JUDGMENT OF THE COURT (Fifth Chamber)
19 May 1998

(Brussels Convention — Interpretation of Article 21 — *Lis alibi pendens* — Definition of 'same parties‘ — Insurance company and its insured)

In Case C-351/96,

REFERENCE to the Court, pursuant to 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 de Cassation, France, for a preliminary ruling in the proceedings pending before that court between

Drouot Assurances SA

and

Consolidated Metallurgical Industries (CMI Industrial Sites),

Protea Assurance and

Groupement d'Intérêt Économique (GIE) Réunion Européenne

on the interpretation of Article 21 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 of the Convention, p. 77) and the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur) and L. Sevón, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Drouot Assurances SA, by Vincent Delaporte, of the Paris Bar,

— Groupement d'Intérêt Économique (GIE) Réunion Européenne, by Didier Le Prado, of the Paris Bar,

— the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and Jean-Marc Belorgey, Chargé de Mission in that directorate, acting as Agents,

— the German Government, by Jörg Pirrung, Ministerialrat in the Federal Ministry of Justice, acting as Agent, and

— the Commission of the European Communities, by Xavier Lewis, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Drouot Assurances SA, represented by Vincent Delaporte; of Consolidated Metallurgical Industries (CMI Industrial Sites) and Protea Assurance, represented by Jean-Christophe Balat, of the Paris Bar; of the French Government, represented by Jean-Marc Belorgey; and of the Commission, represented by Xavier Lewis, at the hearing on 13 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 January 1998, gives the following

Judgment

1. By order of 8 October 1996, received at the Court on 25 October 1996, the Cour de Cassation (Court of Cassation), France, 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 21 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 of the Convention, p. 77) and the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter 'the Convention').

2. That question was raised in proceedings brought by Drouot Assurances SA, a company incorporated under French law (hereinafter 'Drouot'), against Consolidated Metallurgical Industries (CMI Industrial Sites, hereinafter 'CMI') and Protea Assurance (hereinafter 'Protea'), companies incorporated under South African law, and Groupement d'Intérêt Économique (GIE) Réunion Européenne (hereinafter 'GIE Réunion'), on the subject of the cost of refloating a barge known as the 'Sequana' which foundered in the inland waters of the Netherlands on 4 August 1989.

3. Article 21 of the Convention provides:

'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court.

A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.'

4. In 1989 CMI arranged with a Mr Velghe to transport on the Sequana a cargo of ferrochromium belonging to it from the Dutch port of Rotterdam to the French port of Garlinghem-Aire-la-Lys on the Rhine. According to the referring court, at the time of these events, the Sequana belonged to a Mr Walbrecq and was chartered by Mr Velghe.

5. However, at the hearing the Court was informed that, according to CMI and Protea, following the death of Mr Walbrecq in 1981, Mr Velghe had become the owner of the Sequana and that, at the material time, the vessel was chartered by another company. Drouot stated that it had no information on those matters, but explained that, according to the custom followed on the Rhine, the master is the legal agent of the owner and he is responsible for checking that the vessel is fit to sail. Finally, according to CMI, Protea and Drouot, Mr Velghe was the master of the Sequana at the time of the events in issue.

6. On 4 August 1989 the Sequana foundered in the inland waters of the Netherlands. Drouot, the insurer of the hull of the vessel, had it refloated at its own expense, thereby enabling CMI's cargo to be salvaged.

7. On 11 and 13 December 1990, Drouot brought proceedings before the Tribunal de Commerce (Commercial Court), Paris, against CMI, Protea (the insurer of the cargo) and GIE Réunion (Protea's agent at the time of the expert's report on the salvaging costs), for payment of the sum of HFL 99 485.53, the figure set by the average adjuster as the amount of the contribution of CMI and Protea to the general average.

8. However, in the French court, CMI and Protea raised an objection of *lis alibi pendens* on the basis of an action they had brought on 31 August 1990 against Mr Walbrecq and Mr Velghe before the Arrondissementsrechtbank (District Court), Rotterdam, for a declaration, *inter alia*, that they were not obliged to contribute to the general average.

9. On 11 March 1992 the Tribunal de Commerce, Paris, rejected the plea of *lis alibi pendens* on the ground that, as Drouot was not a party to the Netherlands action and Mr Walbrecq and Mr Velghe were not parties to the French action, the parties to the two actions were not the same. Moreover, the Tribunal took the view that the subject-matter of the applications made in the two actions was not the same.

10. CMI, Protea and GIE Réunion then appealed to the Cour d'Appel (Court of Appeal), Paris. Before that court, CMI and Protea argued that the only reason Drouot was not a party to the Netherlands action was that procedural rules in the Netherlands did not permit insurers to be brought into the action. They also argued that, since the subject-

matter of the dispute before the Netherlands court encompassed that of the dispute before the French court, the subject-matter of the two disputes was the same.

11. In a judgment of 29 April 1994, the Cour d'Appel, Paris, first noted that it was common ground that Netherlands procedural rules restricted the opportunity for an insurer to be party to proceedings in which the insured is involved. It then considered that Drouot was in fact present in the Netherlands action 'through the intermediary of the insured'. Finally, it held that, in the light of the arguments put forward by CMI and Protea, the two disputes did have the same subjectmatter. Accordingly the plea of *lis alibi pendens* was upheld.

12. Drouot then appealed to the Cour de Cassation against that judgment, contending that the parties to the two actions were not the same.

13. The Cour de Cassation, taking the view that the appeal before it raised a difficulty concerning the interpretation of Article 21 of the Convention, decided to stay proceedings and seek a ruling from the Court of Justice on the question

'Whether with regard in particular to the independent concept of "same parties" used in Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, there is inter- State *lis alibi pendens* for the purposes of that provision where a court of one Contracting State is seised by the insurer of a vessel that has been shipwrecked with an action seeking from the owner and the insurer of the cargo on board partial reimbursement, by way of contribution to the general average, of the refloating costs, when a court of another Contracting State was seised previously by that owner and insurer with an action against the owner and the charterer of the vessel for a declaration that they were not obliged to contribute to the general average, and the court seised second declines jurisdiction, despite the parties in the two cases not being strictly identical, on the ground that the procedural law applicable before the court seised first "restricts the opportunity for an insurer to be party to proceedings in which the insured is involved" so that the insurer of the vessel is in fact also involved, through the intermediary of the insured, in the case brought first.'

14. By that question, the national court is asking essentially whether Article 21 of the Convention is applicable in the case of two actions for contribution to general average, one brought by the insurer of the hull of a vessel which has foundered against the owner and the insurer of the cargo which the vessel was carrying when it sank, the other brought by the latter two parties against the owner and the charterer of the vessel.

15. As the parties to those two actions do not appear to be the same, it should be considered whether, in a case such as that in the main proceedings, the insurer of the hull of a vessel must be deemed to be the same person as its insured when applying the 'same parties' criterion contained in Article 21 of the Convention.

16. According to consistent case-law, the terms used in Article 21 of the

Convention in order to determine whether a situation of *lis pendens* arises must be regarded as independent (Case C-406/92 *The 'Tatry'* [1994] ECR I-5439, paragraph 30).

17. In the *'Tatry'* judgment, cited above, at paragraph 32, the Court stressed that Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention, a section intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.

18. In that same judgment, at paragraph 33, the Court held that, in the light of the wording of Article 21 of the Convention and the objective set out above, that article must be understood as requiring, as a condition of the obligation of the second court seised to decline jurisdiction, that the parties to the two actions be identical.

19. It is certainly true that, as regards the subject-matter of two disputes, there may be such a degree of identity between the interests of an insurer and those of its insured that a judgment delivered against one of them would have the force of *res judicata* as against the other. That would be the case, *inter alia*, where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured without the latter being in a position to influence the proceedings. In such a situation, insurer and insured must be considered to be one and the same party for the purposes of the application of Article 21 of the Convention.

20. On the other hand, application of Article 21 cannot have the effect of precluding the insurer and its insured, where their interests diverge, from asserting their respective interests before the courts as against the other parties concerned.

21. In the present case, CMI and Protea made clear at the hearing that, in the Netherlands action, they seek to have Mr Velghe declared exclusively liable for the foundering of the Sequana. As the insurer merely of the hull of the vessel, however, Drouot takes the view that it cannot be held liable for the fault of its insured and thus has no interest in the Netherlands action.

22. It appears, moreover, that, in the French action, Drouot has been acting not in its capacity as the representative of its insured but in its capacity as a direct participant in the refloating of the Sequana.

23. Thus, in this case, it does not appear that the interests of the insurer of the hull of the vessel can be considered to be identical to and indissociable from those of its insured, the owner and the charterer of that vessel. However, it is for the national court to ascertain whether this is in fact the case.

24. In those circumstances, the existence or otherwise of a national procedural rule such as that mentioned in the question referred for a preliminary ruling is of no relevance to the solution of the dispute.

25. The answer to the question raised must thus be that Article 21 of the Convention is not applicable in the case of two actions for contribution to general average, one brought by the insurer of the hull of a vessel which has foundered against the owner and the insurer of the cargo which the vessel was carrying when it sank, the other brought by the latter two parties against the owner and the charterer of the vessel, unless it is established that, with regard to the subject-matter of the two disputes, the interests of the insurer of the hull of the vessel are identical to and indissociable from those of its insured, the owner and the charterer of that vessel.

Costs

26. The costs incurred by the French and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 answer to the question referred to it by the Cour de Cassation, France, by order of 8 October 1996, hereby rules:

Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as atended 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, is not applicable in the case of two actions for contribution to general average, one brought by the insurer of the hull of a vessel which has foundered against the owner and the insurer of the cargo which the vessel was carrying when it sank, the other brought by the latter two parties against the owner and the charterer of the vessel, unless it is established that, with regard to the subject-matter of the two disputes, the interests of the insurer of the hull of the vessel are identical to and indissociable from those of its insured, the owner and the charterer of that vessel.

Gulmann
Wathelet
Moitinho de Almeida
Edward
Sevón

Delivered in open court in Luxembourg on 19 May 1998.

R. Grass
C. Gulmann
Registrar
President of the Fifth Chamber
1: Language of the case: French.