

JUDGMENT OF THE COURT (Fifth Chamber)
27 September 1988 *

In Case 189/87

REFERENCE to the Court under Article 3 of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the proceedings pending before that court between

Athanasios Kalfelis, a furrier,

and

(1) Bankhaus Schröder, Münchmeyer, Hengst und Co., now known as HEMA Beteiligungsgesellschaft mbH KG, in liquidation,

(2) Bankhaus Schröder, Münchmeyer, Hengst International SA, Luxembourg,

and

(3) Ernst Markgraf, procurator holder of Bankhaus Schröder, Münchmeyer, Hengst und Co., Frankfurt am Main,

on the interpretation of Article 5 (3) and Article 6 (1) of the Convention of 27 September 1968,

* Language of the Case: German.

THE COURT (Fifth Chamber)

composed of: G. Bosco, President of Chamber, U. Everling, Y. Galmot, R. Joliet and F. A. Schockweiler, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator

after considering the observations submitted on behalf of

Athanasios Kalfelis, by Harald Aderhold, Rechtsanwalt,

the German Government, by Christof Böhmer, acting as Agent,

the Italian Government, by Oscar Fiumara, avvocato dello Stato,

the United Kingdom, by H. R. L. Purse, assisted by M. C. L. Carpenter, acting as Agents,

the Luxembourg Government, by Yves Mersch, commissaire du gouvernement près de la Bourse, acting as Agent, assisted by Nicolas Decker, avocat,

the Commission of the European Communities, by Jörn Pipkorn, a member of its Legal Department, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt,

having regard to the Report for the Hearing and further to the hearing on 5 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 June 1988,

gives the following

Judgment

- 1 By order of 27 April 1987, which was received at the Court Registry on 16 June 1987, the Bundesgerichtshof referred to the Court for a preliminary ruling under Article 3 of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention') two questions on the interpretation of Articles 5 (3) and 6 (1) of the Convention.
- 2 The questions were raised in proceedings brought by Athanasios Kalfelis against Bankhaus Schröder, Münchmeyer, Hengst und Co., Frankfurt am Main, and Bankhaus Schröder, Münchmeyer, Hengst International SA, Luxembourg, and Ernst Markgraf, a procuracy holder for the first-named bank.
- 3 Between March 1980 and July 1981 Mr Kalfelis concluded with the bank established in Luxembourg, through the intermediary of the bank established in Frankfurt am Main and with the participation of the latter's joint procuracy-holder, a number of spot and futures stock-exchange transactions in silver bullion and for that purpose paid DM 344 868.52 to the bank in Luxembourg. The futures transactions resulted in a total loss. The object of Mr Kalfelis's action is to obtain an order that the defendants, as jointly and severally liable for the debt, should pay him DM 463 019.08 together with interest. His claim is based on contractual liability for breach of the obligation to provide information, on tort, pursuant to Paragraph 823 (2) of the Bürgerliches Gesetzbuch (Civil Code) in conjunction with Paragraph 263 of the Strafgesetzbuch (Criminal Code) and Paragraph 826 of the Bürgerliches Gesetzbuch, since the defendants caused him to suffer loss as a result of their conduct *contra bonos mores*. He also alleges unjust enrichment, on the ground that futures stock-exchange contracts, such as futures transactions in silver bullion, are not binding on the parties by virtue of mandatory provisions of German law and therefore reclaims the sums which he paid over.
- 4 Bankhaus Schröder, Münchmeyer, Hengst International SA challenged the jurisdiction of the German courts at every stage of the procedure and therefore the

Bundesgerichtshof stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

- (1) (a) Must Article 6 (1) of the EEC Convention be interpreted as meaning that there must be a connection between the actions against the various defendants?
- (b) If Question (a) must be answered in the affirmative, does the necessary connection between the actions against the various defendants exist if the actions are essentially the same in fact and law (*einfache Streitgenossenschaft*), or must a connection be assumed to exist only if it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (for example, in cases of “*notwendige Streitgenossenschaft*” (compulsory joinder))?
- (2) (a) Must the term “tort” in Article 5 (3) of the EEC Convention be construed independently of the Convention or must it be construed according to the law applicable in the individual case (*lex causae*), which is determined by the private international law of the court applied to?
- (b) Does Article 5 (3) of the EEC Convention confer, in respect of an action based on claims in tort and contract and for unjust enrichment, accessory jurisdiction on account of factual connection even in respect of the claims not based on tort?
- 5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the Community legislation and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

- 6 The first question submitted by the Bundesgerichtshof is intended essentially to ascertain whether, for Article 6 (1) of the Convention to apply, a connection must

exist between the claims made by the same plaintiff against several defendants and, if so, what the nature of that connection is.

- 7 Pursuant to Article 2 of the Convention, persons domiciled in a Contracting State are, subject to the provisions of the Convention, 'whatever their nationality, to be sued in the courts of that State'. Section 2 of Title II of the Convention, however, provides for 'special jurisdictions', by virtue of which a defendant domiciled in a Contracting State may be sued in another Contracting State. One of the special jurisdictions is that provided for in Article 6 (1) according to which a defendant may be sued 'where he is one of a number of defendants, in the courts for the place where any one of them is domiciled'.
- 8 The principle laid down in the Convention is that jurisdiction is vested in the courts of the State of the defendant's domicile and that the jurisdiction provided for in Article 6 (1) is an exception to that principle. It follows that an exception of that kind must be treated in such a manner that there is no possibility of the very existence of that principle being called in question.
- 9 That possibility might arise if a plaintiff were at liberty to make a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of the defendants is domiciled. As is stated in the report prepared by the committee of experts which drafted the Convention (Official Journal C 59, 5.3.1979, p. 1), such a possibility must be excluded. For that purpose, there must be a connection between the claims made against each of the defendants.
- 10 In order to ensure, as far as possible, the equality and uniformity of the rights and obligations under the Convention of the Contracting States and of the persons concerned, the nature of that connection must be determined independently.
- 11 In that regard, it must be noted that the abovementioned report prepared by the committee of experts referred expressly, in its explanation of Article 6 (1), to the

concern to avoid the risk in the Contracting States of judgments which are incompatible with each other. Furthermore, account was taken of that preoccupation in the Convention itself, Article 22 of which governs cases of related actions brought before courts in different Contracting States.

- 12 The rule laid down in Article 6 (1) therefore applies where the actions brought against the various defendants are related when the proceedings are instituted, that is to say where it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. It is for the national court to verify in each individual case whether that condition is satisfied.
- 13 It must therefore be stated in reply to the first question that for Article 6 (1) of the Convention to apply there must exist between various actions brought by the same plaintiff against different defendants a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The second question

- 14 The second question submitted by the Bundesgerichtshof is intended essentially to ascertain, first, whether the phrase 'matters relating to tort, delict or quasi delict' used in Article 5 (3) of the Convention must be given an independent meaning or be defined in accordance with the applicable national law and, secondly, in the case of an action based concurrently on tortious or delictual liability, breach of contract and unjust enrichment, whether the court having jurisdiction by virtue of Article 5 (3) may adjudicate on the action in so far as it is not based on tort or delict.
- 15 With respect to the first part of the question, it must be observed that the concept of 'matters relating to tort, delict or quasi-delict' serves as a criterion for defining the scope of one of the rules concerning the special jurisdictions available to the plaintiff. As the Court held with respect to the expression 'matters relating to a contract' used in Article 5 (1) (see the judgments of 22 March 1983 in Case 34/82

Peters v ZNAV [1983] ECR 987, and of 8 March 1988 in Case 9/87 *SPRL Arcado and SA Haviland* [1988] ECR 1539), having regard to the objectives and general scheme of the Convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned.

- 16 Accordingly, the concept of matters relating to tort, delict or quasi-delict must be regarded as an autonomous concept which is to be interpreted, for the application of the Convention, principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given full effect.
- 17 In order to ensure uniformity in all the Member States, it must be recognized that the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5 (1).
- 18 It must therefore be stated in reply to the first part of the second question that the term 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5 (3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5 (1).
- 19 With respect to the second part of the question, it must be observed, as already indicated above, that the 'special jurisdictions' enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively. It must therefore be recognized that a court which has jurisdiction under Article 5 (3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.

- 20 Whilst it is true that disadvantages arise from different aspects of the same dispute being adjudicated upon by different courts, it must be pointed out, on the one hand, that a plaintiff is always entitled to bring his action in its entirety before the courts for the domicile of the defendant and, on the other, that Article 22 of the Convention allows the first court seised, in certain circumstances, to hear the case in its entirety provided that there is a connection between the actions brought before the different courts.
- 21 In those circumstances, the reply to the second part of the second question must be that a court which has jurisdiction under Article 5 (3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.

Costs

- 22 The costs incurred by the governments of the Italian Republic, the United Kingdom, the Federal Republic of Germany and the Grand Duchy of Luxembourg, and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in reply to the questions submitted to it by the Bundesgerichtshof by order of 27 April 1987, hereby rules:

- (1) For Article 6 (1) of the Convention to apply there must exist between the various actions brought by the same plaintiff against different defendants a**

connection of such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings;

- (2) (a) The term 'matters relating to tort, delict or quasi-delict' used in Article 5 (3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5 (1);
- (b) A court which has jurisdiction under Article 5 (3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.

Bosco

Everling

Galmot

Joliet

Schockweiler

Delivered in open court in Luxembourg on 27 September 1988.

J.-G. Giraud

G. Bosco

Registrar

President of the Fifth Chamber