

Facts

An Italian company sought enforcement of two Italian judgments, dating from 1978 and 1984, whereby a Belgian company had been ordered to pay damages for failure to perform a contract. Litigation between the parties had started in 1967. Belgian courts had rendered judgments in 1967, 1971 and 1972. Those decisions declared that the contract between the parties was invalid and awarded the Belgian party damages.

Judgment

The court held that the Belgian and the Italian decisions were irreconcilable. In order to ascertain whether the two judgments were irreconcilable, it should

be examined whether they entailed legal consequences which were mutually exclusive. This was the case, as the Italian courts had awarded damages for breach of a contract which had been declared invalid by the Belgian courts. The court observed that Art. 27 did not require that the judgment given in the State in which recognition was sought should be earlier in time than the decision of which recognition was sought.

Comment

It has never explicitly been required for the application of this refusal ground that the national decision be rendered earlier than the foreign judgment. Nonetheless, in the case of *Hoffmann v Krieg*, Case 145/86, the European Court noted that the national decision had already acquired force of *res judicata* at the time the order for enforcement of the foreign decision was issued. This shows that national courts should at least pay attention to the time factor when deciding whether or not decisions are irreconcilable.

ARTICLE 28, PARAGRAPH 3

" . . . jurisdiction of the court of the State of origin may not be reviewed . . . "

Case principle

Jurisdiction review is not permitted even where the foreign ruling itself was as to jurisdiction.

Case

Commercial Court of Brussels, 29 March 1988, Tijdschrift Voor Belgisch 43
Handelsrecht (1990) 800

Facts

This case involved unilateral termination of a contract of exclusive distributorship. The German manufacturer had taken the precaution of requesting the German Landgericht to rule that it did not owe any compensation to the Belgian distributor. This was meant to prevent Belgian courts from asserting jurisdiction in the case. The German court decided that it had no jurisdiction to rule on the case, since the contract was to be performed in Belgium (Art. 5(1)). The distributor then sued its German counterpart before a Belgian court. This court examined whether or not it should recognize the German decision. The manufacturer claimed that the Landgericht had wrongly decided that it had no jurisdiction. The object of the dispute was not only fair compensation in the absence of a reasonable notice of termination, but also the additional

compensation provided by Art. 3 of the Belgian Act of 1961. This last compensation was an autonomous obligation to be performed in Germany. The first compensation was not an autonomous obligation but, under Belgian law, an obligation replacing the unperformed contractual obligation. Therefore, this obligation had to be located at the place where the unperformed obligation had to be performed, *i.e.* Belgium. The German court could have declared that it had jurisdiction in respect of the second claim of the Belgian plaintiff, but the Landgericht had declined to do so.

Judgment

The court decided that the decision whereby the Landgericht declared that it had no jurisdiction, should be recognized without any special procedure being required (Art. 26). Further, it held that it had no power whatsoever to review the jurisdiction of the court of the state of origin. The court decided that it could not inquire upon this matter, because Art. 5(1) was not part of the exceptions foreseen in Art. 28. In an *obiter dictum*, the court added that the Landgericht was not wrong when it held that all claims had to be brought before the court where the main obligation had to be performed, *i.e.* in Belgium. The Landgericht had actually applied the ruling in *Shenavai v Kreischer* without mentioning it.

Comment

The duty to recognize judgments given in other Member States also covers decisions whereby a court declares that it has no jurisdiction, even though only an incorrect application of the Convention's rules leads to this conclusion—provided that the matter does not fall under s.3, 4 or 5 of Title II.

ARTICLE 29

"Under no circumstances . . . "

Case principle

1. Review of factors taken into account in granting an amount of maintenance is prohibited.

Case

44 Court of Appeal of Liège, 17 May 1984, Jurisprudence de Liège (1984) 381

Facts

A French court had divorced two people and granted maintenance to one of them in 1969. In 1977, another French court changed the maintenance order.

The maintenance-creditor sought enforcement of those two decisions in Belgium. The debtor argued that the maintenance was unreasonable in view of his income. He also claimed that the original judge had been influenced, when calculating the maintenance, by the fact that the debtor had since then remarried. The debtor claimed that the maintenance was granted in part as a penalty for his second marriage and, as such, violated the freedom of marriage.

Judgment

The court held that to adjudicate upon the debtor's allegations would amount to a prohibited review of the substance of the case.

Comment

The fact that a judge does not take the debtor's income into account when calculating the maintenance could, in some exceptional cases, be held to be contrary to public policy. The line between the (forbidden) review of the substance of the case and the (permitted) examination of such contravention of public policy is a thin one.

Case principle

2. Review is even prohibited where the allegation is that the judgment-court decided in contravention of the EC Treaty.

Case

Court of First Instance of Liège, 9 October 1995, Actualités du Droit (1996) 80 **45**

Facts

See supra, Art. 27(1), Case 41.

Judgment

Besides the public policy exception, the Belgian plaintiff claimed that the German court had applied a legal provision (s.92 of the German Handelsgesetzbuch) which was contrary to the prohibition of discrimination on the ground of nationality (Art. 6 of the EC Treaty). The Belgian court held that it had no power to review the substance of the case in order to assess whether the provision was, as alleged, contrary to European rules.

Comment

On the lack of power to review the substance of the original decision, see also Commercial Court of Antwerp, 19 October 1978, Rechtspraak van Haven van Antwerpen (1979–80) 184; Court of First Instance of Brussels, 12 April 1988, Tijdschrift voor Belgisch Burgerlijk Recht (1989) 422; Court of First Instance of Brussels, 3 April 1995, Actualités du Droit (1996) 173.

ARTICLE 30

" . . . may stay . . . "

Case principle

Stay of enforcement is discretionary, not mandatory.

Case

46 Commercial Court of Liège, 8 March 1984, Jurisprudence de Liège (1984) 289

Facts

See supra, Art. 26, Case 36.

Judgment

The court held that the appeal in Cassation constituted an '*ordinary appeal*' in the sense of Art. 30. It noted that a stay of proceedings was not a duty but a mere possibility for the national court. None of the parties had asked the court to stay the proceedings, because they wanted to speed up the litigation. In order to decide whether or not to stay the proceedings, the court examined the different claims so as to see whether the appeal in Cassation could have any influence on these claims. The court came to the conclusion that there was no reason to stay the proceedings.

Comment

Belgian courts sometimes forget the possibilities offered by Arts 30 and 38 of the Convention! In one judgment, the Court of Appeal of Liège held that if an appeal had been lodged against the foreign judgment, of which enforcement was sought, this would in no way be an obstacle to granting leave to enforce (Court of Appeal of Liège, 25 January 1984, Jurisprudence de Liège (1984) 113). In another instance, the Court of First Instance of Brussels neglected altogether to consider the effects of an appeal pending against the French judgment it declared enforceable (Court of First Instance of Brussels, 3 April 1995, Actualités du Droit (1996) 173). In one case, a court refused to stay the proceedings because the original judgment appeared to have been well-founded, so that it was highly unlikely that it would be overturned on appeal: Court of First Instance of Nivelles, 23 June 1993, Revue Trimestrielle de Droit Familial (1995) 70. The nature of the proceedings (enforcement of maintenance orders, where any delay can be catastrophic for the plaintiff) also explains why some courts do not use the possibility offered by the Convention.

ARTICLE 39

" . . . no measures of enforcement may be taken other than protective . . . "

Case principle

Article 39 provisional powers held also to extend to judgment-court measures pending the enforcement-appeal.

Case

Court of First Instance of Brussels, 23 November 1987, Revue Régionale de Droit (1988) 96

Facts

A company with its corporate seat in France had been ordered by the Court of Appeal of Brussels to pay a considerable amount of money to a Belgian company as compensation for the lack of notice on termination of an exclusive distribution contract between them. The defendant did not pay and the plaintiff started enforcement proceedings in France and also attempted to execute his judgment in Belgium. The defendant opposed French enforcement, under Arts 36 and 37 of the Convention. A seizure on some properties of the defendant was authorized by the French judge on the basis of Art. 39. The Belgian company, nevertheless, considering that this seizure only guaranteed part of the debt, asked the *Belgian* judge to order a seizure on other properties located on Belgian territory. The debtor considered that this was not possible on the basis of Art. 39 which only allowed the plaintiff to take measures guaranteeing the enforcement in the country where the enforcement was requested.

Judgment

The judge considered that the drafters of Arts 38 and 39 could not have meant that protective measures were excluded in the country where the judgment was rendered. The fact that a seizure was authorized in France covering part of a debt did not affect the jurisdiction of the Belgian judge to order a new seizure.

Comment

In the majority of cases, Art. 39 is used to order seizures in the country where enforcement is sought (see, for instance, Court of First Instance of Brussels, 29 July 1993, Journal des Tribunaux (1994) 251). In this particular case, however, the judge provided an extensive interpretation of Art. 39. In his observations on the judgment, H. Born underlines the necessity of bringing a similar

case to the Court of Justice so that the scope of application of this provision is clearly determined.

ARTICLE 47(1)

" . . . documents which establish that . . . the judgment . . . has been served;"

Case principle

The very fact of the debtor's appeal against enforcement held to amount to proof that the foreign judgment was served, in the absence of required documentary evidence.

Case

48 Court of First Instance of Tournai, 21 February 1991, Jurisprudence de Liège, Mons et Bruxelles (1991) 691

Facts

The Belgian company Promac was ordered by French courts to pay a sum of money to the French company Sogeservice. The latter had filed an application for enforcement before the Belgian judge. This application had been served upon the corporate seat of Promac. Under Art. 36, Promac opposed enforcement on the ground that Sogeservice had not produced the documents required under Art. 47(1).

Judgment

Copies of three documents had been annexed to the application for enforcement: the judgment of the French judge, the appeal introduced before the French judge and the order for seizure granted by the French judge. Although Sogeservice had not presented a document establishing that the judgment had been served, the fact that Promac had lodged an appeal against this judgment was considered to be sufficient proof that the judgment had been correctly served upon Promac.

Comment

This decision appears to indicate that the essence of this part of the requirements under Art. 47(1) is service of the judgment rather than the production of documentary proof thereof.

" . . . according to the law of the State of origin . . . "

Case principle

Service must have complied with one or more methods of service of the judgment-State's law.

Case

Court of Cassation, 23 September 1994, Arresten Van Het Hof Van Cassatie (1994) 779 49

Facts

The representative (*vertegenwoordiger*) of a Belgian company was served with a German judgment against the company. The judgment had to be executed in Belgium. At first and second instance, the judges considered that the conditions of Art. 47(1) had been fulfilled. The Belgian company appealed further to the Court of Cassation, as it considered that serving the company through its representative was not in conformity with the law of the State in which the judgment was given, that is, Germany.

Judgment

According to the court, the judgment in the State of origin had not been properly served upon the defendant. The Court of Cassation examined several German mechanisms to serve a judgment upon a foreign defendant and concluded that service on a representative was not a valid method of service abroad. Therefore, the conditions imposed in Art. 47(1) were not fulfilled. (Nevertheless, the Court of Cassation did not revoke the authorization of enforcement of the judgment, because it considered that the Belgian party had failed to state which specific provision of German law was infringed and therefore, the appeal in Cassation was inadmissible.)

Comment

From the viewpoint of the Convention, it is noteworthy to stress that serving a representative of the company is not sufficient to fulfil the requirements of Art. 47(1) when the judgment-State is Germany.

(As for the inadmissibility of the appeal in Cassation, the Belgian company had mentioned in its appeal several provisions in the bilateral treaty between Germany and Belgium, as well as Art. IV of the Protocol annexed to the Convention, neither of which mentioned the possibility of serving the company's representative. As those provisions are part of German law, one wonders whether the Court of Cassation was not too strict on the assessment of the Cassation grounds?)

ARTICLE 52, PARAGRAPH 1

" . . . the Court shall apply its internal law."

Case principle

1. Internal law chooses between different rules on domicile.

Case

50 Justice of Peace of Brussels, 27 July 1990, Journal Des Juges De Paix (1990) 396

Facts

In 1978, a French court had divorced two French nationals. The woman claimed before a Belgian Justice of the Peace the payment of maintenance for her son. The defendant, a European civil servant, argued that he had a residence in Belgium, but that he was domiciled in France, where all claims therefore had to be brought.

Judgment

The Justice of the Peace referred to Art. 36 of the Code of Civil Procedure, according to which a person is domiciled where he is registered with the local authorities. As the defendant was not subject to the obligation to register, being employed by the European Community, the judge used the subsidiary definition of domicile (Art. 102 of the Civil Code) and found that the defendant had his principal establishment in Brussels. Jurisdiction was therefore established.

Case principle

2. Effect of election of domicile for jurisdiction is for *lex fori*.

Case

51 Commercial Court of Antwerp, 30 June 1987, Rechtspraak Van Haven Van Antwerpen (1987) 57

Facts

The defendant, a German company, had carried goods for a third party from Antwerp to Greece. The goods were damaged during the trip. The buyer, holder of a bill of lading, claimed damages. The defendant argued that German courts had jurisdiction, as agreed in the bill of lading.

Judgment

The court set aside the jurisdiction clause appearing in the bill of lading because under Belgian law the holder of the bill of lading did not succeed to the rights and obligations of the shipper (see *supra*, Art. 17). More interestingly, it decided that its jurisdiction was also based on the domicile of the defendant. The defendant had given an address for service of process in Belgium. The court considered that this circumstance showed that the defendant had, as far as the proceedings were concerned, its domicile in Belgium.

Comment

The court should have applied its rules of private international law under Art. 53, para. 1 in order to determine where the defendant company had its seat. It would probably have found that the seat was located in Germany.

ARTICLE 54, PARAGRAPH 2

" . . . or in a convention concluded between the State of origin and the State addressed which was in force when the proceedings were instituted."

Case

Court of First Instance of Brussels, 12 April 1988, Tijdschrift Voor Belgisch **5:** Burgerlijk Recht (1989) 422

Facts

An Italian company sought enforcement of two Italian judgments whereby a Belgian company had been ordered to pay damages. The defendant argued that the Convention's rules were not applicable, since the litigation was started in 1969, *i.e.* before the entry into force of the Convention.

Judgment

The court held that Convention Title III was applicable. The judgments were given in Italy after the entry into force of the Convention, *i.e.* in 1978 and 1984. Further, the judgment-court based its jurisdiction on Art. 2(5) of the Belgian-Italian Convention of 6 April 1962. Accordingly, jurisdiction had been based on a convention in force between the two States concerned when the proceedings were instituted. The court also noted incidentally that the jurisdiction ground of this bilateral convention, on the basis of which the original court heard the action, was similar to Art. 5(1) of the Convention.

ANNEXED PROTOCOL/LUGANO PROTOCOL NO. 1
ARTICLE I, PARAGRAPH 2

" . . . expressly and specifically so agreed."

Case principle

The jurisdiction clause with the Luxembourg party need not be contained in a separate document for it to be effective in accordance with Art. I, para. 2 and *Porta-Leasing*.

Case

53 Court of Appeal of Liège, 16 June 1992, Jurisprudence de Liège, Mons, Bruxelles (1992) 1397

Facts

A Luxembourg company had agreed to a jurisdiction clause in favour of Belgian courts. At the trial, it submitted that the clause did not fulfil the special conditions of Art. I.

Judgment

The court held that a jurisdiction clause has to be the object of a specific agreement which is expressly and specifically concerned with jurisdiction and specifically signed by the Luxembourg party. The mere signing of the contract is not sufficient, even if the jurisdiction clause has been specifically identified (underlined or printed in heavy type). The court decided, however, that it was not necessary that the specific agreement should be contained in a separate document from the one which constituted the written instrument of the contract. An express agreement, a specific provision of the contract specifically devoted to the clause, was sufficient.

Comment

See also Court of Appeal of Gent, 17 March 1988, Tijdschrift voor Gentse Rechtspraak (1988) 60; Commercial Court of Hasselt, 13 November 1991, Tijdschrift voor Belgisch Handelsrecht (1992) 897; Court of First Instance of Arlon, 10 April 1992, Tijdschrift voor Belgisch Burgerlijk Recht (1993) 281; Justice of the Peace of Brussels, 28 February 1991, Tijdschrift van de vrede- en politierechters (1992) 154.

3

DENMARK

Torben Svenné Schmidt

A. LEGAL SYSTEM

Courts

The ordinary courts in Denmark are divided into three instances. At the bottom are the 82 towncourts (*byretter*). In most of these there is a single legally qualified judge, but the Towncourt of Copenhagen consists of a president and 41 judges. The four next biggest towns also have a president and various numbers of judges and other bigger towns have four, three or two judges. However, in civil cases, only a single judge sits on the bench.

Appeals from the towncourts go to one of the two High Courts for the eastern and western part of Denmark (*Østre Landsret* and *Vestre Landsret*). These courts consist of a president and 45 and 22 judges, respectively. In each civil case, the court is staffed by three judges. The High Courts may also be courts of first instance under certain circumstances—for instance, when a case is of a fundamental character or has a special far-reaching importance for one of the parties, the towncourt may refer the case to the High Court. Furthermore, and this is more important, if a civil case concerns a claim having a value of over 500000 Danish crowns (approximately £50000) each of the parties may demand that it is referred to the High Court as first instance.

The Supreme Court (*Højesteret*) consists of a president and 15 judges. In most cases, the court is staffed by five judges but a higher number of judges may be prescribed by the president. This court is an appellate court from the High Courts, but, contrary to the arrangement in many other countries, the Supreme Court may, in civil cases, consider both the facts and the law applied by the High Court. If a case is started at a towncourt, it may only be