

OPINION OF ADVOCATE GENERAL
TIZZANO
delivered on 16 December 2004¹

I — Introduction

1. This case concerns a question as to the interpretation of the Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter ‘the Brussels Convention’ or simply ‘the Convention’)² referred to the Court of Justice of the European Communities for a preliminary ruling by the Cour d’Appel (Court of Appeal) of Grenoble (France).

2. In summary, the national court asks whether a jurisdiction clause entered into in accordance with the requirements of Article 12(3) of the Brussels Convention may be relied upon against an insured or against a beneficiary under an insurance

policy if that party is not also the policyholder.

II — Legal background

The provisions of the Brussels Convention

3. The Brussels Convention applies to civil and commercial disputes and is intended to determine, by the provisions contained in Title II, the jurisdiction of the courts of Contracting States within the Community sphere.

4. The general rule, laid down in Article 2 of the Convention, is based on the principle that jurisdiction lies with the courts of the defendant’s domicile. However, the Convention makes important exceptions to this rule with provision for special (Section 2 of Title II) or exclusive jurisdiction (Section 5) and for *prorogatio fori* (Section 6), in the context

¹ — Original language: Italian.

² — Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (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 text — p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989, on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1), and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1). A consolidated version of the Convention is published in OJ 1998 C 27, p. 1.

of the general scheme, as well as through the creation of sub-schemes founded on a quite different principle, that of the protection of the weaker party (Sections 3 and 4). Of foremost relevance here is Section 3 of Title II of the Convention. According to Article 7, jurisdiction in matters relating to insurance policies is governed by the succeeding articles (8 to 12a) quite autonomously with respect to the rules laid down by Sections 1 and 2 of that title.

5. Specifically, Article 8 sets up a full-blown *forum actoris* in favour of the weaker contracting party, providing as follows:

‘An insurer domiciled in a Contracting State may be sued:

(1) in the courts of the State where he is domiciled, or

(2) in another Contracting State, in the courts for the place where the policyholder is domiciled ...’.

6. Article 9 in turn provides that:

‘[i]n respect of liability insurance ... the insurer may ... be sued in the courts for the place where the harmful event occurred’.

7. In addition to those forum options, Article 10(1) of the Convention provides that ‘[i]n respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party had brought against the insured’.

8. In cases where the insurer is the plaintiff, Article 11 provides that an insurer ‘may bring proceedings only in the courts of the Contracting State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary’.

9. Of particular relevance to this case is Article 12 of the Convention, which provides that the above jurisdiction rules may be departed from ‘only by an agreement on jurisdiction:

(1) which is entered into after the dispute has arisen, or

- (2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or
- (b) in a form which accords with practices which the parties have established between themselves; or
- (3) which is concluded between a policyholder and an insurer, both of whom are domiciled in the same Contracting State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State ...’.
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

10. Finally, in relation to prorogation of jurisdiction, mention must be made of Article 17 of the Convention, which is in the following terms:

...

[1] If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
- [4] Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

[5] If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.'

erie du Chatelard') in Eydoche (France), which consisted of fitting sandwich boards, manufactured by Plast'Europ, as it then was, with a polyurethane filling injected between two layers of facing.

III — Facts and procedure

11. Société financière et industrielle du Peloux (hereinafter 'SFIP'), formerly known as SA Plast'Europ, is a French subsidiary of the Belgian company Recticel SA (hereinafter 'Recticel').

12. In 1988, Recticel entered into an insurance policy with a group of Belgian insurers on its own behalf and that of its European subsidiaries, including SFIP.

13. Article K of the insurance policy provides that 'in the event of a dispute concerning the present contract, the company will submit to the jurisdiction of the court of the domicile of the policyholder'.

14. In 1990, the French company Calland Réalisations SARL carried out various insulation works at Établissements Bernard Laitiere du Chatelard SA (hereinafter 'Lait-

15. An expert's report found design and manufacturing faults in the panels and determined that those defects made the premises in which Laiterie du Chatelard carried on its business unfit for that purpose.

16. By proceedings brought in the Tribunal de grande instance Bourgoin-Jallieu (France) on 1 and 12 March 2001, Laiterie du Chatelard claimed damages from (a) Abeille Assurances SA, the insurer of Calland Réalisations SARL, (b) SFIP, (c) SMABTP, SFIP's professional liability insurer, (d) AXA Global Risks SA and (e) Zurich International SA, SFIP's general insurers.

17. In the course of those proceedings, SFIP sought to join as third parties in accordance with Article 10(1) of the Brussels Convention all the Belgian insurance companies that were parties to the insurance policy made with Recticel in 1988.

18. The Belgian insurance companies contested the territorial jurisdiction of the Bourgoïn-Jallieu court relying on Article K of the insurance policy by virtue of which such third-party proceedings were subject to the jurisdiction of the court of Recticel's domicile, that is, the Tribunal de première instance de Bruxelles.

19. By judgment of 13 September 2002, the Tribunal de grande instance de Bourgoïn-Jallieu upheld the objection to jurisdiction by the Belgian insurance companies and relinquished jurisdiction in favour of the Belgian courts as far as SFIP's third-party proceedings against the insurance companies were concerned.

20. SFIP appealed against that decision by way of a *contredit de compétence* to the Grenoble Cour d'appel, which, having doubts as to the interpretation of the Brussels Convention, stayed the proceedings and referred the following question to the Court of Justice in accordance with the Luxembourg Protocol of 3 June 1971:³

personally approve the clause in question, the harm occurred in another Member State and the insured has also brought third-party proceedings in that other State against insurers domiciled there?'

21. In the ensuing proceedings, written observations were submitted by the French Government, the United Kingdom Government, the Commission, and by the insurance companies Gerling Konzern, Mutuelle du Mans, Axa Belgium, Zurich International Belgique, Ace Insurance and Fortis Corporate Insurance (hereinafter 'the insurance companies').

22. At the hearing on 27 October 2004, representations were made on behalf of Axa Belgium, Gerling Konzern, France, the United Kingdom and the Commission.

IV — Legal analysis

'Is the insured beneficiary of a contract of insurance for the benefit of others, entered into between a policyholder and an insurer who are both domiciled in the same Member State, bound by a clause conferring jurisdiction on the courts of that State if it did not

23. By the question referred for a ruling, the national court asks, in substance, whether a jurisdiction clause entered into in accordance with the requirements of Article 12(3) of the Brussels Convention may be relied upon against an insured or a beneficiary

3 — OJ 1975 L 204, p. 28.

under an insurance policy who is not also the policyholder and who is domiciled in a different Member State from the policyholder (and from the insurer).

24. In their observations submitted to the Court, the intervening parties gave opposing answers to this question.

25. According to one view, advocated by the Commission with arguments that will be related as necessary in due course, a jurisdiction clause in a policy entered into by an insurer and by a policyholder for the benefit of a third party cannot be relied upon against that third party. In the instant case, accordingly, the clause agreed by Recticel and the insurance companies was not operative against SFIP.

26. The contrary view is taken by the United Kingdom and by the insurance companies, who argue that such a clause can indeed be relied upon against a third-party insured and, hence, in this case, against SFIP.

27. At the hearing that view was then also subscribed to by the French Government, which in its written observations had concluded instead, following close scrutiny of the two opposing views, that there was a case to be made for both.

28. That much said, in order to take a position on the two views, it is necessary first to consider briefly the various provisions of the Convention concerned with jurisdiction in insurance matters.

29. In that regard, it should be remembered that the jurisdiction rules set out in Section 3 of the Convention reflect the need to protect parties such as the policyholder, the insured and the third-party beneficiary, who 'in most cases [are] faced with a predetermined contract the clauses of which are no longer negotiable and [are] the weaker part[ies] economically'⁴ in the insurance relationship.

30. In essence, that protection is implemented on two fronts. If the plaintiff is the insurer, Article 11 of the Convention confers jurisdiction exclusively on the courts of the weaker party's domicile. If instead it is the weaker party in the relationship who is the plaintiff, that party has the option, under Article 8(1) and (2) of the Convention, to sue the insurer either in the courts of the insurer's domicile or in the courts of the policyholder's domicile

⁴ — Case C-412/98 *Group Josi* [2000] ECR I-5925, paragraph 64; see also Case 201/82 *Gerling* [1983] ECR 2503, paragraph 17.

31. In addition to those forum options, two further special jurisdictions are provided for, by Articles 9 and 10 of the Convention, in relation to liability insurance.

32. Article 9 provides, in relevant part, that the insurer may in addition be sued in the courts for the place where the harmful event occurred. Article 10(1), meanwhile, provides that the insurer may be joined as a third party in proceedings for damages brought by the injured party against the insured, provided that third-party proceedings of that kind are permitted under the *lex fori*.

33. Finally, the protection of the weaker party in the insurance relationship is supplemented by the imposition of strict conditions on clauses departing from the forum rules laid down by the other provisions of Section 3 described above.

34. Article 12 of the Convention provides that the jurisdiction rules in insurance matters may be departed from by means of jurisdiction clauses. But at the same time it lays down conditions to prevent such clauses prejudicing the weaker party in the insurance relationship. These conditions are that (i) the weaker party has consented explicitly to the effects of the jurisdiction clause after the dispute has arisen (Article 12(1)); or that (ii) the pre-selected forum is compatible with the protection of that party's interests

(Article 12(2) and (3)); or that (iii) neither party is deserving of protection (Article 12(4) and (5)).

35. Thus, while upholding party autonomy, a principle to which special importance is also attached,⁵ the Convention guards against the possibility that the objective of protecting the weaker party could be undermined by means of jurisdiction clauses imposed by insurers using their greater bargaining power.

36. Following that preliminary discussion, I will now embark on a more in-depth analysis of Article 12(3) of the Convention, which is undoubtedly the key provision for the purposes of this case.

37. As we have seen, that provision allows the parties to an insurance contract to depart from the general jurisdiction rules described above by including in their contract a clause 'which is concluded between a policyholder and an insurer, both of whom are domiciled in the same Contracting State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State'.

5 — See Case 23/78 *Meeth* [1978] ECR 2133, paragraph 5.

38. It may be noted, to begin with, that the main purpose of this exception is to enable the insurer to exclude the operation of the jurisdiction rules laid down in Articles 9 and 10 of the Convention. By means of a clause of this kind the insurer can avoid the possibility of either being sued in the courts for the place where the harmful event occurred (Article 9) or being joined by the insured in proceedings which the injured party has brought against the insured (Article 10).⁶

39. Yet on proper consideration a jurisdiction agreement of this kind cannot disadvantage the policyholder since it requires policyholder and insurer to be domiciled in the same State in order for jurisdiction to be conferred on the courts of that State.

40. Problems arise, however, when as in this case the insured and the policyholder are not the same person and the insured is domiciled in a different Member State from the policyholder and the insurer.

41. In those circumstances, as mentioned above, the Commission maintains that the

need to protect the third-party insured means that the jurisdiction clause is not enforceable against such a party.

42. The United Kingdom Government and the insurance companies, on the other hand, invoke grounds of legal certainty, as well as other arguments which I mention below, to argue that the jurisdiction clause is binding on the insured despite the fact that it was entered into between the policyholder and the insurer. Only that approach, they maintain, provides genuine protection for the insurer's interest in defending actions in a single predetermined forum, especially in liability insurance matters.

43. For my part, let me say at once that the text of Article 12(3) does not seem to me to provide a conclusive answer to the question. It merely sets forth the conditions that have to be satisfied by a jurisdiction clause within its scope, but says nothing about the point here in issue. This is confirmed by the fact that the intervening parties arrived at opposite conclusions from a literal reading of the provision in question.

44. According to the United Kingdom, the wording of Article 12(3) of the Convention shows that a jurisdiction clause which complies with its requirements is fully effective even against a third-party insured or a beneficiary. In its view, if the Contracting States had wished to differentiate

⁶ — It will be recalled that the injured party may sue in the courts of the insured person's domicile or in those for the place where the harmful event occurred, by virtue of Articles 2 and 5(3) of the Convention respectively.

between such parties and the policyholder, so that a jurisdiction clause validly entered into could not be relied upon against them, they would have had no difficulty in so providing expressly. Where the Convention's framers saw fit to make a distinction between the policyholder and the other parties they did so overtly. That was the case, for example, in Article 12(2), which authorises an agreement on jurisdiction that 'allows the policyholder, *the insured or a beneficiary* to bring proceedings in courts other than those indicated in this Section'.⁷ *A contrario*, the failure to differentiate in Article 12(3) between the policyholder's situation and that of the other parties means that those situations are treated alike and hence that clauses based on that provision are effective against third parties.

45. Moreover, the United Kingdom goes on, to hold that Article 12(3) is intended to protect a third-party insured or a beneficiary differently from the policyholder would amount to an unacceptable 'creative interpretation' of the provision, reading into it a limitation on the effectiveness of the clause which is not ordained either directly or indirectly by Article 12.

46. In support of its case, the United Kingdom also prays in aid the instrument that

replaced the Convention, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter 'Regulation No 44/2001').⁸ Article 13(3), the provision of the regulation corresponding to Article 12(3) of the Convention, makes no mention of the third-party insured or a beneficiary, although references to those parties have been added in other provisions on jurisdiction allocation in insurance matters, in particular Article 9 (1)(b), which corresponds to Article 8(2) of the Convention.⁹

47. That confirms, according to the United Kingdom Government, that where the intention was to make specific provision for the third-party insured and the beneficiary, this was done *expressis verbis*.

48. The opposite view is taken by the Commission, which argues that the silence of Article 12(3) of the Convention with regard to the third-party insured and a beneficiary must in fact be taken to mean that those parties are in a different situation

⁸ — OJ 2001 L 12, p. 1.

⁹ — According to the latter provision, an insurer domiciled in a Contracting State may be sued 'in another Contracting State, in the courts for the place where the policyholder is domiciled'. Article 9(1)(b) of Regulation No 44/2001, on the other hand, provides that the insurer may be sued 'in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled'.

⁷ — Emphasis added.

from the policyholder. Moreover, the Commission goes on, turning the United Kingdom's argument on its head, if the intention had been to treat all three parties the same, the Convention would have said so expressly, as it did in the case of the aforementioned Article 12(2).

Article 12(2) of the Convention, which has a different rationale to Article 12(3). As already noted, Article 12(2) authorises jurisdiction clauses which allow 'the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section'.

49. This stark difference of opinion confirms, in my view, that the text of Article 12 (3) is not capable of providing clear and indisputable guidance as to the effects of that provision.

52. It is therefore clear that a clause of that kind cannot cause any prejudice to the weaker parties in the insurance relationship since, far from excluding the jurisdiction rules in insurance matters laid down by the Convention, it in fact adds an extra forum to those provided for under the rules. The protection of the weaker parties to the insurance relationship is thus maintained and indeed enhanced.

50. Nor for that matter do I believe that any light is shed on the question by the case-law, in particular *Gerling*,¹⁰ which is cited by the intervening parties and in which each side again finds arguments to support its own view.

53. Clauses under Article 12(3), on the other hand, designate a jurisdiction that excludes the other possibilities arising under the relevant provisions of Section 3 of the Convention. It is therefore acceptable for such clauses to be enforceable against third parties if and only if that does not run counter to the policy of protecting the insured which underlies the rules laid down by the Convention in this area.

51. It is true that the Court held in that case, which concerned an insurance contract between an insurer and a policyholder who had contracted both for its own benefit and for that of a third party, that the third party is entitled to rely on a jurisdiction clause contained in the contract as against the insurer.¹¹ It is also true, however, that the clause at issue in that case was one based on

54. Given therefore the different rationale and effects of the two provisions, it is not in my view correct to argue, as the United Kingdom Government and the insurance companies do, that if it is the case-law of the

¹⁰ — Cited above.

¹¹ — *Ibid.*, paragraph 20.

Court that an insured person may take the benefit of a jurisdiction clause which is within Article 12(2) of the Convention, there is no reason why a clause within Article 12(3) should not operate against the same party.

58. It will be recalled that in a civil liability matter the tortfeasor may be sued by the injured party either in the courts of its State of domicile (Article 2 of the Convention) or in the courts for the place where the harmful event occurred (Article 5(3) of the Convention).

55. As was the case with the text of the provision, neither does the relevant Community case-law ultimately provide a reliable basis for the answer to the question referred. We must therefore resort to a schematic interpretation of the Convention's provisions in insurance matters.

59. As the insured party under a civil liability policy, the insured would in both cases enjoy adequate protection in its dealings with the insurer, by virtue of Article 10 (1) of the Convention.

56. In so doing, the first point to note is that the purpose of those provisions is, as repeatedly stated, to protect the weaker parties in the insurance relationship, being the policyholder, the insured and the beneficiary.

60. In the former case, it could join the insurer in the proceedings in the courts of its domicile. In the latter case, it would be entirely up to the insured to choose whether to pursue its claim against the insurer in a different forum. The insurer could either be joined in proceedings in the *forum delicti*, which is closer to the facts of the case, or sued in separate third-party proceedings in the courts of the insured's own domicile.

57. If that is taken as the starting point, the answer to the question will then be sought by examining whether, in the case of an action for damages brought by the injured party against a tortfeasor who is insured for civil liability but who is not the policyholder, the tortfeasor-insured can in fact suffer a prejudice as a result of the application of the jurisdiction clause contained in the policy.

61. If a jurisdiction clause in accordance with Article 12(3) of the Convention is brought into play, then an insured *who is also a party to the insurance contract* and is sued by the injured party in the court for the

place where the harmful event occurred, would be unable, by reason of that clause, to implead the insurer in that court but would still be able to pursue its own claims in separate proceedings in the courts of its own domicile (which in this scenario is also, by definition, that of the insurer). So the jurisdiction clause would not fatally undermine the policy of protecting the weaker party that informs the entire section of the Convention dedicated to insurance.

the same as that common to the insurer and the policyholder; the application of the clause in their case would have the effect of preventing them, unlike what would happen in the policyholder's case, from seeking relief in the courts of their own domicile.

62. Where as in this case, however, *the insured is a third party to the insurance contract*, and is domiciled (as here) in a different Member State to the insurer, the jurisdiction clause would have the effect of depriving that party both of the courts for the place of the harmful event and of those of its own domicile, forcing it to pursue its claims against the insurer in the courts of the latter's domicile.

64. It is clear, however, that if that were the position then the aim of protecting the weaker party that underlies Section 3 of the Convention would be badly thwarted.

65. The conclusion is the same, moreover, when the approach which I am criticising is applied to the case of the insurer suing the third-party insured.

63. It is therefore not the case, as the United Kingdom and the insurance companies maintain, that if the clause could not be relied upon against a third-party insured it would mean that the insurance policy gave such parties greater rights than the policyholder, against whom the clause could indeed be invoked. As we have just seen, when (as in this case) the domicile of the third-party insured or of a beneficiary is not

66. In that instance, Article 11 of the Convention provides as the general rule (and again in the interests of protecting the weaker contracting party) that an insurer may bring proceedings only 'in the courts of the Contracting State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary'.

67. But if an agreement on jurisdiction had been entered into in accordance with Article

12(3) and if it could be relied upon against the third-party insured, the protection conferred by Article 11 would inevitably be undermined, since the weaker party would have to defend itself in the courts of the insurer's domicile.

68. Similar considerations apply to the argument which the United Kingdom seeks to deduce from the aforementioned Regulation No 44/2001, which replaced the Brussels Convention, relying on the fact that Article 13 of the regulation and Article 12 of the Convention are substantially identical (see paragraph 46 et seq.).

69. In relation to that, I must first observe that while that regulation has no application to this case,¹² none the less the changes it makes to relevant provisions are not without interest for present purposes in view of the substantial identity to which I have just referred.

70. On that basis, I would note that the 13th recital to the regulation states that '[i]n relation to insurance ... the weaker party

should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for'.

71. To that end, Article 9(1)(b) of Regulation No 44/2001 increased the protection given by the Convention to the weaker parties in an insurance relationship by allowing the insurer to be sued not only in the courts of its own domicile but also 'in another Member State, *in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled*'.¹³

72. Thus, as well as being able to sue in the courts of the policyholder's domicile, the only jurisdiction contemplated by Article 8 (2) of the Brussels Convention, under Regulation No 44/2001 the third-party insured also has the option, which it did not have under the Convention, of suing the insurer in the courts of its own domicile.

73. But if the framers of the regulation, despite their greater concern than in 1968 with the protection of weaker parties other than the policyholder, did not see fit to change the rule contained in Article 12(3) of the Convention and which the regulation

12 — Article 66(1) of Regulation No 44/2001 provides: 'This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof', which was set to take place on 1 March 2002. As we have seen, *Etablissements Bernard Laiterie du Chatelard SA* instituted the main proceedings on 1 March 2001.

13 — Emphasis added.

reproduces in substantially identical terms (in Article 13(3)), that indicates, to my mind, that the Community legislature must have proceeded on the assumption that jurisdiction clauses based on that provision cannot be relied upon against such parties.

74. If a jurisdiction clause of the kind provided for by Article 12(3) of the Convention, and the analogous Article 13(3) of the regulation, could be relied upon against a third-party insured or a beneficiary domiciled in another Member State, such parties would necessarily be compelled to bring suit in the courts of the insurer's domicile, thus losing the possibility, which already existed under the Convention and was confirmed by the regulation,¹⁴ of pursuing their claims in the courts of the *forum delicti*, as well as the right, introduced in their favour by Article 9 (1)(b) of the regulation, to sue in the courts of their own domicile.

75. Which, let me repeat again, would be irreconcilable with the aim of the Community legislation to protect the weaker party in the insurance relationship.

76. It therefore seems to me that in the light of all these schematic considerations the better view, of those put forward, is that a

jurisdiction clause in accordance with Article 12(3) of the Convention cannot be relied upon against an insured who is a third party to the insurance policy.

77. For the sake of completeness, however, the objections to that view raised by the insurance companies and the United Kingdom Government still need to be considered.

78. The first of those objections, as mentioned previously, is based on the requirement of legal certainty. An insurer, the argument goes, ought to know for certain from the time the contract is entered into what court will have jurisdiction over all disputes that may arise from it, something that would not be possible if the interpretation were adopted that the jurisdiction clause does not apply.

79. I must point out, however, that the approach in question does not necessarily prevent the insurer from knowing in advance in which courts it may be sued. It is well known that in the majority of insurance policies arranged on behalf of or for the benefit of a third party, the policyholder notifies the third party's particulars to the insurer at the time the contract is entered into, so that the insurer has adequate notice as to which courts will have jurisdiction to hear and determine any litigation that may arise between it and the third-party insured or beneficiary.

¹⁴ — Articles 9 and 10 respectively.

80. In the second instance, the insurance companies argue that the approach in question would jeopardise the uniform interpretation of the Convention, given the possibility of conflicting decisions on the same issue.

81. It seems to me, however, that that objection is easily answered by pointing out that the requirements of uniform interpretation of the Convention and avoidance of conflicting judgments are amply secured by the conferral of jurisdiction on the Court of Justice to interpret the Convention as well as by the provisions thereof devoted to *lis pendens* and related actions.

82. The United Kingdom and the insurance companies further argue that the need to protect the weaker party does not apply in the present case given that Recticel and its subsidiaries are companies of national and European scale and thus capable of negotiating with the insurers on what are effectively equal terms. That this was so was demonstrated by the fact that the jurisdiction clause was not imposed on Recticel but expressly requested by it.

83. I do not find that argument convincing, however, even leaving aside the fact that an interpretation given by the Court when exercising its preliminary ruling jurisdiction is by nature meant to transcend the facts of the particular case.

84. As it happens, a request for the protection afforded to the weaker party in the insurance relationship to be restricted in cases where that party is economically powerful was made by the United Kingdom during the negotiations leading to its accession to the Convention. That request was based on the same argument as here, that the social protection policy underlying the jurisdiction rules in insurance matters is no longer justified where the policyholder is a large enterprise.

85. When it came to the drafting of the Convention, however, the view was taken that, for reasons of legal certainty, the policy of protecting the weaker party in the insurance relationship could be restricted only in relation to certain categories of insurance risk. The United Kingdom's request, as evidenced *inter alia* by the *travaux préparatoires* of the Convention,¹⁵ raised the difficulty of finding an objective criterion to define the circumstances in which the requirement to protect the weaker party in the insurance relationship would not apply.

86. It was therefore decided in the end to insert an Article 12a into the Convention, allowing jurisdiction clauses in relation to

15 — See paragraph 140 of the 'Schlosser Report', Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, of 9 October 1978 (OJ 1979 C 59, p. 71).

‘major risk’ insurance only, that is to say, in insurance policies covering certain kinds of transport (in particular air and sea transport). From this it may be inferred, *a contrario*, that the size and international stature of the policyholder or insured enterprise do not of themselves have the effect of precluding the operation of the special rules laid down by the Convention in insurance matters, since that effect is confined to the cases specified in Article 12a.

rights and obligations of one of the original parties’.¹⁹

89. If that is so, the Court observed, there is no need to ascertain whether the third party expressed its intention to be bound by the jurisdiction clause, since ‘[i]n such circumstances, acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it’.²⁰

87. Lastly, the United Kingdom Government seeks to rely on a series of decided cases concerning clauses contained in a bill of lading, in which the Court held that such clauses were enforceable against a third-party holder of the bill.

90. On the other hand, if, under the *lex causae*, the party not privy to the original contract did not succeed to the rights and obligations of one of the original parties, the Court held that ‘the court seised must ascertain, having regard to the requirements laid down in the first paragraph of Article 17 of the Convention, whether he actually accepted the jurisdiction clause relied on against him’.²¹

88. The United Kingdom Government points out that in *Tilly Russ*,¹⁶ *Castelletti*,¹⁷ and *Coreck*,¹⁸ the Court held that a jurisdiction clause within Article 17 of the Brussels Convention and incorporated in a bill of lading can be relied upon against a holder of the bill who was not privy to the original contract so long as, under the applicable law, the third-party holder ‘has succeeded to the

91. It seems to me, however, that in those judgments the Court did no more than apply the general principles governing contractual obligations. That is to say, it held that a jurisdiction clause, like any other term of a contract, can bind only those who were party to it and who, by signing it, evinced their intention to depart from the jurisdiction provisions of the Convention.

16 — Case 71/83 [1984] ECR 2417.

17 — Case C-159/97 [1999] ECR I-1597.

18 — Case C-387/98 [2000] ECR I-9337.

19 — *Coreck*, paragraph 24.

20 — *Coreck*, paragraph 25.

21 — *Coreck*, paragraph 26.

92. According to the Court, however, that general principle is subject to two exceptions.

93. In the first place, the agreement between the original parties will be binding on a third party who, by virtue of the proper law of the contract, has succeeded to all the rights and duties of one of the parties thereto.

94. Since there is no question of that being the case here, I will move straight on to the second exception, which is that an agreement on jurisdiction is binding on a third party who expressly consents to it.

95. However, while that outcome is in general a reflection of the principles of party autonomy and freedom of contract with which the Convention is imbued, different considerations apply in the specific area of insurance, where, as the Commission points out, those principles have to be tempered with the equally fundamental requirements of protecting the weaker party to an insurance contract.

96. Of course, it might be argued that by giving its explicit consent the third party ceases to be a 'stranger' to the jurisdiction clause, which is one of the grounds for the

unenforceability of such a clause against it. On a proper view, however, such consent is not sufficient to make the clause effective against the third party, at least where, as is the case here, that party is not domiciled in the same Member State as the insurer (and the policyholder).

97. As we have seen (see paragraph 33 et seq. above), the Convention allows the weaker party to waive certain forum options otherwise available to it under the jurisdiction rules of Section 3 only if to do so would not result in any prejudice to that party. In the case of a prorogation of jurisdiction in accordance with Article 12(3), prejudice is avoided by the fact that the designated forum is the State where both parties (and hence the weaker party too) have their domicile (see paragraph 39 above). In the case of a third party domiciled in some other State, however, the forum determined by the jurisdiction clause would be the home State of the insurer alone, an outcome which would obviously be incompatible with the objectives pursued by Section 3 of the Convention.

98. Nor does the argument hold that explicit consent by the third party substantially alters the situation. As noted above (see paragraph 33 et seq.), the protection conferred on the weaker party by Articles 7 to 11 of the Convention can be waived by means of a jurisdiction clause within Article 12 of the Convention only in cases where it may be reasonably presumed that the clause is not prejudicial to that party (see, in particular,

subparagraphs (2) and (3)). Such is not the position in the case at hand since the operation of the clause would confer exclusive jurisdiction on the courts of the insurer's domicile, a domicile not that of the third party.

considered here are capable of upsetting the view adopted above.

99. It does not seem to me, therefore, that any of the objections that have been

100. On that ground, I propose that the Court answer the question referred to the effect that a jurisdiction clause in accordance with Article 12(3) of the Brussels Convention cannot be relied upon against a third-party insured who is domiciled in a different Member State from the insurer and the policyholder.

V — Conclusions

101. In the light of the foregoing considerations, I therefore propose that the Court answer the question referred by the Cour d'appel de Grenoble in the following terms:

A jurisdiction clause in accordance with Article 12(3) of the Brussels Convention cannot be relied upon against a third-party insured who is domiciled in a different Member State from the insurer and the policyholder.