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Case C-266/01, ECJ 15 May 2003

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COMPULSORY GUARANTEES UNDER THE TIR CONVENTION – A 'CIVIL AND COMMERCIAL' MATTER UNDER THE BRUSSELS REGULATION?

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Préservatrice Foncière Tiard SA v Staat der Nederlanden
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In Case C-266/01 *Préservatrice Foncière Tiard SA v Staat der Nederlanden* (judgment of 15 May 2003), the European Court of Justice was asked by the Hoge Raad der Nederlanden[2] whether contractual and guarantee matters arising from the Customs Convention on the International Transport of Goods under cover of TIR Carnets ('the TIR Convention') 1975[3] fall within the governance of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. Article 1 of the Brussels Convention provides that the Convention 'shall apply in civil and commercial matters whatever the nature of the court or tribunal' and that 'it shall not extend, in particular, to revenue, customs or administrative matters'. The main proceedings arose out of the enforcement of a guarantee required under the TIR for the payment of duties and taxes due from the holders of TIR carnets issued. Préservatrice Foncière Tiard SA ('PFT') a company established under French law in France had contractually agreed to guarantee certain TIR dues to the Netherlands. Upon the failure of the carnet holders to pay, the Netherlands brought proceedings against PFT before the Rechtbank de Rotterdam[4] to enforce the guarantee. PFT argued that the Netherlands was in error to bring proceedings in the Netherlands and that jurisdiction should be determined in accordance with the Brussels Convention (which requires that the defendant be sued at the place of his domicile[5] generally). Although the Brussels Convention has largely been superseded by the new Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and

* I am grateful to my colleagues at the University of Westminster, Richard Earle and Peter Burridge for their helpful comments.

[2] The Supreme Court of the Netherlands.

[3] As approved and adopted by the European Community by Council Regulation (EEC) 2112/78 of 25 July 1978 (OJ 1978 L252, at 1). The TIR requires that goods carried under the TIR procedure are not subject to the payment or deposit of import or export duties and taxes at customs offices en route. In order to ensure the transit system is not abused, the Convention requires that the goods be accompanied by a document, the TIR carnet and that the transport operations be guaranteed by associations approved by the contracting states (Article 6, TIR Convention).

[4] District Court in Rotterdam.

[5] Article 2.

Commercial Matters (Council Regulation 44/2001),[6] as the wording of Article 1 has not been changed, this case provides an important clarification of EU rules on civil and commercial jurisdiction as they may affect the enforcement of customs and transit dues.

The ruling

The ECJ ruled that 'civil and commercial matters' covered 'a claim by which a contracting state [sought] to enforce against a person governed by private law a private law guarantee contract which was concluded in order to enable a third party to supply a guarantee required and defined by that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, [did] not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals'. As far as the scope of 'customs matters' is concerned, the ECJ ruled that it did not extend to a claim by which a contracting state sought to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the legal relationship between the state and the guarantor, under that contract, did not entail the exercise by the state of powers going beyond those existing under the rules applicable to relations between private individuals, even if the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

The arguments put forward by the Netherlands are persuasive. They argued that there is a significant link between the act of guarantee and the system of taxes and duties whose payment it seeks to ensure. The guarantee would not have been required or indeed, become an issue without the public law relationship between the state and the authorised trader using the TIR carnet. The content of the act of guarantee was to a large extent determined by the rules of public law.

The ECJ, however, demurred. It held that it was necessary to examine first whether the legal relationship between the Netherlands and PFT under the guarantee contract was characterised by an exercise of public powers on the part of the state to which the debt is owed. That means, it would appear, whether the legal relationship under that guarantee was unique and different to that between private individuals. Also the ECJ was concerned to see whether that relationship was one which entailed the exercise of public powers by the state. In the present case, the ECJ found that the legal relationship between the Netherlands and PFT was not one directly governed by the TIR Convention. Although the Convention defines the obligations of a national guaranteeing association (such as PFT), the Convention does not define the extent of the possible undertakings imposed on a guarantor by a state as a condition for a decision authorising national guaranteeing associations. The guarantee contract was also no different from an ordinary contract of guarantee – it was not imposed by statute law, it was freely undertaken, and the guarantor may freely bring an end to it by notice. As PFT contended, the Netherlands' claim against PFT was founded solely in the guarantee contract, a contract governed by private law.

It is not easy to counter these findings of the ECJ on principal but it is submitted that the ruling will have serious practical implications for the system of duty collection within the EU (or the EEA). The effect of the ECJ's preliminary ruling is that where the guarantor is an entity established elsewhere in the EU, it is no longer axiomatic that the national authority collecting those dues can simply commence enforcement proceedings in the home state. They will need to assess the wider private international law implications under the Brussels Convention or Council Regulation 44/2001. That could very well mean that the proceedings may have to be brought in the Member State where the guarantor is established (domiciled). In order to avoid this, the collecting authority may have to insert a choice of exclusive jurisdiction clause to ensure the courts in the home Member State have jurisdiction under the Brussels Convention[7] or Council Regulation 44/2001.[8] It has not been the practice of

[6] The new regulation came into force on 1 March 2002. It applies where the defendant is domiciled in a Member State of the EU. The Brussels Convention, however, continues to have effect where the defendant is domiciled in Denmark.

[7] Article 17.

[8] Article 23.

national authorities responsible for collecting payment under the guarantees at present to insert such clauses. The assumption, it seems, has always been that the guarantees are in lieu of the customs debt in issue and as such, no exclusive jurisdiction clause is used.

It is of course possible for the customs authorities of a Member State to argue that under Article 5(1)[9] the guarantor may be sued in that Member State as the obligation to pay should have been discharged there. The general rule in Article 5(1) states that in matters relating to contract a defendant may additionally be sued in the Member State where the performance in question is to be effected. The problem with this strategy is overcoming the definition of 'performance in question'. In a contract of guarantee, on general principles,[10] it is likely, although not certain, that the performance in question is the obligation to pay. Where payment is effected, however, is not always clear in the enforcement of customs duties and similar taxes. Payment may be deemed to have been made on receipt by the beneficiary's agent or authorised representative or by the beneficiary himself. That would suggest that with the closer co-operation between customs authorities between Member States,[11] it is conceivable for one customs authority or a foreign representative to collect payment on behalf of another. Where that is the case, it is open to argument that the place of performance in question might be in that Member State.[12]

Another problem with Article 5(1) for the national customs agencies is that that Article only provides for an additional basis for jurisdiction, it does not provide for *exclusive* jurisdiction for the collecting Member State concerned. As a result it is not unthinkable that the guarantor may institute proceedings himself to challenge the right of the collecting Member State to enforce the guarantee in another Member State, thus bringing about a *lis pendens* situation.

Such problems of enforcement of the guarantee do not feature in the ECJ's determination to keep the exceptions to the Brussels regime limited and narrow. The emphasis on the characterisation of the legal relationship between the state and the guarantor,[13] and the refusal to consider the public law underpinning on the contents of the guarantee contract, might be seen as further evidence of this determination.

The second issue for the court's consideration was whether the reference in Article 1 to 'customs matters' includes such a guarantee. The ECJ ruled that that reference sought only to draw attention to the fact that 'customs matters' are not covered by the concept of 'civil and commercial matters' and did not have the effect of either limiting or modifying the scope of the latter concept. On that basis, the ECJ pronounced, 'it follows that the criterion for fixing the limits of the concept of "customs matters" must be analogous to that applied to the concept of "civil and commercial matters" '.

It seems indisputable from the ruling that where the dispute is about the legality or legal nature of the dues, that would fall within 'customs matters' for the purposes of jurisdiction.[14] It is thus possible that one Member State will have jurisdiction to hear a dispute over the legality of the imposition of the duty/tax because that is a matter of public law for adjudication by its courts, whilst another Member State has the jurisdiction to arbitrate the legal implications of the guarantee on the basis of the Brussels regime. It is conceivable that the latter proceedings may bring into issue the legality of the

[9] The numbering of the provision is the same in both the Brussels Convention and the Council Regulation.

[10] In Case 14/76 *Ets A de Bloos SPRL v Société en commandite par actions Bouyer* [1976] ECR 1497, the ECJ ruled that the relevant obligation is the obligation on which the claimant's action is based. In the case of a guarantee, where the claimant's action is founded on the guarantor's refusal or failure to pay, the obligation in question would be the duty to pay.

[11] Mutual Assistance schemes are already in place within the EU for the enforcement of certain national and EU duties. See generally http://europa.eu.int/comm/taxation_customs/index_en.htm.

[12] See, for example, the documentary credit case of *Royal Bank of Scotland v Cassa directive Risparmio delle Provincie Lombard*, *The Financial Times*, 21 January 1992, Court of Appeal, where a contract between the issuing bank and the confirming bank in relation to a letter of credit provides for reimbursement through a third bank, the place of performance of the issuing bank's obligation to reimburse the confirming bank is at the specified place of business of the third bank.

[13] The emphasis on the legal relationship is not new. See Case 29/76 *LTU* [1976] ECR 1541, paragraph 3; Case 133/78 *Gourdain* [1979] ECR 733, paragraph 3; Case 814/79 *Rüffer* [1980] ECR 3807, paragraph 7; Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 18 and Case C-271/00 *Baten* [2002] ECR I-0000, paragraph 28.

[14] Paragraph 44 of the Judgment.

underpinning duty/tax. This naturally increases the risk of irreconcilable judgments by the two Member States concerned over what is essentially two closely related subject-matters. It is also unclear whether the rule in Article 28 where 'related actions are pending in the courts of different Member States, any court other than the court first seised[15] *may* stay its proceedings' will apply where one of the two actions is a public law matter which clearly falls outside the scope of the Regulation. It should apply to the court seised of the private law matter. That court, if latterly seised should thus stay proceedings for the validity of the customs debt to be resolved first by the other Member State where it is expedient to hear and determine the two actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings.[16] It would appear, however, that Article 28 will not apply to the court seised of jurisdiction over the public law matter. Any exercise of discretion in relation to *lis pendens* actions will thus depend entirely on national law.

Guarantees are mandatory under the TIR Convention: they underpin and support the TIR system. This ruling by the ECJ not only complicates the entire process of customs debt collection and enforcement but also weakens the operation of the TIR Convention and similar systems.[17] Enforcement agencies, such as Customs and Excise, may have to rely on contractual devices to avoid the risk of contest in another jurisdiction over the enforcement of such guarantees.

[15] Article 30 provides that a court shall be deemed to be seised: (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

[16] Article 28(3).

[17] Including excise, AAD. In the UK, the ATA Carnet system may entail different considerations because the guarantee is provided by the Chambers of Commerce & Industry as part of the international guarantee chain. See generally HMCE Public Notice 104 (March 2002).