JUDGMENT OF THE COURT

19 February 2002 *

In Case C-256/00,

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Cour d'appel de Bruxelles (Belgium) for a preliminary ruling in the proceedings pending before that court between

Besix SA

and

Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG),

Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & Co. KG (Plafog),

on the interpretation of Article 5(1) of the aforementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — amended version — p. 77),

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken and N. Colneric (Presidents of Chambers), A. La Pergola, J.P. Puissochet, M. Wathelet, R. Schintgen (Rapporteur) and V. Skouris, Judges,

Advocate General: S. Alber,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Besix SA, by A. Delvaux, avocat,

— Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & Co. KG (Plafog), by P. Hallet, avocat,

— the Commission of the European Communities, by J.L. Iglesias Buhigues and X. Lewis, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2001,

gives the following

Judgment

1 By judgment of 19 June 2000, received at the Court on 28 June 2000, the Cour d'appel de Bruxelles (Court of Appeal, Brussels) referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters a question on the interpretation of Article 5(1) of that Convention (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 — amended version — p. 77, hereinafter 'the Brussels Convention').

2 That question has been raised in proceedings between the Belgian company Besix SA (hereinafter 'Besix'), established at Brussels (Belgium) and the German companies Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (hereinafter 'WABAG') and Planungs- und Forschungsgellschaft Dipl. Ing. W. Kretzschmar GmbH & Co. KG (hereinafter 'Plafog'), both established at Kulmbach (Germany), concerning a claim for damages lodged by Besix against WABAG and Plafog for loss which it alleges it suffered owing to breach by those two companies of an exclusivity clause in the context of a contract concerning a public invitation to tender.

The Brussels Convention

3 The jurisdiction rules laid down by the Brussels Convention are contained in Title II, which consists of Articles 2 to 24.

4 In this regard, the first paragraph of Article 2 of the Brussels Convention, which forms part of Section 1, entitled 'General provisions', of Title II, states:

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

5 The first paragraph of Article 3 of the Brussels Convention, which is in the same section, provides:

'Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this title.'

6 Thus, under Article 5, which is part of Section 2, entitled 'Special jurisdiction', of Title II of the Brussels Convention:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

(1) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

...'

The main proceedings and the question referred for a preliminary ruling

7 According to the national court's case-file, on 24 January 1984, WABAG, which belongs to the Deutsche Babcock group, and Besix signed in Brussels an agreement drawn up in French whereby they undertook to submit a joint tender in response to a public invitation to tender for a project of the Ministry of Mines and Energy of Cameroon called 'water supply in 11 urban centres in Cameroon' and, if their tender were accepted, to perform the contract jointly.

8 Under the terms of the agreement, the two companies undertook 'to act exclusively and not to commit themselves to other partners'.

9 However, when the tenders were opened, it was found that Plafog, which, like WABAG, is part of the Deutsche Babcock group, had, in association with a Finnish undertaking, also taken part in the tender for the public contract in question.

10 After all the tenders had been assessed, it was decided to split the contract and to entrust different lots to different undertakings. One lot was awarded to the group which included Plafog whilst the WABAG-Besix group, which was lower placed, did not win any part of the contract.

11 Besix, taking the view that the exclusivity and non-competition clause had been breached, brought an action in damages against WABAG and Plafog on 19 August 1987 before the Tribunal de commerce de Bruxelles claiming damages of BEF 80 000 000.

12 That court found that it had jurisdiction to hear Besix's claim pursuant to Article 5(1) of the Brussels Convention on the ground that, under the conflict rule of the court before which the matter had been brought, the applicable law was that of the State with which the contract had the closest connection and that the obligation in question, namely the exclusivity undertaking, should have been performed in Belgium as a corollary to the preparation of the joint tender.

13 When, however, its action was dismissed as unfounded, Besix took its case to the Cour d'appel de Bruxelles.

14 By way of cross appeal, WABAG and Plafog contended that only the German courts had jurisdiction to hear and determine the case.

15 Besix, on the other hand, submitted that the obligation of exclusivity had been partially performed in Belgium, since the non-competition undertaking enabled the joint tender to be prepared and that fact alone was sufficient to confer jurisdiction on the Belgian courts, under Article 5(1) of the Brussels Convention.

16 According to the Cour d'appel, the contractual obligation in question, as referred to in Article 5(1) of the Brussels Convention, consists in the present case of the undertaking — which, according to Besix, was breached by WABAG and Plafog — to act exclusively and without commitment to other partners in relation to the public contract in question.

17 Having regard to the line of case-law beginning with the judgment of 6 October 1976 in Case 12/76 *Tessili* [1976] ECR 1473, according to which the place of performance of the obligation in question must be determined in accordance with the law governing that obligation as designated by the rules on the conflict of

laws of the court before which the matter is brought, and having regard to the fact that the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome in 19 June 1980 (OJ 1980 L 266, p. 1), is not applicable in the present case — since the Belgian ratification law limited its application to contracts concluded after 1 January 1988 —, Belgian private international law designates, according to the Cour d'appel, as the law applicable to the contract (unless the parties have chosen the applicable law, which was not the case here), the law of the country with which the contract has the closest connection.

18 The agreement of 24 January 1984 was concluded in Brussels. Furthermore, Besix, which was responsible for the greater part of the contract, was regarded as the leader of the WABAG-Besix group and was centralising operations in Brussels with a view to preparing the joint tender. Consequently, Belgian law, according to the Cour d'appel, is the law of the country with which the contract, including the exclusivity undertaking which it contained, had the closest connection.

19 Belgium was also the place where the parties had in fact the greatest interest in honouring their undertaking to act exclusively, since it was in that Contracting State that they were to prepare the joint tender and, more generally, there is in this case a particularly close connecting factor between the present dispute and the Belgian courts such as to render Article 5(1) of the Brussels Convention applicable.

20 However, the Cour d'appel raises the question whether the fact that the undertaking to act exclusively was to be honoured, *inter alia*, in Belgium — and was indeed honoured in Belgium, since it was in Germany that Plafog negotiated with the Finnish undertaking — is sufficient to confer jurisdiction on the Belgian courts. Since the parties' undoubted intention was that the other contracting party should not commit itself to another partner for the purpose of submitting a joint tender for the public contract concerned, the place where any such commitment was entered into or fulfilled does not matter and the exclusivity obligation in question was applicable in any place whatever in the world, the places for performance of that obligation therefore being particularly numerous.

21 Taking the view that, in those circumstances, determination of the case required an interpretation of the Brussels Convention, the Cour d'appel de Bruxelles decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Must Article 5(1) of the [Brussels] Convention ... be interpreted as meaning that a defendant domiciled in a Contracting State may, in another Contracting State, be sued, in matters relating to a contract, in the courts for any of the places of performance of the obligation in question, in particular where, consisting in an obligation not to do something — such as, in the present case, an undertaking to act exclusively with another party to a contract with a view to submitting a joint bid for a public contract and not to enter into a commitment with another partner — that obligation is to be performed in any place whatever in the world?

If not, may that defendant be sued specifically in the courts for one of the places of performance of the obligation and, if so, by reference to what criterion must that place be determined?'

22 It is clear from the order for reference that the Cour d'appel de Bruxelles found, first, that the relevant obligation for the purposes of the application of Article 5(1) of the Brussels Convention was an obligation not to do something, consisting here in the parties' undertaking not to commit themselves to other partners in connection with a procedure for the award of a public contract, and, second, that the parties did not designate either the place of performance of that contractual obligation or the courts having jurisdiction to hear any action relating to such an obligation, or, for that matter, the law governing the contract. The referring court also states that, given all the circumstances of the case, the parties' clear intention was to have the obligation in question honoured throughout the world, with the result that the places for its performance are particularly numerous.

23 The question referred for a preliminary ruling must be answered in the light of those factors.

24 As the referring court itself points out, the Court has repeatedly held that the principle of legal certainty is one of the objectives of the Brussels Convention (Case 38/81 *Effer* [1982] ECR 825, paragraph 6; Case C-26/91 *Handte* [1992] ECR I-3967, paragraphs 11, 12, 18 and 19; Case C-129/92 *Owens Bank* [1994] ECR I-117, paragraph 32; Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913, paragraph 18; and Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307, paragraph 23).

25 According to its preamble, the Brussels Convention is intended to strengthen in the Community the legal protection of persons established therein, by laying down common rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the various national courts before which proceedings in a particular case may be brought (see, to that effect, *Custom Made Commercial*, cited above, paragraph 15).

26 That principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the basic principle of the Brussels Convention laid down in Article 2, such as the rule in Article 5(1), should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued (*Handte*, cited above, paragraph 18, and *GIE Groupe Concorde and Others*, paragraph 24).

27 Second, the Court has consistently held that it is essential to avoid, so far as possible, creating a situation in which a number of courts have jurisdiction in respect of one and the same contract, in order to preclude the risk of irreconcilable decisions and to facilitate the recognition and enforcement of

judgments in States other than those in which they were delivered (Case 14/76 *De Bloos* [1976] ECR 1497, paragraph 9; Case 266/85 *Shenavai* [1987] ECR 239, paragraph 8; Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 21; Case C-383/95 *Rutten* [1997] ECR I-57, paragraph 18; and Case C-420/97 *Leathertex* [1999] ECR I-6747, paragraph 31).

28 It follows from the foregoing that Article 5(1) of the Brussels Convention is to be interpreted as meaning that, in the event that the relevant contractual obligation has been, or is to be, performed in a number of places, jurisdiction to hear and determine the case cannot be conferred on the court within whose jurisdiction any one of those places of performance happens to be located.

29 Rather, as is clear from the very wording of that provision, which, in matters relating to a contract, confers jurisdiction on the courts 'for the place' of performance of the obligation in question, a single place of performance for the obligation in question must be identified.

30 According to the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 22), the special rules of jurisdiction laid down in Section 2 of Title II of that Convention are justified in particular by the consideration that there is a close connecting factor between the dispute and the court called upon to resolve it (see Case 56/79 *Zelger* [1980] ECR 89, paragraph 3).

31 The reason for the adoption of the jurisdictional rule in Article 5(1) of the Brussels Convention was concern for sound administration of justice and efficacious conduct of proceedings (see, to this effect, in particular *Tessili*, paragraph 13; *Shenavai*, paragraph 6, and *Mulox IBC*, paragraph 17, and, by way of analogy, as regards Article 5(3) of the Brussels Convention, Case C-220/88 *Dumez France and Tracoba* [1990] ECR I-49, paragraph 17; Case

C-68/93 *Shevill and Others* [1995] ECR I-415, paragraph 19; and Case C-364/93 *Marinari* [1995] ECR I-2719, paragraph 10). The court of the place where the contractual obligation giving rise to the action is to be performed will normally be the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence.

32 It follows that, in a case such as that now referred, characterised by a multiplicity of places of performance of the contractual obligation in question, a single place of performance has to be identified. In principle, this will be the place presenting the closest connection between the dispute and the court having jurisdiction.

33 However, as the Commission rightly points out, application of the Court's traditional case-law, according to which the place of the performance of the obligation in question, within the meaning of Article 5(1) of the Brussels Convention, is to be determined in accordance with the law governing the obligation in question, according to the conflict rules of the court seised (*Tessili*, paragraphs 13 and 15; *Custom Made Commercial*, paragraph 26; *GIE Groupe Concorde and Others*, paragraph 32; and *Leathertex*, paragraph 33), does not enable that result to be achieved.

34 Where parties have agreed a contractual obligation not to do something, applicable without any geographical limit, that approach does not avoid a multiplicity of competent courts, since it leads to the result that the places of performance of the obligation in question are in all the Contracting States. It also involves the risk that the claimant will be able to choose the place of performance which he judges to be most favourable to his interests.

35 Consequently, that interpretation does not make it possible to identify the court most qualified territorially to determine the case. Furthermore, it is likely to reduce the predictability of the competent court, so that it is incompatible with the principle of legal certainty.

36 A further point is that it is not possible, in a situation such as that at issue in the present case, to give an autonomous interpretation of the place of performance, referred to in Article 5(1) of the Brussels Convention, without calling in question the case-law established since *Tessili*, recalled in paragraph 33 above and upheld most recently by the Court in its judgments in *GIE Groupe Concorde and Others* and *Leathertex*.

37 Accordingly, contrary to the approach envisaged by the court which has referred this case, the place of performance of the obligation in question in the present case cannot be identified on the basis of factual considerations, that is, on the basis of the specific circumstances of the case evidencing a particularly close connection between the case and a Contracting State.

38 Further, it is true that there is settled case-law, as regards contracts of employment, to the effect, first, that the place of performance of the relevant obligation should be determined by reference, not to the applicable national law in accordance with the conflict rules of the court seised, but to uniform criteria which it is for the Court to lay down on the basis of the scheme and objectives of the Brussels Convention (*Mulox IBC*, paragraph 16); next, that those criteria lead to the choice of the place where the employee actually performs the work covered by the contract with his employer (*Mulox IBC*, paragraph 20); finally, that, where the employee performs his work in more than one Contracting State, the place where the obligation characterising the contract is to be performed, within the meaning of Article 5(1) of the Brussels Convention, is the place where or from which the employee principally discharges his obligations towards his employer (*Mulox IBC*, paragraph 26) or where the employee has established the effective centre of his activities (*Rutten*, paragraph 26).

39 However, contrary to the alternative argument put forward by Besix, that case-law of the Court, rehearsed in the preceding paragraph, cannot be applied by analogy in the present case.

40 As the Court has repeatedly held (see, in particular, *Shenavai*, paragraph 17, *GIE Groupe Concorde and Others*, paragraph 19, and *Leathertex*, paragraph 36), where these specific features of a contract of employment are lacking, it is neither necessary nor appropriate to identify the obligation which characterises the contract and to centralise at its place of performance all jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract.

41 As for the solution consisting in choosing as the place of performance the place where the breach of the obligation in question was committed, that cannot be applied either, since it would also imply a reversal of the *Tessili* case-law, by giving an autonomous interpretation to the concept of place of performance, without looking at the law applicable to the relevant obligation in accordance with the conflict rules of the court seised. Besides, it would not avoid the situation of many courts having jurisdiction in the event that that obligation had not been honoured in many different Contracting States.

42 Finally, the Commission proposes to apply by analogy the solution adopted by the Court in paragraph 19 of the judgment in *Shenavai*, so that, for the purposes of Article 5(1) of the Brussels Convention, the determining factor, in a case such as this, would not be the place of performance of the non-competition undertaking but the place of performance of the positive obligation to which that undertaking is accessory, in that it guarantees its proper performance.

43 Besix has suggested a variant of that solution, whereby the negative obligation in question in the instant case should be regarded as the corollary of the obligation, arising from the agreement concluded on 24 January 1984 between Besix and WABAG, to participate in submitting a tender for the public contract in question and to perform the works put out to tender, so that it would be the place of performance of that latter obligation which should be determined.

44 The Court finds, however, that such an interpretation would be hardly compatible with the wording of Article 5(1) of the Brussels Convention, which, since its amendment, in some language versions, by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, specifies that the obligation whose place of performance determines which court has jurisdiction is 'the obligation which forms the basis of the claim' [in the English version 'the obligation in question']. Nor would that interpretation be compatible with the case-law of the Court on the version prior to that amendment of that provision, according to which the obligation whose place of performance determines judicial jurisdiction for the purposes of Article 5(1) is that which arises under the contract and the non-performance of which is relied upon in support of the action (*De Bloos*, paragraphs 14 and 15).

45 In the present case, as may be seen from paragraph 16 of this judgment, the national court found that only the obligation of exclusivity and non-competition was in question, the sole purpose of the legal action brought by Besix being to obtain compensation for the damage which it claims to have suffered through breach of that obligation by WABAG and Plafog. Accordingly, the question referred by the Cour d'appel de Bruxelles relates solely to determination of the place for performance of that negative obligation. However, the approach advocated by Besix and the Commission would entail the prior determination of the relevant positive obligation.

46 It is, moreover, settled case-law that, in view of the allocation of jurisdiction under the preliminary ruling procedure provided for by the Protocol of 3 June 1971 on the interpretation of the Brussels Convention by the Court of Justice, it is for the national court to rule on those questions of fact, the Court confining itself to interpreting that Convention in the light of the findings made by the national court (see, to that effect, *Leathertex*, paragraph 21).

47 Further, unlike the situation in the case now before the court making this reference, the dispute which led to the ruling in *Shenavai* concerned two distinct obligations.

48 In view of the considerations set forth above, it appears that Article 5(1) of the Brussels Convention is not apt to apply in a case such as that in the main proceedings, where it is not possible to determine the court having the closest connection with the case by making jurisdiction coincide with the actual place for performance of the obligation considered relevant by the national court.

49 By its very nature, an obligation not to do something, which, like that in question in the main proceedings, consists in an undertaking to act exclusively with a contracting partner and a prohibition restraining those parties from committing themselves to another partner for the purpose of submitting a joint tender for a public contract and which, according to the parties' intention, is applicable without any geographical limit and must therefore be honoured throughout the world — and, in particular, in each of the Contracting States —, is not capable of being identified with a specific place or linked to a court which would be particularly suited to hear and determine the dispute relating to that obligation. By definition, such an undertaking to refrain from doing something in any place whatsoever is not linked to any particular court rather than to any other.

50 In those circumstances jurisdiction can, in such a case, be determined solely in accordance with Article 2 of the Brussels Convention, which provides a certain and reliable criterion (Case 32/88 *Six Constructions* [1989] ECR 341, paragraph 20).

51 That solution is, moreover, in conformity with the scheme of the Brussels Convention and the rationale of Article 5(1) thereof.

52 The system of common rules on conferment of jurisdiction laid down in Title II of the Brussels Convention is based on the general rule, set out in the first paragraph of Article 2, that persons domiciled in a Contracting State are to be sued in the

courts of that State, irrespective of the nationality of the parties. That jurisdictional rule is a general principle, which expresses the maxim *actor sequitur forum rei*, because it makes it easier, in principle, for a defendant to defend himself (see, in particular, Case C-412/98 *Group Josi* [2000] ECR I-5925, paragraphs 34 and 35).

53 It is only by way of derogation from that fundamental principle that the Brussels Convention makes provision, in accordance with the first paragraph of Article 3, for, in particular, special jurisdictional rules, such as that laid down in Article 5(1), where the choice depends on an option to be exercised by the claimant.

54 However, it is well settled that that option must not give rise to an interpretation going beyond the cases expressly envisaged by the Brussels Convention, for otherwise the general principle laid down in the first paragraph of Article 2 would be undermined and a claimant might be able to affect the choice of a court unforeseeable for a defendant domiciled in the territory of a Contracting State (see, in particular, *Group Josi*, paragraphs 49 and 50, and the references there).

55 In the light of all the foregoing considerations, the answer to be given to the question referred for a preliminary ruling must be that the special jurisdictional rule in matters relating to a contract laid down in Article 5(1) of the Brussels Convention is not applicable where, as in the present case, the place of performance of the obligation in question cannot be determined because it consists in an undertaking not to do something which is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance. In such a case, jurisdiction can be determined only by application of the general criterion laid down in the first paragraph of Article 2 of the Convention.

Costs

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

On those grounds,

THE COURT,

in answer to the question referred to it by the Cour d'appel de Bruxelles by judgment of 19 June 2000, hereby rules:

The special jurisdictional rule in matters relating to a contract, laid down in Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark,

Ireland and the United Kingdom of Great Britain and Northern Ireland, is not applicable where, as in the present case, the place of performance of the obligation in question cannot be determined because it consists in an undertaking not to do something which is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance. In such a case, jurisdiction can be determined only by application of the general criterion laid down in the first paragraph of Article 2 of that Convention.

Rodríguez Iglesias	Jann	Macken
Colneric	La Pergola	Puissochet
Wathelet	Schintgen	Skouris

Delivered in open court in Luxembourg on 19 February 2002.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President