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JURISPRUDENCE

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Reference for a preliminary ruling from the Corte d'Appello di Milano (Italy) lodged on 22 August 2007 - Marco Gambazzi v Daimler Chrysler Canada Inc and CIBC Mellon Trust Company

(Case C-394/-07)

Language of the case: Italian

Referring court

Corte d'Appello di Milano

Parties to the main proceedings

Appellant: Marco Gambazzi

Respondents: Daimler Chrysler Canada Inc, CIBC Mellon Trust Company

Questions referred

On the basis of the public-policy clause in Article 27(1) of the Brussels Convention, may the court of the State requested to enforce a judgment take account of the fact that the court of the State which handed down that judgment denied the unsuccessful party - which had entered an appearance - the opportunity to present any form of defence following the issue of a debarring order as described [in the grounds of the present Order]?

Or does the interpretation of that provision in conjunction with the principles to be inferred from Article 26 et seq of the Convention, concerning the mutual recognition and enforcement of judgments within the Community, preclude the national court from finding that civil proceedings in which a party has been prevented from exercising the rights of the defence, on grounds of a debarring order issued by the court because of that party's failure to comply with a court injunction, are contrary to public policy within the meaning of Article 27(1)?

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Order of the President of the Court of 13 June 2006 (reference for a preliminary ruling from the Tribunale di Napoli - Italy) - Giuseppina Montoro and Michelangelo Liguori v Beth Israel Deaconess Medical Center

(Case C-170/06) [1]

Language of the case: Italian

The President of the Court has ordered that the case be removed from the register.

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1 -

2 - OJ C 143, 17.06.2006.

ORDONNANCE DU PRÉSIDENT DE LA COUR

13 juin 2006 (*)

«Radiation»

Dans l'affaire C-170/06,

ayant pour objet une demande de décision préjudicielle au titre du protocole du 3 juin 1971 relatif à l'interprétation par la Cour de justice de la convention du 27 septembre 1968 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, introduite par Tribunale di Napoli (Italie), par décision du 2 mars 2006, parvenue à la Cour le 30 mars 2006, dans la procédure

Giuseppina Montoro,

Michelangelo Liguori

contre

Beth Israel Deaconess Medical Center,

LE PRÉSIDENT DE LA COUR ,

le premier avocat général, M^me^ C. Stix-Hackl, entendu,

rend la présente

Ordonnance

1 Par ordonnance du 12 mai 2006, parvenue au greffe de la Cour le 29 mai 2006, le Tribunal di Napoli a informé la Cour qu'il retirait sa demande de décision à titre préjudiciel.

2 Dans ces conditions, il y a lieu d'ordonner la radiation de la présente affaire du registre de la Cour.

3 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction nationale, il appartient à celle-ci de statuer sur les dépens.

Par ces motifs, le Président de la Cour ordonne:

L'affaire C-170/06 est radiée du registre de la Cour.

Fait à Luxembourg, le 13 juin 2006.

Le greffier	Le président
R. Grass	V. Skouris

* Langue de procédure: l'italien.

Judgment of the Court (Second Chamber)
of 15 February 2007
Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias. Reference for a preliminary ruling: Efeteio Patron - Greece. Brussels Convention - First sentence of the first paragraph of Article 1 - Scope - Civil and commercial matters - Meaning - Action for compensation brought in a Contracting State, by the successors of the victims of war massacres, against another Contracting State on account of acts perpetrated by its armed forces. Case C-292/05.

Convention on Jurisdiction and the Enforcement of Judgments - Scope - Civil and commercial matters - Meaning of civil and commercial matters'

(Convention of 27 September 1968, Art. 1, first para., first sentence)

On a proper construction of the first sentence of the first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978, 1982 and 1989 Accession Conventions, civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.

The term Civil and commercial matters' does not cover disputes resulting from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals and there is all the more reason for such an assessment as regards a legal action for compensation deriving from operations conducted by armed forces, as such operations are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy.

The question as to whether or not the acts carried out in the exercise of public powers that constitute the basis for such proceedings are lawful concerns the nature of those acts, but not the field within which they fall. Since that field as such must be regarded as not falling within the scope of the Convention, the unlawfulness of such acts cannot justify a different interpretation.

(see paras 34-37, 41-44, operative part)

In Case C-292/05,

REFERENCE 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, from the Efetio Patron (Greece), made by decision of 8 June 2005, received at the Court on 20 July 2005, in the proceedings

Irini Lechouritou,

Vasilios Karkoulias,

Georgios Pavlopoulos,

Panagiotis Bratsikas,

Dimitrios Sotiropoulos,

Georgios Dimopoulos

v

Dimosio tis Omospondiakis Dimokratias tis Germanias,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), J. Kluka, R. Silva de Lapuerta and J. Makarczyk, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 September 2006,

after considering the observations submitted on behalf of:

- Ms Lechouritou, Mr Karkoulias, Mr Pavlopoulos, Mr Bratsikas, Mr Sotiropoulos and Mr Dimopoulos, by I. Stamoulis, dikigoros, and J. Lau, Rechtsanwalt,

- the German Government, by R. Wagner, acting as Agent, assisted by Professor B. Heß,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Aiello, avvocato dello Stato,

- the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

- the Polish Government, by T. Nowakowski, acting as Agent,

- the Commission of the European Communities, by M. Condou-Durande and A.-M. Rouchaud-Joet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2006,

gives the following

Judgment

On those grounds, the Court (Second Chamber) hereby rules:

On a proper construction of the first sentence of the first paragraph of Article 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.

1. This reference for a preliminary ruling relates to the interpretation of Article 1 of the 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 version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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) (the Brussels Convention').

2. The reference was made in proceedings between Ms Lechouritou, Mr Karkoulias, Mr Pavlopoulos,

Mr Bratsikas, Mr Sotiropoulos and Mr Dimopoulos, Greek nationals resident in Greece who are the plaintiffs in those proceedings, and the Federal Republic of Germany concerning compensation for the financial loss and non-material damage which the plaintiffs have suffered on account of acts perpetrated by the German armed forces and of which their parents were victims at the time of the occupation of Greece during the Second World War.

Legal context

3. Article 1 of the Brussels Convention, which constitutes Title I thereof, headed Scope', provides:

This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

3. social security;

4. arbitration.'

4. The rules on jurisdiction laid down by the Brussels Convention are set out in Articles 2 to 24, which constitute Title II of the Convention.

5. Article 2, which forms part of Section 1 (General provisions') of Title II, sets out in its first paragraph the basic rule of the Brussels Convention in the following terms:

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.'

6. The first paragraph of Article 3 of the Brussels Convention, which appears in the same section, is worded as follows:

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.'

7. Articles 5 to 18 of the Brussels Convention, which form Sections 2 to 6 of Title II, lay down rules governing special, mandatory or exclusive jurisdiction.

8. Article 5, which appears in Section 2 (Special jurisdiction') of Title II, provides:

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

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

...'.

The main proceedings and the questions referred for a preliminary ruling

9. It is apparent from the documents sent to the Court by the referring court that the main proceedings have their origins in the massacre of civilians by soldiers in the German armed forces which was

perpetrated on 13 December 1943 and of which 676 inhabitants of the municipality of Kalavrita (Greece) were victims.

10. In 1995 the plaintiffs in the main proceedings brought an action before the Polimeles Protodikio Kalavriton (Court of First Instance, Kalavrita) for compensation from the Federal Republic of Germany in respect of the financial loss, non-material damage and mental anguish caused to them by the acts perpetrated by the German armed forces.

11. In 1998 the Polimeles Protodikio Kalavriton, before which the Federal Republic of Germany did not enter an appearance, dismissed the action on the ground that the Greek courts lacked jurisdiction to hear it because the defendant State, which was a sovereign State, enjoyed the privilege of immunity in accordance with Article 3(2) of the Greek Code of Civil Procedure.

12. In January 1999 the plaintiffs in the main proceedings appealed against that judgment to the Efetio Patron (Court of Appeal, Patras) (Greece) which, after holding in 2001 that the appeal was formally admissible, stayed proceedings until the Anotato Idiko Dikastirio (Superior Special Court) (Greece) had ruled, in a parallel case, on the interpretation of the rules of international law concerning immunity of sovereign States from legal proceedings and on their categorisation as rules generally recognised by the international community. More specifically, that case concerned, first, whether Article 11 of the European Convention on State Immunity - signed at Basle on 16 May 1972, but to which the Hellenic Republic is not a party - according to which a Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred', is to be regarded as a generally recognised rule of international law. Second, the further question was raised as to whether this exception to the immunity of the Contracting States covers, in accordance with international custom, claims for compensation in respect of wrongful acts which, while committed at the time of an armed conflict, adversely affected persons in a specific group or a particular place who had no connection with the armed clashes and did not participate in the military operations.

13. In 2002 the Anotato Idiko Dikastirio held in the case brought before it that, as international law currently stands, a generally recognised rule of international law continues to exist, according to which it is not permitted that a State be sued in a court of another State for compensation in respect of a tort or delict of any kind which took place in the territory of the forum and in which armed forces of the State being sued are involved in any way, whether in wartime or peacetime', so that the State being sued enjoys immunity in that instance.

14. In accordance with Article 100(4) of the Greek Constitution, decisions of the Anotato Idiko Dikastirio are irrevocable'. Also, under Article 54(1) of the Code on the Anotato Idiko Dikastirio, a decision by it determining whether a rule of international law is to be regarded as generally recognised applies erga omnes', so that a decision of the Anotato Idiko Dikastirio which has removed doubt as to whether a particular rule of international law is to be regarded as generally recognised, and the assessment in that regard set out in the decision, bind not only the court which referred the matter to it or the litigants who made the application which is at the origin of the decision, but also every court and body of the Hellenic Republic before which the same legal issue is raised.

15. After the plaintiffs in the main proceedings had pleaded the Brussels Convention, in particular Article 5(3) and (4) which, in their submission, abolished States' right of immunity in all cases of torts and delicts committed in the State of the court seised, the Efetio Patron had doubts, however, as to whether the proceedings brought before it fell within the scope of that Convention, observing in this regard that the question whether the defendant State enjoyed immunity and, consequently, the Greek courts lacked jurisdiction to hear the case before it turned on the answer to disputed

questions of law.

16. It was in those circumstances that the Efetio Patron decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

(1) Do actions for compensation which are brought by natural persons against a Contracting State as being liable under civil law for acts or omissions of its armed forces fall within the scope ratione materiae of the Brussels Convention in accordance with Article 1 thereof where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity?

(2) Is it compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very application of the Convention is neutralised, in particular in respect of acts and omissions of the defendant's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-1944?'

Procedure before the Court

17. By letter lodged at the Court Registry on 28 November 2006, the plaintiffs in the main proceedings made observations on the Opinion of the Advocate General and requested the Court to decide that the present case is of exceptional importance and refer it to the full Court or a Grand Chamber, in accordance with Article 16 of the Statute of the Court of Justice'.

18. It must be pointed out at the outset that neither the Statute of the Court of Justice nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion. The Court has therefore held that applications to that effect must be rejected (see, in particular, the order in Case C17/98 Emesa Sugar [2000] ECR I-665, paragraphs 2 and 19).

19. Also, under the third paragraph of Article 16 of the Statute of the Court of Justice, the Court shall sit in a Grand Chamber when a Member State or an institution of the Communities that is party to the proceedings so requests'.

20. It is apparent from the very wording of the third paragraph of Article 16 that individuals do not have standing to make such a request, and in the present instance the request that the case be referred to a Grand Chamber was not made by a Member State or an institution of the Communities that is party to the proceedings.

21. In addition, apart from the cases listed in the fourth paragraph of Article 16, it is the Court alone which, pursuant to the fifth paragraph thereof, has the power to decide, after hearing the Advocate General, to refer a case to the full Court, where it considers that case to be of exceptional importance.

22. Here, the Court holds that there is no good reason for it to make such a reference.

23. Accordingly, the request as set out in paragraph 17 of this judgment must necessarily be refused.

24. It must be added that the same conclusion would be necessary if the request by the plaintiffs in the main proceedings should be regarded as seeking the reopening of the procedure.

25. The Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties order the reopening of the oral procedure under Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia Case C-309/99 Wouters and Others [2002] ECR I1577, paragraph 42; Case C-309/02 Radlberger Getränkegesellschaft

and S. Spitz [2004] ECR I11763, paragraph 22; and Case C308/04 P SGL Carbon v Commission [2006] ECR I-5977, paragraph 15).

26. However, the Court, after hearing the Advocate General, finds that in the present case it has before it all the information and arguments necessary to reply to the questions referred by the national court and that that material has been debated before it.

Consideration of the questions

Question 1

27. By its first question, the referring court essentially asks whether, on a proper construction of the first sentence of the first paragraph of Article 1 of the Brussels Convention, civil matters' within the meaning of that provision covers a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.

28. It must be stated at the outset that while the Brussels Convention, in accordance with the first sentence of the first paragraph of Article 1, lays down the principle that its scope is limited to civil and commercial matters', it does not define the meaning or the scope of that concept.

29. It is to be remembered that, in order to ensure, as far as possible, that the rights and obligations which derive from the Brussels Convention for the Contracting States and the persons to whom it applies are equal and uniform, the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. It is thus clear from the Court's settled case-law that civil and commercial matters' must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of the Brussels Convention and, second, to the general principles which stem from the corpus of the national legal systems (see, inter alia, Case 29/76 LTU [1976] ECR 1541, paragraphs 3 and 5; Case 814/79 Rüffer [1980] ECR 3807, paragraph 7; Case C271/00 Baten [2002] ECR I-10489, paragraph 28; Case C-266/01 Préservatrice foncière TIARD [2003] ECR I-4867, paragraph 20; and Case C-343/04 EZ [2006] ECR I-4557, paragraph 22).

30. According to the Court, that interpretation results in the exclusion of certain legal actions and judicial decisions from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action (see LTU , paragraph 4; Rüffer , paragraph 14; Baten , paragraph 29; Préservatrice foncière TIARD , paragraph 21; EZ , paragraph 22; and Case C167/00 Henkel [2002] ECR I-8111, paragraph 29).

31. Thus, the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (see LTU , paragraph 4; Rüffer , paragraph 8; Henkel , paragraph 26; Baten , paragraph 30; Préservatrice foncière TIARD , paragraph 22; and Case C-172/91 Sonntag [1993] ECR I1963, paragraph 20).

32. It is pursuant to this principle that the Court has held that a national or international body governed by public law which pursues the recovery of charges payable by a person governed by private law for the use of its equipment and services acts in the exercise of its public powers, in particular where that use is obligatory and exclusive and the rate of charges, the methods of calculation and the procedures for collection are fixed unilaterally in relation to the users (LTU , paragraph 4).

33. Similarly, the Court has held that the concept of civil and commercial matters' within the meaning of the first sentence of the first paragraph of the Brussels Convention does not include

an action brought by the State as agent responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck, in performance of an international obligation, carried out by or at the instigation of that administering agent in the exercise of its public authority (Rüffer , paragraphs 9 and 16).

34. Disputes of that nature do result from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals (see, to this effect, Sonntag , paragraph 22; Henkel , paragraph 30; Préservatrice foncière TIARD , paragraph 30; and Case C-265/02 Frahuil [2004] ECR I1543, paragraph 21).

35. There is all the more reason for such an assessment in a case such as the main proceedings.

36. The legal action for compensation brought by the plaintiffs in the main proceedings against the Federal Republic of Germany derives from operations conducted by armed forces during the Second World War.

37. As the Advocate General has observed in points 54 to 56 of his Opinion, there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy.

38. It follows that acts such as those which are at the origin of the loss and damage pleaded by the plaintiffs in the main proceedings and, therefore, of the action for damages brought by them before the Greek courts must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when those acts were perpetrated.

39. Having regard to the case-law recalled in paragraph 30 of this judgment, a legal action such as that brought before the referring court therefore does not fall within the scope ratione materiae of the Brussels Convention as defined in the first sentence of the first paragraph of Article 1 thereof.

40. Such an interpretation cannot be affected by the line of argument, set out in greater detail by the plaintiffs in the main proceedings, that, first, the action brought by them before the Greek courts against the Federal Republic of Germany is to be regarded as constituting proceedings to establish liability that are of a civil nature and, moreover, covered by Article 5(3) and (4) of the Brusssels Convention, and second, that acts carried out iure imperii do not include illegal or wrongful actions.

41. First of all, the Court has already held that the fact that the plaintiff acts on the basis of a claim which arises from an act in the exercise of public powers is sufficient for his action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the scope of the Brussels Convention (see Rüffer , paragraphs 13 and 15). The fact that the proceedings brought before the referring court are presented as being of a civil nature in so far as they seek financial compensation for the material loss and non-material damage caused to the plaintiffs in the main proceedings is consequently entirely irrelevant.

42. Second, the reference made to the rules governing jurisdiction which are specifically set out in Article 5(3) and (4) of the Brussels Convention is immaterial, because the issue as to whether the Convention falls to apply to the main proceedings logically constitutes a prior question which, if answered in the negative as here, entirely relieves the court before which the case has been brought of the need to examine the substantive rules laid down by the Convention.

43. Finally, the question as to whether or not the acts carried out in the exercise of public powers that constitute the basis for the main proceedings are lawful concerns the nature of those acts,

but not the field within which they fall. Since that field as such must be regarded as not falling within the scope of the Brussels Convention, the unlawfulness of such acts cannot justify a different interpretation.

44. In addition, the proposition put forward in this regard by the plaintiffs in the main proceedings, if accepted, would be such as to raise preliminary questions of substance even before the scope of the Brussels Convention can be determined with certainty. Such difficulties would without doubt be incompatible with the broad logic and the objective of that Convention, which - as is apparent from its preamble and from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) - is founded on the mutual trust of the Contracting States in their legal systems and judicial institutions, and seeks to ensure legal certainty by laying down uniform rules concerning conflict of jurisdiction in the civil and commercial field and to simplify formalities with a view to the rapid recognition and enforcement of judicial decisions made in the Contracting States.

45. Furthermore, in the same field of judicial cooperation in civil matters, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15), which likewise provides, in Article 2(1), that it applies in civil and commercial matters', specifies in that provision that it shall not extend... to... the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)', without drawing a distinction in that regard according to whether or not the acts or omissions are lawful. The same is true of Article 2(1) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

46. Having regard to all of the foregoing considerations, the answer to the first question must be that, on a proper construction of the first sentence of the first paragraph of Article 1 of the Brussels Convention, civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State.

Question 2

47. In view of the reply given to the first question, there is no need to answer the second question.

Costs

48. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
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SUB	Brussels Convention of 27 September 1968
AUTLANG	Greek
OBSERV	Federal Republic of Germany ; Italy ; Netherlands ; Poland ; Member States ; Commission ; Institutions
NATIONA	Greece
NATCOUR	*A9* Efeteio Patron, apofasis tis 08/06/2005 (525/2005) ; - Feraci, Ornella: La sentenza Lechouritou e l'ambito di applicazione ratione materiae della convenzione di Bruxelles del 27 settembre 1968, Rivista di diritto internazionale privato e processuale 2007 p.657-674
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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Schintgen

DATES of document: 15/02/2007
of application: 20/07/2005

Judgment of the Court (Second Chamber) of 16 February 2006

Gaetano Verdoliva v J. M. Van der Hoeven BV, Banco di Sardegna and San Paolo IMI SpA. Reference for a preliminary ruling: Corte d'appello di Cagliari - Italy. Brussels Convention - Judgment authorising the enforcement of a judgment given in another Contracting State - Failure of, or defective, service - Notice - Time for appealing. Case C-3/05.

Convention on Jurisdiction and the Enforcement of Judgments - Enforcement - Judgment authorising enforcement - Service

(Brussels Convention of 27 September 1968, Art. 36)

Article 36 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Accession Conventions of 1978, 1982 and 1989, is to be interpreted as requiring due service of the decision authorising enforcement in accordance with the procedural rules of the Contracting State in which enforcement is sought, and therefore, in cases of failure of, or defective, service of the decision authorising enforcement, the mere fact that the party against whom enforcement is sought has notice of that decision is not sufficient to cause time to run for the purposes of the time-limit fixed in that article.

First, the requirement that the decision authorising enforcement be served has a dual function: on the one hand, it serves to protect the rights of the party against whom enforcement is sought and, on the other, it allows, in terms of evidence, the strict and mandatory time-limit for appealing provided for that provision to be calculated precisely. That double function, combined with the aim of simplification of the formalities to which enforcement of judicial decisions delivered in other Contracting States is subject, explains why the Convention makes transmission of the decision authorising enforcement to the party against whom enforcement is sought subject to procedural requirements that are more stringent than those applicable to transmission of that same decision to the applicant. Secondly, if the sole issue were whether the document authorising enforcement came to the attention of the party against whom enforcement was sought, that could render the requirement of due service meaningless and, moreover, would make the exact calculation of the time-limit provided for in that provision more difficult thus thwarting the uniform application of the provisions of the Convention.

(see paras 34-38, operative part)

In Case C-3/05,

REFERENCE for a preliminary ruling, 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 Corte d'appello di Cagliari (Italy), made by decision of 12 November 2004, received at the Court on 6 January 2005, in the proceedings

Gaetano Verdoliva

v

J.M. Van der Hoeven BV,

Banco di Sardegna,

San Paolo IMI SpA,

with

Pubblico Ministero, intervening,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, R. Silva de Lapuerta, G. Arestis and J. Kluka (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Verdoliva, by M. Comella and U. Ugas, avvocati,

- the Italian Government, by I.M. Braguglia, acting as Agent, and A. Cingolo, avvocato dello Stato,

- the Commission of the European Communities, by E. de March and A.-M. Rouchaud-Joet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 November 2005,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 36 of the 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 version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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) (the Brussels Convention').

2. The reference was made in the course of proceedings between Mr Verdoliva and J.M. Van der Hoeven BV (Van der Hoeven'), Banco di Sardegna and San Paolo IMI SpA, formerly Instituto San Paolo di Torino, concerning the enforcement, in Italy, of a judgment given by the Arrondissementsrechtsbank 'sGravenhage (Netherlands), ordering Mr Verdoliva to pay NLG 365 000 to Van der Hoeven.

Legal context

The Brussels Convention

3. Under the first paragraph of Article 26 of the Brussels Convention, a judgment given in a Contracting State is to be recognised in the other Contracting States without any special procedure being required.

4. Article 27(2) of the Convention provides that a judgment is not to be recognised where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence.

5. According to the first paragraph of Article 31 of the Convention, a judgment given in a Contracting State and enforceable in that State is to be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.

6. Under Article 34 of the Brussels Convention:

The court applied to shall give its decision without delay; the party against whom enforcement

is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

The application may be refused only for one of the reasons specified in Articles 27 and 28.

...'

7. Article 35 of the Convention requires the appropriate officer of the court to bring the decision given on the application to the notice of the applicant without delay, in accordance with the procedure laid down by the law of the State in which enforcement is sought.

8. Article 36 of the Convention provides:

If enforcement is authorised, the party against whom enforcement is sought may appeal against the decision within one month of service thereof.

If that party is domiciled in a Contracting State other than that in which the decision authorising enforcement was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.'

9. Article 40(1) of the Brussels Convention provides that the applicant may appeal if the application for enforcement is refused.

Italian procedural law

10. Article 143 of the Italian Code of Civil Procedure (Codice di Procedura Civile, the CPC') provides that, if a person's place of residence or domicile are unknown, the bailiff is to effect service by lodging a copy of the document in the town hall of the last place of residence and attaching another copy to the notice board of the bailiff's office.

11. Article 650 of the CPC provides that the addressee of an order for payment can also appeal against enforcement of the order, even after expiry of the period set by the order, provided that he proves that he had no notice of the order in sufficient time, owing inter alia to defective service. However, such an appeal ceases to be admissible 10 days from the date of the first notice of enforcement.

The main proceedings and the questions referred for a preliminary ruling

12. By judgment of 14 September 1993, the Arrondissementsrechtsbank 'sGravenhage ordered Mr Verdoliva to pay Van der Hoeven the sum of NLG 365 000, together with interest and incidental expenses.

13. On 24 May 1994, the Corte d'appelo di Cagliari made an order authorising enforcement of that judgment in the Italian Republic and attachment of the amount owed by Mr Verdoliva in the sum of ILT 220 million.

14. An initial attempt to serve the enforcement order at Mr Verdoliva's residence in Capoterra (Italy) was unsuccessful. According to the certificate of service dated 14 July 1994, Mr Verdoliva, while still registered in that area, had moved elsewhere more than a year previously.

15. Service of the order was therefore effected a second time in accordance with Article 143 of the CPC. According to the certificate of service dated 27 July 1994, the bailiff lodged a copy of the order at the town hall in Capoterra and posted a second copy on his office notice board.

16. Since Mr Verdoliva did not appeal against that order within 30 days of such service, Van der Hoeven proceeded to enforce the judgment against Mr Verdoliva by intervening in the enforcement procedure already initiated against him by Banco di Sardegna and San Paolo IMI SpA.

17. By an application lodged on 4 December 1996 before the Tribunale civile di Cagliari (Italy), Mr Verdoliva appealed against enforcement on the grounds, first, that the enforcement order had not been served on him, and, secondly, that it had not been lodged at the Capoterra town hall and

that, consequently, the certificate of service of 27 July 1994 was false.

18. That appeal was dismissed by judgment of the Tribunale civile di Cagliari of 7 June 2002, on the ground, in particular, that it was time-barred. According to that court, it would be permissible, by analogy with Article 650 of the CPC, to appeal out of time where, on account of defective service, no notice of the enforcement order had been obtained in sufficient time. However, the period for lodging such an appeal could not, in any event, exceed 30 days from the date of the first enforcement document which brought that order to Mr Verdoliva's notice.

19. Mr Verdoliva appealed against that judgment to the Corte d'appello di Cagliari, advancing the same arguments as at first instance and adding that service of the enforcement order was also invalid by reason of infringement of Article 143 of the CPC, as interpreted by the Corte suprema di cassazione (Italy). The bailiffs had neither carried out the necessary enquiries to determine whether the addressee was in fact untraceable nor given an account of such enquiries in the certificate of service of 27 July 1994.

20. Taking the view that resolution of the dispute depended on the interpretation of Article 36 of the Brussels Convention, the Corte d'appello di Cagliari decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Does the Brussels Convention provide an independent definition of notice of procedural documents or is that term left to be defined by national rules?

(2) Can it be inferred from the rules of the Brussels Convention, and in particular from Article 36 thereof, that service of the enforcement order provided for in [that article] may be effected in a manner deemed equivalent to service?

(3) Does notice of the enforcement order, in cases of failure of, or defective, service, none the less cause time to run for the purposes of the time-limit laid down in that article? If not, is the Brussels Convention to be interpreted as limiting the ways in which notice of the enforcement order will be deemed to have been acquired?'

Concerning the questions referred

21. By its questions, which it is appropriate to examine together, the national court asks essentially whether, in cases of failure, or defective, service of the decision authorising enforcement, the mere fact that the party against whom enforcement is sought had notice of that decision is sufficient to cause time to run for the purposes of Article 36 of the Brussels Convention.

22. In that regard, it must be observed at the outset that the wording of Article 36 of the Brussels Convention does not by itself enable an answer to be given to the questions raised.

23. While that provision provides that the time-limit for appealing against the decision authorising enforcement begins to run from the day on which that decision is served, it does not define service and does not specify the manner in which it must be effected in order to be effective, except where the party against whom enforcement is sought is domiciled in a Contracting State other than that in which the decision authorising enforcement was given. Service in such a case is required to be effected either on him in person or at his residence before the time for appealing begins to run.

24. Further, Article 36 of the Brussels Convention does not, in contrast to Article 27(2) of that Convention, include any express condition for validity of service.

25. Accordingly, Article 36 of the Brussels Convention must be interpreted in the light of the scheme and aims of that Convention.

26. In relation to the aims of the Brussels Convention, it is clear from its preamble that it

is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals. It is settled case-law that it is not, however, permissible to achieve that aim by undermining in any way the right to a fair hearing (see, in particular, Case 49/84 Debaecker and Plouvier [1985] ECR 1779, paragraph 10, and Case C-522/03 Scania Finance France [2005] ECR I-0000, paragraph 15).

27. More particularly, as far as enforcement is concerned, the principal aim of the Convention is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure whilst giving the party against whom enforcement is sought an opportunity to lodge an appeal (see, in particular, Case 148/84 Deutsche Genossenschaftsbank [1985] ECR 1981, paragraph 16, and Case C-7/98 Krombach [2000] ECR I-1935, paragraph 19).

28. In relation to the scheme established by the Brussels Convention for recognition and enforcement, it is appropriate to point out that, in addition to Article 36, other provisions of that Convention provide for the service on the defendant of documents or decisions.

29. Accordingly, by virtue of Articles 27(2) and the second sentence of Article 34 of that Convention, a judgment given in default of appearance is not to be recognised or enforced in another Contracting State if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence. In that context, the Court has held that a judgment given in default of appearance in a Contracting State must not be recognised in another Contracting State where the document which instituted the proceedings was not duly served on the defendant, even if the defendant subsequently had notice of the judgment and did not have recourse to the available legal remedies (Case C-305/88 Lancray [1990] ECR I-2725, paragraph 23, and Case C-123/91 Minalmet [1992] ECR I-5661, paragraph 21).

30. Moreover, it must be observed that, under the scheme established by the Brussels Convention with regard to enforcement, the interests of the applicant and of the person against whom enforcement is sought are protected differently.

31. Article 36 of the Convention provides, in relation to the party against whom enforcement is sought, for the use of a formal mechanism of service' of the decision authorising enforcement. Conversely, it follows from Article 35 of the Convention that the decision given on the application is required only to be brought to the notice' of the applicant.

32. Further, according to Article 36 of the Brussels Convention, the party against whom enforcement is sought may appeal against the decision, according to whether or not he is domiciled in the Contracting State in which the decision authorising enforcement was given, within a time-limit of one or two months from the date of service of the decision. That time-limit is of a strict and mandatory nature (Case 145/86 Hoffmann [1988] ECR 645, paragraphs 30 and 31). Conversely, it follows from both the wording of Article 40(1) of that Convention and the Jenard Report on the Convention (OJ 1979 C 59, p. 1, 53), that an applicant's right of appeal against a decision refusing the application for enforcement is not subject to any time-limit.

33. In light of those considerations it must be established whether, in cases of failure of, or defective, service of the decision authorising enforcement, the mere fact that the person against whom enforcement is sought has notice of that decision suffices for the time-limit fixed in Article 36 of the Brussels Convention to begin to run.

34. In that regard, it is common ground, first, as stated by the Advocate General at point 56 of her Opinion, that the requirement that the decision authorising enforcement be served has a dual function: on the one hand, it serves to protect the rights of the party against whom enforcement is sought and, on the other, it allows, in terms of evidence, the strict and mandatory time-limit for appealing provided for in Article 36 of the Brussels Convention to be calculated precisely.

35. That double function, combined with the aim of simplification of the formalities to which enforcement of judicial decisions delivered in other Contracting States is subject, explains why the Brussels Convention, as is clear from paragraph 32 of this judgment, makes transmission of the decision authorising enforcement to the party against whom enforcement is sought subject to procedural requirements that are more stringent than those applicable to transmission of that same decision to the applicant.

36. Secondly, it should be borne in mind that, if the sole issue were whether the document authorising enforcement came to the attention of the party against whom enforcement was sought, that could render the requirement of due service meaningless. Claimants would then be tempted to ignore the prescribed forms for due service (see, to that effect, in the context of Article 27(2) of the Brussels Convention, Lancray , paragraph 20).

37. Moreover, that would make the exact calculation of the time-limit provided for in Article 36 of the Convention more difficult, thus thwarting the uniform application of the provisions of the Convention (see, to that effect, Lancray , paragraph 20).

38. Therefore the reply to the questions put to the Court must be that Article 36 of the Brussels Convention is to be interpreted as requiring due service of the decision authorising enforcement, in accordance with the procedural rules of the Contracting State in which enforcement is sought, and therefore, in cases of failure of, or defective, service of the decision authorising enforcement, the mere fact that the party against whom enforcement is sought has notice of that decision is not sufficient to cause time to run for the purposes of the time-limit fixed in that article.

Costs

39. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 36 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, the Convention of 25 October 1982 on the accession of the Republic of Greece and the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, is to be interpreted as requiring due service of the decision authorising enforcement in accordance with the procedural rules of the Contracting State in which enforcement is sought, and therefore, in cases of failure of, or defective, service of the decision authorising enforcement, the mere fact that the party against whom enforcement is sought has notice of that decision is not sufficient to cause time to run for the purposes of the time-limit fixed in that article.

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OBSERV	Italy ; Member States ; Commission ; Institutions
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NATCOUR	*A9* Corte d'appello di Cagliari, ordinanza del 12/11/2004 (R.G. 503/02) ; - Praxis des internationalen Privat- und Verfahrensrechts 2005 Heft 3 p.II, V (résumé)
NOTES	Carballo Piñeiro, Laura: Regularidad de la notificacion de documentos judiciales en el derecho europeo (Comentario a las SSTJCE de 9 de febrero de 2006, Plumex, y de 16 de febrero de 2006, Verdoliva), Diario La ley 2006 no 6537 p.1-10 ; Idot, Laurence: Régularité de la signification de l'ordonnance d'exequatur, Europe 2006 Avril Comm. no 139 p.32 ; Pataut, Etienne: Revue critique de droit international privé 2006 p.697-704 ; Conti, Roberto ; Foglia, Raffaele: Notifica inesistente o irregolare della decisione che accorda l'esecuzione, Il Corriere giuridico 2006 p.558-560 ; Anthimos, A.: Armenopoulos 2006 p.832-833 ; Tagaras, Haris: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles, Cahiers de droit européen 2006 p.535-538 ; Heiderhoff, Bettina: Kenntnisnahme ersetzt nicht die Zustellung im Vollstreckbarerklärungsverfahren, Praxis des internationalen Privat- und Verfahrensrechts 2007 p.202-204 ; Rylski, Piotr: Dorczenie stwierdzenia wykonalnoci wedug konwencji brukselskiej a prawo dunika do obrony - glosa do wyroku ETS z 16.02.2006 r. w sprawie C-3/05 G. Verdoliva przeciwko J.M. Van der Hoeven BV i in., Europejski Przegld Sdowy 2007 Vol. 6 p.44-52 ; Caponi, Remo: Caso Verdoliva: un miope unitarismo misconosce una opportuna soluzione nazionale, Il Corriere giuridico 2007/2008 p.6-14
PROCEDU	Reference for a preliminary ruling
ADVGEN	Kokott

JUDGRAP Kluka

DATES of document: 16/02/2006
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Judgment of the Court (First Chamber) of 18 May 2006

Land Oberösterreich v EZ as. Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Brussels Convention - Article 16(1)(a) - Exclusive jurisdiction in matters relating to property - Action for cessation of a nuisance caused, or likely to be caused, to land by the activities of a nuclear power station situated on the territory of a neighbouring State - Not applicable. Case C-343/04.

Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - Proceedings which have as their object rights in rem in immovable property - Meaning

(Brussels Convention of 27 September 1968, Art. 16(1)(a))

Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended most recently by the 1996 Convention, must be interpreted as meaning that an action which seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, does not fall within the scope of that provision. The exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest. By contrast, if the basis of an action for cessation of a nuisance, possibly preventive in nature, is the interference with a right in rem in immovable property, such an action does not constitute a dispute having as its object rights in rem in immovable property, as the real and immovable nature of that right is, in this context, of only marginal significance. Therefore, the real and immovable nature of the right at issue does not have a decisive influence on the issues to be determined in the dispute in the main proceedings, which would not have been raised in substantially different terms if the right whose protection is sought against the alleged nuisance were of a different type, such as, for example, the right to physical integrity or a personal right.

Finally the considerations of sound administration of justice which underlie Article 16(1)(a) are not applicable in such an action and do not, therefore, preclude such an action from remaining outside the scope of that provision.

(see paras 27, 30-31, 34-35, operative part)

In Case C343/04,

REFERENCE for a preliminary ruling, 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, from the Oberster Gerichtshof (Austria), made by decision of 21 July 2004, received at the Court on 10 August 2004, in the proceedings

Land Oberösterreich

v

EZ a.s.,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann (Rapporteur), N. Colneric, J.N. Cunha Rodrigues and E. Levits, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 13 October 2005,

after considering the observations submitted on behalf of:

- Land Oberösterreich, by J. Hintermayr and C. Hadeyer, Rechtsanwälte,

- EZ a.s., by W. Moringer, Rechtsanwalt,

- the Polish Government, by T. Nowakowski, acting as Agent,

- the United Kingdom Government, by M. Bethell, acting as Agent,

- the Commission of the European Communities, by A.M. Rouchaud and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2006,

gives the following

Judgment

On those grounds, the Court (First Chamber) hereby rules:

Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended most recently by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that an action which, like that brought under Paragraph 364(2) of the Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code) in the main proceedings, seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, does not fall within the scope of that provision.

1. This reference for a preliminary ruling concerns the interpretation of Article 16(1)(a) of the 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 version - 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) (the Brussels Convention').

2. The reference was made in the course of proceedings between the Land Oberösterreich (Province of Upper Austria) and EZ a.s. (EZ') concerning nuisance caused to agricultural land owned by the province in Austria, as a result of the operation by EZ of the Temelín nuclear plant, situated on the territory of the Czech Republic.

Legal background

The Brussels Convention

3. In Title II, which concerns the rules of jurisdiction, Section 1, entitled General provisions', of the Brussels Convention, the first subparagraph of Article 2 provides:

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.'

4. Under the first subparagraph of Article 4 of the Brussels Convention:

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.'

5. Article 5 of the Brussels Convention, which is in Section 2 of Title II, entitled Special jurisdiction', states:

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

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...'.

6. Article 16 of the Brussels Convention, which constitutes Section 5 of Title II, entitled Exclusive jurisdiction', states:

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;

...'.

National legislation

7. Paragraph 364(2) of the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch) (the ABGB') states:

The owner of land can prohibit his neighbour from producing influences, emanating from the latter's land, by effluent, smoke, gases, heat, odours, noise, vibration and the like, in so far as they exceed normal local levels and significantly interfere with the usual use of the land. Direct transmission, without a specific legal right, is unlawful in all circumstances.'

8. The national court explains that an action brought on the basis of that provision seeks the prohibition of the nuisance, or at least its prevention, by means of appropriate precautions. The action is treated, in accordance with national case-law, as a type of actio negatoria (Eigentumsfreiheitsklage') which asserts a claim based on a property right.

9. Paragraph 364a of the ABGB provides:

However, if the interference is caused, in excess of that measure, by a mining installation or an officially authorised installation on the neighbouring land, the landowner is entitled only to bring court proceedings for compensation for the damage caused, even where the damage is caused by circumstances which were not taken into account in the official authorisation process.'

10. The national court states that such a right to financial compensation is independent of fault and falls within the law relating to neighbours.

The dispute in the main proceedings and the question referred for a preliminary ruling

11. The Province of Upper Austria is the owner of several pieces of land used for agriculture and agricultural trials, on which there is an agricultural college. The land is situated about 60 km from the Temelín nuclear power station, which was brought into operation on a trial basis

on 9 October 2000. That power plant is operated by EZ, a Czech energy-supply undertaking in which the Czech State has 70% ownership, on land that it owns.

12. Acting in its capacity as owner of the land, and taking the view that the operation of a nuclear power station does not constitute a form of exercise of public powers but is a private sector activity under the jurisdiction of the civil courts, the Province of Upper Austria brought an action against EZ, on 31 July 2001, before the Landesgericht Linz (Regional Court, Linz).

13. That action sought, principally, an order to EZ to put an end to the influences on the Province of Upper Austria's land caused by ionising radiation emanating from the Temelín power plant, in so far as they exceeded those to be expected from a nuclear power station operated in accordance with current generally recognised technological standards. Alternatively, the province sought an order to EZ to put an end to the risks created by that radiation, in so far as those risks exceeded those to be expected from a nuclear power station operated in accordance with current generally recognised technological standards.

14. The Province of Upper Austria submits that the ionising radiation emitted by the Temelín power station constitutes a nuisance within the meaning of Paragraph 364(2) of the ABGB. The radioactivity generated by that power station during the current trial period or, in any event, the risk of contamination of the soil caused by the normal operation, or more particularly by a malfunction, of the plant exceed the usual local level and cause a lasting interference with the normal use of the land belonging to the province for residential, educational and agricultural purposes. The requirements for bringing an action, possibly preventive, for cessation of a nuisance are therefore satisfied.

15. EZ submitted that the Austrian courts lacked jurisdiction, claiming in particular that Article 16(1)(a) of the Brussels Convention is not applicable to an action for prevention of a nuisance. Such an action is compensatory in nature and falls within Article 5(3) of the Brussels Convention. EZ further submits that an order to cease committing a nuisance issued against it by an Austrian court would interfere, in violation of international law, with the territorial and judicial sovereignty of the Czech Republic and could not be enforced on the territory of the Czech Republic.

16. By judgment of 17 April 2002, the Landesgericht Linz declined jurisdiction to hear the Province of Upper Austria's application. That judgment was overturned on appeal by the Oberlandesgericht Linz (Higher Regional Court, Linz) which, by judgment of 19 September 2003, held that the Austrian courts had jurisdiction to decide such a dispute under Article 16(1)(a) of the Brussels Convention.

17. The Oberster Gerichtshof (Supreme Court), before which an appeal on a point of law was brought, observes that it is not clear from the file whether the Temelín nuclear power station was the subject of an official authorisation referred to by Paragraph 364a of the ABGB.

18. The Oberster Gerichtshof also considers that the case-law of the Court does not enable it to be established with certainty whether an action of the kind brought on the basis of Paragraph 364(2) of the ABGB is covered by Article 16(1)(a) of the Brussels Convention, or whether it is covered by the case referred to in Article 5(3) of that convention.

19. In those circumstances, the Oberster Gerichtshof decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

Is the expression proceedings which have as their object rights in rem in immovable property in Article 16(1)(a) of the [Brussels Convention] to be interpreted as including a (preventive) action for an injunction, pursuant to Paragraph 364(2) of the [ABGB], prohibiting emissions from a property located in a neighbouring State - which is not a Member State of the European Union - affecting land owned by the claimant (in this case, the influences of ionising radiation emanating

from a nuclear power station in the Czech Republic)?'

The question referred for a preliminary ruling

20. By its question, the national court asks if Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that an action which, like that brought under Paragraph 364(2) of the ABGB in the main proceedings, seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, falls within the category of proceedings which have as their object rights in rem in immovable property' within the meaning of that provision.

Preliminary observations

21. It must be observed, as a preliminary point, that, although the Czech Republic was not a party to the Brussels Convention at the date on which the Province of Upper Austria brought the action before the Austrian courts, and the defendant in the main proceedings was not therefore domiciled in a Contracting State at that date, such a circumstance does not prevent the application of Article 16 of the Brussels Convention, as is expressly stated in the first subparagraph of Article 4.

22. Furthermore, it must be recalled that, under the first subparagraph of Article 1 of the Brussels Convention, the Convention is to apply, whatever court is seised, in civil and commercial matters' but shall not extend, in particular, to revenue, customs or administrative matters'. It is clear from settled case-law that the concept of civil and commercial matters' must be regarded as an independent concept which must be interpreted by referring to the objectives and scheme of that convention and the general principles which stem from the corpus of the national legal systems. Therefore, in particular, the scope of the Convention must be essentially determined either by reason of the legal relationships between the parties to the action or of the subject-matter of the action (see, in particular, Case 814/79 Rüffer [1980] ECR 3807, paragraphs 7 and 14).

23. The national court, which is responsible for analysing such factors and determining, with reference to the case-law of the Court, whether the Brussels Convention applies to a dispute such as the one before it, did not ask the Court about the interpretation of Article 1 of the Convention. Having regard to that fact, and to the answer given below to the question referred, there is no need to give further consideration to the scope of that provision.

The interpretation of Article 16(1)(a) of the Brussels Convention

24. As is clear from Article 16(1)(a) of the Brussels Convention, the courts of the Contracting State where the property is situated have exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property.

25. In that connection, it must be recalled that in order to ensure that the rights and obligations arising out of the Brussels Convention for the Contracting States and for individuals concerned are as equal and uniform as possible, an independent definition must be given in Community law to the phrase in proceedings which have as their object rights in rem in immovable property' (see, in particular, Case C-115/88 Reichert and Kockler [1990] ECR I-27, paragraph 8).

26. The caselaw of the Court also shows that, in that they introduce an exception to the general rules of jurisdiction set out in the Brussels Convention, the provisions of Article 16 - in particular Article 16(1)(a) - must not be given an interpretation broader than is required by their objective (see, in particular, Case C73/04 Klein [2005] ECR I-8667, paragraph 15 and the case-law cited).

27. It is by way of derogation from the general principle laid down by the first subparagraph of Article 4 of the Brussels Convention, which states that if the defendant is not domiciled in a Contracting State each Contracting State is to apply its own rules of international jurisdiction,

that Article 16(1)(a) provides that in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property the courts of the Contracting State where the property is situated are to have exclusive jurisdiction (Klein , paragraph 14). Furthermore, the provisions of Article 16 have the effect of depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, result in their being brought before a court which is not that of any of them (see, in particular, Reichert and Kockler , paragraph 9).

28. As regards the objective pursued by Article 16(1)(a) of the Brussels Convention, it is clear both from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the consistent case-law of the Court that the essential reason for the exclusive jurisdiction of the courts of the Contracting State where the property is situated is that the court of the place where property is situated is best placed to deal with matters relating to rights in rem in, and tenancies of, immovable property (see, in particular, Case 73/77 Sanders [1977] ECR 2383, paragraphs 11 and 12).

29. As regards, in particular, disputes concerning rights in rem in immovable property, they must generally be decided by applying the rules of the State where the property is situated, and the disputes which arise frequently require checks, inquiries and expert assessments which have to be carried out on the spot, so that the assignment of exclusive jurisdiction to the court of the place where the property is situated, which for reasons of proximity is best placed to ascertain the facts satisfactorily, satisfies the need for the proper administration of justice (see, in particular, Sanders , paragraph 13, and Reichert and Kockler , paragraph 10).

30. It is in the light of the interpretative principles thus recalled that the Court held that Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that the exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (Reichert and Kockler , paragraph 11).

31. Therefore, as EZ, the United Kingdom Government and the Commission of the European Communities rightly submit, an action, possibly preventive, for cessation of a nuisance, such as that brought in the dispute in the main proceedings, does not fall within the category of actions as defined in the preceding paragraph.

32. In that connection, it must be observed that the Jenard Report referred to above (pp. 1, 34 and 35) states that a rule of jurisdiction, such as that laid down in Article 16(1)(a) of the Brussels Convention which take[s] as [its] criterion the subject-matter of the cases' is applied in disputes concerning rights in rem in immovable property'.

33. As regards the Schlosser Report on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, p. 71, point 163), it states, in that connection, that the working party which drew up the report had no difficulty in clarifying that actions for damages based on infringement of rights in rem or on damage to property in which rights in rem exist do not fall within the scope of Article 16(1)(a) since the existence and content of such rights in rem, usually rights of ownership, are of only marginal significance in that context.

34. An action for cessation of a nuisance, possibly preventive in nature, such as that at issue in the main proceedings, does not constitute a dispute having as its object rights in rem in immovable property either. It is true that the basis of such an action is the interference with a right in

rem in immovable property, but the real and immovable nature of that right is, in this context, of only marginal significance. As EZ and the Commission point out, the real and immovable nature of the right at issue does not have a decisive influence on the issues to be determined in the dispute in the main proceedings, which would not have been raised in substantially different terms if the right whose protection is sought against the alleged nuisance were of a different type, such as, for example, the right to physical integrity or a personal right. Just like the action at issue in the main proceedings, such actions essentially seek an order that the person causing the interference, actual or potential, to a right, for example by failing to comply with current generally recognised technological standards, put an end to it.

35. It must also be stated that the considerations of sound administration of justice which underlie Article 16(1)(a) of the Brussels Convention, as set out in paragraph 29 above, are not applicable in an action for cessation of a nuisance, possibly preventive in nature, such as that at issue in the main proceedings, and do not, therefore, preclude such an action from remaining outside the scope of that provision.

36. First, in a case, such as the present one, concerning two pieces of land situated in two different States, it cannot be considered that an action such as that pending before the national court should in general be decided according to the rules of one State rather than the other.

37. As is illustrated, in that regard, by Paragraph 364(2) of the ABGB, which provides that the nuisance in respect of which an order for cessation can be obtained is that caused by a neighbour' which exceed[s] normal local levels and significantly interfere[s] with the usual use of the land', an action of that kind generally involves consideration of factors particular to the place where the property concerned is situated. To that extent it appears difficult to consider that a provision of that type is intended to be exclusive even where the distance between the two properties concerned will potentially submit them to usual local conditions which are different.

38. Second, the examination of an action such as that at issue in the main proceedings does not require an assessment of facts which, being more particularly appropriate to the place where one of the two properties concerned is situated, are likely to justify conferring jurisdiction on the courts of one of the two States to the exclusion of the other. Therefore, in paragraphs 15 and 17 of the judgment in Case 21/76 Mines de potasse d'Alsace ' [1976] ECR 1735, delivered in respect of an action for liability for damage caused to property situated in one Member State by toxic waste discharged in a river by an undertaking situated in another Member State, the Court stated that, when faced with this type of situation, the place of the event giving rise to the damage and the place where the damage occurred are both capable, depending on the circumstances, of being particularly helpful from the point of view of the evidence and of the conduct of the proceedings.

39. In the main proceedings, as is apparent from the order for reference, the action brought by the Province of Upper Austria seeks to determine whether the influences caused or likely to be caused by the ionising radiation emanating from the Temelín power station exceed the influences or risks normally associated with the operation of a nuclear power station in accordance with current generally recognised technological standards. As EZ, the United Kingdom Government and the Commission rightly pointed out, such an assessment clearly requires verifications which, to a large extent, have to be undertaken at the place where the power station is located.

40. In the light of all the foregoing, the answer to the question referred must be that Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that an action which, like that brought under Paragraph 364(2) of the ABGB in the main proceedings, seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, does not fall within the scope of that provision.

Costs

41. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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NOTES	Wittwer, Alexander: Internationale Zuständigkeit bei Abwehr von Immissionen aus Atomkraftwerken, European Law Reporter 2006 p.264-266 ; Knöfel, Oliver L.: Nachbarschaftsklage gegen Atomkraftwerk - Temelín II, Recht der internationalen Wirtschaft 2006 p.627-629 ; McGuire, Mary-Rose: actio negatoria: internationale Zuständigkeit und anwendbares Recht, Ecolex

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PROCEDU Reference for a preliminary ruling

ADVGEN Poiares Maduro

JUDGRAP Schiemann

DATES of document: 18/05/2006
of application: 10/08/2004

Judgment of the Court (First Chamber)
of 26 May 2005
Groupement d'intérêt économique (GIE) Réunion européenne and Others v Zurich España and Société pyrénéenne de transit d'automobiles (Soptrans). Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Request for interpretation of Article 6(2) and the provisions of Section 3, Title II - Jurisdiction in matters relating to insurance - Third-party proceedings between insurers - Multiple insurance situation. Case C-77/04.

1. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction in matters relating to insurance - Objective - Protection of the weaker party - Scope - Thirdparty proceedings between insurers - Excluded

(Brussels Convention of 27 September 1968, Title II, Section 3)

2. Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Thirdparty proceedings - Applicability of thirdparty proceedings based on multiple insurance - Condition - Existence of a connecting factor with the principal claim

(Brussels Convention of 27 September 1968, Art. 6(2)

1. Thirdparty proceedings between insurers based on multiple insurance are not subject to the rules of special jurisdiction in matters relating to insurance in Section 3 of Title II 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic 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.

In affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, the provisions of that section reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract, the clauses of which are no longer negotiable, and is the weaker party economically. No special protection is justified since the parties concerned are professionals in the insurance sector, none of whom may be presumed to be in a weaker position than the others.

(see paras 17, 20, 24, operative part 1)

2. Article 6(2) 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic 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, is applicable to thirdparty proceedings between insurers based on multiple insurance, in so far as there is a sufficient connection between the original proceedings and the thirdparty proceedings to support the conclusion that the choice of forum does not amount to an abuse.

It is for the national court seised of the original claim to verify the existence of such a connection, in the sense that it must satisfy itself that the thirdparty proceedings do not seek to remove the defendant from the jurisdiction of the court which would be competent in the case.

(see paras 32, 36, operative part 2)

In Case C-77/04,

REFERENCE for a preliminary ruling, 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, from the Cour de Cassation (France), made by decision of 20 January 2004, received at the Court on 17 February 2004, in the proceedings

Groupement d'intérêt économique (GIE) Réunion européenne and Others,

v

Zurich España,

Société pyrénéenne de transit d'automobiles (Soptrans),

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric, J.N. Cunha Rodrigues (Rapporteur), M. Ilei and E. Levits, Judges,

Advocate General: F.G. Jacobs,

Registrar: K.H. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 8 December 2004,

after considering the observations submitted on behalf of;

- Groupement d'intérêt économique (GIE) Réunion européenne and Others, by M. Levis, avocat,

- Zurich España, by P. Alfredo and G. Thouvenin, avocats,

- the French Government, by G. de Bergues and A. Bodard-Hermant, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, and P. Gentili, avvocato dello Stato,

- the Commission of the European Communities, by A.M. Rouchaud-Joet, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2005,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 6(2) and the provisions of Section 3 of Title II of the 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) (the Convention').

2. The reference was made in respect of proceedings in which the insurers of Société pyrénéenne de transit d'automobiles (Soptrans') sought to join Zurich Seguros, now Zurich España (Zurich'), as a third party for the purpose of apportionment between those insurance companies of indemnification payable by Soptrans to General Motors España (GME').

Legal background

3. The first paragraph of Article 2 of the Convention provides:

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.'

4. Article 6(2), which appears in Section 2 of Title II of the Convention, entitled Special jurisdiction', is worded as follows:

A person domiciled in a Contracting State may also be sued:

...

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

...'.

5. Articles 7 to 12a make up Section 3, Jurisdiction in matters relating to insurance', of Title II of the Convention.

6. Article 7 of the Convention states:

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5 point 5'.

7. Under Article 11 of the Convention:

Without prejudice to the provisions of the third paragraph of Article 10, 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 policy-holder, the insured or a beneficiary....'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8. The dispute in the main proceedings arises from damage sustained on 13 August 1990 in the car park on which Soptrans, a company established in France, stores new cars.

9. Soptrans is insured, in respect of the damage caused to those vehicles, by GIE Réunion européenne, Axa, successor in law to Union des assurances de Paris, Winterthur, successor in law to La Neuchâteloise, Le Continent and Assurances Mutuelles de France (the insurers'), all of whom have their head office or a branch in France.

10. A number of damaged vehicles belonged to GME and were insured by Zurich, which is established in Spain. Following a settlement in the course of proceedings before a court in Saragossa (Spain) Soptrans undertook to pay ESP 120 000 000 as compensation to GME for damage sustained by the vehicles it owned.

11. In parallel with those proceedings, Soptrans sued the insurers before the Tribunal de grande instance de Perpignan (Regional Court, Perpignan) (France) seeking an order that they indemnify it in respect of the consequences of the action brought against it in the Spanish court.

12. The insurers, in turn, sought to join Zurich as a third party before the Tribunal de grande instance, on the basis of Article L. 121-4 of the French Insurance Code, which provides that, in cases of multiple insurance, the amount of indemnification to be paid to the insured is to be divided proportionately between the various insurers. Zurich contested the jurisdiction of the French court, claiming that the courts in Barcelona (Spain), where it has its head office, had jurisdiction.

13. By judgment of 2 February 1999, the Tribunal de grande instance de Perpignan held that the French courts had jurisdiction on the basis of Article 6(2) of the Convention. Zurich appealed against that decision to the Cour d'appel de Montpellier (Court of Appeal, Montpellier) which took the view that in this case only the provisions of Section 3 of Title II of the Convention were applicable and declared that the French courts did not have jurisdiction to hear the third-party proceedings between the insurers and Zurich.

14. The insurers then appealed to the Cour de Cassation (French Court of Cassation), on the grounds that third-party proceedings based on multiple insurance were not within the scope of Article 11 of the Convention and that the existence of a connection between the original proceedings and the third-party proceedings was not one of the conditions for the application of Article 6(2) of the Convention.

15. Taking the view that, in those circumstances, the resolution of the dispute required an interpretation of the Convention, the Cour de Cassation decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

1. Are third-party proceedings between insurers, based on alleged multiple insurance or co-insurance rather than on a re-insurance agreement, covered as matters relating to insurance by the provisions of Section 3 of Title II of the Brussels Convention...?

2. Is Article 6(2) applicable when determining jurisdiction in the event of third-party proceedings between insurers and, if so, is such application contingent on there being a connection between the various claims within the meaning of Article 22 of the Convention or, at the very least, on evidence that there is sufficient connection between such claims to demonstrate that the choice of forum does not amount to an abuse?'

The questions referred for a preliminary ruling

The first question

16. Section 3 of Title II of the Convention concerns the rules of special jurisdiction in matters relating to insurance.

17. According to settled case-law, it is apparent from a consideration of the provisions of Section 3 in the light of the documents leading to their enactment that, in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically (Case 201/82 Gerling and Others v Amministrazione del Tesoro dello Stato [1983] ECR 2503, paragraph 17 and Case C-412/98 Group Josi [2000] ECR I-5925, paragraph 64).

18. That role of protecting the party deemed to be economically weaker and less experienced in legal matters implies, however, that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom such protection is not justified (Group Josi , paragraph 65).

19. In this case, as is clear from the file submitted to the Court, the insurers sought to bring Zurich before the Tribunal de grande instance de Perpignan on the basis of Article L. 121-4 of the French Insurance Code, which permits an insurer who is a defendant in proceedings brought by an insured to join any other insurers as third parties where there is a situation of multiple insurance, in order to obtain their contribution to indemnifying the insured party.

20. In those circumstances no special protection is justified since the parties concerned are professionals in the insurance sector, none of whom may be presumed to be in a weaker position than the others.

21. As the Advocate General rightly pointed out in paragraph 17 of his Opinion, support can be found for that view in particular in Articles 8, 10 and 12 of the Convention, which clearly contemplate proceedings brought by a policy-holder, insured or injured party, and in Article 11, which refers to proceedings brought against a policy-holder, insured, or beneficiary.

22. The authors of the Convention took as their premiss that the provisions of Section 3 of Title II were applicable only to relations characterised by an imbalance between the parties and established for that reason a body of rules on special jurisdiction which favours the party regarded as economically weaker and less experienced in legal matters. Moreover, Article 12(5) of the Convention excludes from that protective body of rules insurance contracts in which the insured enjoys considerable economic power.

23. It is therefore consistent with the letter, spirit and purpose of the provisions in question to hold that they are not applicable to relations between insurers in the context of third-party proceedings.

24. The answer to the first question is therefore that third-party proceedings between insurers based on multiple insurance are not subject to the provisions of Section 3 of Title II of the Convention.

The second question

25. Under Article 6(2) of the Convention, in the case of third-party proceedings, a person may be joined as a third party in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.

26. In the case before the national court, the insurers sought to join Zurich as a third party before the court in which Soptrans was seeking an order that the insurers indemnify it for all the consequences of the action brought against it by GMS.

27. The claims brought by Soptrans and by the insurers before the Tribunal de grande instance de Perpignan must therefore be regarded respectively as original proceedings and third-party proceedings within the meaning of Article 6(2) of the Convention.

28. That classification is borne out by the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, p. 27), according to which an action within the meaning of Article 6(2) is defined as brought against a third party by the defendant in an action for the purpose of being indemnified against the consequences of that action'.

29. The applicability, in this case, of Article 6(2) of the Convention remains however subject to compliance with the condition requiring that the third-party proceedings should not have been instituted with the sole object of removing the party sued from the jurisdiction of the court which would be competent in the case.

30. As both the Commission and the Advocate General, in paragraphs 32 and 33 of his Opinion, have emphasised, the existence of a connection between the two sets of proceedings before the French courts is inherent in the very concept of third-party proceedings.

31. There is an inherent relation between an action brought against an insurer seeking indemnification for the consequences of an insured event and proceedings whereby that insurer seeks contribution from another insurer considered to have provided cover for the same event.

32. It is for the national court seised of the original claim to verify the existence of such a connection, in the sense that it must satisfy itself that the third-party proceedings do not seek

to remove the defendant from the jurisdiction of the court which would be competent in the case.

33. It follows that Article 6(2) of the Convention does not require the existence of any connection other than that which is sufficient to establish that the choice of forum does not amount to an abuse.

34. It should be added in that respect that, with regard to third party proceedings, Article 6(2) merely determines which court has jurisdiction and is not concerned with conditions for admissibility properly so-called. As regards procedural rules, reference must be made to the nation al rules applicable by the national court (Case C-365/88 Hagen [1990] ECR I-1845, paragraphs 18 and 19).

35. However, the application of national procedural rules may not impair the effectiveness of the Convention. A court may not apply conditions of admissibility laid down by national law which would have the effect of restricting the application of the rules of jurisdiction laid down in the Convention (Hagen , paragraph 20).

36. In the light of the foregoing considerations, the answer to the second question must be that Article 6(2) of the Convention is applicable to third-party proceedings between insurers based on multiple insurance, in so far as there is a sufficient connection between the original proceedings and the third-party proceedings to support the conclusion that the choice of forum does not amount to an abuse.

Costs

37. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. Third-party proceedings between insurers based on multiple insurance are not subject to the provisions of Section 3 of Title II 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic 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.

2. Article 6(2) of the Convention is applicable to third-party proceedings between insurers based on multiple insurance, in so far as there is a sufficient connection between the original proceedings and the third-party proceedings to support the conclusion that the choice of forum does not amount to an abuse.

DOCNUM	62004J0077
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

PUBREF	European Court reports 2005 Page I-04509
DOC	2005/05/26
LODGED	2004/02/17
JURCIT	41968A0927(01)-A02L1 : N 3 41968A0927(01)-A06PT2 : N 4 25 - 36 41968A0927(01)-A07 : N 6 41968A0927(01)-A08 : N 21 41968A0927(01)-A10 : N 21 41968A0927(01)-A11 : N 7 21 41968A0927(01)-A12 : N 21 41968A0927(01)-A12PT5 : N 22 61982J0201 : N 17 61998J0365 : N 34 35 61998J0412 : N 17 18
CONCERNS	Interprets 41968A0927(01) -A06PT2 Interprets 41968A0927(01) -A07
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	France ; Italy ; Member States ; Commission ; Institutions
NATIONA	France
NATCOUR	*P1* Cour de cassation (France), 1re chambre civile, arrêt du 10/05/2006 (01-11229) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 2006 I no 222 ; - Bulletin d'information de la Cour de Cassation 2006 no 1693 p.36-37 (résumé) ; - Gazette du Palais 2006 no 221-222 I Jur. p.20-21 (résumé) ; - La Semaine juridique - édition générale 2006 IV 2239 p.1140-1141 (résumé) ; - La Semaine juridique - édition générale 2006 240 p.1039 (résumé) ; - Revue critique de droit international privé 2006 p.899-900 ; - International Litigation Procedure 2007 p.301-304 ; - Sinay-Cytermann, Anne: Revue critique de droit international privé 2006 p.900-904
NOTES	Heiss, Helmut: Zuständigkeit, Versicherungsrecht 2005 p.1003 ; Heredia Cervantes, Ivan: Intervencion provocada, demandes entre aseguradores y competencia judicial internacional tras la sentencia del TJCE de 26 de mayo de 2005, Diario La ley 2005 no 6330 p.1-11 ; Smeele, F.G.M. ; Oude Alink, S.M.: Aansprakelijkheid en verzekering - A & V 2005 p.180-185 ; Rüfner, Thomas: Das Verhältnis der Gewährleistungs- oder Interventionsklage (Art. 6 Nr. 2 EuGVVO/EuGVÜ) zum Hauptprozess, Praxis des internationalen Privat- und Verfahrensrechts 2005 p.500-503 ; Idot, Laurence: De l'appel en garantie entre assureurs, Europe 2005 Juillet Comm. no 272 p.29-30 ; Raynouard, Arnaud: Revue de jurisprudence commerciale 2005 p.338-339 ; Sinay-Cytermann, Anne: Revue critique de droit international privé 2006 p.173-183 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2006 no 514 ; Tagaras, Haris: Chronique de jurisprudence

de la Cour de justice relative à la Convention de Bruxelles, Cahiers de droit européen 2006 p.522-525

PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Cunha Rodrigues

DATES of document: 26/05/2005
of application: 17/02/2004

Judgment of the Court (First Chamber) of 13 October 2005

Brigitte and Marcus Klein v Rhodos Management Ltd. Reference for a preliminary ruling: Oberlandesgericht Hamm - Germany. Brussels Convention - Jurisdiction in proceedings regarding tenancies of immoveable property - Time-share in immoveable property. Case C-73/04.

Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - Proceedings which have as their object tenancies of immovable property - Definition - Time-share in immovable property by virtue of a club membership contract - Exclusion

(Convention of 27 September 1968, Art. 16(1)(a))

Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Accession Conventions of 1978, 1982 and 1989, must be interpreted as meaning that it does not apply to a club membership contract which, in return for a membership fee which represents the major part of the total price, allows members to acquire a right to use on a timeshare basis immovable property of a specified type in a specified location and provides for the affiliation of members to a service which enables them to exchange their right of use.

(see para. 28, operative part)

In Case C-73/04,

REFERENCE 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, from the Oberlandesgericht Hamm (Germany), by decision of 27 January 2004, received at the Court on 17 February 2004, in the proceedings

Brigitte and Marcus Klein

v

Rhodos Management Ltd,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, K. Schiemann, N. Colneric, J.N. Cunha Rodrigues and E. Levits, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

- Mr and Mrs Klein, by M. Brinkmann, Rechtsanwalt,

- the Federal Republic of Germany, by R. Wagner, acting as Agent,

- the United Kingdom of Great Britain and Northern Ireland, by C. Jackson and R. Caudwell, acting as Agents, and T. de la Mare, barrister,

- the Commission of the European Communities, by A.M. Rouchaud-Joet and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2005,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 16(1)(a) of the 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) and 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; the Convention').

2. The reference was made in the course of proceedings brought by Mr and Mrs Klein against Rhodos Management Ltd (Rhodos') for the repayment of sums paid on the conclusion of a contract under the terms of which Mr and Mrs Klein acquired a right to use an apartment in Greece on a time-share basis.

Law

3. The first paragraph of Article 4 of the Convention provides:

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.'

4. Article 16(1)(a) of the Convention provides:

The following courts shall have exclusive jurisdiction, regardless of domicile:

1(a) in proceedings which have as their object rights in rem in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated;'.

Factual background and the questions referred for a preliminary ruling

5. In 1992, Mr and Mrs Klein, who live in Germany, concluded inter alia with Rhodos, a company established in the Isle of Man, a contract described as a membership contract' (Mitgliedschaftsvertrag), under the terms of which the parties, who were described as buyers' (Käufer), became members of a club.

6. Membership of that club was a requirement for the purchase of a right to use a holiday property on a time-share basis. Under the same contract, Mr and Mrs Klein acquired the right to the use of an apartment of a specified type and in a specified location in a hotel complex in Greece for the 13th calendar week of each year until the year 2031.

7. The fee for membership of the club was DEM 10 153 out of the total price of DEM 13 300 which Mr and Mrs Klein paid.

8. Membership of the club also gave access to a service for the coordination of exchanges of holiday periods and locations. Membership of that service was subject to a fee of DEM 350 for three years.

9. The hotel complex where the apartment at issue in the main proceedings was situated offered holders of time-share rights the same facilities as those provided for hotel guests.

10. Mr and Mrs Klein first paid a deposit of DEM 2 640 and shortly afterwards transferred the full amount of the price without deducting the deposit.

11. In the main proceedings, Mr and Mrs Klein seek the repayment of the total amount paid of DEM 15 940.

12. On appeal, the Oberlandesgericht Hamm had doubts as to its international jurisdiction and decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary

ruling:

1. Does the concept of proceedings which have as their object... tenancies of immovable property under Article 16(1)(a) of the Brussels Convention extend to proceedings concerning the right, for a particular week each year for almost 40 years, to use an apartment in a hotel complex, differentiated according to its type and situation? Is this the case even if the contract provides for the simultaneous and obligatory membership of a club, the main purpose of which is to guarantee that its members may exercise their right to use the apartment?

2. If the answer to the first question is in the affirmative, the further question arises:

If so, does the exclusive competence resulting from Article 16(1)(a) of the Brussels Convention apply equally to rights which flow from such a lease but which, in fact and in law, do not concern the lease, and in particular to the right to reimbursement of a sum erroneously paid in excess of the amount demanded in consideration for use of the apartment and for membership of the club?'

The questions referred for a preliminary ruling

The first question

13. By its first question, the referring court essentially seeks to know whether Article 16(1)(a) of the Convention must be interpreted as meaning that it applies to a contract providing for membership of a club, the principal benefit of which consists in allowing its members to acquire and exercise a right to use on a time-share basis immoveable property of a type and in a location specified in the contract.

14. As a preliminary point, it must be observed that Article 16(1) of the Convention provides for the exclusive jurisdiction of the courts of the Contracting State where the property is situated, in proceedings which have as their object rights in rem in, or tenancies of, immovable property, by way of derogation from the general principle laid down by the first paragraph of Article 4 of the Convention, which is that if the defendant is not domiciled in a Contracting State, each Contracting State is to apply its own rules of international jurisdiction.

15. As an exception to the general rule of jurisdiction set out in the Convention, Article 16 must not be given an interpretation broader than is required by its objective, since the article deprives the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them (see Case 73/77 Sanders [1977] ECR 2383, paragraphs 17 and 18; Case C-115/88 Reichert and Kockler [1990] ECR I-27, paragraph 9; Case C-292/93 Lieber [1994] ECR I-2535, paragraph 12; and Case C8/98 Dansommer [2000] ECR I-393, paragraph 21).

16. According to both the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 35) and the case-law, the essential reason for conferring exclusive jurisdiction on the courts of the Contracting State in which the property is situated is that the courts of the locus rei sitae are the best placed, for reasons of proximity, to ascertain the facts satisfactorily, by carrying out checks, inquiries and expert assessments on the spot, and to apply the rules and practices which are generally those of the State in which the property is situated (see, in particular, Sanders , paragraph 13, Reichert and Kockler , paragraph 10, and Dansommer , paragraph 27). That report also states, with specific regard to the rule of exclusive jurisdiction in the matter of tenancies of immovable property in Article 16(1), that the Convention draftsmen intended it to cover, inter alia, disputes over compensation for damage caused by tenants (Dansommer , cited above, paragraph 28).

17. However, that objective is not at issue in the case in the main proceedings, as the action brought by Mr and Mrs Klein, seeking repayment of the total amount they paid, can only be brought

on the basis of a claim that the contract concluded with Rhodos is void.

18. The contract was described by the parties as a contract for membership of a club. As the referring court observed, the membership fee of DEM 10 153 constituted the major part of the total price of DEM 13 300.

19. That membership enabled Mr and Mrs Klein to acquire, for an amount which, in the light of the information in the order for reference, can be put at about DEM 2 000, the right to use an apartment of a specified type in a specified location for one week of the year for a period of nearly 40 years.

20. Thus, the value of the right to use the property is of only secondary economic importance, in the construction of the contract at issue, compared with the right to membership.

21. The Court has held that a contract which does not only concern the right to use a time-share apartment, but also concerns the provision of separate services of a value higher than that of the right to use the property, is not a contract for the rental of immoveable property within the meaning of Article 3(2)(a) of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 372, p. 31) (Case C-423/97 Travel Vac [1999] ECR I-2195, paragraph 25).

22. Given the link between the Convention and the Community legal order (Case C-398/92 Mund & Fester [1994] ECR I467, paragraph 12, and Case C-7/98 Krombach [2000] ECR I-1935, paragraph 24), that interpretation must be taken into account for the purposes of the interpretation of the Convention.

23. The German and United Kingdom Governments observed that the principal benefit conferred by the club membership contract at issue in the main proceedings is the possibility of acquiring the right to use property on a time-share basis.

24. In that connection it must be observed that the property itself, which is defined only as being of a particular type within a hotel complex, is not specified or designated individually in the club membership contract. As the Commission pointed out, the right of use could relate to a different apartment each year.

25. That circumstance is compounded by the fact that, as Mr and Mrs Klein pointed out, that contract itself makes provision for the affiliation of its members to a service allowing them, on payment of an annual fee, initially payable for three years, to exchange their holiday accommodation.

26. In the light of all those circumstances, it appears that the link between the club membership contract at issue in the main proceedings and the property to be actually used by the member is not sufficiently close to warrant classifying it as a tenancy within the meaning of Article 16(1)(a) of the Convention which, as observed in paragraph 15 of this judgment, must be interpreted strictly.

27. That finding is borne out by the fact that the membership contract in question provides for the provision of services which are made available to club members on the same terms as those offered to clients of the hotel complex. As the Commission observed, those additional services go beyond the transfer of a right of use which constitutes the subjectmatter of a tenancy agreement. Although the content and nature of the services at issue in the main proceedings are not specified in the order for reference, it must none the less be observed that a complex contract concerning a range of services provided in return for a lump sum paid by the customer is outside the scope within which the exclusive jurisdiction laid down by Article 16(1) of the Convention finds its raison d'être and cannot constitute a tenancy as such within the meaning of that article (Case C-280/90 Hacker [1992] ECR I1111, paragraph 15).

28. Accordingly, the answer to the first question must be that on a proper construction, Article

16(1)(a) of the Convention does not apply to a club membership contract which, in return for a membership fee which represents the major part of the total price, allows members to acquire a right to use on a time-share basis immoveable property of a specified type in a specified location and provides for the affiliation of members to a service which enables them to exchange their right of use.

The second question

29. In view of the reply to the first question, the second question no longer serves any purpose.

Costs

30. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

On a proper construction of Article 16(1)(a) 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, that Article does not apply to a club membership contract which, in return for a membership fee which represents the major part of the total price, allows members to acquire a right to use on a time-share basis immoveable property of a specified type in a specified location and provides for the affiliation of members to a service which enables them to exchange their right of use.

DOCNUM	62004J0073
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-08667
DOC	2005/10/13
LODGED	2004/02/17
JURCIT	31985L0577-A03P2LA : N 21 41968A0927(01)-A04L1 : N 3 14 41968A0927(01)-A16 : N 15 41968A0927(01)-A16PT1LA : N 1 4 12 14 26 - 28 61977J0073 : N 15 16 61988J0115 : N 15 16 61990J0280 : N 27 61992J0398 : N 22

61993J0292 : N 15
61997J0423 : N 21
61998J0007 : N 22
61998J0008 : N 15 16

CONCERNS Interprets 41968A0927(01) -A16PT1LA

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Federal Republic of Germany ; United Kingdom ; Member States ; Commission ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Oberlandesgericht Hamm, Beschluß vom 27/01/2004 (29 U 56/03) ; - Europäische Zeitschrift für Wirtschaftsrecht 2004 p.576 (résumé) ; - Neue juristische Wochenschrift 2004 p.2040 (résumé) ; - Mankowski, Peter: Verbraucher und Recht 2004 p.217-219

NOTES Wittwer, Alexander: Ist Timesharing Miete?, European Law Reporter 2005 p.395-396 ; Raynouard, Arnaud: Revue de jurisprudence commerciale 2005 p.501-502 ; X: Il Foro italiano 2005 IV Col.595 ; Idot, Laurence: Compétence en matière de baux d'immeuble et multipropriété, Europe 2005 Décembre no 421 Comm. p.26 ; Muir Watt, Horatia: Revue critique de droit international privé 2006 p.188-192 ; Hüßtege, Rainer: Clubmitgliedschaften und Teilzeitwohnrechte im Anwendungsbereich des Art. 16 Nr. 1 EuGVÜ/Art. 22 Nr. 1 S. 1 EuGVVO, Praxis des internationalen Privat- und Verfahrensrechts 2006 p.124-126 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2006 no 285 ; Anthimos, A.: Armenopoulos 2006 p.984-985 ; Tagaras, Haris: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles, Cahiers de droit européen 2006 p.526-531 ; Capilli, Giovanna: Brevi note su competenza giurisdizionale esclusiva ex. art. 16 Conv. Bruxelles e multiproprietà, Int'l Lis 2006/2007 p.25-29 ; Downes, Noemí: Conflicting Interests in Timeshare Contracts Revisited on the Occasion of the ECJ (First Chamber) Case C-73/04 Judgment 13 October 2005, Brigitte and Marcus Klein v. Rhodos Management Ltd, European Review of Private Law / Revue européenne de droit privé / Europäische Zeitschrift für Privatrecht 2007 p.157-168

PROCEDU Reference for a preliminary ruling

ADVGEN Geelhoed

JUDGRAP Jann

DATES of document: 13/10/2005
of application: 17/02/2004

Judgment of the Court (First Chamber) of 13 July 2006

Roche Nederland BV and Others v Frederick Primus and Milton Goldenberg. Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands. Brussels Convention - Article 6(1) - More than one defendant - Jurisdiction of the courts of the place where one of the defendants is domiciled - Action for infringement of a European patent - Defendants established in different Contracting States - Infringements committed in a number of Contracting States. Case C-539/03.

Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - More than one defendant

(Convention of 27 September 1968, Art. 6(1))

Article 6(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended most recently by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that it does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them. Since neither the patent infringements of which the various defendants are accused nor the national law in relation to which those acts are assessed are the same there is no risk of irreconcilable decisions being given in European patent infringement proceedings brought in different Contracting States, since possible divergences between decisions given by the courts concerned would not arise in the context of the same factual and legal situation.

It follows that the connection required for Article 6(1) of the Brussels Convention to apply cannot be established between such actions.

(see paras 20, 25, 27-28, 31, 33, 35, 41, operative part)

In Case C-539/03,

Reference 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, from the Hoge Raad der Nederlanden (Netherlands), made by decision of 19 December 2003, received at the Court on 22 December 2003, in the proceedings

Roche Nederland BV and Others,

v

Frederick Primus,

Milton Goldenberg,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Schiemann, K. Lenaerts, E. Juhasz and M. Ilei, Judges,

Advocate General: P. Léger,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 27 January 2005,

after considering the observations submitted on behalf of:

- Roche Nederland BV and Others., by P.A.M. Hendrick, O. Brouwer, B.J. Berghuis and K. Schillemans, advocaaten,

- Drs Primus and Goldenberg, by W. Hoyng, advocaat,

- the Netherlands Government, by H.G. Sevenster and J.G.M. van Bakel, acting as Agents,

- the French Government, by G. de Bergues and A. Bodard-Hermant, acting as Agents,

- the United Kingdom Government, by E. O'Neill, acting as Agent, and M. Tappin, Barrister,

- the Commission of the European Communities, by A.-M. Rouchaud-Joet and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2005,

gives the following

Judgment

On those grounds, the Court (First Chamber) hereby rules:

Article 6(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended most recently by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that it does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them.

1. This reference for a preliminary ruling concerns the interpretation of Article 6(1) of the 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 version - 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) (the Brussels Convention').

2. The reference was made in the course of proceedings between Roche Nederland BV and eight other companies in the Roche group, on the one hand, and Drs Primus and Goldenberg, on the other, in respect of an alleged infringement of the latter's rights in a European patent of which they are the proprietors.

Legal background

The Brussels Convention

3. Featuring in Title II, on the rules of jurisdiction, and Section I, entitled General Provisions', the first paragraph of Article 2 of the Brussels Convention 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.'

4. According to the first paragraph of Article 3 of the Brussels Convention:

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.'

5. Article 6 of the Brussels Convention, which appears in Section 2 of Title II, entitled Special jurisdiction', states:

[A defendant domiciled in a Contracting State] may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled;

...'.

6. Article 16 of the Brussels Convention, which constitutes Section 5 of Title II thereof, entitled Exclusive jurisdiction', states:

The following courts shall have exclusive jurisdiction, regardless of domicile:

...

(4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place;

...'.

7. Article Vd of the Protocol annexed to the Brussels Convention, which, pursuant to Article 65 of the latter, forms an integral part of the Convention, states:

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Contracting State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State which is not a Community patent by virtue of the provisions of Article 86 of the Convention for the European Patent for the Common Market, signed at Luxembourg on 15 December 1975.'

8. Article 22 of the Brussels Convention, which appears in Section 8, entitled Lis pendens - related actions' of Title II thereof, provides that where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings or, under certain conditions, decline jurisdiction. According to the third paragraph of that provision:

For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

9. Under Article 27(3) of the Brussels Convention, which appears in Title III, concerning the rules on recognition and enforcement, and in Section I, entitled Recognition', a judgment is not to be recognised if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought'.

The Munich Convention

10. The Convention on the Grant of European Patents, signed in Munich on 5 October 1973 (the Munich Convention'), establishes, according to Article 1 thereof, a system of law, common to the Contracting States, for the grant of patents for invention'.

11. Outside the scope of the common rules on granting patents, a European patent continues to be

governed by the national law of each of the Contracting States for which it has been granted. In that regard, Article 2(2) of the Munich Convention states:

The European patent shall, in each of the Contracting States for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by that State...'.

12. As regards the rights conferred on the proprietor of a European patent, Article 64(1) and (3) of that convention provides:

(1) A European patent shall... confer on its proprietor from the date of publication of the mention of its grant, in each Contracting State in respect of which it is granted, the same rights as would be conferred by a national patent granted in that State.

...

(3) Any infringement of a European patent shall be dealt with by national law.'

The main proceedings and the questions referred for a preliminary ruling

13. Drs Primus and Goldenberg, who are domiciled in the United States of America, are the proprietors of European patent No 131 627.

14. On 24 March 1997, they brought an action before the Rechtbank te s'-Gravenhage against Roche Nederland BV, a company established in the Netherlands, and eight other companies in the Roche group established in the United States of America, Belgium, Germany, France, the United Kingdom, Switzerland, Austria and Sweden (Roche and Others'). The applicants claimed that those companies had all infringed the rights conferred on them by the patent of which they are the proprietors. That alleged infringement consisted in the placing on the market of immuno-assay kits in countries where the defendants are established.

15. The companies in the Roche group not established in the Netherlands contested the jurisdiction of the Netherlands' courts. As regards the substance, they based their arguments on the absence of infringement and the invalidity of the patent in question.

16. By judgment of 1 October 1997, the Rechtbank te s'-Gravenhage declared that it had jurisdiction and dismissed the applications of Drs Primus and Goldenberg. On appeal, the Gerechtshof te s'-Gravenhage (Regional Court of Appeal) set aside the judgment and, inter alia, prohibited Roche and Others from infringing the rights attached to the patent in question in all the countries designated in it.

17. The Hoge Raad (Supreme Court), hearing an appeal on a point of law, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Is there a connection, as required for the application of Article 6(1) of the Brussels Convention, between a patent infringement action brought by a holder of a European patent against a defendant having its registered office in the State of the court in which the proceedings are brought, on the one hand, and against various defendants having their registered offices in Contracting States other than that of the State of the court in which the proceedings are brought, on the other hand, who, according to the patent holder, are infringing that patent in one or more other Contracting States?

(2) If the answer to Question 1 is not or not unreservedly in the affirmative, in what circumstances is such a connection deemed to exist, and is it relevant in this context whether, for example,

- the defendants form part of one and the same group of companies?

- the defendants are acting together on the basis of a common policy, and if so is the place from which that policy originates relevant?

- the alleged infringing acts of the various defendants are the same or virtually the same?'

The questions referred for a preliminary ruling

18. By those questions, which it is appropriate to consider together, the national court asks essentially whether Article 6(1) of the Brussels Convention must be interpreted as meaning that it is to apply to European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States and, in particular, where those companies, which belong to the same group, have acted in an identical or similar manner in accordance with a common policy elaborated by one of them.

19. By way of derogation from the principle laid down in Article 2 of the Brussels Convention, that a defendant domiciled in a Contracting State is to be sued in the courts of that State, in a case where there is more than one defendant, Article 6(1) of the Convention allows a defendant domiciled in one Contracting State to be sued in another Contracting State where one of the defendants is domiciled.

20. In the judgment in Case 189/87 Kalfelis [1988] ECR 5565, paragraph 12, the Court held that for Article 6(1) of the Brussels 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.

21. The requirement of a connection does not derive from the wording of Article 6(1) of the Brussels Convention. It has been inferred from that provision by the Court in order to prevent the exception to the principle that jurisdiction is vested in the courts of the State of the defendant's domicile laid down in Article 6(1) from calling into question the very existence of that principle (Kalfelis , paragraph 8). That requirement was subsequently confirmed by the judgment in Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 48, and was expressly enshrined in the drafting of Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), which succeeded the Brussels Convention.

22. The formulation used by the Court in Kalfelis repeats the wording of Article 22 of the Brussels Convention, according to which actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Article 22 was interpreted in Case C-406/92 Tatry [1994] ECR I5439, paragraph 58, to the effect that, in order to establish the necessary relationship between the cases, it is sufficient that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences.

23. The scope given to the concept of irreconcilable' judgments by the judgment in Tatry in the context of Article 22 of the Brussels Convention is therefore wider than that given to the same concept in Case 145/86 Hoffman [1988] ECR 645, paragraph 22, in the context of Article 27(3) of the Convention, which provides that a judgment given in a Contracting State will not be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought. In Hoffmann , the Court had held that, in order to ascertain whether two judgments are irreconcilable within the meaning of Article 27(3), it must be determined whether they entail legal consequences which are mutually exclusive.

24. Drs Primus and Goldenberg and the Netherlands Government argue that the broad interpretation of the adjective irreconcilable', in the sense of contradictory, which was given in Tatry in the context of Article 22 of the Brussels Convention, must be extended to the context of Article 6(1) of the Convention. Roche and Others and the United Kingdom Government, with whose arguments the

Advocate General agreed in point 79 et seq of his Opinion, submit, by contrast, that such a transposition is not permissible given the differences between the purpose and the position of the two provisions in question in the scheme of the Brussels Convention, and that a narrower interpretation must be preferred.

25. However, it does not appear necessary in this case to decide that issue. It is sufficient to observe that, even assuming that the concept of irreconcilable' judgments for the purposes of the application of Article 6(1) of the Brussels Convention must be understood in the broad sense of contradictory decisions, there is no risk of such decisions being given in European patent infringement proceedings brought in different Contracting States involving a number of defendants domiciled in those States in respect of acts committed in their territory.

26. As the Advocate General observed, in point 113 of his Opinion, in order that decisions may be regarded as contradictory it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact.

27. However, in the situation referred to by the national court in its first question referred for a preliminary ruling, that is in the case of European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States, the existence of the same situation of fact cannot be inferred, since the defendants are different and the infringements they are accused of, committed in different Contracting States, are not the same.

28. Possible divergences between decisions given by the courts concerned would not arise in the context of the same factual situation.

29. Furthermore, although the Munich Convention lays down common rules on the grant of European patents, it is clear from Articles 2(2) and 64(1) of that convention that such a patent continues to be governed by the national law of each of the Contracting States for which it has been granted.

30. In particular, it is apparent from Article 64(3) of the Munich Convention that any action for infringement of a European patent must be examined in the light of the relevant national law in force in each of the States for which it has been granted.

31. It follows that, where infringement proceedings are brought before a number of courts in different Contracting States in respect of a European patent granted in each of those States, against defendants domiciled in those States in respect of acts allegedly committed in their territory, any divergences between the decisions given by the courts concerned would not arise in the context of the same legal situation.

32. Any diverging decisions could not, therefore, be treated as contradictory.

33. In those circumstances, even if the broadest interpretation of irreconcilable' judgments, in the sense of contradictory, were accepted as the criterion for the existence of the connection required for the application of Article 6(1) of the Brussels Convention, it is clear that such a connection could not be established between actions for infringement of the same European patent where each action was brought against a company established in a different Contracting State in respect of acts which it had committed in that State.

34. That finding is not called into question even in the situation referred to by the national court in its second question, that is where defendant companies, which belong to the same group, have acted in an identical or similar manner in accordance with a common policy elaborated by one of them, so that the factual situation would be the same.

35. The fact remains that the legal situation would not be the same (see paragraphs 29 and 30 of this judgment) and therefore there would be no risk, even in such a situation, of contradictory

decisions.

36. Furthermore, although at first sight considerations of procedural economy may appear to militate in favour of consolidating such actions before one court, it is clear that the advantages for the sound administration of justice represented by such consolidation would be limited and would constitute a source of further risks.

37. Jurisdiction based solely on the factual criteria set out by the national court would lead to a multiplication of the potential heads of jurisdiction and would therefore be liable to undermine the predictability of the rules of jurisdiction laid down by the Convention, and consequently to undermine the principle of legal certainty, which is the basis of the Convention (see Case C-256/00 Besix [2002] ECR I1699, paragraphs 24 to 26, Case C-281/02 Owusu [2005] ECR I-1383, paragraph 41, and Case C-4/03 GAT [2006] ECR I-0000, paragraph 28).

38. The damage would be even more serious if the application of the criteria in question gave the defendant a wide choice, thereby encouraging the practice of forum shopping which the Convention seeks to avoid and which the Court, in its judgment in Kalfelis , specifically sought to prevent (see Kalfelis , paragraph 9).

39. It must be observed that the determination as to whether the criteria concerned are satisfied, which is for the applicant to prove, would require the court seised to adjudicate on the substance of the case before it could establish its jurisdiction. Such a preliminary examination could give rise to additional costs and could prolong procedural time-limits where that court, being unable to establish the existence of the same factual situation and, therefore, a sufficient connection between the actions, would have to decline jurisdiction and where a fresh action would have to be brought before a court of another State.

40. Finally, even assuming that the court seised by the defendant were able to accept jurisdiction on the basis of the criteria laid down by the national court, the consolidation of the patent infringement actions before that court could not prevent at least a partial fragmentation of the patent proceedings, since, as is frequently the case in practice and as is the case in the main proceedings, the validity of the patent would be raised indirectly. That issue, whether it is raised by way of an action or a plea in objection, is a matter of exclusive jurisdiction laid down in Article 16(4) of the Brussels Convention in favour of the courts of the Contracting State in which the deposit or registration has taken place or is deemed to have taken place (GAT , paragraph 31). That exclusive jurisdiction of the courts of the granting State has been confirmed, as regards European patents, by Article Vd of the Protocol annexed to the Brussels Convention.

41. Having regard to all of the foregoing considerations, the answer to the questions referred must be that Article 6(1) of the Brussels Convention must be interpreted as meaning that it does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them.

Costs

42. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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NATCOUR	*A9* Hoge Raad, arrest van 19/12/2003 (C02/228 HR ; C02/280 HR) ; - Intellectuele eigendom & Reclamerecht 2004 p.158 (résumé) ; - Nederlands internationaal privaatrecht 2004 no 39 ; - Nederlands juristenblad 2004 p.193-195 ; - Rechtspraak van de week 2004 no 10 ; - Bijblad bij de industriele eigendom 2005 p.313-343 ; - Brinkhof, J.J.: Cross-border problematiek, grensoverschrijdende inbreukverboden en desbewustheid, Bijblad bij de industriele eigendom 2004 p.4-5 ; - Hirsch Ballin, E.M.H.: Rode draad "Raad en Daad: Over rechtsvorming door de Hoge Raad", Ars aequi 2005 p.500-504
NOTES	Brinkhof, J.J.: Bijblad bij de industriele eigendom 2006 p.3-4 ; Brinkhof, J.J.: HvJ EG beperkt mogelijkheden van grensoverschrijdende verboden, Bijblad bij de industriele eigendom 2006 p.319-322 ; Wittwer, Alexander: Patentrecht im Doppelpack - zwei weitreichende Entscheidungen zur internationalen Zuständigkeit bei Patentverletzungen, European Law Reporter 2006 p.391-394 ; Conti, Roberto ; Foglia, Raffaele: Contraffazione di brevetti e pluralità

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Jann

DATES of document: 13/07/2006
of application: 22/12/2003

Judgment of the Court (First Chamber)
of 13 October 2005
Scania Finance France SA v Rockinger Spezialfabrik für Anhängerkupplungen GmbH & Co.
Reference for a preliminary ruling: Oberlandesgericht München - Germany. Brussels Convention - Recognition and enforcement - Grounds for refusal - Meaning of 'duly served'. Case C-522/03.

Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement - Grounds for refusal - Defendant in default of appearance not duly served with the document instituting proceedings in sufficient time - Meaning of duly served - Determined according to the provisions of an international convention applicable between the State in which the judgment was given and the State in which recognition is sought

(Convention of 27 September 1968, Art. 27(2), and Article IV of the Protocol)

Article 27(2) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Accession Conventions of 1978, 1982, 1989 and 1996, and the first paragraph of Article IV of the Protocol annexed to that convention, must be interpreted as meaning that, where a relevant international convention, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, is applicable between the State in which the judgment is given and the State in which recognition is sought, the question whether the document instituting the proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of that convention, without prejudice to the use of direct transmission between public officers, where the State in which recognition is sought has not officially objected, in accordance with the second paragraph of Article IV of the Protocol. The two methods of transmitting documents provided for by Article IV of the Protocol annexed to the Convention are exhaustive, in the sense that it is solely where neither of those two options is usable that transmission may be effected in accordance with the law applicable in the court in the State in which the judgment was given.

(see paras 22, 28, 30, operative part)

In Case C-522/03,

REFERENCE for a preliminary ruling 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, from the Oberlandesgericht München (Germany), made by decision of 31 October 2003, registered at the Court on 15 December 2003, in the proceedings

Scania Finance France SA

v

Rockinger Spezialfabrik für Anhängerkupplungen GmbH & Co.,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, K. Schiemann, K. Lenaerts, E. Juhasz and M. Ilei, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

- Scania Finance France SA, by W. Hildmann, Rechtsanwalt,

- Rockinger Spezialfabrik für Anhängerkupplungen GmbH & Co., by A. Vigier, Rechtsanwalt,

- the Federal Republic of Germany, by R. Wagner, acting as Agent,

- the French Republic, by A. Bodard-Hermant, A.L. Hare and G. de Bergues, acting as Agents,

- the Republic of Austria, by E. Riedl, acting as Agent,

- the Commission of the European Communities, by A.M. Rouchaud-Joet and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2005,

gives the following

Judgment

On those grounds, the Court (First Chamber) hereby rules:

Article 27 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, and the first paragraph of Article IV of the Protocol annexed to that convention, must be interpreted as meaning that, where a relevant international convention is applicable between the State in which the judgment is given and the State in which recognition is sought, the question whether the document instituting the proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of that convention, without prejudice to the use of direct transmission between public officers, where the State in which recognition is sought has not officially objected, in accordance with the second paragraph of Article IV of the Protocol.

1. This reference for a preliminary ruling concerns the interpretation of Article 27(2) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Journal Officiel 1972 L 299, p. 32), 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), 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) (the Brussels Convention'), and Article IV of the Protocol annexed to that convention.

2. The reference was made in the course of a dispute between Scania Finance France SA (Scania'), established in Angers (France), and Rockinger Spezialfabrik für Anhängerkupplungen GmbH & Co. (Rockinger'), established in Munich (Germany), concerning enforcement in Germany of a judgment delivered by the Cour d'appel d'Amiens (Court of Appeal, Amiens) (France), ordering Rockinger to pay Scania the sum of FRF 615 566.72.

Legal background

The Brussels Convention

3. Article 20 of the Brussels Convention, which is in Title II, entitled Jurisdiction', states:

Where a defendant domiciled in one Contracting State is sued in a court of another Contracting

State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.

The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

The provisions of the foregoing paragraph shall be replaced by those of Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, if the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention.'

4. According to the first paragraph of Article 26 of the Brussels Convention, which is in Title III, entitled Recognition and Enforcement':

A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required.'

5. Article 27(2) of the Convention provides none the less that a judgment delivered in a Contracting State is not to be recognised in other Contracting States where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence.'

6. Article IV of the Protocol annexed to the Brussels Convention, which, according to Article 65 of the Convention, forms an integral part thereof, states:

Judicial and extrajudicial documents drawn up in one Contracting State which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States.

Unless the State in which service is to take place objects by declaration to the Secretary-General of the Council of the European Communities, such documents may also be sent by the appropriate public officers of the State in which the document has been drawn up directly to the appropriate public officers of the State in which the addressee is to be found. In this case the officer of the State of origin shall send a copy of the document to the officer of the State applied to who is competent to forward it to the addressee. The document shall be forwarded in the manner specified by the law of the State applied to. The forwarding shall be recorded by a certificate sent directly to the officer of the State of origin.'

The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention')

7. According to Article 1, the Hague Convention is applicable, in civil and commercial matters, to all cases where there is occasion to transmit a judicial or extrajudicial document for service abroad.

8. Article 15 of the Hague Convention states:

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present convention, and the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

...'

National law

9. Pursuant to Article 684 of the new French New Civil Procedure Code service of a document addressed to a person domiciled abroad is made on the public prosecutor's office. According to Article 685, service is effected by a bailiff of the court who lodges two copies of the document with the public prosecutor's office. The latter stamps the original document and forwards the copies to the Ministry of Justice for the purpose of transmission. Pursuant to Article 686 of the New Civil Procedure Code the bailiff must send to the addressee on the same day or, at the latest on the first working day, by registered letter with a notice of delivery, a certified copy of the document served. According to Article 683, those provisions do not affect the application of treaties which provide for another method of service.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10. Scania sued Rockinger before the Cour d'appel d'Amiens. The service of the document instituting the proceedings was effected by lodging it with the public prosecutor's office.

11. A German judicial officer was responsible for forwarding that document to Rockinger. Rockinger objected to such service, in particular on the ground that that document was not translated into German. Rockinger then received another copy of that document by post, but again without an accompanying German translation.

12. By judgment of 8 September 2000, the Cour d'appel d'Amiens ordered Rockinger, which did not enter an appearance, to pay Scania the sum of FRF 615 566.72.

13. On Scania's application, the Landgericht München I, by decision of 3 April 2002, ordered the enforcement of the judgment of the Cour d'appel d'Amiens. Rockinger appealed to the Oberlandesgericht München, which decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) Is Article 27(2) of the [Brussels] Convention and the first paragraph of Article IV of the Protocol... to be interpreted as meaning that judicial documents may be served on a defendant, who at the time of service of the document instituting the proceedings is domiciled in a Contracting State other than the State of the court seised, only in accordance with the conventions concluded between the Contracting States?

(2) If not, is Article 12 EC to be interpreted as precluding a national rule under which service of a judicial document on a defendant who, at the time of the service, is domiciled in another Member State is deemed constituted by a domestic service whereby the bailiff of the court lodges the document instituting the proceedings with the public prosecution service, which forwards the documents for transfer pursuant to international conventions or by diplomatic means, and, by registered letter with notice of delivery, notifies the foreign party of the service which has been effected?'

The questions referred for a preliminary ruling

The first question

14. By its first question the national court asks essentially whether Article 27(2) of the Brussels Convention and the first paragraph of Article IV of the Protocol must be interpreted as meaning that, where a relevant international convention is applicable between the State in which the judgment was given and the State in which enforcement is sought, the question whether the document instituting the proceedings has been duly served on a defendant who has failed to enter an appearance must be

determined solely in the light of the provisions of that convention, or whether it may also be determined by reference to the national rules in force in the State in which the judgment was given if the application of those rules has not been excluded by the convention.

15. As a preliminary point it must be recalled that, although according to its preamble the Brussels Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is settled case-law of the Court that it is not permissible to achieve that aim by undermining in any way the right to a fair hearing (Case 49/84 Debaecker and Plouvier [1985] ECR 1779, paragraph 10; Case C-305/88 Lancray [1990] ECR I-2725, paragraph 21; and Case C-7/98 Krombach [2000] ECR I-1935, paragraph 43).

16. From that point of view, Article 27(2) of the Brussels Convention aims to ensure that a judgment is not recognised or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised (Case 166/80 Klomps [1981] ECR 1593, paragraph 9).

17. For that purpose, Article 27(2) provides that a judgment delivered in another Contracting State is not to be recognised where it was given in default of appearance, if the defendant was not duly served' with the document which instituted the proceedings in sufficient time'.

18. The Brussels Convention does not harmonise the different systems of service abroad of legal documents which are in force in the Contracting States (Case 228/81 Pendy Plastic [1982] ECR 2723, paragraph 13 and Lancray , paragraph 28). However, the first paragraph of Article IV of the Protocol states that judicial documents drawn up in one Contracting State which have to be served on persons in another Contracting State are to be transmitted in accordance with the procedures laid down in the conventions concluded between the Contracting States.

19. It is clear from the wording of that provision that, where there is a convention on the service of judicial documents between the State in which the judgment is given and the State in which enforcement is sought, the question whether the document instituting the proceedings has been duly served must be determined in the light of the provisions of that convention.

20. Scania and the German Government have argued that the first paragraph of Article IV of the Protocol must be interpreted as meaning that it refers also to all the methods of service provided for by the national laws of the States concerned, since their use is not excluded by the conventions concluded between those States.

21. Such an interpretation cannot be accepted.

22. The two paragraphs of Article IV of the Protocol provide for two methods of transmitting documents: the first, according to the methods provided for by the conventions concluded between the Contracting States, the second, directly between public officials, unless the State in which service is to take place objects. The words may also' used in the second paragraph of Article IV of the Protocol clearly show that those two options for transmission are exhaustive, in the sense that it is solely where neither of those two options is usable that transmission may be effected in accordance with the law applicable in the court in the State in which the judgment was given.

23. The exhaustive nature of the provisions of Article IV of the Protocol is confirmed by the fact that, in order to ensure that the rights of a defendant who fails to enter an appearance are effectively protected, the Brussels Convention confers jurisdiction to determine whether the document instituting the proceedings was duly served not only, at the stage of recognition and enforcement, on the court of the Member State in which enforcement is sought, but also, at the stage of the determination of jurisdiction, on the court of the State in which the judgment was given, which is required by virtue of Article 20 of the Convention to undertake such an assessment (Pendy Plastic

, paragraph 13 and Lancray , paragraph 28).

24. For that purpose, the second paragraph of Article 20 of the Brussels Convention provides that where a defendant domiciled in a Contracting State is sued in a court of another Contracting State and fails to enter an appearance the court is to stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence. By virtue of the third paragraph of Article 20, those provisions are replaced by those of Article 15 of the Hague Convention if the document instituting the proceedings had to be transmitted abroad in accordance with that convention.

25. In the same way as the second paragraph of Article 20 of the Brussels Convention, but in accordance with rules which are far more detailed and precise, Article 15 of the Hague Convention sets out the circumstances in which a document instituting the proceedings may be considered as having been served on a defendant who is domiciled abroad and has failed to enter an appearance (Pendy Plastic , paragraph 12).

26. As the Commission pointed out, since the scheme put in place by the Brussels Convention provides that the court of the State in which the judgment was given and the court of the State in which enforcement is sought both review whether the document instituting the proceedings has been duly served, the logic of that scheme requires that the review takes place, in so far as possible, in the context of the same legal frame of reference. Therefore, if the option available in the second paragraph of Article IV of the Protocol has not been used and the Hague Convention is applicable between the State in which the judgment was given and the State in which enforcement is sought, it is exclusively by reference to the provisions of Article 15 of the Hague Convention, to which the third paragraph of Article 20 of the Brussels Convention refers, that the court of the State in which judgment was given and the court of the State in which enforcement is sought are to determine whether the document instituting the proceedings has been duly served.

27. In the main proceedings, the national court found that the French Republic and the Federal Republic of Germany were both parties to the Hague Convention at the date on which the service in question was effected.

28. It follows that, in order to be regarded as duly served, within the meaning of Article 27(2) of the Brussels Convention, service must have been effected in accordance with the rules of the Hague Convention.

29. It is for the court in which enforcement is sought to determine, for the purposes of recognition and enforcement of the judgment given in the original State, whether the provisions of Article 15 of the Hague Convention were complied with in the proceedings before the court in the original State as regards service on the defendant of the document instituting the proceedings (Pendy Plastic , paragraphs 13 and 14).

30. It follows from all of the foregoing considerations that the answer to the first question must be that Article 27(2) of the Brussels Convention and the first paragraph of Article IV of the Protocol must be interpreted as meaning that, where a relevant international convention is applicable between the State in which the judgment is given and the State in which recognition is sought, the question whether the document instituting the proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of that convention, without prejudice to the use of direct transmission between public officers where the State in which recognition is sought has not officially objected, in accordance with the second paragraph of Article IV of the Protocol.

The second question

31. Given the answer to the first question, there is no need to answer the second question.

Costs

32. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

DOCNUM	62003J0522
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-08639
DOC	2005/10/13
LODGED	2003/12/15
JURCIT	11997E012 : N 13 41965A1115-A01 : N 7 41965A1115-A15 : N 8 24 26 41968A0927(01)-A20 : N 3 41968A0927(01)-A20L2 : N 24 25 41968A0927(01)-A20L3 : N 24 41968A0927(01)-A26L1 : N 4 41968A0927(01)-A27PT2 : N 1 5 13 16 17 - 19 28 - 30 41968A0927(01)-A65 : N 6 41968A0927(02)-A04 : N 6 22 23 41968A0927(02)-A04L1 : N 13 18 22 30 41968A0927(02)-A04L2 : N 22 26 30 61980J0166 : N 16 61981J0228 : N 18 23 25 29 61984J0049 : N 15 61988J0305 : N 15 18 23 61998J0007 : N 15
CONCERNS	Interprets 41968A0927(01) -A27PT2 Interprets 41968A0927(02) -A04L1 Interprets 41968A0927(02) -A04L2
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	German

OBSERV	Federal Republic of Germany ; France ; Austria ; Member States ; Commission ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Oberlandesgericht München, Beschluß vom 26/11/2003 (25 W 1478/02) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 2003, 2005 p.609-613 ; - Praxis des internationalen Privat- und Verfahrensrechts 2004 p.XI (résumé)
NOTES	Raynouard, Arnaud: Revue de jurisprudence commerciale 2005 p.500-501 ; X: Giustizia civile 2005 I p.2890 ; Idot, Laurence: Signification des actes et conditions de l'exequatur, Europe 2005 Décembre no 422 Comm. p.26 ; Adobati, E.: La Corte interpreta la convenzione di Bruxelles e chiarisce che la sentenza puo essere eseguita solamente nel rispetto della normativa sulle notifiche, Diritto comunitario e degli scambi internazionali 2005 p.717-719 ; Pataut, Etienne: Revue critique de droit international privé 2006 p.199-205 ; Stadler, Astrid: Ordnungsgemäße Zustellung im Wege der remise au parquet und Heilung von Zustellungsfehlern nach der Europäischen Zustellungsverordnung, Praxis des internationalen Privat- und Verfahrensrechts 2006 p.116-123 ; Anthimos, A.: Armenopoulos 2006 p.180-181 ; Tagaras, Haris: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles, Cahiers de droit européen 2006 p.532-535
PROCEDU	Reference for a preliminary ruling
ADVGEN	Geelhoed
JUDGRAP	Jann
DATES	of document: 13/10/2005 of application: 15/12/2003

Judgment of the Court (Third Chamber) of 28 October 2004

Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV. Reference for a preliminary ruling: Oberlandesgericht München - Germany. Brussels Convention - Articles 20 and 57(2) - Failure by the defendant to enter an appearance - Defendant domiciled in another Contracting State - Geneva Convention on the Contract for the International Carriage of Goods by Road - Conflict between conventions. Case C-148/03.

Convention on Jurisdiction and the Enforcement of Judgments - Relationship with other conventions - Conventions relating to a particular field - Convention containing rules on jurisdiction - Jurisidiction of the court seised challenged by the defendant on the basis of such a convention - Compliance by the court seised, in accordance with Article 57 of the Brussels Convention, with the rules of jurisdiction of the specialised convention

(Brussels Convention of 27 September 1968, Arts 20 and 57(2)(a))

Article 57(2)(a) 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting State is sued may derive its jurisdiction from a specialised convention to which the first State is a party as well and which contains specific rules on jurisdiction, even where the defendant, in the course of the proceedings in question, submits no pleas on the merits and formally contests the jurisdiction of the court seised.

In that connection, although it is true that according to Article 20 of the Convention of 27 September 1968, applicable by virtue of the second sentence of Article 57(2)(a), the court in question is required to declare of its own motion that it has no jurisdiction unless its jurisdiction was derived from the terms of that convention, the jurisdiction of that court must, however, be regarded as derived from the Convention, because Article 57 thereof specifically states that the rules of jurisdiction laid down by specialised conventions are not affected by that convention.

In those circumstances, when verifying of its own motion whether it has jurisdiction with respect to that convention, the court of a Contracting State in which a defendant domiciled in another Contracting State is sued and fails to enter an appearance must take account of the rules of jurisdiction laid down by specialised conventions to which the first Contracting State is also a party.

(see paras 16-20, operative part)

In Case C-148/03,

REFERENCE for a preliminary ruling 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 from the Oberlandesgericht München (Germany), made by decision of 27 March 2003, registered at the Court on 31 March 2003, in the proceedings

Nürnberger Allgemeine Versicherungs AG

v

Portbridge Transport International BV,

THE COURT (Third Chamber),

composed of: A. Rosas, President of the Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Nürnberger Allgemeine Versicherungs AG, by K. Demuth, Rechtsanwalt,

- Portbridge Transport International BV, by J. Kienzle, Rechtsanwalt,

- the German Government, by R. Wagner, acting as Agent,

- the United Kingdom Government, by K. Manji, acting as Agent, and by D. Beard, Barrister,

- the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without a hearing or an Opinion,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Articles 20 and 57(2)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36, the Brussels Convention'), 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), 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).

2. The reference was made in the course of a dispute between Nürnberger Allgemeine Versicherungs AG (Nürnberger') and Portbridge Transport International BV (Portbridge') concerning a claim for compensation for the harm sustained by Nürnberger as a result of the loss of goods which were to have been transported by Portbridge to the United Kingdom.

Legal background

3. Under Article 57(1) and (2)(a) of the Brussels Convention:

This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this convention shall not prevent a court of a Contracting State which is a party to a convention on a particular matter from assuming jurisdiction in accordance with that Convention, even where the defendant is domiciled in another Contracting State which is not a party to that Convention.

The court hearing the action shall, in any event, apply Article 20 of this Convention.'

4. The first paragraph of Article 20 of the Brussels Convention provides:

Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.'

5. The Convention on the Contract for the International Carriage of Goods by Road (CMR'), signed in Geneva on 19 May 1956, applies, in accordance with Article 1 to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country,... irrespective of the place of residence and the nationality of the parties'.

6. Under Article 31(1) of the CMR:

In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

(a) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

(b) the place where the goods were taken over by the carrier or the place designated for delivery is situated.'

7. Both the Federal Republic of Germany and the Kingdom of the Netherlands are parties to the CMR.

The dispute in the main proceedings and the question referred for a preliminary ruling

8. Nürnberger is a transportinsurance company incorporated under German law. It is claiming from Portbridge, a company incorporated under Netherlands law, compensation for the loss, in June 2000, of goods taken over by the latter in Vöhringen (Germany) which were to have been transported to the United Kingdom.

9. The carriage of goods at issue in the main proceedings is subject to the provisions of the CMR. In accordance with Article 31(1)(b) of that convention, the court seised, namely the Landgericht Memmingen (Germany), has jurisdiction since the place where the goods to be transported were taken over is situated within its jurisdiction. Portbridge nevertheless contested the jurisdiction of that court and did not submit any pleas on the merits.

10. In an interlocutory judgment, the Landgericht Memmingen declined jurisdiction and dismissed Nürnberger's action on the ground that it was inadmissible. It considered that, notwithstanding the rules on jurisdiction laid down in Article 31 of the CMR, pursuant to the second sentence of Article 57(2)(a) of the Brussels Convention Article 20 of that convention must be applied where a defendant does not enter an appearance or refuses to submit any pleas on the merits of the case. In such circumstances that provision requires the court seised to declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.

11. Nürnberger appealed against that judgment to the Oberlandesgericht München, arguing that the provisions on jurisdiction laid down in Article 31(1) of the CMR override the general provisions on jurisdiction of the Brussels Convention even where the defendant has submitted no pleas on the merits, but has merely contested the jurisdiction of the court seised.

12. It was in those circumstances that the national court decided to stay the proceedings and refer

the following question to the Court for a preliminary ruling:

Do the provisions on jurisdiction contained in other conventions take precedence over the general provisions on jurisdiction in the Brussels Convention even where a defendant domiciled in the territory of a State which is a party to the Brussels Convention and against whom an action has been brought before a court of another State which is a party to that Convention fails to submit pleas as to the merits of the case in the proceedings before that court?'

The question referred for a preliminary ruling

13. By that question the national court asks, essentially, whether Article 57(2)(a) of the Brussels Convention must be interpreted as meaning that a court of a Contracting State in which a defendant domiciled in another Contracting State is sued may base its jurisdiction on a specialised convention, to which the first State is also a party and which contains specific rules on jurisdiction excluding the application of the Brussels Convention, even where, in the course of the proceedings in question, the defendant does not submit pleas on the merits.

14. In that regard it must be noted that Article 57 introduces an exception to the general rule that the Brussels Convention takes precedence over other conventions signed by the Contracting States on jurisdiction and the recognition and enforcement of judgments. The purpose of that exception is to ensure compliance with the rules of jurisdiction laid down by specialised conventions, since when those rules were enacted account was taken of the specific features of the matters to which they relate (see Case C-406/92 Tatry [1994] ECR I-5439, paragraph 24).

15. Portbridge maintains, nevertheless, that the rules of jurisdiction set out in Article 31(1) of the CMR should be disregarded and must make way for the application of the Brussels Convention under the second sentence of Article 57(2)(a), according to which the court hearing the action shall, in any event, apply Article 20 of this convention'.

16. Article 20, it will be recalled, provides that, where a defendant is sued in a court of another Contracting State and does not enter an appearance, the court is to declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Brussels Convention.

17. In this case, the jurisdiction of the court must be regarded as derived from the Brussels Convention, because Article 57 specifically states that the rules of jurisdiction laid down by specialised conventions are not affected by the Brussels Convention.

18. In those circumstances, when verifying of its own motion whether it has jurisdiction with respect to that convention, the court of a Contracting State in which a defendant domiciled in another Contracting State is sued and fails to enter an appearance must take account of the rules of jurisdiction laid down by specialised conventions to which the first Contracting State is also a party.

19. The same is true where, as in this case, the defendant, while submitting no pleas on the merits, formally contests the jurisdiction of the national court seised of the case.

20. Having regard to the foregoing, the answer to the question must be that Article 57(2)(a) of the Brussels Convention should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting State is sued may derive its jurisdiction from a specialised convention to which the first State is a party as well and which contains specific rules on jurisdiction, even where the defendant, in the course of the proceedings in question submits no pleas on the merits.

Costs

21. 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. Costs incurred

in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) rules as follows:

Article 57(2)(a) 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, should be interpreted as meaning that the court of a Contracting State in which a defendant domiciled in another Contracting State is sued may derive its jurisdiction from a specialised convention to which the first State is a party as well and which contains specific rules on jurisdiction, even where the defendant, in the course of the proceedings in question, submits no pleas on the merits.

DOCNUM	62003J0148
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2004 Page I-10327
DOC	2004/10/28
LODGED	2003/03/31
JURCIT	41968A0927(01)-A20 : 41968A0927(01)-A57P1 : 41968A0927(01)-A57P2LA :
CONCERNS	Interprets 41968A0927(01) -A57P2LA
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Oberlandesgericht München, Beschluß vom 27/03/2003 (14 U 281/02) ; - Praxis des internationalen Privat- und Verfahrensrechts 2003 p.IX

(résumé) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts 2005 p.409-411 ; - International Litigation Procedure 2003 p.727-730

NOTES Vogl, Thorsten: Entscheidungen zum Wirtschaftsrecht 2004 p.1219-1220 ; Idot, Laurence: Conflits de conventions, Europe 2004 Décembre Comm. no 434 p.29 ; Guzman Zapater, Monica: Jurisprudencia española y comunitaria de Derecho internacional privado, Revista española de Derecho Internacional 2004 p.873-875 ; Alvarez Rubio, Juan José: La regla de especialidad como cauce para superar los conflictos entre convenios internacionales:Nueva decision del TJCE (S 28 de octubre de 2004), Diario La ley 2005 no 6179 p.1-10 ; Cortese, Bernardo: Regime comunitario della competenza giurisdizionale e rilievo delle convenzioni in materie particolari in caso di mancata comparizione del convenuto: brevi note sulla motivazione delle sentenze della Corte e sulla dottrina dell'acte clair, Il Corriere giuridico 2005 p.12-14 ; Belmonte, Anna: Sul coordinamento tra l'art. 57 della Convenzione di Bruxelles del 1968 e le altre convenzioni disciplinanti la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materie particolari, Giustizia civile 2005 I p.586-590 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2005 no 430 ; Brière, Carine: La Convention dite CMR prime sur la Convention de Bruxelles, Recueil Le Dalloz 2005 Jur. p.548-550 ; Bon-Garcin, Isabelle: Les transports, contrats et responsabilités, La Semaine juridique - entreprise et affaires 2005 p.1928-1929 ; Haubold, Jens: CMR und europäisches Zivilverfahrensrecht - Klarstellungen zu internationaler Zuständigkeit und Rechtshängigkeit, Praxis des internationalen Privat- und Verfahrensrechts 2006 p.224-229 ; Tagaras, Haris: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles, Cahiers de droit européen 2006 p.495-497

PROCEDU Reference for a preliminary ruling

ADVGEN Tizzano

JUDGRAP Schintgen

DATES of document: 28/10/2004
of application: 31/03/2003

Judgment of the Court (Second Chamber)
of 12 May 2005
Société financière et industrielle du Peloux v Axa Belgium and Others. Reference for a preliminary ruling: Cour d'appel de Grenoble - France. Brussels Convention - Jurisdiction in respect of contracts of insurance - Agreement conferring jurisdiction between a policy-holder and an insurer both domiciled in the same Contracting State - Enforceability of a jurisdiction clause against an insured who did not approve that clause - Insured domiciled in another Contracting State. Case C-112/03.

Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction in matters relating to insurance - Prorogation of jurisdiction - Jurisdiction clause agreed between a policy-holder and an insurer both domiciled in the same Contracting State - Unenforceable against a beneficiary who did not subscribe to that clause and is domiciled in another Contracting State

(Brussels Convention of 27 September 1968, Art. 12(3))

A jurisdiction clause conforming with Article 12(3) 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic 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, being a provision that allows a policy-holder and an insurer who, when the contract is entered into, are domiciled or habitually resident in the same Contracting State to confer jurisdiction on the courts of that State, even where the harmful event may occur abroad, cannot be relied on against a beneficiary under that contract who has not expressly subscribed to that clause and is domiciled in a Contracting State other than that of the policy-holder and the insurer.

First, the enforceability of such a clause would deprive that beneficiary of the opportunity to bring proceedings before the courts for the place where the harmful event occurred or to bring proceedings before the courts of his own domicile, by compelling him to pursue the enforcement of his rights against the insurer before the courts of the latter's domicile, and, second, it would enable the insurer, in proceedings against the beneficiary, to have recourse to the courts of his own domicile. The result of such an interpretation would be to accept a conferral of jurisdiction for the benefit of the insurer and to disregard the aim of protecting the economically weakest party, in this case the beneficiary, who must be entitled to bring proceedings and defend himself before the courts of his own domicile.

(see paras 32, 39-40, 43, operative part)

In Case C-112/03,

REFERENCE 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, from the Cour d'Appel, Grenoble (France), by decision of 20 February 2003, received at the Court on 13 March 2003, in the proceedings

Société financière et industrielle du Peloux

v

Axa Belgium and Others,

Gerling Konzern Belgique SA,

Etablissements Bernard Laiterie du Chatelard,

Calland Réalisations SARL,

Joseph Calland,

Maurice Picard,

Abeille Assurances Cie,

Mutuelles du Mans SA,

SMABTP,

Axa Corporate Solutions Assurance SA,

Zurich International France SA,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, J. Makarczyk, P. Kris and J. Kluka (Rapporteur), Judges,

Advocate General: A. Tizzano,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 27 October 2004,

after considering the observations submitted on behalf of:

- Axa Belgium and Others, J.-P. Caston and I. Scheidecker, lawyers,

- Gerling Konzern Belgium SA, by SCP HPMBC Rostain, lawyers,

- Mutuelles du Mans SA, by C. Michel, lawyer,

- the French Government, by G. de Bergues and A. Bodard-Hermant, acting as Agents,

- the United Kingdom Government, by R. Caudwell, acting as Agent, assisted by J. Stratford, barrister,

- the Commission of the European Communities, by A.-M. Rouchaud-Joet, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2004,

gives the following

Judgment

On those grounds, the Court (Second Chamber) hereby rules:

A jurisdiction clause conforming with Article 12(3) 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic 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, cannot be relied on against a beneficiary under that contract who has not expressly subscribed to that clause and is domiciled in a Contracting State other than that of the policy-holder and the insurer.

1. This reference for a preliminary ruling concerns the interpretation of Article 12(3) of the 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) (the Brussels Convention' or the Convention').

2. The question was raised in a proceeding concerning a ruling as to jurisdiction pending before the Cour d'Appel, Grenoble, between Société financière et industrielle du Peloux, formerly Plast'Europ SA (hereinafter SFIP'), a company incorporated under French law, the insurers Axa Belgium, formerly AXA Royale Belge SA (hereinafter Axa Belgium'), Zurich Assurances SA (hereinafter Zurich Assurances'), AIG Europe SA (hereinafter AIG Europe'), Fortis Corporate Insurance SA (hereinafter Fortis'), Gerling Konzern Belgique SA (hereinafter Gerling'), Axa Corporate Solutions Assurance SA (hereinafter Axa Corporate') and Zurich International France SA (hereinafter Zurich International France'), concerning the enforceability of a jurisdiction clause in third-party proceedings commenced by SFIP against its co-insurers under a group insurance contract.

Law

3. Article 7 of the Brussels Convention, in Title II, Section 3, thereof, concerning jurisdiction in matters relating to insurance, provides:

In matters relating to insurance, jurisdiction shall be determined by this Section...'

4. Article 8 of the Convention provides:

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, or

3. if he is a coinsurer, in the courts of a Contracting State in which proceedings are brought against the leading insurer.

...'.

5. Article 9 of the Convention is worded as follows:

In respect of liability insurance..., the insurer may in addition be sued in the courts for the place where the harmful event occurred. ...'

6. Under Article 10 of the Convention:

In 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.

...'

7. Article 11 of the Convention provides:

Without prejudice to the provisions of the third paragraph of Article 10, 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.

...'

8. Article 12 of the Convention provides:

The provisions of this Section may be departed from only by an agreement on jurisdiction:

...

2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, 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,...

...'

9. Under Article 17 of the Brussels Convention, in Title II, Section 6, concerning agreements conferring jurisdiction:

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

(b) in a form which accords with practices which the parties have established between themselves;

...

Agreements... conferring jurisdiction shall have no legal force if they are contrary to the provisions of [Article] 12...

...'

The main proceedings and the question referred to the Court of Justice

10. Calland Réalisations SARL (hereinafter Calland'), which is insured with Abeille Assurances Cie (hereinafter Abeille'), a French insurer incorporated under French law, undertook in 1990 the construction of a cheese production plant on behalf of Etablissements Bernard Laiterie du Chatelard (hereinafter Laiterie du Chatelard'), a company incorporated under French law, using for all the building works panels manufactured by SFIP.

11. An expert's report ordered by Laiterie du Chatelard concluded that the panels in question were subject to design and manufacturing defects, rendering the premises unfit for use. The cost of remedial work was estimated at about EUR 610 000.

12. SFIP was insured when those works were carried out with a number of French lead and following insurers. As a subsidiary of Recticel SA (hereinafter Recticel'), a company incorporated under Belgian law, it was also insured with a number of Belgian following insurers under a group insurance contract signed by Recticel and extended to SFIP by an addendum of 8 July 1988, with retroactive effect to 7 June 1988, the date on which the company entered the Recticel group. Chapter VIII, Article K, of that contract stipulates that, in the event of a dispute concerning the present contract, the company shall submit to the jurisdiction of the court of the domicile of the policy-holder'. The referring court observes that that article was clearly not imposed by the insurer.

13. Laiterie du Chatelard, by applications dated 1 and 12 March 2001, brought proceedings for damages before the Tribunal de Grande Instance de Bourgoin-Jallieu (France), against the following companies:

- Calland, in voluntary liquidation, a subsequent writ having been served on its two directors,

J. Calland and M. Picard,

- Abeille, the insurer of Calland,

- SFIP,

- SMABTP, SFIP's insurer as regards manufacturer's liability,

- AXA Global Risks SA (hereinafter AXA Global Risks'), SFIP's insurer as regards miscellaneous risks,

- Zurich International, SFIP's insurer as regards miscellaneous risks.

14. On 5 June 2001, the latter brought a third-party proceedings against its French following insurers, namely Zurich International France and Axa Corporate, which had been subrogated to the rights of AXA Global Risks.

15. On 21 June 2001, SFIP brought third-party proceedings on the basis of the first paragraph of Article 10 of the Brussels Convention against its Belgian following insurers, which were co-insurers under the group insurance contract, namely Axa Belgium, Zurich Assurances, AIG, Fortis and Gerling (hereinafter the Belgian co-insurers').

16. The Belgian co-insurers objected that the Tribunal de Grande Instance de Bourgoin-Jallieu lacked jurisdiction, relying on the jurisdiction clause contained in the group insurance contract.

17. Applying Chapter VII, Article K, of that contract, the Tribunal de Grande Instance de Bourgoin-Jallieu, by judgment of 13 September 2002, ordered SFIP to pursue its proceedings before the Tribunal de Première Instance de Bruxelles (Belgium), where Recticel, the policy-holder under the group insurance contract had its registered office, to obtain a ruling on its claims against the Belgian co-insurers.

18. On 27 September 2002, SFIP appealed against that ruling on jurisdiction to the Cour d'Appel, Grenoble.

19. Before the latter court, SFIP submitted that a jurisdiction clause based on Article 12(3) of the Brussels Convention could not be relied on by an insurer against a beneficiary who had not expressly subscribed to the insurance policy containing that clause. Laiterie du Chatelard and SMABTP endorsed the arguments put forward by SFIP.

20. It was in those circumstances that the Cour de Cassation decided to stay its proceedings and refer the following question to the Court of Justice for a preliminary ruling:

May the insured beneficiary of a contract of insurance concluded on its behalf between a policy-holder (subscriber) and an insurer who are domiciled in the same Member State be made subject to the clause conferring jurisdiction on the courts of that State, when it has not personally approved the clause, when the damage occurred in another Member State and when it has also applied for insurers domiciled in the same State to be joined as parties to proceedings before a court of that State?'

The question referred to the Court of Justice

21. By its question, the national court seeks essentially to ascertain whether a jurisdiction clause conforming with Article 12(3) of the Brussels Convention, in a contract of insurance concluded between a policy-holder and an insurer, can be enforced against a beneficiary under that contract who did not expressly subscribe to that clause and is domiciled in a Contracting State other than that of the policy-holder and the insurer.

Observations submitted to the Court

22. The Belgian co-insurers and the United Kingdom Government refer to the judgment in Case 201/82

Gerling and Others [1983] ECR 2503, in which the Court ruled that where a contract of insurance, entered into between an insurer and a policyholder and stipulated by the latter to be for his benefit and to ensure for the benefit of third parties to such a contract, contains a clause conferring jurisdiction relating to proceedings which might be brought by such third parties, the latter, even if they have not expressly signed the said clause, may rely upon it provided that, as between the insurer and the policyholder, the condition as to writing laid down by Article 17 of the Brussels Convention has been satisfied and provided that the consent of the insurer in that respect has been clearly manifested. In paragraph 18 of that judgment, the Court held that the Convention expressly provided for the possibility of stipulating clauses conferring jurisdiction not only in favour of the policyholder, being a party to the contract, but also in favour of the insured and the beneficiary, who may happen not to be parties to the contract in cases where those various persons are not one and the same, and whose identity may even be unknown when the contract is signed. The Belgian co-insurers infer from that judgment that the Court has already accepted that a jurisdiction clause may be enforced against a beneficiary, without the latter having himself to meet the conditions laid down in Article 17 of the Brussels Convention.

23. The Commission considers, on the other hand, that the beneficiary is covered by the insurance contract, without being bound by the jurisdiction clause, simply by virtue of compulsory protection automatically enjoyed by every weak party'. It is clear from the case-law of the Court that a beneficiary who is not a signatory to a contract concluded by one person on behalf of another may rely on the jurisdiction clause but that, conversely, that clause cannot be invoked against him. The Commission also observes that Article 12(2) of the Brussels Convention, referred to in Gerling and Others , explicitly refers to the situation of beneficiaries and that the agreements on jurisdiction referred to therein are optional, for the benefit of the weak party' alone. Consequently, insured and the beneficiaries are included in the list of parties who may sign or rely on such a clause. However, Article 12(3) of the Brussels Convention allows a jurisdiction clause of which the exclusive nature can hardly be doubted, which does not mention the third-party beneficiary and which cannot therefore be relied on against him.

24. The Belgian co-insurers and the United Kingdom Government submit that a jurisdiction clause conforming with Article 12(3) of the Brussels Convention, was stipulated at the suggestion of the policy-holder and that, consequently, the argument based on the principle that the weak party' to the insurance contract must be protected is not relevant. According to all the co-insurers, the exceptions inherent in the contract which the insurer may rely on as against the policy-holder can also be relied on against beneficiaries, who are always free to reject a clause entered into in their favour whenever the constraints associated with it are not convenient for them. In the main proceedings, the beneficiary is invoking, vis-à-vis the insurers, rights based on the contract as a whole, of which the jurisdiction clause at issue forms part, and it cannot take refuge behind the fact that it is a wholly autonomous French insured party since, under the group insurance contract, it is entirely and directly dependent upon Recticel for the management of insurance policies and claims.

25. Following the same line of argument, the Belgian co-insurers, referring to Case C-256/00 Besix [2002] ECR I-1699, express the view that an intention pursued by the Brussels Convention was to ensure predictability and certainty in parties' legal relationships and, 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.

26. The French and United Kingdom Governments endorse those views and consider that importance should be attached to the freely expressed will of the parties and to legal certainty in the sphere of insurance. Where insurance contracts of that kind cover a number of companies in a single group

in more than one State, it is necessary to make provision to ensure that any disputes which might arise from the application of such a contract are subject to the same jurisdiction. Such an interpretation of the Brussels Convention facilitates the uniform interpretation of insurance contracts, avoids conflicting decisions and the multiplication of litigation. That interpretation thus contributes to the attainment of a European insurance market.

27. The Commission also submits that the unenforceability of jurisdiction clauses against an insured is liable to make matters unpredictable for insurers, with the result that they might be unable to predict before which court they might be sued. Nevertheless, it must be recognised that the Community legislature preferred to place emphasis on the aim of protecting the insured.

Findings of the Court

28. As a preliminary point, it should be borne in mind that the Brussels Convention must be interpreted having regard both to its scheme and objectives and to its relationship with the Treaty (Case 12/76 Tessili [1976] ECR 1473, paragraph 9).

29. In that connection, in Title II, Section 3, the Brussels Convention establishes an autonomous system for the conferral of jurisdiction in matters of insurance. Articles 8 to 10 of the Convention provide in particular that an insurer domiciled in a Contracting State may be sued in the courts of the Contracting State where he is domiciled, in the courts of the policy-holder's domicile, in the courts of the place where the harmful event occurred in the case of liability insurance or in the court in which the injured party has brought proceedings against the insured, if the law of that court so allows. In addition, Article 11 of the Convention 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.

30. According to settled case-law, it is apparent from a consideration of the provisions of that section, in the light of the documents leading to their enactment that, in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically (Case 201/82 Gerling and Others [1983] ECR 2503, paragraph 17, and Case C-412/98 Group Josi [2001] ECR I-5925, paragraph 64).

31. In insurance contracts, the aim of protecting the economically weaker party is also ensured by the rules concerning the autonomy of the parties in relation to jurisdiction clauses. Thus, Article 12 of the Brussels Convention lists exhaustively the cases in which the parties may derogate from the rules laid down in its Title II, Section 3. Moreover, under the fourth paragraph of Article 17 of the Convention, jurisdiction clauses have no legal force if they are contrary to Article 12. It follows from those provisions that the Convention establishes a system in which derogations from the jurisdictional rules in matters of insurance must be interpreted strictly.

32. In particular, Article 12(3) of the Brussels Convention allows a policy-holder and an insurer who, when the contract is entered into, are domiciled or habitually resident in one and the same Contracting State to confer jurisdiction on the courts of that State, even where the harmful event occurs abroad, unless the law of the latter prohibits such agreements. Such clauses are allowed by the Brussels Convention because they are not capable of depriving the policy-holder, the weakest party, of adequate protection. As the Advocate General observes in point 61 of his Opinion, although, in such circumstances, the policy-holder is deprived of the opportunity to bring proceedings before the court of the place where the harmful event occurred, he is still able to bring proceedings before the court of his own domicile.

33. Thus, the principle of party autonomy enables the policy-holder, the weakest party to the contract,

to waive either of the two forms of protection afforded by the Brussels Convention. However, by virtue of the overriding aim of protecting the economically weakest party, that autonomy does not extend so far as to allow such a policy-holder to waive entitlement to the jurisdiction of the courts of his domicile. As the weakest party, he must not be discouraged from suing by being compelled to bring his action before the courts in the State in which the other party to the contract is domiciled (see, by analogy, in the case of consumers, Case C-464/01 Gruber [2005] ECR I-0000, paragraph 34).

34. It is in the light of those considerations that it is necessary to determine whether or not a jurisdiction clause agreed upon in accordance with Article 12(3) of the Brussels Convention between a policy-holder and an insurer is enforceable against a beneficiary domiciled in a Contracting State other than that of the policy-holder and the insurer.

35. The Brussels Convention and, in particular, Article 12(3) thereof, give no precise details as to the effects, for the insured or any beneficiary of an insurance contract, of such a jurisdiction clause. A literal interpretation of the provisions of the Convention does not therefore disclose whether, and if so under what conditions, such a clause may be relied upon by an insurer against a beneficiary where the latter is domiciled in a Member State other than that of the policy-holder and the insurer.

36. In those circumstances, as is clear from paragraph 28 of this judgment, it is incumbent on the Court to interpret the provisions of the Brussels Convention having regard to its scheme and general objectives.

37. In that connection, it must be borne in mind that the beneficiary, like the policy-holder, is protected by the Brussels Convention as the economically weakest party within the meaning of the judgment in Gerling and Others.

38. Consequently, a jurisdiction clause based on Article 12(3) of the Convention cannot in any event be accepted as enforceable against a beneficiary unless it does not undermine the aim of protecting the economically weakest party.

39. As the Advocate General observed in points 62 and 67 of his Opinion, the enforceability of such a clause would have serious repercussions for a third-party beneficiary domiciled in another Contracting State. First, it would deprive that insured of the opportunity to bring proceedings before the courts for the place where the harmful event occurred or to bring proceedings before the courts of his own domicile, by compelling him to pursue the enforcement of his rights against the insurer before the courts of the latter's domicile. Second, it would enable the insurer, in proceedings against the beneficiary, to have recourse to the courts of his own domicile.

40. The result of such an interpretation would be to accept a conferral of jurisdiction for the benefit of the insurer and to disregard the aim of protecting the economically weakest party, in this case the beneficiary, who must be entitled to bring proceedings and defend himself before the courts of his own domicile.

41. Moreover, it is for the purpose of strengthening that protection, already upheld in paragraph 17 of Gerling and Others , that Article 9(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) was drafted in such a way as expressly to enable insured or beneficiaries under an insurance contract to bring proceedings against the insurer before the courts of their own domicile, and the second indent of the first paragraph of Article 8 of the Brussels Convention provides only for jurisdiction of the courts of the policy-holder's domicile, without determining whether or not the insurer may be sued before the courts of the domicile of the insured or of a beneficiary.

42. Furthermore, Gerling and Others cannot, contrary to the contentions of the Belgian co-insurers and the United Kingdom Government, be relied on to support the idea of enforceability since, first, that judgment was concerned with a jurisdiction clause based on Article 12(2) of the Brussels Convention, which expressly authorises the parties to a contract to stipulate a clause conferring jurisdiction, which is not exclusive but optional, for the sole benefit of the policy-holder, the insured or the beneficiary, and, second, in the same judgment the Court ruled only as to the enforceability of such a clause by a third party, being the beneficiary, against the insurer and not as to the enforceability thereof by the insurer against that third party. As the Advocate General notes in point 52 of his Opinion, the fact that a beneficiary under an insurance contract can avail himself of that clause against the insurer is not liable to cause him harm but, on the contrary, by adding a further forum to those provided for by the Brussels Convention in relation to insurance matters, is conducive to greater protection of the economically weakest party.

43. It follows from all the foregoing that the question submitted should be answered in the following terms:

A jurisdiction clause conforming with Article 12(3) of the Brussels Convention cannot be relied on against a beneficiary under that contract who has not expressly subscribed to that clause and is domiciled in a Contracting State other than that of the policy-holder and the insurer.

Costs

44. Since these proceedings are, for the parties to the main proceedings, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court. The costs incurred in submitting observations to the court, other than those of the said parties, are not recoverable.

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NATCOUR *A9* Cour d'appel de Grenoble, arrêt du 20/02/2003 (02/03628)

NOTES Smeele, F.G.M. ; Oude Alink, S.M.: Aansprakelijkheid en verzekering - A & V 2005 p.180-185 ; Wittwer, Alexander: Gerichtsstandsvereinbarungen "zu Lasten Dritter" in Versicherungsverträgen, European Law Reporter 2005 p.489-490 ; Heuzé, Vincent: Revue critique de droit international privé 2005 p.762-771 ; Heiss, Helmut: Gerichtsstandsvereinbarungen zulasten Dritter, insbesondere in Versicherungsverträgen zu ihren Gunsten, Praxis des internationalen Privat- und Verfahrensrechts 2005 p.497-500 ; Idot, Laurence: Clause attributive de juridiction et contrat d'assurance, Europe 2005 Juillet Comm. no 271 p.29 ; Raynouard, Arnaud: Revue de jurisprudence commerciale 2005 p.338-339 ; Michinel Alvarez, Miguel Angel: Jurisprudencia española y comunitaria de Derecho internacional privado, Revista española de Derecho Internacional 2005 p.951-954 ; ihula, Toma: Société financière: platnost ujednaní o soudní príslunosti v pojistné smlouv, EMP Jurisprudence 2006 p.35-38 ; Fricke, Martin: Voraussetzungen der Bindung eines aus dem Versicherungsvertrag begünstigten Versicherten an eine Gerichtsstandsvereinbarung nach dem EuGVÜ, Versicherungsrecht 2006 p.1283-1286 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2006 no 514 ; Tagaras, Haris: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles, Cahiers de droit européen 2006 p.518-522

PROCEDU Reference for a preliminary ruling

ADVGEN Tizzano

JUDGRAP Kluka

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Judgment of the Court (First Chamber)
of 28 April 2005
St. Paul Dairy Industries NV v Unibel Exser BVBA. Reference for a preliminary ruling: Gerechtshof te Amsterdam - Netherlands. Brussels Convention - Provisional, including protective, measures - Hearing of witnesses. Case C-104/03.

Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction to order provisional, including protective, measures - Definition of provisional, including protective, measures - Hearing of witnesses to enable the applicant to decide whether to bring proceedings - Excluded

(Brussels Convention of 27 September 1968, Art. 24)

Article 24 to 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, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of provisional, including protective, measures'.

In the absence of any justification other than that interest of the applicant, the grant of such a measure does not pursue the aim of the jurisdiction laid down by way of derogation by Article 24 of the Convention, which is to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings and to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case.

(see paras 12-13, 17, 25, operative part)

In Case C-104/03,

REFERENCE for a preliminary ruling 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 from the Gerechtshof te Amsterdam (Netherlands), made by decision of 12 December 2002, received at the Court on 6 March 2003, in the proceedings

St. Paul Dairy Industries NV

v

Unibel Exser BVBA

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, N. Colneric, J.N. Cunha Rodrigues, M. Ilei and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 July 2004,

after considering the observations submitted on behalf of:

- St. Paul Dairy Industries NV, by R.M.A. Lensen, advocaat,

- Unibel Exser BVBA, by I.P. de Groot, advocaat,

- the German Government, by R. Wagner, acting as Agent,

- the United Kingdom Government, by K. Manji, acting as Agent, and T. Ward, Barrister,

- the Commission of the European Communities, by E. Manhaeve and A.M. RouchaudJoet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2004,

gives the following

Judgment

1. The reference for a preliminary ruling relates to the interpretation of Article 24 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, of Ireland and of 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) (hereinafter the Convention').

2. That reference was made in a dispute between St. Paul Dairy Industries NV (St. Paul Dairy') and Unibel Exser BVBA (Unibel'), both established in Belgium, relating to the hearing of a witness who is resident in the Netherlands.

Law

The Convention

3. Article 24 of the Convention provides that:

Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

National law

4. Article 186(1) of the Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure) (the WBR') provides that, in cases where the law allows witness evidence, a court may order a provisional hearing of a witness, on the application of the party concerned, before proceedings are issued.

The main proceedings and the questions referred for a preliminary ruling

5. By order of 23 April 2002, the Rechtbank te Haarlem (Netherlands) ordered, on the application of Unibel, a provisional hearing of a witness resident in the Netherlands.

6. St. Paul Dairy appealed against that order to the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal), claiming that the Netherlands court did not have jurisdiction to hear the application made by Unibel.

7. With regard to the substance of the dispute between Unibel and St. Paul Dairy, the order for reference states that it is common ground that both parties are established in Belgium, the legal relationship at issue in the main proceedings is governed by Belgian law, the court having jurisdiction to hear the matter is the Belgian court and no case on the same subject has been brought in the

Netherlands or in Belgium.

8. In those circumstances, the Gerechtshof te Amsterdam decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Does the provision in Article 186 et seq. of the [WBR] concerning the preliminary hearing of witnesses prior to the bringing of proceedings come within the scope of the Brussels Convention in light of the fact also that, as provided for in that legislation, it seeks not only to enable material evidence to be taken from witnesses shortly after the facts in dispute and to prevent evidence from being lost but also, and in particular, to provide an opportunity for persons involved in an action subsequently brought before the civil courts - those considering bringing such an action, those who anticipate that the action will be brought against them, or third parties otherwise concerned by such an action - to obtain advance clarification of the facts (with which they are perhaps not entirely familiar), so as to enable them better to assess their position, particularly also with regard to the issue of identification of the party against whom proceedings must be instituted?

(2) If so, can the provision in that case constitute a measure within the meaning of Article 24 of the Brussels Convention?'

The questions referred for a preliminary ruling

9. The questions posed by the national court, which can be examined together, ask essentially whether an application for a witness to be heard before the proceedings on the substance are initiated, with the aim of enabling the applicant to decide whether to bring a case, falls within the scope of application of the Convention as being a provisional or protective measure as provided for in Article 24 thereof.

10. A preliminary point to note is that Article 24 can be relied on to bring within the scope of the Convention only those provisional, including protective, measures in areas which fall within its scope as defined in Article 1 thereof (see Case 143/78 De Cavel [1979] ECR 1055, paragraph 9; Case 25/81 C.H.W. [1982] ECR 1189, paragraph 12; and Case C-391/95 Van Uden [1998] ECR I-7091, paragraph 30). It is therefore for the national judge to verify whether that is the case in the main proceedings.

11. Article 24 of the Convention authorises a court of a Contracting State to rule on an application for a provisional or protective measure even though it does not have jurisdiction to hear the substance of the case. That provision thus lays down an exception to the system of jurisdiction set up by the Convention and must therefore be interpreted strictly.

12. The jurisdiction laid down by way of derogation by Article 24 of the Convention is intended to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings.

13. In accordance with that aim, the expression provisional, including protective, measures' within the meaning of Article 24 of the Convention is to be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case (see Case C-261/90 Reichert and Kockler [1992] ECR I2149, paragraph 34, and Van Uden , cited above, paragraph 37).

14. The granting of this type of measure requires on the part of the court, in addition to particular care, detailed knowledge of the actual circumstances in which the measures are to take effect. Generally, the court must be able to make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered (see Case 125/79 Denilauler [1980] ECR 1553, paragraph 15, and Van Uden , paragraph 38).

15. In the main proceedings, the measure sought, namely the hearing, before a court of a Contracting State, of a witness resident in the territory of that State, is intended to establish facts on which the resolution of future proceedings could depend and in respect of which a court in another Contracting State has jurisdiction.

16. It is clear from the order for reference that that measure, the grant of which, according to the law of the Contracting State in question, is not subject to any particular conditions, is intended to enable the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard.

17. In the absence of any justification other than the interest of the applicant in deciding whether to bring proceedings on the substance, clearly the measure sought in the main proceedings does not pursue the aim of Article 24 of the Convention as set out in paragraphs 12 and 13 of the present judgment.

18. It should be noted that the grant of such a measure could easily be used to circumvent, at the stage of preparatory inquiries, the jurisdictional rules set out in Articles 2 and 5 to 18 of the Convention.

19. The principle of legal certainty, which constitutes one of the aims of the Convention, requires, in particular, that the jurisdictional rules which derogate from the basic principle of the Convention laid down in Article 2, such as the rule in Article 24 thereof, 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 (see, to that effect, Case C440/97 GIE Groupe Concorde and Others [1999] ECR I-6307, paragraphs 23 and 24; Case C-256/00 Besix [2002] ECR I-1699, paragraph 24; and Case C281/02 Owusu [2005] ECR I-0000, paragraphs 38 to 40).

20. The grant of a measure such as that at issue in the main proceedings may also lead to a multiplication of the bases of jurisdiction in relation to one and the same legal relationship, which is contrary to the aims of the Convention (Case C-295/95 Farrell [1997] ECR I-1683, paragraph 13).

21. Whilst consequences such as those described in paragraphs 18 and 20 of this judgment are inherent in the application of Article 24 of the Convention, they are justifiable only to the extent that the measure sought pursues the aims of that article.

22. As noted in paragraph 17 of this judgment, that is not the case in the main proceedings.

23. Moreover, an application to hear a witness in circumstances such as those in the main proceedings could be used as a means of sidestepping the rules governing, on the basis of the same guarantees and with the same effects for all individuals, the transmission and handling of applications made by a court of a Member State intended to have an inquiry carried out in another Member State (see Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174, p. 1)).

24. These considerations are sufficient to prevent a measure, the aim of which is to allow the applicant to assess the chances or risks of proceedings, being regarded as a provisional or protective measure within the meaning of Article 24 of the Convention.

25. The answer to the questions referred must therefore be that Article 24 of the Convention must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of provisional, including protective, measures'.

Costs

26. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) rules as follows:

Article 24 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, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of provisional, including protective, measures'.

DOCNUM	62003J0104
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-03481
DOC	2005/04/28
LODGED	2003/03/06
JURCIT	41968A0927(01)-A01 : 41968A0927(01)-A24 :
CONCERNS	Interprets 41968A0927(01) -A24
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
OBSERV	Federal Republic of Germany ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Netherlands
NATCOUR	*A9* Gerechtshof Amsterdam, 3e meervoudige burgerlijke kamer, beschikking van 12/12/2002 (658/2002) ; - Nederlands internationaal privaatrecht 2003

no 111 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2003 no 20 (résumé) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2003 NJ Kort no 27

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Jann

DATES of document: 28/04/2005
of application: 06/03/2003

Judgment of the Court (First Chamber)
of 13 July 2006
Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG. Reference for a preliminary ruling: Oberlandesgericht Düsseldorf - Germany. Brussels Convention - Article 16(4) - Proceedings concerned with the registration or validity of patents - Exclusive jurisdiction of the court of the place of deposit or registration - Declaratory action to establish no infringement - Question of the patent's validity raised indirectly. Case C-4/03.

Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - Proceedings concerned with the registration or validity of patents

(Convention of 27 September 1968, Art. 16(4))

Article 16(4) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as last amended by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection. First, to allow a court seised of the main action relating to a patent, such as an action for infringement or for a declaration that there has been no infringement, to establish, indirectly, the invalidity of the patent at issue would undermine the binding nature of the rule of jurisdiction laid down in that article and would circumvent its mandatory nature. Second, the possibility which this offers would have the effect of multiplying the heads of jurisdiction and would be liable to undermine the predictability of the rules of jurisdiction laid down by the Convention, and consequently to undermine the principle of legal certainty, which is the basis of the Convention. Finally, to allow, within the scheme of the Convention, decisions in which courts other than those of a State in which a particular patent is issued rule indirectly on the validity of that patent would also multiply the risk of conflicting decisions which the Convention seeks specifically to avoid.

(see paras 26-29, 31, operative part)

In Case C-4/03,

REFERENCE for a preliminary ruling, 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, from the Oberlandesgericht Düsseldorf (Germany), made by decision of 5 December 2002, received at the Court on 6 January 2003, in the proceedings

Gesellschaft für Antriebstechnik mbH & Co. KG

v

Lamellen und Kupplungsbau Beteiligungs KG,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, N. Colneric, J.N. Cunha Rodrigues, M. Ilei and E. Levits, Judges,

Advocate General: L.A. Geelhoed,

Registrar: F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 July 2004,

after considering the observations submitted on behalf of:

- Gesellschaft für Antriebstechnik mbH & Co. KG, by T. Musmann, Rechtsanwalt,

- Lamellen und Kupplungsbau Beteiligungs KG, by T. Reimann, Rechtsanwalt,

- the German Government, by R. Wagner, acting as Agent,

- the French Government, by G. de Bergues and A. Bodard-Hermant, acting as Agents,

- the United Kingdom Government, by K. Manji, acting as Agent, assisted by D. Alexander, Barrister,

- the Commission of the European Communities, by A.M. Rouchaud and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2004,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 16(4) of the 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 version - 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) (the Convention').

2. The reference has been made in the course of proceedings between Gesellschaft für Antriebstechnik mbH & Co. KG (GAT') and Lamellen und Kupplungsbau Beteiligungs KG (LuK') concerning the marketing of products by the first of those companies which, according to the second, amounts to an infringement of two French patents of which it is the proprietor.

Legal context

3. Article 16 of the Brussels Convention, which constitutes Section 5 (Exclusive jurisdiction') of Title II, concerning the rules of jurisdiction, states:

The following courts shall have exclusive jurisdiction, regardless of domicile:

...

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place;

...'

4. The fourth paragraph of Article 17 of the Convention, which, together with Article 18, makes up Section 6 (Prorogation of jurisdiction') of Title II, provides that [a]greements... conferring jurisdiction shall have no legal force... if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.'

5. Article 18 of the Convention states:

Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply ... where another court has exclusive jurisdiction by virtue of Article 16.'

6. Article 19 of the Convention, which features in Section 7 (Examination as to jurisdiction and admissibility') of Title II, provides:

Where a court of a Contracting State is seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16, it shall declare of its own motion that it has no jurisdiction.'

7. According to the first paragraph of Article 28 of the Convention, which is in Section 1 (Recognition') of Title III, concerning the rules of recognition and enforcement, a judgment shall not be recognised if it conflicts with the provisions of Sections 3, 4 or 5 of Title II'. The second paragraph of Article 34 of the Convention, which is in Section 2 (Enforcement') of Title III, refers, in regard to the possible grounds for refusing enforcement of a decision, to the first paragraph of Article 28, cited above.

The dispute in the main proceedings and the question referred for a preliminary ruling

8. GAT and LuK, companies established in Germany, are economic operators competing in the field of motor vehicle technology.

9. GAT made an offer to a motor vehicle manufacturer, also established in Germany, with a view to winning a contract to supply mechanical damper springs. LuK alleged that the spring which was the subject of GAT's proposal infringed two French patents of which LuK was the proprietor.

10. GAT brought a declaratory action before the Landgericht (Regional Court), Düsseldorf to establish that it was not in breach of the patents, maintaining that its products did not infringe the rights under the French patents owned by LuK and, further, that those patents were either void or invalid.

11. The Landgericht Düsseldorf considered that it had international jurisdiction to adjudicate upon the action relating to the alleged infringement of the rights deriving from the French patents. It considered that it also had jurisdiction to adjudicate upon the plea as to the alleged nullity of those patents. The Landgericht dismissed the action brought by GAT, holding that the patents at issue satisfied the requirements of patentability.

12. On appeal by GAT, the Oberlandesgericht (Higher Regional Court) Düsseldorf decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

Should Article 16(4) of the Convention... be interpreted as meaning that the exclusive jurisdiction conferred by that provision on the courts of the Contracting State in which the deposit or registration of a patent has been applied for, has taken place or is deemed to have taken place under the terms of an international convention only applies if proceedings (with erga omnes effect) are brought to declare the patent invalid or are proceedings concerned with the validity of patents within the meaning of the aforementioned provision where the defendant in a patent infringement action or the claimant in a declaratory action to establish that a patent is not infringed pleads that the patent is invalid or void and that there is also no patent infringement for that reason, irrespective of whether the court seised of the proceedings considers the plea in objection to be substantiated or unsubstantiated and of when the plea in objection is raised in the course of proceedings?'

The question referred for a preliminary ruling

13. By that question, the referring court seeks in essence to ascertain the scope of the exclusive jurisdiction provided for in Article 16(4) of the Convention in relation to patents. It asks whether that rule concerns all proceedings concerned with the registration or validity of a patent, irrespective of whether the question is raised by way of an action or a plea in objection, or whether its application is limited solely to those cases in which the question of a patent's registration or validity is

raised by way of an action.

14. It should be recalled, in this connection, that the notion of proceedings concerned with the registration or validity of patents' contained in Article 16(4) of the Convention must be regarded as an independent concept intended to have uniform application in all the Contracting States (Case 288/82 Duijnstee [1983] ECR 3663, paragraph 19).

15. The Court has thus held that proceedings relating to the validity, existence or lapse of a patent or an alleged right of priority by reason of an earlier deposit are to be regarded as proceedings concerned with the registration or validity of patents' (Duijnstee , cited above, paragraph 24)

16. If, on the other hand, the dispute does not concern the validity of the patent or the existence of the deposit or registration and these matters are not disputed by the parties, the dispute will not be covered by Article 16(4) of the Convention (Duijnstee , paragraphs 25 and 26). Such would be the case, for example, with an infringement action, in which the question of the validity of the patent allegedly infringed is not called into question.

17. In practice, however, the issue of a patent's validity is frequently raised as a plea in objection in an infringement action, the defendant seeking to have the claimant retroactively denied the right on which the claimant relies and thus have the action brought against him dismissed. The issue can also be invoked, as in the case in the main proceedings, in support of a declaratory action seeking to establish that there has been no infringement, whereby the claimant seeks to establish that the defendant has no enforceable right in regard to the invention in question.

18. As the Commission has observed, it cannot be established from the wording of Article 16(4) of the Convention whether the rule of jurisdiction set out therein applies only to cases in which the question of a patent's validity is raised by way of an action or whether it extends to cases in which the question is raised as a plea in objection.

19. Article 19 of the Convention, which, in certain language versions, refers to a claim being brought principally', does not provide further clarity. Apart from the fact that the degree of clarity of the wording of that provision varies according to the particular language version, that provision, as the Commission has observed, does not confer jurisdiction but merely requires the court seised to examine whether it has jurisdiction and in certain cases to declare of its own motion that it has none.

20. In those circumstances, Article 16(4) of the Convention must be interpreted by reference to its objective and its position in the scheme of the Convention.

21. In relation to the objective pursued, it should be noted that the rules of exclusive jurisdiction laid down in Article 16 of the Convention seek to ensure that jurisdiction rests with courts closely linked to the proceedings in fact and law.

22. Thus, the exclusive jurisdiction in proceedings concerned with the registration or validity of patents conferred upon the courts of the Contracting State in which the deposit or registration has been applied for or made is justified by the fact that those courts are best placed to adjudicate upon cases in which the dispute itself concerns the validity of the patent or the existence of the deposit or registration (Duijnstee , paragraph 22). The courts of the Contracting State on whose territory the registers are kept may rule, applying their own national law, on the validity and effects of the patents which have been issued in that State. This concern for the sound administration of justice becomes all the more important in the field of patents since, given the specialised nature of this area, a number of Contracting States have set up a system of specific judicial protection, to ensure that these types of cases are dealt with by specialised courts.

23. That exclusive jurisdiction is also justified by the fact that the issue of patents necessitates

the involvement of the national administrative authorities (see, to that effect, the Report on the Convention by Mr Jenard, OJ 1979 C 59, p. 1, at p. 36).

24. In relation to the position of Article 16 within the scheme of the Convention, it should be pointed out that the rules of jurisdiction provided for in that article are of an exclusive and mandatory nature, the application of which is specifically binding on both litigants and courts. Parties may not derogate from them by an agreement conferring jurisdiction (fourth paragraph of Article 17 of the Convention) or by the defendant's voluntary appearance (Article 18 of the Convention). Where a court of a Contracting State is seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have jurisdiction by virtue of Article 16, it must declare of its own motion that it has no jurisdiction (Article 19 of the Convention). A judgment given which falls foul of the provisions of Article 16 does not benefit from the system of recognition and enforcement under the Convention (first paragraph of Article 28 and second paragraph of Article 34 thereof).

25. In the light of the position of Article 16(4) within the scheme of the Convention and the objective pursued, the view must be taken that the exclusive jurisdiction provided for by that provision should apply whatever the form of proceedings in which the issue of a patent's validity is raised, be it by way of an action or a plea in objection, at the time the case is brought or at a later stage in the proceedings.

26. First, to allow a court seised of an action for infringement or for a declaration that there has been no infringement to establish, indirectly, the invalidity of the patent at issue would undermine the binding nature of the rule of jurisdiction laid down in Article 16(4) of the Convention.

27. While the parties cannot rely on Article 16(4) of the Convention, the claimant would be able, simply by the way it formulates its claims, to circumvent the mandatory nature of the rule of jurisdiction laid down in that article.

28. Second, the possibility which this offers of circumventing Article 16(4) of the Convention would have the effect of multiplying the heads of jurisdiction and would be liable to undermine the predictability of the rules of jurisdiction laid down by the Convention, and consequently to undermine the principle of legal certainty, which is the basis of the Convention (see Case C-256/00 Besix [2002] ECR I-1699, paragraphs 24 to 26, Case C-281/02 Owusu [2005] ECR I-1383, paragraph 41, and Case C-539/03 Roche Nederland and Others [2006] ECR I0000, paragraph 37).

29. Third, to allow, within the scheme of the Convention, decisions in which courts other than those of a State in which a particular patent is issued rule indirectly on the validity of that patent would also multiply the risk of conflicting decisions which the Convention seeks specifically to avoid (see, to that effect, Case C406/92 Tatry [1994] ECR I-5439, paragraph 52, and Besix , cited above, paragraph 27).

30. The argument, advanced by LuK and the German Government, that under German law the effects of a judgment indirectly ruling on the validity of a patent are limited to the parties to the proceedings, is not an appropriate response to that risk. The effects flowing from such a decision are in fact determined by national law. In several Contracting States, however, a decision to annul a patent has erga omnes effect. In order to avoid the risk of contradictory decisions, it is therefore necessary to limit the jurisdiction of the courts of a State other than that in which the patent is issued to rule indirectly on the validity of a foreign patent to only those cases in which, under the applicable national law, the effects of the decision to be given are limited to the parties to the proceedings. Such a limitation would, however, lead to distortions, thereby undermining the equality and uniformity of rights and obligations arising from the Convention for the Contracting States and the persons concerned (Duijnstee , paragraph 13).

31. In the light of the foregoing, the answer to the question referred must be that Article 16(4) of the Convention is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection.

Costs

32. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 16(4) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as last amended by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2006 Page I-06509
DOC	2006/07/13
LODGED	2003/01/06
JURCIT	41968A0927(01)-A16 : 41968A0927(01)-A16PT4 : 41968A0927(01)-A17L4 : 41968A0927(01)-A18 : 41968A0927(01)-A19 : 41968A0927(01)-A28L1 : 41968A0927(01)-A34L2 : 41978A1009(01) : 41982A1025(01) : 41989A0535 : 41997A0115(01) :
CONCERNS	Interprets 41968A0927(01) -A16PT4
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Federal Republic of Germany ; France ; United Kingdom ; Member States ; Commission ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Oberlandesgericht Düsseldorf, Beschluß vom 05/12/2002 (2 U 104/01) ; - Gewerblicher Rechtsschutz und Urheberrecht, internationaler Teil 2003 p.1030-1032 ; - International Litigation Procedure 2003 p.658-664

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Geelhoed
JUDGRAP	Jann
DATES	of document: 13/07/2006 of application: 06/01/2003

Judgment of the Court (Grand Chamber)
of 1 March 2005
Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others. Reference for a preliminary ruling: Court of Appeal (England and Wales), Civil Division - United Kingdom. Brussels Convention - Territorial scope of the Brussels Convention - Article 2 - Jurisdiction - Accident which occurred in a non - Contracting State - Personal injury - Action brought in a Contracting State against a person domiciled in that State and other defendants domiciled in a non - Contracting State - Forum non conveniens - Incompatibility with the Brussels Convention. Case C-281/02.

1. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction - Litigation between parties domiciled in the same Contracting State and having connections with a non-Contracting State - Applicability of Article 2 of the Convention

(Brussels Convention of 27 September 1968, Art. 2)

2. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction - Jurisdiciton of the court of a Contracting State on the basis of Article 2 of the Convention - Objection to jurisdiction derived from an exception on the basis of the forum non conveniens doctrine - Not permissible

(Brussels Convention of 27 September 1968, Art. 2)

1. Article 2 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, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, is applicable in proceedings where the parties before the courts of a Contracting State are domiciled in that State and the litigation between them has certain connections with a third State but not with another Contracting State, that provision thus covering relationships between the courts of a single Contracting State and those of a non-Contracting State, rather than relationships between the courts of several Contracting States.

Although, for the jurisdiction rules of the Convention to apply at all, the existence of an international element is required, the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of that provision, from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature.

Moreover, the designation of the court of a Contracting State as the court having jurisdiction on the ground of the defendant's domicile in that State, even in proceedings which are, at least in part, connected, because of their subject-matter or the claimant's domicile, with a non-Contracting State, is not such as to impose an obligation on that State so that the principle of the relative effect of treaties is not affected.

(see paras 25-26, 30-31, 35)

2. 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, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention

of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, precludes a court of a Contracting State from declining to exercise jurisdiction on the ground that a court in a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.

No exception on the basis of the forum non conveniens doctrine was provided for by the authors of the Convention and application of the doctrine is liable to undermine the predictability of the rules of jurisdiction laid down by the Convention, and consequently to undermine the principle of legal certainty, which is the basis of the Convention. Moreover, allowing forum non conveniens would be likely to affect the uniform application of the rules of jurisdiction contained in the Convention and the legal protection of persons established in the Community.

(see paras 37, 41-43, operative part)

In Case C-281/02,

Reference 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 by the Court of Appeal (England and Wales) Civil Division (United Kingdom), by decision of

5 July 2002

, received at the Court on

31 July 2002

, in the proceedings

Andrew Owusu

v

N.B. Jackson, trading as Villa Holidays Bal-Inn Villas' ,

Mammee Bay Resorts Ltd ,

Mammee Bay Club Ltd ,

The Enchanted Garden Resorts & Spa Ltd ,

Consulting Services Ltd ,

Town & Country Resorts Ltd,

THE COURT (Grand Chamber),

composed of P. Jann, President of the First Chamber, acting for the President, C.W.A. Timmermans and A. Rosas, Presidents of Chambers, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur), N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on

4 May 2004,

after considering the observations submitted on behalf of:

- Mr Owusu, by R. Plender QC and P. Mead, barrister,

- Mr Jackson, by B. Doherty and C. Thomann, solicitors,

- Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd and Town & Country Resorts Ltd, by P. Sherrington, S. Armstrong and L. Lamb, solicitors,

- the United Kingdom Government, by K. Manji, acting as Agent, and D. Lloyd-Jones QC,

- the German Government, by R. Wagner, acting as Agent,

- the Commission of the European Communities, by A.-M. Rouchaud-Joet and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on

14 December 2004,

gives the following

Judgment

Costs

53. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.

1. This reference for a preliminary ruling concerns the interpretation of Article 2 of the 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 version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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; the Brussels Convention').

2. The reference was made in the course of proceedings brought by Mr Owusu against Mr Jackson, trading as Villa Holidays Bal-Inn Villas', and several companies governed by Jamaican law, following an accident suffered by Mr Owusu in Jamaica.

Legal background

The Brussels Convention

3. According to its preamble the Brussels Convention is intended to facilitate the reciprocal

recognition and enforcement of judgments of courts or tribunals, in accordance with Article 293 EC, and to strengthen in the Community the legal protection of persons therein established. The preamble also states that it is necessary for that purpose to determine the international jurisdiction of the courts of the contracting States.

4. The provisions relating to jurisdiction appear in Title II of the Brussels Convention. According to Article 2 of the Convention:

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.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State'.

5. However, Article 5(1) and (3) of that convention provides that a defendant may be sued in another Contracting State, in matters relating to a contract, in the courts for the place of performance of the obligation in question, and, in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.

6. The Brussels Convention is also intended to prevent conflicting decisions. Thus, according to Article 21, which concerns lis pendens :

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 stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court'.

7. Article 22 of the Convention provides:

Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

National law

8. According to the doctrine of forum non conveniens , as understood in English law, a national court may decline to exercise jurisdiction on the ground that a court in another State, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice (1986 judgment of the House of Lords, in Spiliada Maritime Corporation v Cansulex Ltd [1987], AC 460, particularly at p. 476).

9. An English court which decides to decline jurisdiction under the doctrine of forum non conveniens stays proceedings so that the proceedings which are thus provisionally suspended can be resumed should it prove, in particular, that the foreign forum has no jurisdiction to hear the case or that the claimant has no access to effective justice in that forum.

The main proceedings and the questions referred for a preliminary ruling

10. On 10 October 1997, Mr Owusu (the claimant'), a British national domiciled in the United Kingdom, suffered a very serious accident during a holiday in Jamaica. He walked into the sea, and when the water was up to his waist he dived in, struck his head against a submerged sand bank and sustained a fracture of his fifth cervical vertebra which rendered him tetraplegic.

11. Following that accident, Mr Owusu brought an action in the United Kingdom for breach of contract against Mr Jackson, who is also domiciled in that State. Mr Jackson had let to Mr Owusu a holiday villa in Mammee Bay (Jamaica). Mr Owusu claims that the contract, which provided that he would have access to a private beach, contained an implied term that the beach would be reasonably safe or free from hidden dangers.

12. Mr Owusu also brought an action in tort in the United Kingdom against several Jamaican companies, namely Mammee Bay Club Ltd (the third defendant'), the owner and occupier of the beach at Mammee Bay which provided the claimant with free access to the beach, The Enchanted Garden Resorts & Spa Ltd (the fourth defendant'), which operates a holiday complex close to Mammee Bay, and whose guests were also licensed to use the beach, and Town & Country Resorts Ltd (the sixth defendant'), which operates a large hotel adjoining the beach, and which has a licence to use the beach, subject to the condition that it is responsible for its management, upkeep and control.

13. According to the file, another English holidaymaker had suffered a similar accident two years earlier in which she, too, was rendered tetraplegic. The action in tort against the Jamaican defendants therefore embraces not only a contention that they failed to warn swimmers of the hazard constituted by the submerged sand bank, but also a contention that they failed to heed the earlier accident.

14. The proceedings were commenced by a claim form issued out of Sheffield District Registry of the High Court (England and Wales) Civil Division on 6 October 2000. They were served on Mr Jackson in the United Kingdom and, on 12 December 2000, leave was granted to the claimant to serve the proceedings on the other defendants in Jamaica. Service was effected on the third, fourth and sixth defendants, but not on Mammee Bay Resorts Ltd or Consulting Services Ltd.

15. Mr Jackson and the third, fourth and sixth defendants applied to that court for a declaration that it should not exercise its jurisdiction in relation to the claim against them both. In support of their applications, they argued that the case had closer links with Jamaica and that the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice.

16. By order of 16 October 2001, the Judge sitting as Deputy High Court Judge in Sheffield (United Kingdom) held that it was clear from Case C-412/98 UGIC v Group Josi [2000] ECR I-5925, paragraphs 59 to 61, that the application of the jurisdictional rules in the Brussels Convention to a dispute depended, in principle, on whether the defendant had its seat or domicile in a Contracting State, and that the Convention applied to a dispute between a defendant domiciled in a Contracting State and a claimant domiciled in a non-Contracting State. In those circumstances the decision of the Court of Appeal in In re Harrods (Buenos Aires) Ltd [1992] Ch 72, which accepted that it was possible for the English courts, applying the doctrine of forum non conveniens , to decline to exercise the jurisdiction conferred on them by Article 2 of the Brussels Convention, was bad law.

17. Taking the view that he had no power himself under Article 2 of the Protocol of 3 June 1971 to refer a question to the Court of Justice for a preliminary ruling to clarify this point, the Judge sitting as Deputy High Court Judge held that, in the light of the principles laid down in Group Josi , it was not open to him to stay the action against Mr Jackson since he was domiciled in a Contracting State.

18. Notwithstanding the connecting factors that the action brought against the other defendants

might have with Jamaica, the judge held that he was also unable to stay the action against them, in so far as the Brussels Convention precluded him from staying proceedings in the action against Mr Jackson. Otherwise, there would be a risk that the courts in two jurisdictions would end up trying the same factual issues upon the same or similar evidence and reach different conclusions. He therefore held that the United Kingdom, and not Jamaica was the State with the appropriate forum to try the action and dismissed the applications for a declaration that the court should not exercise jurisdiction.

19. Mr Jackson and the third, fourth and sixth defendants appealed against that order. The Court of Appeal (England and Wales) Civil Division states that, in this case, the competing jurisdictions are a Contracting State and a non-Contracting State. If Article 2 of the Brussels Convention is mandatory, even in this context, Mr Jackson would have to be sued in the United Kingdom before the courts of his domicile and it would not be open to the claimant to sue him under Article 5(3) of the Brussels Convention in Jamaica, where the harmful event occurred, because that State is not another Contracting State. In the absence of an express derogation to that effect in the Convention, it is therefore not permissible to create an exception to the rule in Article 2. According to the referring court, the question of the application of forum non conveniens in favour of the courts of a non-Contracting State, when one of the defendants is domiciled in a Contracting State, is not a matter on which the Court of Justice has ever given a ruling.

20. According to the claimant, Article 2 of the Brussels Convention is of mandatory application, so that the English courts cannot stay proceedings in the United Kingdom against a defendant domiciled there, even though the English court takes the view that another forum in a non-Contracting State is more appropriate.

21. The referring court points out that if that position were correct it might have serious consequences in a number of other situations concerning exclusive jurisdiction or lis pendens. It adds that a judgment delivered in England, deciding the case, which was to be enforced in Jamaica, particularly as regards the Jamaican defendants, would encounter difficulty over certain rules in force in that country on the recognition and enforcement of foreign judgments.

22. Against that background, the Court of Appeal decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Is it inconsistent with the Brussels Convention... , where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary powe r, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:

(a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;

(b) if the proceedings have no connecting factors to any other Contracting State?

2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?'

On the questions referred

The first question

23. In order to reply to the first question it must first be determined whether Article 2 of the Brussels Convention is applicable in circumstances such as those in the main proceedings, that is to say, where the claimant and one of the defendants are domiciled in the same Contracting State and the case between them before the courts of that State has certain connecting factors with a non-Contracting State, but not with another Contracting State. Only if it is will the question arise whether, in the circumstances of the case in the main proceedings, the Brussels Convention

precludes the application by a court of a Contracting State of the forum non conveniens doctrine where Article 2 of that convention would permit that court to claim jurisdiction because the defendant is domiciled in that State.

The applicability of Article 2 of the Brussels Convention

24. Nothing in the wording of Article 2 of the Brussels Convention suggests that the application of the general rule of jurisdiction laid down by that article solely on the basis of the defendant's domicile in a Contracting State is subject to the condition that there should be a legal relationship involving a number of Contracting States.

25. Of course, as is clear from the Jenard report on the Convention (OJ 1979 C 59, pp. 1, 8), for the jurisdiction rules of the Brussels Convention to apply at all the existence of an international element is required.

26. However, the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of Article 2 of the Brussels Convention, from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature. That situation is such as to raise questions in the Contracting State, as it does in the main proceedings, relating to the determination of international jurisdiction, which is precisely one of the objectives of the Brussels Convention, according to the third recital in its preamble.

27. Thus the Court has already interpreted the rules of jurisdiction laid down by the Brussels Convention in cases where the claimant was domiciled or had its seat in a non-Contracting State while the defendant was domiciled in a Contracting State (see Case C-190/89 Rich [1991] ECR I3855, Case C-406/92 Tatry [1994] ECR I5439 and Group Josi , paragraph 60).

28. Moreover, the rules of the Brussels Convention on exclusive jurisdiction or express prorogation of jurisdiction are also likely to be applicable to legal relationships involving only one Contracting State and one or more non-Contracting States. That is so, under Article 16 of the Brussels Convention, in the case of proceedings which have as their object rights in rem in immovable property or tenancies of immovable property between persons domiciled in a non-Contracting State and relating to an asset in a Contracting State, or, under Article 17 of the Brussels Convention, where an agreement conferring jurisdiction binding at least one party domiciled in a non-Contracting State opts for a court in a Contracting State.

29. Similarly, as the Advocate General pointed out in points 142 to 152 of his Opinion, whilst it is clear from their wording that the Brussels Convention rules on lis pendens and related actions or recognition and enforcement of judgments apply to relationships between different Contracting States, provided that they concern proceedings pending before courts of different Contracting States or judgments delivered by courts of a Contracting State with a view to recognition and enforcement thereof in another Contracting State, the fact nevertheless remains that the disputes with which the proceedings or decisions in question are concerned may be international, involving a Contracting State and a non-Contracting State, and allow recourse, on that ground, to the general rule of jurisdiction laid down by Article 2 of the Brussels Convention.

30. To counter the argument that Article 2 applies to a legal situation involving a single Contracting State and one or more non-Contracting States, the defendants in the main proceedings and the United Kingdom Government cited the principle of the relative effect of treaties, which means that the Brussels Convention cannot impose any obligation on States which have not agreed to be bound by it.

31. In that regard, suffice it to note that the designation of the court of a Contracting State as the court having jurisdiction on the ground of the defendant's domicile in that State, even in proceedings which are, at least in part, connected, because of their subject-matter or the claimant's domicile, with a non-Contracting State, is not such as to impose an obligation on that State.

32. Mr Jackson and the United Kingdom Government also emphasised, in support of the argument that Article 2 of the Brussels Convention applied only to disputes with connections to a number of Contracting States, the fundamental objective pursued by the Convention which was to ensure the free movement of judgments between Contracting States.

33. The purpose of the fourth indent of Article 220 of the EC Treaty (now the fourth indent of Article 293 EC), on the basis of which the Member States concluded the Brussels Convention, is to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States (Case C398/92 Mund & Fester [1994] ECR I467, paragraph 11). In fact it is not disputed that the Brussels Convention helps to ensure the smooth working of the internal market.

34. However, the uniform rules of jurisdiction contained in the Brussels Convention are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, by definition involving a number of Member States. Suffice it to observe in that regard that the consolidation as such of the rules on conflict of jurisdiction and on the recognition and enforcement of judgments, effected by the Brussels Convention in respect of cases with an international element, is without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject (see, by analogy, as regards harmonisation directives based on Article 95 EC intended to improve the conditions for the establishment and working of the internal market, Joined Cases C-465/00, C138/01 and C-139/01 Osterreichischer Rundfunk and Others [2003] ECR I4989, paragraphs 41 and 42).

35. It follows from the foregoing that Article 2 of the Brussels Convention applies to circumstances such as those in the main proceedings, involving relationships between the courts of a single Contracting State and those of a non-Contracting State rather than relationships between the courts of a number of Contracting States.

36. It must therefore be considered whether, in such circumstances, the Brussels Convention precludes a court of a Contracting State from applying the forum non conveniens doctrine and declining to exercise the jurisdiction conferred on it by Article 2 of that Convention.

The compatibility of the forum non conveniens doctrine with the Brussels Convention

37. It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention (see, as regards the compulsory system of jurisdiction set up by the Brussels Convention, Case C-116/02 Gasser [2003] ECR I-0000, paragraph 72, and Case C-159/02 Turner [2004] ECR I-0000, paragraph 24). It is common ground that no exception on the basis of the forum non conveniens doctrine was provided for by the authors of the Convention, although the question was discussed when the Convention of 9 October 1978 on the Accession of Denmark, Ireland and the United Kingdom was drawn up, as is apparent from the report on that Convention by Professor Schlosser (OJ 1979 C 59, p. 71, paragraphs 77 and 78).

38. Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention (see, inter alia, Case C-440/97 GIE Groupe Concorde and Others [1999] ECR I6307, paragraph 23, and Case C-256/00 Besix [2002] ECR I1699, paragraph 24), would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the

forum non conveniens doctrine.

39. 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 (Besix , paragraph 25).

40. The Court has thus held that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in Article 2 of the Brussels Convention 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 (GIE Groupe Concorde and Others , paragraph 24, and Besix , paragraph 26).

41. Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.

42. The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another State and the prolongation of the procedural time-limits.

43. Moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules.

44. The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.

45. In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention, for the reasons set out above.

46. In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other

Contracting State.

The second question

47. By its second question, the referring court seeks essentially to know whether, if the Court takes the view that the Brussels Convention precludes the application of forum non conveniens , its application is ruled out in all circumstances or only in certain circumstances.

48. According to the order for reference and the observations of the defendants in the main proceedings and of the United Kingdom Government, that second question was asked in connection with cases where there were identical or related proceedings pending before a court of a non-Contracting State, a convention granting jurisdiction to such a court or a connection with that State of the same type as those referred to in Article 16 of the Brussels Convention.

49. The procedure provided for in Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate (see, inter alia, Case C-231/89 Gmurzynska-Bscher [1990] ECR I4003, paragraph 18, Case C314/96 Djabali [1998] ECR I1149, paragraph 17, and Case C-318/00 Bacardi-Martini and Cellier des Dauphins [2003] ECR I905, paragraph 41).

50. Thus, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, to that effect, Djabali , paragraph 19, Bacardi-Martini and Cellier des Dauphins , paragraph 42, and Joined Cases C-480/00 to C-482/00, C-484/00, C-489/00 to C-491/00 and C497/00 to C-499/00 Azienda Agricola Ettore Ribaldi and Others [2004] ECR I0000, paragraph 72).

51. In the present case, it is common ground that the factual circumstances described in paragraph 48 of this judgment are not the same as those of the main proceedings.

52. Accordingly there is no need to reply to the second question.

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61990J0261 : N 13
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NATCOUR *A9* Court of Appeal (England), Civil Division, order of 05/07/2002 ([2002] EWCA Civ 877) ; - International Litigation Procedure 2002 p.813-830 ; - Current Law - Monthly Digest 2003 Part 1 no 80 (résumé) ; - Revue critique de droit international privé 2003 p.335-339 ; - Muir Watt, Horatia: Revue critique de droit international privé 2003 p.340-343

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Schintgen

DATES of document: 01/03/2005
of application: 31/07/2002

Judgment of the Court (Fifth Chamber)
of 5 February 2004
Frahuil SA v Assitalia SpA. Reference for a preliminary ruling: Corte suprema di cassazione - Italy. Brussels Convention - Special jurisdiction - Article 5(1) - Meaning of matters relating to a contract- Contract of guarantee entered into without the knowledge of the principal debtor - Subrogation of the guarantor to the rights of the creditor - Right of recourse of the guarantor against the principal debtor. Case C-265/02.

1. Convention on Jurisdiction and the Enforcement of Judgments - Scope - Civil and commercial matters - Meaning of civil and commercial matters - Action brought by a guarantor against the principal debtor by way of legal subrogation in the context of a contract of guarantee - Included - (Brussels Convention of 27 September 1968, Art. 1, first para.)

2. Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction in matters relating to a contract - Meaning - Action brought by a guarantor, by way of subrogation, against the principal debtor in the context of a contract of guarantee concluded with a third party - Excluded where the principal debtor has not authorised the conclusion of the contract - (Brussels Convention of 27 September 1968, Art. 5(1))

1. An action brought by way of legal subrogation against an importer who owed customs duties by the guarantor who paid those duties to the customs authorities in performance of a contract of guarantee under which it had undertaken to the customs authorities to guarantee payment of the duties in question by the forwarding agent, which had originally been instructed by the principal debtor to pay the debt, does not amount to the exercise of powers falling outside the scope of the rules applicable to relationships between private individuals, and must therefore be regarded as coming within the concept of " civil and commercial matters" within the meaning of the first paragraph of Article 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.

see paras 19, 21

2. 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as follows: " matters relating to a contract" do not cover the obligation which a guarantor who paid customs duties under a guarantee obtained by the forwarding agent seeks to enforce in legal proceedings by way of subrogation to the rights of the customs authorities and by way of recourse against the owner of the goods, if the latter, who was not a party to the contract of guarantee, did not authorise the conclusion of that contract.

see para. 26, operative part

In Case C-265/02,

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 Corte suprema di cassazione (Italy) for a preliminary ruling in the proceedings pending before that court between

Frahuil SA

and

Assitalia SpA,

on the interpretation of Article 5(1) of the abovementioned 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), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

THE COURT (Fifth Chamber),

composed of:

P. Jann (Rapporteur), acting for the President of the Fifth Chamber,

C.W.A. Timmermans and

S. von Bahr, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

the Commission of the European Communities, by E. de March and A.-M. Rouchaud-Joet, acting as Agents,

having regard to the report of the Judge-Rapporteur,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1. By order of 11 April 2002, received at the Court on 18 July 2002, the Corte suprema di cassazione (Supreme Court of Cassation) 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 and amended version p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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; hereinafter " the Brussels Convention").

2. That question was raised in the course of proceedings brought by way of recourse by Assitalia SpA (" Assitalia"), a company governed by Italian law, against Frahuil SA (" Frahuil"), a company governed by French law, in order to obtain reimbursement of the customs duties which Assitalia had paid as guarantor of the forwarding agent Vegetoil srl (" Vegetoil") in connection with the importation of goods by Frahuil.

Relevant provisions

The Convention

3. The first paragraph of Article 1 of the Convention provides that it " shall apply in civil and commercial matters... It shall not extend, in particular, to revenue, customs or administrative matters."

4. The first paragraph of Article 2 of the Convention 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 5 provides:

" 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;...

"

6. The first paragraph of Article 53 of the Convention provides:

" For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile...."

National law

7. Concerning the guarantee, Article 1949 of the Italian Civil Code (" the Civil Code"), entitled " Subrogation of the guarantor to the rights of the creditor" , provides in particular:

" The guarantor who has paid the debt shall be subrogated to all the rights which the creditor had against the debtor."

8. The first paragraph of Article 1950 of the Civil Code, entitled " Recourse against the principal debtor" , is worded as follows:

" The guarantor who has paid shall have recourse against the principal debtor, even if the guarantee was obtained without the knowledge of the debtor."

The main proceedings and the question referred

9. Frahuil, established in Marseille (France), imported into Italy goods from non-Member States. It instructed Vegetoil to carry out the customs clearance formalities and claims to have paid to it in advance the amounts of the customs duties payable.

10. Vegetoil did not pay the duties in question, but exercised its right to defer payment against the provision of a guarantee pursuant to Articles 78 and 79 of the testo unico delle disposizioni legislative in materia doganale (Consolidated Customs Law), approved by Decree No 43 of the President of the Republic of 23 January 1973 (GURI ordinary supplement to No 80 of 28 March 1973).

11. The guarantee was provided by means of a contract of guarantee entered into, without the knowledge of Frahuil, between Vegetoil and Assitalia, established in Rome, in which the latter stood surety for Vegetoil as regards the Italian customs authorities.

12. Assitalia paid the customs duties payable in connection with the importation by Frahuil.

13. Assitalia summonsed Frahuil before the Tribunale di Roma (Italy) in order to obtain reimbursement of the sums which it had paid to the customs authorities. That action was based on the subrogation to the rights of the creditor and on the action for recourse against the debtor provided for, in favour of the guarantor, in Articles 1949 and 1950 of the Civil Code.

14. Frahuil raised an objection concerning the lack of jurisdiction of the Italian courts on the

ground that, in accordance with Article 2 of the Brussels Convention, it should have been sued in the courts of the State in which it has its seat, namely in the French courts.

15. By judgment of 20 June and 15 September 1995, the Tribunale di Roma declared itself to have jurisdiction. On appeal, the Corte d ' appello di Roma upheld that judgment by decision of 24 October and 12 November 1997. The Corte d ' appello held that the Italian courts had jurisdiction under Article 5(1) of the Brussels Convention. Frahuil ' s obligation to reimburse Assitalia derived from a contract of guarantee which, under the provisions of the Civil Code, was valid although the debtor did not have knowledge of it.

16. Frahuil appealed on a point of law to the Corte suprema di cassazione. It argued, essentially, that subrogation of the guarantor to the rights of the creditor and the action for recourse afforded against the principal debtor are derived not from the contract of guarantee but from the law, in particular Articles 1949 and 1950 of the Civil Code. Assitalia contended that the action brought was of a contractual nature since, under the provisions of the Civil Code, it was the natural consequence of the contract of guarantee.

17. Uncertain as to the interpretation of Article 5(1) of the Brussels Convention, the Corte suprema di cassazione decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

> " Is Article 5(1) of the Brussels Convention of 27 September 1968, 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic 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, to be interpreted as subsuming under matters relating to a contract the obligation which a guarantor who paid customs duties under a guarantee obtained by the forwarding agent seeks to enforce in legal proceedings by way of subrogation to the rights of the customs authorities and by way of recourse against the third-party debtor who is the owner of the goods and unconnected with the contract of guarantee?"

The question referred

The applicability of the Convention

18. Since the main proceedings relate to the recovery of sums paid to discharge customs duties, the first point to be examined is whether that falls within the scope of the Brussels Convention.

In the present case, the action was brought against an importer who owed customs duties by the guarantor who paid those duties to the customs authorities. The guarantor paid in performance of a contract of guarantee under which it had undertaken to the customs authorities to guarantee payment of the duties in question by the forwarding agent, which had originally been instructed by the principal debtor to pay the debt.

20. In a case such as the present one in which there are multiple relationships involving a party who is a public authority and a person governed by private law, as well as only parties governed by private law, it is necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action (Case C-271/00 Baten [2002] ECR I-10489, paragraph 31, and Case 266/01 Préservatrice foncière TIARD [2003] ECR I-4867, paragraph 23).

21. The legal relationship between Frahuil and Assitalia, the two parties governed by private law who are contesting the main proceedings, is a relationship governed by private law. According to the order for reference, the party which brought the action is exercising a legal remedy which

is open to it through a legal subrogation provided for in a civil law provision. That action does not amount to the exercise of powers falling outside the scope of the rules applicable to relationships between private individuals, and must therefore be regarded as coming within the concept of " civil and commercial matters" within the meaning of the first paragraph of Article 1 of the Convention (see, to this effect, Préservatrice foncière TIARD , cited above, paragraph 36).

The concept of matters relating to a contract

According to settled case-law, the concept of " matters relating to a contract" is to be interpreted independently, regard being had to the objectives and general scheme of the Convention, in order to ensure that it is applied uniformly in all the Contracting States; that concept cannot therefore be taken to refer to classification under the relevant national law of the legal relationship in question before the national court (see in particular Case C-26/91 Handte v Traitements Mécano-Chimiques des Surfaces [1992] ECR I-3967, paragraph 10, Case C-51/97 Réunion européenne and Others [1998] ECR I-6511, paragraph 15, Case C-334/00 Tacconi [2002] ECR I-7357, paragraph 19, and Case C-167/00 Henkel [2002] ECR I-8111, paragraph 35).

23. Under the system of the Brussels Convention, the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and it is only by way of derogation from that principle that the Brussels Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (see in particular Handte , paragraph 14, and Réunion européenne and Others , paragraph 16, both cited above).

24. Also according to settled case-law, it follows that the concept of " matters relating to a contract" in Article 5(1) of the Brussels Convention is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (Handte , paragraph 15, Réunion européenne and Others , paragraph 17, and Tacconi , paragraph 23, cited above).

25. In that regard it is not disputed that in the main proceedings Frahuil is not a party to the contract of guarantee under which Assitalia undertook to guarantee the payment of the customs duties by Vegetoil. However, it appears that Frahuil instructed Vegetoil to carry out the formalities of customs clearance. It is therefore a matter for the referring court to examine the legal relationship between Frahuil and Vegetoil in order to establish whether that relationship permitted Vegetoil, on behalf of Frahuil, to enter into a contract such as the contract of guarantee in question in the main proceedings.

26. It follows from the foregoing considerations that the answer to the question referred by the national court must be that Article 5(1) of the Convention must be interpreted as meaning that " matters relating to a contract" do not cover the obligation which a guarantor who paid customs duties under a guarantee obtained by the forwarding agent seeks to enforce in legal proceedings by way of subrogation to the rights of the customs authorities and by way of recourse against the owner of the goods, if the latter, who was not a party to the contract of guarantee, did not authorise the conclusion of that contract.

Costs

27. 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 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 Corte suprema di cassazione by order of 11 April 2002, hereby rules:

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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as follows:

" matters relating to a contract" do not cover the obligation which a guarantor who paid customs duties under a guarantee obtained by the forwarding agent seeks to enforce in legal proceedings by way of subrogation to the rights of the customs authorities and by way of recourse against the owner of the goods, if the latter, who was not a party to the contract of guarantee, did not authorise the conclusion of that contract.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2004 Page I-01543
DOC	2004/02/05
LODGED	2002/07/18
JURCIT	41968A0927(01)-A01L1 : N 3 18 - 21 41968A0927(01)-A02L1 : N 4 41968A0927(01)-A05PT1 : N 1 5 22 - 26 41968A0927(01)-A53L1 : N 6 62000J0271 : N 20 62001J0266 : N 20 21 61991J0026 : N 22 - 24 61997J0051 : N 22 - 24 62000J0334 : N 22 24 62000J0167 : N 22
CONCERNS	Interprets 41968A0927(01) -A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG	Italian
OBSERV	Commission ; Institutions
NATIONA	Italy
NATCOUR	*A9* Corte suprema di Cassazione, ordinanza del 11/04/2002 06/06/2002 (8249/02) ; - Il Consiglio di Stato 2002 II p.1528 (résumé) ; - Il massimario del Foro italiano 2002 Col.596-597 (résumé) ; - Rivista di diritto internazionale privato e processuale 2002 p.1073-1077 ; - Il Foro italiano 2003 I Col.897-900 ; - X: Il Foro italiano 2003 I Col.897-898 ; - X: Il Foro italiano 2003 I Col.897-898
NOTES	Mankowski, Peter: Entscheidungen zum Wirtschaftsrecht 2004 p.379-380 ; Franzina, Pietro: Surrogazione e regresso del fideiussore nella disciplina comunitaria della competenza giurisdizionale, Giustizia civile 2004 I p.1134-1139 ; Blobel, Felix: The European Legal Forum 2004 p.44-48 (EN) ; Idot, Laurence: Matière contractuelle, Europe 2004 Avril Comm. no 116 p.18 ; Lorenz, Stephan ; Unberath, Hannes: Der Bürgenregress im Vertragsgerichtsstand - "Mutation" durch Gläubigerwechsel?, Praxis des internationalen Privat- und Verfahrensrechts 2004 p.298-304 ; Freitag, Robert: Anwendung von EuGVÜ, EuGVO und LugÜ auf öffentlich-rechtliche Forderungen?, Praxis des internationalen Privat- und Verfahrensrechts 2004 p.305-309 ; Wittwer, Alexander: Regress des Bürgen (k)ein vertraglicher Anspruch, European Law Reporter 2004 p.316-318 ; Cerdonio Chiaramonte, Giuliana: Foro contrattuale e diritto del fideiussore che ha pagato tributi doganali, Il Corriere giuridico 2004 p.126-128 ; García Lopez, Julio A.: Jurisprudencia española y comunitaria de Derecho internacional privado, Revista española de Derecho Internacional 2004 p.844-848 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2005 no 66 ; Santoro, Laura: Spunti in merito alla interpretazione dell'art. 5, punto 1, della Convenzione di Bruxelles del 27 settembre 1968, Europa e diritto privato 2006 p.333-351
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Jann
DATES	of document: 05/02/2004 of application: 18/07/2002

Judgment of the Court (Second Chamber)
of 10 June 2004
Rudolf Kronhofer v Marianne Maier and Others. Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Brussels Convention - Article 5(3) - Jurisdiction in matters relating to tort, delict or quasi-delict - Place where the harmful event occurred - Financial loss arising from capital investments in another Contracting State. Case C-168/02.

Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction in matters relating to tort, delict or quasi-delict' - Place where the harmful event occurred - Definition - Place of domicile of claimant who has suffered financial loss arising from capital investments in another Contracting State - Excluded

(Convention of 27 September 1968, Art. 5(3))

Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcements of Judgments in Civil and Commercial Matters, as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Republic of Portugal, 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, must be interpreted as meaning that the expression place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

The term place where the harmful event occurred' cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere. First, such an interpretation would mean that the determination of the court having jurisdiction would depend on matters that were uncertain and would thus run counter to the strengthening of the legal protection of persons established in the Community which, by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued, is one of the objectives of the Convention. Second, it would be liable in most cases to give jurisdiction to the courts of the place in which the claimant was domiciled. The Convention does not favour that solution except in cases where it expressly so provides.

(see paras 19-21, operative part)

In Case C-168/02

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 Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Rudolf Kronhofer

and

Marianne Maier,

Christian Möller,

Wirich Hofius,

Zeki Karan,

on the interpretation of Article 5(3) of the abovementioned Convention of 27 September 1968 (OJ 1978 L 304, p. 36), as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of 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 Republic of Portugal (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),

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet, J.N. Cunha Rodrigues (Rapporteur), R. Schintgen and N. Colneric, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mr Kronhofer, by M. Brandauer, Rechtsanwalt,

- Ms Maier, by M. Scherbantie, Rechtsanwältin,

- Mr Karan, by C. Ender, Rechtsanwalt,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the German Government, by R. Wagner, acting as Agent,

- the United Kingdom Government, by K. Manji, acting as Agent, and T. Ward, Barrister,

- the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Kronhofer, represented by M. Brandauer and R. Bickel, Rechtsanwälte, of Mr Karan, represented by C. Ender, and of the Commission, represented by A.-M. Rouchaud and W. Bogensberger, at the hearing on 20 November 2003,

after hearing the Opinion of the Advocate General at the sitting on

15 January 2004,

gives the following

Judgment

1. By order of 9 April 2002, received at the Court on 6 May 2002, the Oberster Gerichtshof (Supreme Court) 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(3) of that Convention (OJ 1978 L 304, p. 36), as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of 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 Republic of Portugal (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) (hereinafter the Convention').

2. That question was raised in proceedings brought by Mr Kronhofer, domiciled in Austria, against Ms Maier, Mr Möller, Mr Hofius and Mr Karan (hereinafter the defendants in the main proceedings'), each domiciled in Germany, in which Mr Kronhofer seeks to recover damages for financial loss which he claims to have suffered as a result of the wrongful conduct of the defendants in the main proceedings as directors or investment consultants of the company Protectas Vermögensverwaltungs GmbH (hereinafter Protectas'), which also has its registered office in Germany.

Legal framework

3. The first paragraph of Article 2 of the Convention 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.'

4. Under Article 5(3) of the Convention:

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

...

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.'

The main proceedings and the question referred

5. Mr Kronhofer brought proceedings against the defendants in the main proceedings before the Landesgericht Feldkirch (Feldkirch Regional Court) (Austria),, , seeking to recover damages for financial loss which he claims to have suffered as a result of their wrongful conduct.

6. The defendants in the main proceedings persuaded him, by telephone, to enter into a call option contract relating to shares. However, they failed to warn him of the risks involved in the transaction. As a result, Mr Kronhofer transferred a total amount of USD 82 500 in November and December 1997 to an investment account with Protectas in Germany which was then used to subscribe for highly speculative call options on the London Stock Exchange. The transaction in question resulted in the loss of part of the sum transferred and Mr Kronhofer was repaid only part of the capital invested by him.

7. The jurisdiction of the Landesgericht Feldkirch was founded on Article 5(3) of the Convention as the court for the place where the harmful event occurred, in this case Mr Kronhofer's domicile.

8. When that action was dismissed, Mr Kronhofer appealed to the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) (Austria), which declined jurisdiction on the ground that the court of domicile was not the place where the harmful event occurred', as neither the place where the event which resulted in damage occurred nor the place where the resulting damage was sustained was in Austria.

9. An application for review on a point of law was brought before the Oberster Gerichtshof, which took the view that the Court of Justice had not yet ruled on the question whether the expression the place where the harmful event occurred' is to be so widely interpreted that, in cases of purely financial damage affecting part of the victim's assets invested in another Member State, it also encompasses the place of the victim's domicile and thus the place where his assets are concentrated.

10. As it considered that a decision on the interpretation of the Convention was necessary to enable it to give judgment, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Is the expression place where the harmful event occurred contained in Article 5(3) of the Convention... to be construed in such a way that, in the case of purely financial damage arising on the investment of part of the injured party's assets, it also encompasses in any event the place where the injured party is domiciled if the investment was made in another Member State of the Community?'

The question referred

11. By its question, the national court is essentially asking whether Article 5(3) of the Convention should be interpreted as meaning that the expression place where the harmful event occurred' may cover the place where the claimant is domiciled and where his assets are concentrated' by reason only of the fact that the claimant has suffered financial damage there resulting in the loss of part of his assets which arose and was incurred in another Contracting State.

12. It should be noted at the outset that the system of common rules of conferment of jurisdiction laid down in Title II of the 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.

13. It is only by way of derogation from that fundamental principle attributing jurisdiction to the courts of the defendant's domicile that Section 2 of Title II of the Convention makes provision for certain special jurisdictional rules, such as that laid down in Article 5(3) of the Convention.

14. Those special jurisdictional rules must be restrictively interpreted and cannot give rise to an interpretation going beyond the cases expressly envisaged by the Convention (see Case 189/87 Kalfelis [1988] ECR 5565, paragraph 19, and Case C-433/01 Blijdenstein [2004] ECR I0000, paragraph 25).

15. According to settled case-law, the rule laid down in Article 5(3) of the Convention is based on the existence of a particularly close connecting factor between a dispute and courts other than those for the place where the defendant is domiciled, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see, inter alia, Case 21/76 Bier (Mines de Potasse d'Alsace ') [1976] ECR 1735, paragraph 11, and Case C-167/00 Henkel [2002] ECR I8111, paragraph 46).

16. The Court has also held that where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression place where the harmful event occurred' in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the claimant, in the courts for either of those places (see, inter alia, Mines de potasse d'Alsace , paragraphs 24 and 25, and Case C-18/02 DFDS Torline [2004] ECR I-0000, paragraph 40).

17. It is clear from the order for reference that the Oberster Gerichtshof takes the view that, in the case in the main proceedings, the place where the damage occurred and the place of the event giving rise to it were both in Germany. The distinguishing feature of this case lies in the fact that the financial damage allegedly suffered by the claimant in another Contracting State is said to have affected the whole of his assets simultaneously.

18. As the Advocate General rightly noted at point 46 of his Opinion, there is nothing in such a situation to justify conferring jurisdiction to the courts of a Contracting State other than that on whose territory the event which resulted in the damage occurred and the damage was sustained, that is to say all of the elements which give rise to liability. To confer jurisdiction in that way would not meet any objective need as regards evidence or the conduct of the proceedings.

19. As the Court has held, the term place where the harmful event occurred' cannot be construed

so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere (see Case C-364/93 Marinari [1995] ECR I-2719, paragraph 14).

20. In a situation such as that in the main proceedings, such an interpretation would mean that the determination of the court having jurisdiction would depend on matters that were uncertain, such as the place where the victim's assets are concentrated' and would thus run counter to the strengthening of the legal protection of persons established in the Community which, by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued, is one of the objectives of the Convention (see Case C-256/00 Besix [2002] ECR I-1699, paragraphs 25 and 26, and DFDS Torline, paragraph 36). Furthermore, it would be liable in most cases to give jurisdiction to the courts of the place in which the claimant was domiciled. As the Court found at paragraph 14 of this judgment, the Convention does not favour that solution except in cases where it expressly so provides.

21. In view of the foregoing considerations, the answer to the question referred must be that Article 5(3) of the Convention must be interpreted as meaning that the expression place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

Costs

22. The costs incurred by the Austrian, German and United Kingdom 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

0in answer to the question referred to it by the Oberster Gerichtshof by order of 9 April 2002, hereby rules:

Article 5(3) 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 Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Republic of Portugal, 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 must be interpreted as meaning that the expression place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

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AUTHOR Court of Justice of the European Communities

FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2004 Page I-06009
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LODGED	2002/05/06
JURCIT	41968A0927 : N 1 20 41968A0927-A02L1 : N 3 12 41968A0927-A05PT3 : N 1 4 10 - 21 41968A0927-TIT2 : N 12 13 41978A1009(01) : N 1 41982A1025(01) : N 1 41989A0535 : N 1 41997A0115(01) : N 1 61976J0021 : N 15 16 61987J0189 : N 14 61993J0364 : N 19 62000J0167 : N 15 62000J0256 : N 20 62001J0433 : N 14 62002J0018 : N 16 20
CONCERNS	Interprets 41968A0927(01) -A05PT3
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Austria ; Federal Republic of Germany ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Austria
NATCOUR	*A9* Oberster Gerichtshof, Beschluß vom 09/04/2002 ; - Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht 2002 p.232-233 (résumé) ; - International Litigation Procedure 2003 p.242-249 ; *P1* Oberster Gerichtshof, Beschluß vom 18/08/2004 ; - Osterreichische Juristenzeitung 2005 p.271-272
NOTES	Blobel, Felix: European Tort Jurisdiction and Pure Economic Loss, The European Legal Forum 2004 p.187-191 (EN) ; Blobel, Felix: Der europäische Deliktsgerichtsstand und reine Vermögensschäden, The European legal forum 2004 p.187-191 ; Franzina, Pietro: L'elusiva proiezione geografica del danno meramente patrimoniale: la responsabilità da informazioni inesatte tra forum commissi delicti e forum destinatae solutionis, Il Corriere giuridico 2004 p.121-126 ; Wittwer, Alexander: Internationale Zuständigkeit bei grenzüberschreitender Kapitalanlage, European Law Reporter 2004 p.438 ; X: Convention de Bruxelles, interprétation de la notion de "lieu où le fait dommageable s'est produit", L'Observateur de Bruxelles 2004 p.17-18 ; Fuentes Camacho, Víctor ; Villafruela Chaves, Paloma: Jurisprudencia

española y comunitaria de Derecho internacional privado, Revista española de Derecho Internacional 2004 p.861-866 ; Von Hein, Jan: Deliktischer Kapitalanlegerschutz im europäischen Zuständigkeitsrecht, Praxis des internationalen Privat- und Verfahrensrechts 2005 p.17-23 ; Muir Watt, Horatia: Revue critique de droit international privé 2005 p.330-335 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2006 no 335

PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Cunha Rodrigues

DATES of document: 10/06/2004
of application: 06/05/2002

Judgment of the Court (Full Court)
of 27 April 2004
Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA. Reference for a preliminary ruling: House of Lords - United Kingdom. Brussels Convention - Proceedings brought in a Contracting State - Proceedings brought in another Contracting State by the defendant in the existing proceedings - Defendant acting in bad faith in order to frustrate the existing proceedings - Compatibility with the Brussels Convention of the grant of an injunction preventing the defendant from continuing the action in another Member State. Case C-159/02.

Convention on Jurisdiction and the Enforcement of Judgments - Injunction granted by a court of a Contracting State prohibiting a party from commencing or continuing legal proceedings before a court in another Contracting State - Not permissible - Incompatible with the principle of mutual cooperation underlying the Convention

(Brussels Convention of 27 September 1968)

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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

Such an injunction constitutes interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention. That interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the party concerned, because the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State, which runs counter to the principle of mutual trust which underpins the Convention and prohibits a court, except in special cases occurring only at the stage of the recognition and enforcement of foreign judgments, from reviewing the jurisdiction of the court of another Member State.

(see paras 26-28, 31, operative part)

In Case C-159/02,

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 House of Lords (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

Gregory Paul Turner

and

Felix Fareed Ismail Grovit,

Harada Ltd,

Changepoint SA ,

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

THE COURT (FULL COURT),

composed of: V. Skouris, President, P. Jann (Rapporteur), C.W.A. Timmermans, C. Gulmann, J.N. Cunha Rodrigues and A. Rosas, Presidents of Chambers, A. La Pergola, J.-P. Puissochet, R. Schintgen, N. Colneric and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Grovit, Harada Ltd and Changepoint SA, by R. Beynon, Solicitor, and T. de La Mare, Barrister,

- the United Kingdom Government, by K. Manji, acting as Agent, assisted by S. Morris QC,

- the German Government, by R. Wagner, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by O. Fiumara, vice avvocato generale dello Stato,

- the Commission of the European Communities, by C. O'Reilly and A.-M. Rouchaud-Joet, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Turner and of the United Kingdom Government, of Mr Grovit, of Harada Ltd and of Changepoint SA, and of the Commission, at the hearing on 9 September 2003,

after hearing the Advocate General at the sitting on

20 November 2003,

gives the following

Judgment

1. By order of 13 December 2001, received at the Court on 29 April 2002, the House of Lords referred to the Court of Justice 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 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, 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) and 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, the Convention').

2. That question was raised in proceedings between Mr Turner, on the one hand and, on the other, Mr Grovit, Harada Limited (Harada') and Changepoint SA (Changepoint') concerning breach of Mr Turner's employment contract with Harada.

The dispute in the main proceedings

3. Mr Turner, a British citizen domiciled in the United Kingdom, was recruited in 1990 as solicitor

to a group of undertakings by one of the companies belonging to that group.

4. The group, known as Chequepoint Group, is directed by Mr Grovit and its main business is running bureaux de change. It comprises several companies established in different countries, one being China Security Ltd, which initially recruited Mr Turner, Chequepoint UK Ltd, which took over Mr Turner's contract at the end of 1990, Harada, established in the United Kingdom, and Changepoint, established in Spain.

5. Mr Turner carried out his work in London (United Kingdom). However, in May 1997, at his request, his employer allowed him to transfer his office to Madrid (Spain).

6. Mr Turner started working in Madrid in November 1997. On 16 November 1998, he submitted his resignation to Harada, the company to which he had been transferred on 31 December 1997.

7. On 2 March 1998 Mr Turner brought an action in London against Harada before the Employment Tribunal. He claimed that he had been the victim of efforts to implicate him in illegal conduct, which, in his opinion, were tantamount to unfair dismissal.

8. The Employment Tribunal dismissed the objection of lack of jurisdiction raised by Harada. Its decision was confirmed on appeal. Giving judgment on the substance, it awarded damages to Mr Turner.

9. On 29 July 1998, Changepoint brought an action against Mr Turner before a court of first instance in Madrid. The summons was served on Mr Turner around 15 December 1998. Mr Turner did not accept service and protested the jurisdiction of the Spanish court.

10. In the course of the proceedings in Spain, Changepoint claimed damages of ESP 85 million from Mr Turner as compensation for losses allegedly resulting from Mr Turner's professional conduct.

11. On 18 December 1998 Mr Turner asked the High Court of Justice of England and Wales to issue an injunction under section 37(1) of the Supreme Court Act 1981, backed by a penalty, restraining Mr Grovit, Harada and Changepoint from pursuing the proceedings commenced in Spain. An interlocutory injunction was issued in those terms on 22 December 1998. On 24 February 1999, the High Court refused to extend the injunction.

12. On appeal by Mr Turner, the Court of Appeal (England and Wales) on 28 May 1999 issued an injunction ordering the defendants not to continue the proceedings commenced in Spain and to refrain from commencing further proceedings in Spain or elsewhere against Mr Turner in respect of his contract of employment. In the grounds of its judgment, the Court of Appeal stated, in particular, that the proceedings in Spain had been brought in bad faith in order to vex Mr Turner in the pursuit of his application before the Employment Tribunal.

13. On 28 June 1999, in compliance with that injunction, Changepoint discontinued the proceedings pending before the Spanish court.

14. Mr Grovit, Harada and Changepoint then appealed to the House of Lords, claiming in essence that the English courts did not have the power to make restraining orders preventing the continuation of proceedings in foreign jurisdictions covered by the Convention.

The order for reference and the questions submitted to the Court

15. According to the order for reference, the power exercised by the Court of Appeal in this case is based not on any presumed entitlement to delimit the jurisdiction of a foreign court but on the fact that the party to whom the injunction is addressed is personally amenable to the jurisdiction of the English courts.

16. According to the analysis made in the order for reference, an injunction of the kind issued by the Court of Appeal does not involve a decision upon the jurisdiction of the foreign court but

rather an assessment of the conduct of the person seeking to avail himself of that jurisdiction. However, in so far as such an injunction interferes indirectly with the proceedings before the foreign court, it can be granted only where the claimant shows that there is a clear need to protect proceedings pending in England.

17. The order for reference indicates that the essential elements which justify the exercise by the Court of Appeal of its power to issue an injunction in this case were that:

- the applicant was a party to existing legal proceedings in England;

- the defendants had in bad faith commenced and proposed to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in England;

- the Court of Appeal considered that in order to protect the legitimate interest of the applicant in the English proceedings it was necessary to grant the applicant an injunction against the defendants.

18. Taking the view, however, that the case raised a problem of interpretation of the Convention, the House of Lords stayed its proceedings pending a preliminary ruling from the Court of Justice on the following question:

Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?'

The question referred to the Court

19. By its question, the national court seeks in essence to ascertain whether the Convention precludes the grant of an injunction by which a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court in another Contracting State even where that party is acting in bad faith in order to frustrate the existing proceedings.

Observations submitted to the Court

20. The defendants in the main proceedings, the German and Italian Governments and the Commission submit that an injunction of the kind at issue in the main proceedings is not compatible with the Convention. They consider, in essence, that the Convention provides a complete set of rules on jurisdiction. Each court is entitled to rule only as to its own jurisdiction under those rules but not as to the jurisdiction of a court in another Contracting State. The effect of an injunction is that the court issuing it assumes exclusive jurisdiction and the court of another Contracting State is deprived of any opportunity of examining its own jurisdiction, thereby negating the principle of mutual cooperation underlying the Convention.

21. Mr Turner and the United Kingdom Government observe, first, that the question on which a ruling is sought concerns only injunctions prompted by an abuse of procedure, addressed to defendants who are acting in bad faith and with the intention of frustrating proceedings before an English court. In pursuit of the aim of protecting the integrity of the proceedings before the English court, only an English court is in a position to decide whether the defendant's conduct undermines or threatens that integrity.

22. In common with the House of Lords, Mr Turner and the United Kingdom Government also submit that the injunctions at issue do not involve any assessment of the jurisdiction of the foreign court. They should be regarded as procedural measures. In that regard, referring to the judgment in Case C-391/95 Van Uden [1998] ECR I-7091, they contend that the Convention imposes no limitation

on measures of a procedural nature which may be adopted by a court of a contracting State, provided that that court has jurisdiction under the Convention over the substance of a case.

23. Finally, Mr Turner and the United Kingdom Government maintain that the grant of an injunction may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings.

Findings of the Court

24. At the outset, it must be borne in mind that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments (Case C-116/02 Gasser [2003] ECR I-0000, paragraph 72).

25. It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them (see, to that effect, Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 23, and Gasser, paragraph 48).

26. Similarly, otherwise than in a small number of exceptional cases listed in the first paragraph of Article 28 of the Convention, which are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction that are not relevant here, the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State (see, to that effect, Overseas Union Insurance and Others , paragraph 24).

27. However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

28. Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom Government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust which, as pointed out in paragraphs 24 to 26 of this judgment, underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.

29. Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention (Case C-365/88 Hagen [1990] ECR I-1845, paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention.

30. The argument that the grant of injunctions may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of lis alibi pendens and of related actions. Second, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.

31. Consequently, the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

Costs

32. The costs incurred by the United Kingdom, German and Italian 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 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 questions referred to it by the House of Lords by order of 13 December 2001, hereby rules:

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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

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CONCERNS	Interprets 41968A0927(01) -
SUB	Brussels Convention of 27 September 1968
AUTLANG	English
OBSERV	United Kingdom ; Federal Republic of Germany ; Italy ; Member States ; Commission ; Institutions
NATIONA	United Kingdom
NATCOUR	*A9* House of Lords, order of 13/12/2001 ([2001] UKHL 65) ; - Current Law - Monthly Digest 2002 Part 3 no 84 (résumé) ; - Industrial Relations Law Reports 2002 p.358-365 ; - International Litigation Procedure 2002 p.444-463 ; - The European Legal Forum 2002 p.367-368 (résumé) ; - Revue critique de droit international privé 2003 p.116-117 ; - X: The European legal forum 2002 p.368-370 (D) ; - Bartels, Steven: The European Legal Forum 2002 p.368-370 (I) ; - Bartels, Steven: The European Legal Forum 2002 p.368-370 (EN) ; - Giorgetti, Mariacarla: L'antitrust injunction inglese e l'Europa giudiziaria: la parola alla Corte di giustizia, Il Corriere giuridico 2002 p.24-28 ; - De Lind van Wijngaarden-Maack, Martina: Vorlage an den EuGH zur Vereinbarkeit von antisuit injunctions mit dem EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 2003 p.153-158 ; - Ambrose, Clare: Can Anti-Suit Injunctions Survive European Community Law?, International and Comparative Law Quarterly 2003 p.401-424 ; - X: The European legal forum 2002 p.368-370 (D) ; - Bartels, Steven: The European Legal Forum 2002 p.368-370 (I) ; - Bartels, Steven: The European Legal Forum 2002 p.368-370 (EN) ; - Giorgetti, Mariacarla: L'antitrust injunction inglese e l'Europa giudiziaria: la parola alla Corte di giustizia, Il Corriere giuridico 2002 p.24-28 ; - De Lind van Wijngaarden-Maack, Martina: Vorlage an den EuGH zur Vereinbarkeit von antisuit injunctions mit dem EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 2003 p.153-158 ; - Ambrose, Clare: Can Anti-Suit Injunctions Survive European Community Law?, International and Comparative Law Quarterly 2003 p.401-424
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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Jann

DATES of document: 27/04/2004
of application: 29/04/2002

**Judgment of the Court
of 9 December 2003
Erich Gasser GmbH v MISAT Srl. Reference for a preliminary ruling: Oberlandesgericht Innsbruck - Austria. Brussels Convention - Article 21 - Lis pendens - Article 17 - Agreement conferring jurisdiction - Obligation to stay proceedings of court second seised designated in an agreement conferring jurisdiction - Excessive duration of proceedings before courts in the Member State of the court first seised. Case C-116/02.**

1. Convention on Jurisdiction and the Enforcement of Judgments - Protocol on the Interpretation of the Convention by the Court of Justice - Preliminary rulings - Jurisdiction of the Court of Justice - Question relying on the submissions of a party to the main proceedings - Whether admissible - Conditions - (Brussels Convention of 27 September 1968; Protocol of 3 June 1971)

2. Convention on Jurisdiction and the Enforcement of Judgments - Lis pendens - Actions brought before courts in different Contracting States - Jurisdiction of the court second seised claimed under an agreement conferring jurisdiction - Not relevant to the obligation to decline jurisdiction - (Brussels Convention of 27 September 1968, Art. 21)

3. Convention on Jurisdiction and the Enforcement of Judgments - Lis pendens - Actions brought before courts in different Contracting States - Excessive duration of proceedings before courts in the Member State of the court first seised - Not relevant to the application of Article 21 of the Convention - (Brussels Convention of 27 September 1968, Art. 21)

1. A national court may, 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, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

see para. 27, operative part 1

2. Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

That fact is not such as to call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

see paras 47, 54, operative part 2

3. Article 21 of the Brussels Convention of 27 September 1968 must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

An interpretation whereby the application of that article should be set aside in such a situation would be manifestly contrary both to the letter and spirit and to the aim of the Convention.

see paras 70, 73, operative part 3

In Case C-116/02,

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 Oberlandesgericht Innsbruck (Austria) for a preliminary ruling in the proceedings pending before that court between

Erich Gasser GmbH

and

MISAT Srl,

on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968, 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),

THE COURT (Full Court),

composed of:

V. Skouris, President,

P. Jann,

C.W.A. Timmermans,

C. Gulmann,

J.N. Cunha Rodrigues and

A. Rosas (Presidents of Chambers),

D.A.O. Edward,

A. La Pergola,

J.-P. Puissochet,

R. Schintgen (Rapporteur),

F. Macken,

N. Colneric and

S. von Bahr, Judges,

Advocate General: P. Léger,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

Erich Gasser GmbH, by K. Schelling, Rechtsanwalt,

MISAT Srl, by U.C. Walter, Rechtsanwältin,

the Italian Government, by I.M. Braguglia, acting as Agent, assisted by O. Fiumara, Vice Avvocato Generale dello Stato,

the United Kingdom Government, by K. Manji, acting as Agent, and by D. Lloyd Jones QC,

the Commission of the European Communities, by A.-M. Rouchaud-Joet and S. Grünheid, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Erich Gasser GmbH, the Italian Government, the United Kingdom Government and the Commission at the hearing on 13 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2003,

gives the following

Judgment

Costs

75. The costs incurred by the Italian and United Kingdom 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 (Full Court),

in answer to the questions referred to it by the Oberlandesgericht Innsbruck by judgment of 25 March 2002, hereby rules:

1. A national court may, 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, 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic 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, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

2. Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

3. Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated

from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

1. By judgment of 25 March 2002, received at the Court on 2 April 2002, the Oberlandesgericht (Higher Regional Court) Innsbruck 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 (the Protocol), a number of questions on the interpretation of Article 21 of the abovementioned Convention of 27 September 1968, 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) (the Brussels Convention or "the Convention").

2. Those questions were raised in proceedings between Erich Gasser GmbH ("Gasser"), a company incorporated under Austrian law, and MISAT Srl ("MISAT"), a company incorporated under Italian law, following a breakdown in their business relations.

Legal background

3. The aim of the Convention, according to its preamble, is to facilitate the reciprocal recognition and enforcement of judgments in accordance with Article 293 EC and to strengthen the legal protection of persons established in the Community. The preamble also states that it is necessary for that purpose to determine the international jurisdiction of the courts of the Contracting States.

4. The provisions on jurisdiction are contained in Title II of the Brussels Convention. Article 2 of the Convention lays down the general rule that the courts in the State in which the defendant is domiciled are to have jurisdiction. Article 5 of the Convention provides, however, that in matters relating to a contract the defendant may be sued in the courts for the place where the obligation which the action seeks to enforce was or should have been performed.

5. Article 16 of the Convention lays down rules governing exclusive jurisdiction. In particular, pursuant to Article 16(1)(a), in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated are to have exclusive jurisdiction.

6. Articles 17 and 18 of the Convention deal with the attribution of jurisdiction.

Article 17 is worded as follows:

> "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

(b) in a form which accords with practices which the parties have established between themselves; or

(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.

...

Agreements... conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15 [insurance and consumer contracts], or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

...

"

7. Article 18 provides:

"Apart from jurisdiction derived from other provisions of this Convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16."

8. The Brussels Convention also seeks to obviate conflicting decisions. Thus, under Article 21, concerning lis pendens :

"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 stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

"

9. Finally, in relation to recognition, Article 27 of the Convention provides:

"A judgment shall not be recognised:

...

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought.

"

10. According to the first paragraph of Article 28 of the Convention, "[m]oreover, a judgment shall not be recognised if it conflicts with the provisions... [concerning insurance and consumer contracts and the matters referred to in Article 16]" .

The main proceedings and the questions referred to the Court

11. The registered office of Gasser is in Dornbirn, Austria. For several years it sold children's clothing to MISAT, of Rome, Italy.

12. On 19 April 2000 MISAT brought proceedings against Gasser before the Tribunale Civile e Penale (Civil and Criminal District Court) di Roma seeking a ruling that the contract between them had terminated ipso jure or, in the alternative, that the contract had been terminated following a disagreement between the two companies. MISAT also asked the court to find that it had not failed to perform the contract and to order Gasser to pay it damages for failure to fulfil the obligations of fairness, diligence and good faith and to reimburse certain costs.

13. On 4 December 2000 Gasser brought an action against MISAT before the Landesgericht (Regional Court) Feldkirch, Austria, to obtain payment of outstanding invoices. In support of the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance

of the contract, within the meaning of Article 5(1) of the Convention but was also the court designated by a choice-of-court clause which had appeared on all invoices sent by Gasser to MISAT, without the latter having raised any objection in that regard. According to Gasser, that showed that, in accordance with their practice and the usage prevailing in trade between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

14. MISAT contended that the Landesgericht Feldkirch had no jurisdiction, on the ground that the court of competent jurisdiction was the court for the place where it was established, under the general rule laid down in Article 2 of the Brussels Convention. It also contested the very existence of an agreement conferring jurisdiction and stated that, before the action was brought by Gasser before the Landesgericht Feldkirch, it had commenced proceedings before the Tribunale Civile e Penale di Roma in respect of the same business relationship.

15. On 21 December 2001, the Landesgericht Feldkirch decided of its own motion to stay proceedings, pursuant to Article 21 of the Brussels Convention, until the jurisdiction of the Tribunale Civile e Penale di Roma had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but did not rule on the existence or otherwise of an agreement conferring jurisdiction, observing that although the invoices issued by the claimant systematically included a reference to the courts of Dornbirn under the heading "Competent Courts" , the orders, on the other hand, did not record any choice of court.

16. Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that proceedings should not be stayed.

17. The national court considers, first, that this is a case of lis pendens since the parties are the same and the claims made before the Austrian and Italian courts have the same cause of action within the meaning of Article 21 of the Brussels Convention, as interpreted by the Court of Justice (see, to that effect, Case 144/86 Gubisch Maschinenfabrik [1987] ECR 4861).

18. After noting that the Landesgericht Feldkirch had not ruled as to the existence of an agreement conferring jurisdiction, the national court raises the question whether the fact that one of the parties repeatedly and without objection settled invoices sent by the other even though those invoices contained a jurisdiction clause can be seen as acceptance of that clause, in accordance with Article 17(1)(c) of the Brussels Convention. The national court states that such conduct by the parties reflects a usage in international trade and commerce which is applicable to the parties and of which they are aware or are deemed to be aware. In the event of the existence of an agreement conferring jurisdiction being established, then, according to the national court, the Landesgericht Feldkirch alone has jurisdiction to deal with the dispute under Article 17 of the Convention. In those circumstances, the question arises whether the obligation to stay proceedings, provided for in Article 21 of the Convention, should nevertheless apply.

19. In addition, the national court asks to what extent the excessive and generalised slowness of legal proceedings in the Contracting State where the court first seised is established is liable to affect the application of Article 21 of the Brussels Convention.

20. It was in those circumstances that the Oberlandesgericht Innsbruck stayed proceedings and referred the following questions to the Court for a preliminary ruling:

"1. May a court which refers questions to the Court of Justice for a preliminary ruling do so purely on the basis of a party's (unrefuted) submissions, whether they have been contested or not contested (on good grounds), or is it first required to clarify those questions as regards the facts by the taking of appropriate evidence (and if so, to what extent)?

2. May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ["the Brussels Convention"], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

3. Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?

4. Do the legal consequences provided for by Italian Law No 89 of 24 March 2001 justify the application of Article 21 of the Brussels Convention even if a party is at risk of detriment as a consequence of the possible excessive length of proceedings before the Italian court and therefore, as suggested in Question 3, it would not actually be appropriate to proceed in accordance with Article 21?

5. Under what conditions must the court other than the court first seised refrain from applying Article 21 of the Brussels Convention?

6. What course of action must the court follow if, in the circumstances described in Question 3, it is not allowed to apply Article 21 of the Brussels Convention?

Should it be necessary in any event, even in the circumstances described in Question 3, to proceed in accordance with Article 21 of the Brussels Convention, there is no need to answer Questions 4, 5 and 6.

"

The first question

21. By its first question, the national court seeks in essence to ascertain whether a national court may, under the Protocol, seek an interpretation of the Brussels Convention from the Court of Justice even where the national court is relying on the submissions of a party to the main proceedings, the merits of which it has not yet assessed.

22. In this case, the national court refers to the fact that the second question is based on the premiss, not yet confirmed by the trial judge, that an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention designates the court within whose jurisdiction Dornbirn is located as the court having jurisdiction to settle the dispute in the main proceedings.

23. It must be borne in mind in that connection that, in the light of the division of responsibilities in the preliminary-ruling procedure laid down by the Protocol, it is for the national court alone to define the subject-matter of the questions which it proposes to refer to the Court. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-220/95 Van den Boogaard [1997] ECR I-1147, paragraph 16; Case C-295/95 Farrell [1997] ECR I-1683, paragraph 11; Case C-159/97 Castelletti [1999] ECR I-1597, paragraph 14, and Case C-111/01 Gantner Electronic [2003] ECR I-4207, paragraphs 34 and 38).

24. However, the spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to

deliver advisory opinions on general or hypothetical questions. In order to enable the Court to provide a useful interpretation of Community law, it is appropriate that the national court should define the legal and factual context of the interpretation sought and it is essential for it to explain why it considers that a reply to its questions is necessary to enable it to give judgment (see to that effect Gantner Electronic , cited above, paragraphs 35, 37 and 38).

25. According to the account of the facts given by the national court, the proposition that there may be an agreement conferring jurisdiction is not purely hypothetical.

26. Moreover, as has been emphasised both by the Commission and by the Advocate General in points 38 to 41 of his Opinion, the national court, before verifying the existence of a clause conferring jurisdiction within the meaning of Article 17 of the Brussels Convention and the existence of usage in international trade and commerce in that connection a process which may necessitate delicate and costly investigations considered it necessary to refer to the Court the second question, to establish whether the existence of an agreement conferring jurisdiction allows non-application of Article 21 of the Brussels Convention. If that question is answered in the affirmative, the national court will have to rule as to the existence of such an agreement conferring jurisdiction and, if the existence thereof is established, it will have to consider itself to have exclusive jurisdiction to give judgment in the main proceedings. Conversely, if the answer is in the negative, Article 21 of the Brussels Convention will have to apply, so that the question whether there is an agreement conferring jurisdiction will no longer be an issue with which the national court is concerned.

27. Consequently, the answer to the first question must be that a national court may, under the Protocol, refer to the Court of Justice a request for interpretation of the Brussels Convention, even where it relies on the submissions of a party to the main proceedings of which it has not yet examined the merits, provided that it considers, having regard to the particular circumstances of the case, that a preliminary ruling is necessary to enable it to give judgment and that the questions on which it seeks a ruling from the Court are relevant. It is nevertheless incumbent on the national court to provide the Court of Justice with factual and legal information enabling it to give a useful interpretation of the Convention and to explain why it considers that a reply to its questions is necessary to enable it to give judgment.

The second question

28. By its second question, the national court seeks in essence to establish whether Article 21 of the Brussels Convention must be interpreted as meaning that, where a court is the second court seised and has exclusive jurisdiction under an agreement conferring jurisdiction, it may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction.

Observations submitted to the Court

29. According to Gasser and the United Kingdom Government, this question should be answered in the affirmative. In support of their interpretation, they rely on the judgment in Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, in which it was held that it is "without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof" that the Court held that Article 21 of the Brussels Convention was to be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised. According to Gasser and the United Kingdom Government, there is no reason to treat Articles 16 and 17 of the Convention differently in relation to the lis pendens rule.

30. The United Kingdom Government states that, whilst Article 17 comes below Article 16 in the

hierarchy of the bases of jurisdiction provided for in the Brussels Convention, it nevertheless prevails over the other bases of jurisdiction, such as Article 2 and the special rules on jurisdiction contained in Articles 5 and 6 of the Convention. The national courts are thus required to consider of their own motion whether Article 17 is applicable and requires them, if appropriate, to decline jurisdiction.

31. The United Kingdom Government adds that it is necessary to examine the relationship between Articles 17 and 21 of the Brussels Convention taking account of the needs of international trade. The commercial practice of agreeing which courts are to have jurisdiction in the event of disputes should be supported and encouraged. Such clauses contribute to legal certainty in commercial relationships, since they enable the parties, in the event of a dispute, easily to determine which courts will have jurisdiction to deal with it.

32. Admittedly, the United Kingdom Government observes that, to justify the general rule embodied in Article 21 of the Brussels Convention, the Court held, in paragraph 23 of Overseas Union Insurance , that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. However, that reasoning is not applicable to cases in which the court second seised has exclusive jurisdiction under Article 17 of the Brussels Convention. In such cases, the court designated by the agreement conferring jurisdiction will, in general, be in a better position to rule as to the effect of such an agreement since it will be necessary to apply the substantive law of the Member State in whose territory the designated court is situated.

33. Finally, the United Kingdom Government concedes that the thesis which it defends might give rise to a risk of irreconcilable judgments. To avoid that risk, it proposes that the Court hold that a court first seised whose jurisdiction is contested in reliance on an agreement conferring jurisdiction must stay proceedings until the court which is designated by that agreement, and is the court second seised, has given a decision on its own jurisdiction.

34. MISAT, the Italian Government and the Commission, on the other hand, favour the application of Article 21 of the Brussels Convention and therefore consider that the court second seised is required to stay proceedings.

35. The Commission, like the Italian Government, considers that the derogation under which the court second seised has jurisdiction, on the ground that it enjoys exclusive jurisdiction under Article 16 of the Brussels Convention, cannot be extended to a court designated under a choice-of-court clause.

36. The Commission justifies the derogation from the rule laid down in Article 21, in the event of recourse to Article 16, by reference to the first paragraph of Article 28 of the Brussels Convention, according to which decisions given in the State of the court first seised in disregard of the exclusive jurisdiction of the court second seised, based on Article 16 of the Convention, cannot be recognised in any Contracting State. It would therefore be inconsistent to require, under Article 21 of the Convention, that the second court, which alone has jurisdiction, should stay proceedings and decline jurisdiction in favour of a court which has no jurisdiction. Such a course of action would result in parties obtaining a decision from a court lacking jurisdiction, which could not take effect in the Contracting State where it was given. In such circumstances, the aim of the Brussels Convention, which is to improve legal protection and for that purpose to ensure the cross-border recognition and enforcement of judgments in civil matters would not be attained.

37. The foregoing considerations do not apply, however, in the event of jurisdiction being conferred on the court second seised under Article 17 of the Brussels Convention. Article 28 of the Convention does not apply to the infringement of Article 17, which forms part of Section 6 of Title II of the Convention. A decision given in breach of the exclusive jurisdiction which the court second

seised derives from a choice-of-court clause should be recognised and enforced in all the Contracting States.

38. The Commission also states that Article 21 of the Brussels Convention seeks not only to obviate irreconcilable decisions which, under Article 27(3) of the Convention, are not recognised, but also to uphold economy of procedure, the court second seised being required initially to stay proceedings, and then to decline jurisdiction as soon as the jurisdiction of the Court first seised is established. That clear rule is conducive to legal certainty.

39. Referring to paragraph 23 of Overseas Union Insurance , the Commission considers that the court second seised is not in any circumstances in a better position than the court first seised to determine whether the latter has jurisdiction. In this case, the Italian Court is in as good a position as the Austrian Court to establish whether it has jurisdiction under Article 17 of the Brussels Convention, because, by virtue of commercial usage between Austria and Italy, the parties conferred exclusive jurisdiction upon the court in whose jurisdiction the registered office of the claimant in the main proceedings is located.

40. Finally, the Commission and the Italian Government observe that the jurisdiction referred to in Article 17 of the Brussels Convention is distinguished from that referred to in Article 16 thereof in that, within the scope of the latter article, the parties cannot conclude agreements conferring jurisdiction contrary to Article 16 (Article 17(3)). Moreover, the parties are entitled at any time to cancel or amend a jurisdiction clause of the kind referred to in Article 17. Such a case would arise, for example, where, under Article 18 of the Convention, a party brought an action in a State other than that to the courts of which jurisdiction has been attributed and the other party enters an appearance before the court seised without contesting its jurisdiction (see to that effect Case 150/80 Elefanten Schuh [1981] ECR 1671, paragraphs 10 and 11).

Findings of the Court

41. It must be borne in mind at the outset that Article 21 of the Brussels Convention, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention, which is 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, so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought (see Gubisch Maschinenfabrik , cited above, paragraph 8). It follows that, in order to achieve those aims, Article 21 must be interpreted broadly so as to cover, in principle, all situations of lis pendens before courts in Contracting States, irrespective of the parties' domicile (Overseas Union Insurance , cited above, paragraph 16).

42. From the clear terms of Article 21 it is apparent that, in a situation of lis pendens , the court second seised must stay proceedings of its own motion until the jurisdiction of the court first seised has been established and, where it is so established, must decline jurisdiction in favour of the latter.

43. In that regard, as the Court also observed in paragraph 13 of Overseas Union Insurance , Article 21 does not draw any distinction between the various heads of jurisdiction provided for in the Brussels Convention.

44. It is true that, in paragraph 26 of Overseas Union Insurance , before holding that Article 21 of the Brussels Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction,

only stay proceedings and may not itself examine the jurisdiction of the court first seised, the Court stated that its ruling was without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof.

45. However, it is clear from paragraph 20 of the same judgment that, in the absence of any claim that the court second seised had exclusive jurisdiction in the main proceedings, the Court of Justice simply declined to prejudge the interpretation of Article 21 of the Convention in the hypothetical situation which it specifically excluded from its judgment.

46. In this case, it is claimed that the court second seised has jurisdiction under Article 17 of the Convention.

47. However, that fact is not such as to call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

48. Moreover, the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction. That jurisdiction is determined directly by the rules of the Brussels Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them (see, to that effect, Overseas Union Insurance , paragraph 23).

49. Thus, where there is an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention, not only, as observed by the Commission, do the parties always have the option of declining to invoke it and, in particular, the defendant has the option of entering an appearance before the court first seised without alleging that it lacks jurisdiction on the basis of a choice-of-court clause, in accordance with Article 18 of the Convention, but, moreover, in circumstances other than those just described, it is incumbent on the court first seised to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with Article 17, that the parties actually agreed to designate the court second seised as having exclusive jurisdiction.

50. The fact nevertheless remains that, despite the reference to usage in international trade or commerce contained in Article 17 of the Brussels Convention, real consent by the parties is always one of the objectives of that provision, justified by the concern to protect the weaker contracting party by ensuring that jurisdiction clauses incorporated in a contract by one party alone do not go unnoticed (Case C-106/95 MSG [1997] ECR I-911, paragraph 17 and Castelletti , paragraph 19).

51. In those circumstances, in view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in Article 17 of the Brussels Convention, it is conducive to the legal certainty sought by the Convention that, in cases of lis pendens , it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention. It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of Article 17 (see, to that effect, Case C-214/89 Powell Duffryn [1992] ECR I-1745, paragraph 14).

52. Moreover, the interpretation of Article 21 of the Brussels Convention flowing from the foregoing considerations is confirmed by Article 19 of the Convention which requires a court of a Contracting State to declare of its own motion that it has no jurisdiction only where it is "seised of a claim which is principally concerned with a matter over which the courts of another contracting

State have exclusive jurisdiction by virtue of Article 16" . Article 17 of the Brussels Convention is not affected by Article 19.

53. Finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.

54. In view of the foregoing, the answer to the second question must be that Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.

The third question

55. By its third question, the national court seeks in essence to ascertain whether Article 21 of the Brussels Convention must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

Admissibility

56. The Commission raises doubts as to the admissibility of this question and, therefore, of the questions which follow it and are related to it, on the ground that the national court has not provided concrete information such as to allow the inference that the Tribunale Civile e Penale di Roma has failed to fulfil its obligation to give judgment within a reasonable time and thereby infringed Article 6 of the European Convention for the safeguard of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter "the ECHR").

57. That view cannot be accepted. As observed by the Advocate General in point 87 of his Opinion, it was indeed in relation to the fact that the average duration of proceedings before courts in the Member State in which the court first seised is established is excessively long that the national court submitted the question whether the court second seised may validly decline to apply Article 21 of the Brussels Convention. To answer that question, which the latter court considered relevant for the decision to be given in the main proceedings, it is not necessary for it to provide information as to the conduct of procedure before the Tribunale Civile e Penale di Roma.

58. It is therefore necessary to answer the third question.

Substance

Observations submitted to the Court

59. According to Gasser, Article 21 of the Brussels Convention must be interpreted in any event as excluding excessively protracted proceedings (that is to say of a duration exceeding three years), which are contrary to Article 6 of the ECHR and would entail restrictions on freedom of movement as guaranteed by Articles 28 EC, 39 EC, 48 EC and 49 EC. It is the responsibility of the European Union authorities or the national courts to identify those States in which it is well known that legal proceedings are excessively protracted.

60. Therefore, in a case where no decision on jurisdiction has been given within six months following the commencement of proceedings before the court first seised or no final decision on jurisdiction has been given within one year following the commencement of those proceedings, it is appropriate, in Gasser's view, to decline to apply Article 21 of the Brussels Convention. In any event, the courts of the State where the court second seised is established are entitled themselves to rule

both on the question of jurisdiction and, after slightly longer periods, on the substance of the case.

61. The United Kingdom Government also considers that Article 21 of the Brussels Convention must be interpreted in conformity with Article 6 of the ECHR. It observes in that connection that a potential debtor in a commercial case will often bring, before a court of his choice, an action seeking a judgment exonerating him from all liability, in the knowledge that those proceedings will go on for a particularly long time and with the aim of delaying a judgment against him for several years.

62. The automatic application of Article 21 in such a case would grant the potential debtor a substantial and unfair advantage which would enable him to control the procedure, or indeed dissuade the creditor from enforcing his rights by legal proceedings.

63. In those circumstances, the United Kingdom Government suggests that the Court should recognise an exception to Article 21 whereby the court second seised would be entitled to examine the jurisdiction of the court first seised where

(1) the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another Contracting State which enjoy jurisdiction under the Brussels Convention and

(2) the court first seised has not decided the question of its jurisdiction within a reasonable time.

64. The United Kingdom Government adds that those conditions should be appraised by the national courts, in the light of all the relevant circumstances.

65. MISAT, the Italian Government and the Commission, on the contrary, advocate the full applicability of Article 21 of the Brussels Convention, notwithstanding the excessive duration of court proceedings in one of the States concerned.

66. According to MISAT, the effect of an affirmative answer to the third question would be to create legal uncertainty and increase the financial burden for litigants, who would be required to pursue proceedings at the same time in two different States and to appear before the two courts seised, without being in a position to foresee which court would give judgment before the other. The already abundant litigation on the jurisdiction of courts would thereby be pointlessly increased, contributing to paralysis of the legal system.

67. The Commission states that the Brussels Convention is based on mutual trust and on the equivalence of the courts of the Contracting States and establishes a binding system of jurisdiction which all the courts within the purview of the Convention are required to observe. The Contracting States can therefore be obliged to ensure mutual recognition and enforcement of judgments by means of simple procedures. This compulsory system of jurisdiction is at the same time conducive to legal certainty since, by virtue of the rules of the Brussels Convention, the parties and the courts can properly and easily determine international jurisdiction. Within this system, Section 8 of Title II of the Convention is designed to prevent conflicts of jurisdiction and conflicting decisions.

68. It is not compatible with the philosophy and the objectives of the Brussels Convention for national courts to be under an obligation to respect rules on *lis pendens* only if they consider that the court first seised will give judgment within a reasonable period. Nowhere does the Convention provide that courts may use the pretext of delays in procedure in other contracting States to excuse themselves from applying its provisions.

69. Moreover, the point from which the duration of proceedings becomes excessively long, to such an extent that the interests of a party may be seriously affected, can be determined only on the basis of an appraisal taking account of all the circumstances of the case. That is an issue which

cannot be settled in the context of the Brussels Convention. It is for the European Court of Human Rights to examine the issue and the national courts cannot substitute themselves for it by recourse to Article 21 of the Convention.

Findings of the Court

70. As has been observed by the Commission and by the Advocate General in points 88 and 89 of his Opinion, an interpretation of Article 21 of the Brussels Convention whereby the application of that article should be set aside where the court first seised belongs to a Member State in whose courts there are, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the Convention.

71. First, the Convention contains no provision under which its articles, and in particular Article 21, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.

72. Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.

73. In view of the foregoing, the answer to the third question must be that Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

The fourth, fifth and sixth questions

74. In view of the answer given to the third question, it is unnecessary to answer the fourth, fifth and sixth questions, which were submitted by the national court only in the event of the third question being answered in the affirmative.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2003 Page I-14693
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JURCIT	41968A0927(01) : N 3 41 53 70

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41968A0927(01)-A16 : N 5 44
41968A0927(01)-A17 : N 6 26 46 - 54
41968A0927(01)-A18 : N 7 49
41968A0927(01)-A19 : N 52
41968A0927(01)-A21 : N 1 8 26 41 - 54 70 - 73
41968A0927(01)-A22 : N 41
41968A0927(01)-A27 : N 9 41
41968A0927(01)-A28 : N 10
41971A0603(02) : N 23 - 27
11997E293 : N 3
11997E234 : N 23 - 27
61995J0220 : N 23
61995J0295 : N 23
61997J0159 : N 23 50
62001J0111 : N 23 24
62002C0116 : N 26
61986J0144 : N 41
61989J0351 : N 41 43 - 45 48
61995J0106 : N 50
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CONCERNS Interprets 41968A0927(01) -A21
Interprets 41971A0603(02) -

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Italy ; United Kingdom ; Member States ; Commission ; Institutions

NATIONA Austria

NATCOUR *A9* Oberlandesgericht Innsbruck, Beschluß vom 25/03/2002 ; - International Litigation Procedure 2002 p.212-232 ; *P1* Oberlandesgericht Innsbruck, Beschluß vom 09/01/2004

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Schintgen

DATES of document: 09/12/2003
of application: 02/04/2002

Order of the Court (First Chamber) of 22 March 2002

Tilly Reichling v Léon Wampach. Reference for a preliminary ruling: Tribunal de paix de Luxembourg - Grand Duchy of Luxemburg. Brussels Convention - Protocol on the interpretation by the Court of Justice of the Convention - National courts which may request the Court to give a preliminary ruling - Manifest lack of jurisdiction of the Court. Case C-69/02.

Convention on Jurisdiction and the Enforcement of Judgments - Protocol on the interpretation by the Court of Justice of the Convention - National courts which may request the Court to give a preliminary ruling - Luxembourg Tribunal de paix acting at first instance - Excluded - Court clearly lacking jurisdiction to give a preliminary ruling on the questions referred to it

(Protocol of 3 June 1971, Art. 2)

In Case C-69/02,

REFERENCE to the Court by the Tribunal de paix de Luxembourg (Luxembourg) for a preliminary ruling in the proceedings pending before that court between

Tilly Reichling

and

Léon Wampach,

third party:

Etablissement d'assurances contre la vieillesse et l'invalidité,

on the interpretation of the 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, of Ireland and of 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),

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, M. Wathelet and A. Rosas (Rapporteur), Judges,

Advocate General: S. Alber,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By judgment of 28 February 2002, received at the Court on 1 March 2002, the Tribunal de paix de Luxembourg (Magistrates' Court, Luxembourg) referred three questions to the Court for a preliminary ruling on the interpretation of the 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, of Ireland and of 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), respectively the Convention and the Accession Conventions.

2 Those questions were raised in the course of proceedings for the validation of an attachment order between Ms Reichling, the judgment creditor, and Mr Wampach, the judgment debtor, with Etablissement d'assurances contre la vieillesse et l'invalidité as third party.

The dispute in the main proceedings and the questions referred for a preliminary ruling

3 Following the grant of an authorisation order by the Juge de paix, Luxembourg, on 15 June 2001, Ms Reichling served an attachment order made against Mr Wampach on Etablissement d'assurances contre la vieillesse et l'invalidité for arrears of maintenance due pursuant to two judicial decisions given on 12 January 1994 and 30 June 1999 by the Cour d'appel (Court of Appeal), making an interim order and giving a ruling respectively on the substance of a divorce.

4 In the course of proceedings for the validation of the attachment order, required by Luxembourg procedural law, Mr Wampach argued that maintenance payments were no longer due as from June 2001.

5 Treating the defence as a cross-petition for the termination of maintenance payments, and having regard to the fact that Ms Reichling is domiciled in France, the Tribunal de paix de Luxembourg held it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

1. Must Article 6(3) of the Brussels Convention be interpreted as meaning that an action for enforcement of a judicial decision, necessarily involving in accordance with procedural rules under domestic law the intervention of a court of law, may be regarded as an original claim based on a contract or on facts? May an original claim based on the enforcement of a judgment declaring and fixing entitlement to maintenance be considered to be based on a contract or facts within the meaning of Article 6(3)? May an original claim seeking enforcement of an entitlement to maintenance be considered to be based on a contract or facts within the meaning of Article 6(3)?

2. Must the expression arising from the same contract or facts on which the original claim was based in Article 6(3) of the Brussels Convention be considered to be more restrictive than the expression related actions used in the third paragraph of Article 22 of the Brussels Convention?

3. Where the court which is to hear and determine the original claim has jurisdiction under Article 16(5) of the Brussels Convention without that original claim requiring that court to adjudicate on the substance of the relationship between the parties to the dispute, does Article 6(3) of the Brussels Convention make it possible for a defendant to bring before that court a counter-claim concerning the legal substance, whereas if it had submitted that claim by way of an independent action it would have fallen, under the terms of the Brussels Convention, within the jurisdiction of the courts of another Contracting State?

Jurisdiction of the Court

6 Under Article 92(1) of the Rules of Procedure, where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court of Justice may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action.

7 The Court's jurisdiction to interpret the Convention is defined by the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention (OJ 1975 L 204, p. 28) as amended by the Accession Conventions (the Protocol).

8 The Protocol reserves to certain courts, referred to in Article 2, the power to request the Court of Justice to give preliminary rulings on questions of interpretation of the Convention, so that it is appropriate, in that regard, to examine whether the Court of Justice has jurisdiction to answer the questions which have been referred.

9 Article 2(1) and (3) of the Protocol set out expressly and exhaustively - the first directly, the second by reference to Article 37 of the Convention - the courts which may make references to the Court. Article 2(2) adds that the courts of the Contracting States sitting in an appellate capacity may also do so.

10 Luxembourg Tribunaux de paix are not mentioned either in Article 2(1) of the Protocol or in Article 37 of the Convention. Furthermore, it is clear from Article 2 of the new Luxembourg Civil Procedure Code in conjunction with Article 9 of the Luxembourg Law of 11 November 1970 on assignment and attachment of salaries, pensions and investment income that, when the Tribunal de paix rules on the validity of an attachment order for a sum exceeding the limit of its jurisdiction of last resort, its decision is subject to appeal. In the present case, it follows both from the subject-matter of the main proceedings, as set out by the national court, and from further details in that regard given by the judgment referring questions to the Court, that the Tribunal de paix is sitting as a court of first instance.

11 It follows that, in the main proceedings, the Tribunal de paix de Luxembourg may not request the Court to give a preliminary ruling on the interpretation of the Convention.

12 In those circumstances, Article 92(1) of the Rules of Procedure must be applied and it must be held that the Court clearly has no jurisdiction to rule on the questions put by the Tribunal de paix de Luxembourg.

Costs

13 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 (First Chamber)

hereby orders:

The Court of Justice of the European Communities clearly has no jurisdiction to answer the questions put by the Tribunal de paix de Luxembourg in its judgment of 28 February 2002.

DOCNUM	62002O0069
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2002 Page I-03393
DOC	2002/03/22

LODGED	2002/03/01
JURCIT	41968A0927(01) : N 1 41968A0927(01)-A06PT3 : N 5 41968A0927(01)-A16PT5 : N 5 41968A0927(01)-A22L3 : N 5 41968A0927(01)-A37 : N 9 10 31991Q0704(02)-A92P1 : N 6 12 41971A0603(02) : N 7 41971A0603(02)-A02 : N 8 - 10
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
NATIONA	Luxembourg
NATCOUR	*A9* Tribunal de paix de Luxembourg, jugement du 28/02/2002 (1101/02) ; - International Litigation Procedure 2002 p.796-804 ; *P1* Tribunal de paix de Luxembourg, jugement du 11/07/2002 ; - International Litigation Procedure 2002 p.809-812
PROCEDU	Reference for a preliminary ruling - inadmissible
ADVGEN	Alber
JUDGRAP	Rosas
DATES	of document: 22/03/2002 of application: 01/03/2002

Judgment of the Court (Third Chamber)
of 14 October 2004
Mærsk Olie & Gas A/S v Firma M. de Haan en W. de Boer. Reference for a preliminary ruling: Højesteret - Denmark. Brussels Convention - Proceedings to establish a fund to limit liability in respect of the use of a ship - Action for damages - Article 21 - Lis pendens - Identical parties - Court first seised - Identical subject-matter and cause of action - None - Article 25 - 'Judgment' - Article 27(2) - Refusal to recognise. Case C-39/02.

1. Convention on Jurisdiction and the Enforcement of Judgments - Lis pendens - Applications having identical subject-matter and involving an identical cause of action - Concept - Application by the owner of a ship seeking the establishment of a liability limitation fund and action for damages brought against the owner by the potential victim of the damage - Excluded

(Brussels Convention of 27 September 1968, Art. 21)

2. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement - Judgment' - Decision to establish a fund to limit liability in respect of the use of a ship - Included

(Brussels Convention of 27 September 1968, Art. 25)

3. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement - Grounds of refusal - Failure to serve the document instituting proceedings on a defendant in default of appearance or to notify that document to the defendant in good time - Decision to establish a fund to limit liability in respect of the use of a ship - Need to notify the document instituting the proceedings even in the event of an appeal challenging the jurisdiction of the original court - Decision constituting a document equivalent to a document instituting proceedings - Recognition - Condition - Review by the court before which enforcement is sought

(Brussels Convention of 27 September 1968, Art. 27(2))

1. An application to a court of a Contracting State by the owner of a ship for the establishment of a liability limitation fund, as provided for under the International Convention of 10 October 1957 relating to the Limitation of the Liability of Owners of Sea-Going Ships, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the owner of the ship do not have the same subject-matter or involve the same cause of action and therefore do not create a situation of lis pendens within the terms of Article 21 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.

(see paras 35, 37, 42, operative part 1)

2. A decision by a court of a Contracting State ordering the establishment of a liability limitation fund, as provided for under the International Convention of 10 October 1957 relating to the Limitation of the Liability of Owners of Sea-Going Ships, is a judgment within the terms of Article 25 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.

In the first place, under Article 25, a judgment' means any judgment given by a court or tribunal of a Contracting State, whatever that judgment may be called. Second, that provision is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions. The fact that such a decision is taken at the conclusion of proceedings in which the parties were not heard is immaterial in that regard as, even if it was taken at the conclusion of

an initial phase of the proceedings in which both parties were not heard, it may be the subject of submissions by both parties before the issue of its recognition or its enforcement pursuant to the Convention of 27 September 1968 comes to be addressed.

(see paras 44, 46, 50, 52 , operative part 2)

3. In order for the decision by a court of a Contracting State establishing a liability limitation fund, as provided for under the International Convention of 10 October 1957 relating to the Limitation of the Liability of Owners of Sea-Going Ships, to be recognised in accordance with 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, the document instituting the proceedings for the establishment of such a fund must have been duly served on or notified to the claimant in good time, even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it.

Where, however, regard being had to the special features of the national law applicable, that decision is to be treated as a document that is equivalent to a document instituting proceedings, it cannot, notwithstanding the fact that it was not previously served on the claimant, be refused recognition in another Contracting State pursuant to Article 27(2) of the Convention of 27 September 1968, on condition that it was itself duly notified to or served on the defendant in good time.

It is for the court of the State in which enforcement is sought to determine whether notification of the document instituting proceedings by way of registered letter within the context of proceedings for the establishment of a liability limitation fund, which is regarded as due and proper for purposes of the law of the original court and of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, was effected in the due and proper manner and in sufficient time to enable the defendant effectively to arrange its defence.

(see paras 58-62, operative part 3)

In Case C-39/02,

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,

brought by the Højesteret (Denmark), by decision of

8 February 2002

, received at the Court on

13 February 2002

, for a preliminary ruling in the proceedings pending before that court between:

Mærsk Olie & Gas A/S

and

Firma M. de Haan en W. de Boer,

THE COURT (Third Chamber),

composed of: A. Rosas, acting as President of the Third Chamber, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 1 April 2004,

after considering the observations submitted on behalf of:

- Mærsk Olie & Gas A/S, by S. Johansen, advokat,

- Firma M. de Haan and W. de Boer, by J.-E. Svensson, advokat,

- the Netherlands Government, by H.G. Sevenster et J. van Bakel, acting as Agents,

- the United Kingdom Government, by P. Ormond, acting as Agent, assisted by A. Layton, Barrister,

- the Commission of the European Communities, by N.B. Rasmussen and A.-M. Rouchaud, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on

13 July 2004,

gives the following

Judgment

Costs

63. As 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. The costs involved in submitting observations to the Court, other than those of the parties to the main proceedings, are not recoverable.

On those grounds, the Court (Third Chamber), hereby rules:

1. An application to a court of a Contracting State by a shipowner for the establishment of a liability limitation fund, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner do not create a situation of lis pendens within the terms of Article 21 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.

2. A decision ordering the establishment of a liability limitation fund, such as that in the main proceedings in the present case, is a judgment within the terms of Article 25 of that Convention.

3. A decision to establish a liability limitation fund, in the absence of prior service on the claimant concerned, and even where the latter has appealed against that decision in order to challenge the jurisd iction of the court which delivered it, cannot be refused recognition in another Contracting State pursuant to Article 27(2) of that Convention, on condition that it was duly served on or notified to the defendant in good time.

1. This reference for a preliminary ruling relates to the interpretation of Articles 21, 25 and 27 of the 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) (the Brussels Convention').

2. This reference has been made in the course of a dispute between the company Mærsk Olie & Gas A/S (Mærsk') and the partnership of Mr M. de Haan and Mr W. de Boer (the shipowners') concerning

an action for damages in respect of damage allegedly caused to underwater pipelines in the North Sea by a trawler belonging to the shipowners.

The legal framework

The 1957 International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships

3. Article 1(1) of the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships of 10 October 1957 (International Transport Treaties, suppl. 1-10, January 1986, p. 81) (the 1957 Convention') provides that the owner of a sea-going ship may limit his liability to a specified amount in respect of one of the claims there listed, unless the occurrence giving rise to the claim resulted from the actual fault of the owner. The claims listed include, under Article 1(1)(b), damage to any property caused by the act, neglect or default of any person on board the ship in connection with the navigation thereof.

4. Under Article 3(1) of the 1957 Convention the amount to which liability may be limited is calculated according to the ship's tonnage and will vary depending on the nature of the damage caused. Thus, in the case where the harmful event has resulted in damage only to property, the amount to which the shipowner may limit his liability corresponds to 1 000 francs Poincaré for each tonne of the ship's tonnage.

5. In the case where the aggregate of the claims resulting from the same harmful event exceeds the limits of liability as thus defined, Article 2(2) and (3) of the 1957 Convention provides that a fund, corresponding to that limit, may be constituted for the purpose of being available only for the payment of claims in respect of which limitation of liability may be invoked. Article 3(2) provides that this fund is to be distributed among the claimants... in proportion to the amounts of their established claims'.

6. Article 1(7) of the 1957 Convention provides: The act of invoking limitation of liability shall not constitute an admission of liability'.

7. Article 4 of the 1957 Convention provides as follows:

... the rules relating to the constitution and distribution of the limitation fund, if any, and all rules of procedure shall be governed by the national law of the State in which the fund is constituted.'

8. According to the case-file, the Kingdom of the Netherlands was bound by the 1957 Convention at the time of the events in issue in the main proceedings.

The Brussels Convention

9. According to its preamble, the purpose of the Brussels Convention is to facilitate the reciprocal recognition and enforcement of judgments of courts or tribunals, in accordance with Article 293 EC, and to strengthen in the Community the legal protection of persons therein established. The preamble also states that it is necessary for that purpose to determine the international jurisdiction of the courts of the Contracting States.

10. Article 2 of the Brussels Convention lays down the general rule that jurisdiction is vested in the courts of the State in which the defendant is domiciled. Article 5 of the Convention, however, provides that, in matters relating to tort, delict or quasi-delict', the defendant may be sued in the courts for the place where the harmful event occurred'.

11. Article 6a of the Brussels Convention adds:

Where by virtue of this Convention a court of a Contracting State has jurisdiction in actions

relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that State, shall also have jurisdiction over claims for limitation of such liability.'

12. The Brussels Convention also seeks to prevent conflicting decisions being delivered. Thus, Article 21, dealing with lis pendens , provides as follows:

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 stay its proceedings until such time as the jurisdiction of the court first seised is established.

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

13. Article 22 of the Brussels Convention provides as follows:

Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

14. With regard to recognition, Article 25 of the Convention states as follows:

For the purposes of this Convention, judgment means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

15. The first paragraph of Article 26 of the Brussels Convention provides:

A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required.'

16. Article 27, however, provides as follows:

A judgment shall not be recognised:

...

2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

...'.

17. Article IV of the Protocol annexed to the Brussels Convention states:

Judicial and extrajudicial documents... which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States.

...'.

The dispute in the main proceeedings and the questions referred for preliminary ruling

18. In May 1985 Mærsk laid oil and gas pipelines in the North Sea. In the course of June 1985 a trawler belonging to the shipowners was fishing in the area in which those pipelines had been laid. Mærsk established that the pipelines had been damaged.

19. By letter of 3 July 1985 Mærsk informed the shipowners that it held them responsible for that damage, the repair work in respect of which it was estimated would cost USD 1 700 019 and GBP 51 961.58.

20. On 23 April 1987 the shipowners lodged with the Arrondissementsrechtbank (District Court) Groningen (Netherlands), the place in which their vessel was registered, an application for limitation of their liability. That court made an order on 27 May 1987 provisionally fixing that limitation at NLG 52 417.40 and enjoining the shipowners to lodge that sum together with NLG 10 000 to cover the legal costs. The shipowers' legal respresentatives informed Mærsk of that decision by telex of 5 June 1987.

21. On 20 June 1987 Mærsk brought an action for damages against the shipowners before the Vestre Landsret (Western Regional Court) (Denmark).

22. On 24 June 1987 Mærsk appealed to the Gerechtshof (Court of Appeal) Leeuwarden (Netherlands) against the decision of the Arrondissementsrechtbank Groningen on the ground that the latter court did not have jurisdiction. On 6 January 1988 the Gerechtshof upheld the decision delivered at first instance, referring to, inter alia, Articles 2 and 6a of the Brussels Convention. Mærsk did not lodge an appeal to have the decision of the Gerechtshof quashed.

23. By registered letter of 1 February 1988 the administrator notified Mærsk's lawyer of the order of the Arrondissementsrechtbank establishing the liability limitation fund and, by letter of 25 April 1988, requested Mærsk to submit its claim.

24. Mærsk did not accede to that request, choosing instead to pursue its action before the Danish court. In the absence of any claims submitted by injured parties, the sum lodged with the Arrondissementsrechtbank in the Netherlands was returned to the shipowners in December 1988.

25. By decision of 27 April 1988 the Vestre Landsret held that the rulings of the Netherlands courts of 27 May 1987 and of 6 January 1988 had to be treated as being judgments within the terms of Article 25 of the Brussels Convention in view of the fact that Mærsk had had the opportunity to defend its position during the corresponding proceedings.

26. As it took the view that the proceedings brought in the Netherlands and in Denmark were between the same parties, had the same subject-matter and related to the same cause of action, and that this finding could not be invalidated by the fact that Mærsk had not defended its interests in the proceedings relating to the limitation of liability, the Vestre Landsret ruled that the conditions governing a finding of lis pendens pursuant to Article 21 of the Brussels Convention had been satisfied.

27. In view of the fact that proceedings had been brought earlier in the Netherlands (23 April 1987) than in Denmark, and in view of the finding of the Arrondissementsrechtbank Groningen, upheld on appeal, that it had jurisdiction to deliver its decision, the Vestre Landsret, acting pursuant to the second paragraph of Article 21 of the Brussels Convention, declined jurisdiction in favour of the Netherlands court.

28. Mærsk appealed against that decision to the Højesteret (Danish Supreme Court).

29. As it took the view that the case raised questions on the interpretation of Articles 21, 25 and 27 of the Brus sels Convention, the Højesteret decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Does a procedure to establish a liability limitation fund pursuant to an application by a shipowner under the Brussels Convention of 10 October 1957 constitute proceedings within the meaning of Article 21 of the 1968 Brussels Convention where it is evident from the application, where the relevant names are stated, who might be affected thereby as a potential injured party?

2. Is an order to establish a liability limitation fund under the Netherlands procedural rules in force in 1986 a judgment within the meaning of Article 25 of the 1968 Brussels Convention?

3. Can a limitation fund which was established on 27 May 1987 by a Netherlands court pursuant to Netherlands procedural rules then in force without prior service on an affected claimant now be denied recognition in another Member State in relation to the claimant concerned pursuant to Article 27(2) of the 1968 Brussels Convention?

4. If Question 3 is answered in the affirmative, is the claimant concerned deprived of its right to rely on Article 27(2) by virtue of the fact that in the Member State which established the limitation fund it raised the matter of jurisdiction before a higher court without having previously objected to default of service?'

The first question

30. By its first question, the Højesteret is essentially asking whether an application brought before a court of a Contracting State by a shipowner seeking to have a liability limitation fund established, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner constitute proceedings that have the same subject-matter, involve the same cause of action and are between the same parties, within the terms of Article 21 of the Brussels Convention.

31. It should be borne in mind at the outset that Article 21 of the Brussels Convention, together with Article 22 on related actions, is contained in Section 8 of Title II of that Convention, which is 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, so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say, the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought (see Case 144/86 Gubisch Maschinenfabrik [1987] ECR 4861, paragraph 8, and Case C-116/02 Gasser [2003] ECR I-0000, paragraph 41).

32. It follows that, in order to achieve those aims, Article 21 must be interpreted broadly so as to cover, in principle, all situations of lis pendens before courts in Contracting States, irrespective of the parties' domicile (Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 16, and Gasser , cited above, paragraph 41).

33. It is, in the present case, common ground that proceedings relating to the establishment of a liability limitation fund, such as those brought before the Netherlands court, are intended to allow a shipowner who could be declared liable under one of the heads of claim listed in Article 1(1) of the 1957 Convention to limit his liability to an amount calculated in accordance with Article 3 of that Convention, such that claimants cannot recover from the shipowner, in respect of the same harmful event, amounts other than those to which they would be entitled under such proceedings.

34. An application of this kind for the establishment of a liability limitation fund undoubtedly constitutes proceedings for the purposes of Article 21 of the Brussels Convention. It is, however, also necessary to examine whether it involves the same subject-matter and cause of action as an action for damages brought by the victim against the shipowner before a court of another Contracting

State and whether those sets of proceedings have been brought between the same parties. Those three cumulative conditions must be satisfied before there can be a situation of lis pendens within the terms of Article 21 of the Brussels Convention.

35. The applications under consideration clearly do not have the same subject-matter. Whereas an action for damages seeks to have the defendant declared liable, an application to limit liability is designed to ensure, in the event that the person is declared liable, that such liability will be limited to an amount calculated in accordance with the 1957 Convention, it being borne in mind that, under Article 1(7) of that Convention, the act of invoking limitation of liability shall not constitute an admission of liability'.

36. The fact that, in proceedings for the establishment of a liability limitation fund, the claims are verified by an administrator or may also be challenged by the debtor is not such as to cast doubt on that analysis. As the Court has already ruled, in order to determine whether two sets of proceedings have the same subject-matter under Article 21 of the Brussels Convention, account should be taken, as is evident from the wording of that article, only of the applicants' respective claims in each of the sets of proceedings, and not of the defence which may be raised by a defendant (Case C-111/01 Gantner Electronic [2003] ECR I4207, paragraph 26).

37. Nor do the applications under consideration involve the same cause of action, within the terms of Article 21 of the Convention.

38. As the cause of action' comprises the facts and the legal rule invoked as the basis for the application (see Case C-406/92 The Tatry [1994] ECR I-5439, paragraph 39), the unavoidable conclusion is that, even if it be assumed that the facts underlying the two sets of proceedings are identical, the legal rule which forms the basis of each of those applications is different, as has been pointed out by Mærsk, the Commission and the Advocate General at point 41 of his Opinion. The action for damages is based on the law governing non-contractual liability, whereas the application for the establishment of a liability limitation fund is based on the 1957 Convention and on the Netherlands legislation which gives effect to it.

39. Accordingly, without it being necessary to examine the third condition that the proceedings must be between the same parties, the conclusion must be drawn that, in the absence of identical subject-matter and an identical cause of action, there is no situation of lis pendens within the terms of Article 21 of the Brussels Convention between a set of proceedings seeking the establishment of a fund to limit the liability of a shipowner, such as the application made in the main proceedings before a court in the Netherlands, and an action for damages brought before the court making the reference for a preliminary ruling.

40. That conclusion does not, in principle, preclude application of Article 22 of the Brussels Convention, as has been pointed out by the United Kingdom Government and by the Advocate General at point 45 of his Opinion. Applications such as those in issue in the main proceedings are sufficiently closely connected to be capable of being regarded as related' within the meaning of the third paragraph of Article 22, with the result that the court second seised may stay proceedings.

41. There are, however, no grounds in the present case for examining the conditions governing application of Article 22 of the Brussels Convention or, in particular, for determining which would, in that event, have been the court first seised, as it is clear from the order making the reference that the proceedings before the Arrondissementsrechtbank Groningen have been definitively terminated and that, in the absence of any claims having been submitted by persons injured, the sum lodged with the Arrondissementsrechtbank was returned to the shipowners in December 1988. In those circumstances, there are no longer any related actions' within the meaning of Article 22 of the Convention.

42. In the light of the foregoing, the answer to the first question must be that an application

to a court of a Contracting State by a shipowner for the establishment of a liability limitation fund, in which the potential victim of the damage is indicated, and an action for damages brought before a court of another Contracting State by that victim against the shipowner do not create a situation of lis pendens within the terms of Article 21 of the Brussels Convention.

The second question

43. By its second question, the Højesteret asks whether a decision ordering the establishment of a liability limitation fund, such as that in issue in the main proceedings, is a judgment within the meaning of Article 25 of the Brussels Convention.

44. In this connection, it should be borne in mind that, under Article 25, a judgment' for the purposes of the Brussels Convention, means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called'.

45. As the Court has already ruled (see Case C-414/92 Solo Kleinmotoren [1994] ECR I-2237, paragraph 17), in order to be a judgment' for the purposes of the Convention the decision in question must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties.

46. As is pointed out in the Report on the Brussels Convention (OJ 1979 C 59, p. 71, point 184), Article 25 of that Convention is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions.

47. Consequently, a decision such as the order made on 27 May 1987 by the Arrondissementsrechtbank Groningen, which provisionally fixed the amount to which the liability of a shipowner would be limited, comes within the scope of Article 25 of the Brussels Convention.

48. Mærsk nevertheless submits that this order cannot be a judgment within the meaning of Article 25 as it was made at the conclusion of non-contested proceedings.

49. That objection cannot be accepted.

50. While it is true that, according to settled case-law, the Convention is concerned essentially with judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin, and under various procedures, of an inquiry in contested proceedings (Case 125/79 Denilauler [1980] ECR 1553, paragraph 13), it must be stated clearly that, even if it was taken at the conclusion of an initial phase of the proceedings in which both parties were not heard, the order of the Netherlands court could have been the subject of submissions by both parties before the issue of its recognition or its enforcement pursuant to the Convention came to be addressed (see also, along these lines, Case C-474/93 Hengst Import [1995] ECR I-2113, paragraph 14).

51. It is thus evident from the case-file that such an order does not have any effect in law prior to being notified to claimants, who may then assert their rights before the court which has made the order by challenging both the right of the debtor to benefit from a limitation of liability and the amount of that limitation. Claimants may, in addition, lodge an appeal against that order challenging the jurisdiction of the court which adopted it - as indeed happened in the main proceedings in the present case.

52. In the light of the foregoing, the answer to the second question must be that a decision ordering the establishment of a liability limitation fund, such as that in the main proceedings in the present case, is a judgment within the terms of Article 25 of the Brussels Convention.

The third and fourth questions

53. By its third and fourth questions, which it is appropriate to examine together, the Højesteret

asks whether a decision establishing a liability limitation fund, in the absence of prior service on the claimant concerned, may be refused recognition in another Contracting State pursuant to Article 27(2) of the Brussels Convention, even in the case where the claimant has appealed against that decision in order to challenge the jurisdiction of the court which delivered it but without having previously objected to default of service of the document instituting the proceedings.

54. It should be borne in mind in this regard that Article 27 of the Convention sets out the conditions governing recognition, in one Contracting State, of judgments delivered in another Contracting State. Article 27(2) states that recognition of a judgment is to be refused where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence'.

55. According to settled case-law, the purpose of Article 27(2) of the Convention is to ensure that a judgment will not be recognised or enforced under the Convention if the defendant has not had an opportunity to put his defence before the court which gave the judgment (Case 166/80 Klomps [1981] ECR 1593, paragraph 9, Case C172/91 Sonntag [1993] ECR I-1963, paragraph 38, and Hengst Import , cited above, paragraph 17).

56. It follows that non-recognition of a judgment for the reasons set out in Article 27(2) of the Brussels Convention is possible only where the defendant was in default of appearance in the original proceedings. That provision cannot therefore be relied on where the defendant appeared, at least if he was notified of the elements of the claim and had the opportunity to arrange for his defence (Sonntag , cited above, paragraph 39).

57. In the present case, Mærsk did not at any time make an appearance in the proceedings for the establishment of a liability limitation fund. Although it appealed against the order of 27 May 1987, that appeal, which, as the Advocate General has stated at point 60 of his Opinion, related only to the jurisdiction of the court which issued the order, cannot be treated as equivalent to an appearance by a defendant in proceedings for limiting the liability of shipowners to a specific maximum amount. The defendant must therefore be considered in default of appearance within the terms of Article 27(2) of the Convention.

58. That being so, in order that the decision establishing a liability limitation fund could be recognised in accordance with the Brussels Convention, the document instituting the proceedings must have been duly served on Mærsk and in sufficient time to enable it to arrange for its defence.

59. Account must be taken in this regard of the special features of the procedure for the establishment of a liability limitation fund, as governed by Netherlands law, under which an order provisionally determining the maximum amount of liability is at first provisionally adopted by the court at the conclusion of a unilateral procedure, which is then followed by reasoned submissions by both parties, as has been pointed out in paragraph 50 of the present judgment. Such an order must be treated as a document that is equivalent to a document instituting proceedings within the meaning of Article 27(2) of the Convention.

60. According to the case-file, the administrator appointed by the Arrondissementsrechtbank Groningen informed Mærsk by registered letter of 1 February 1988 of the content of the order of 27 May 1987 and, according to the information provided by the Netherlands Government, such notification is due and proper under Netherlands law and under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, signed in The Hague on 15 November 1965, which was, at the time of the facts in the main proceedings in the present case, binding on the Kingdom of the Netherlands and the Kingdom of Denmark.

61. It is for the court in which enforcement is sought to determine whether notification was effected

in the due and proper form and in sufficient time to enable the defendant to arrange its defence effectively, account being taken of all the circumstances of the case (Klomps , cited above, paragraph 20, and Case 49/84 Debaecker and Plouvier [1985] ECR 1779, paragraph 31).

62. In the light of the foregoing, the reply to the third and fourth questions must be that a decision to establish a liability limitation fund, in the absence of prior service on the claimant concerned, and even where the latter has appealed against that decision in order to challenge the jurisdiction of the court which delivered it, cannot be refused recognition in another Contracting State pursuant to Article 27(2) of the Brussels Convention, on condition that it was duly served on or notified to the defendant in good time.

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CONCERNS	Interprets 41968A0927(01) -A21 Interprets 41968A0927(01) -A25 Interprets 41968A0927(01) -A27PT2
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction ; Enforcement of judgments
AUTLANG	Danish
OBSERV	Netherlands ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Denmark
NATCOUR	*A9* Højesterets anke-og kæremålsudvalg, beslutning af 08/02/2002 (233/98) ; - International Litigation Procedure 2003 p.233-241
NOTES	Idot, Laurence: Litispendance, Europe 2004 Décembre Comm. no 435 p.29-30 ; Maseda Rodríguez, Javier: Jurisprudencia española y comunitaria de Derecho

internacional privado, Revista española de Derecho Internacional 2004 p.868-872 ; Bonassies, Pierre: Limitation de responsabilité, Le droit maritime français 2005 p.33-37 ; Pataut, Etienne: Revue critique de droit international privé 2005 p.129-138 ; Bonassies, Pierre ; Delebecque Philippe: Le droit maritime français 2005 p.56-58 ; Toader, Camelia: Cooperare judiciar in materie civil. Interpretarea art. 21, 25 i 27 ale Conveniei de la Bruxelles privind competena judiciar i executarea deciziilor in materie civil i comercial, Analele Universitatii din Bucuresti 2005 p.124-127 ; Henty, Paul ; Davis, Cecily: When Must the Corrective Mechanism be Used? Case C-39/02, Commission v Greece, Public Procurement Law Review 2006 p.NA9-NA13 ; Smeele, Frank: Recognition of foreign limitation proceedings under the European Jurisdiction and Judgments Convention, Praxis des internationalen Privat- und Verfahrensrechts 2006 p.229-233 ; Tagaras, Haris: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles, Cahiers de droit européen 2006 p.489-495 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2007 no 389

PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Schintgen

DATES of document: 14/10/2004
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Judgment of the Court (Second Chamber)
of 20 January 2005

Petra Engler v Janus Versand GmbH. Reference for a preliminary ruling: Oberlandesgericht Innsbruck - Austria. Brussels Convention - Request for the interpretation of Article 5(1) and (3) and Article 13, first paragraph, point 3 - Entitlement of a consumer to whom misleading advertising has been sent to seek payment, in judicial proceedings, of the prize which he has ostensibly won - Classification - Action of a contractual nature covered by Article 13, first paragraph, point 3, or by Article 5(1) or in matters of tort, delict or quasi-delict by Article 5(3) - Conditions. Case C-27/02.

1. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction over consumer contracts - Article 13, first paragraph, point 3, of the Convention - Conditions of applicability - Action by a consumer domiciled in a Member State seeking an order that a mail-order company established in another Member State award a prize ostensibly won - In the absence of a connection with a contract for the supply of goods or services the action does not constitute an action of a contractual nature for the purpose of that provision

(Convention of 27 September 1968, Art. 13, first para., point 3)

2. Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction in matters relating to contract - Action of a contractual nature - Meaning - Action by a consumer domiciled in a Member State seeking an order that a mail-order company established in another Member State award a prize ostensibly won - Included - Conditions - Letter addressed to the consumer designating him by name as the prize winner - Acceptance of the promise by the consumer and request for payment of the prize - Award of the prize not subject to an order for goods and no such order made - No effect

(Convention of 27 September 1968, Art. 5(1))

1. As regards Article 13, first paragraph, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, 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, relating to jurisdiction over consumer contracts, point 3 of that provision is applicable only in so far as, first, the claimant is a private final consumer not engaged in trade or professional activities, second, the legal proceedings relate to a contract between that consumer and the professional vendor for the sale of goods or services which has given rise to reciprocal and interdependent obligations between the two parties and, third, that the two conditions specifically set out in Article 13, first paragraph, point 3(a) and (b), are fulfilled.

Consequently, in a situation where a professional vendor made contact with a consumer by sending her a personalised letter containing a prize notification together with a catalogue and an order form for the sale of its goods in the Contracting State where she resides in order to induce her to take up the vendor's offer, but where the vendor's initiative was not followed by the conclusion of a contract between the consumer and the vendor for one of the purposes referred to in Article 13, first paragraph, point 3, of the Convention and in the course of which the parties assumed reciprocal obligations, the action brought by the consumer for the payment of the prize cannot be regarded as being contractual in nature for the purposes of that provision.

(see paras 34, 36, 38)

2. The rules of jurisdiction 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, 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, must be interpreted in the following way:

- legal proceedings by which a consumer seeks an order, under the law of the Contracting State in which he is domiciled, that a mail order company established in another Contracting State award a prize ostensibly won by him is contractual in nature for the purpose of Article 5(1) of that convention, provided that, first, that company, with the intention of inducing the consumer to enter a contract, addresses to him in person a letter of such a kind as to give the impression that a prize will be awarded to him if he returns the payment notice' attached to the letter and, second, he accepts the conditions laid down by the vendor and does in fact claim payment of the prize announced;

- on the other hand, even though the letter also contains a catalogue advertising goods for that company and a request for a trial without obligation', the fact that the award of the prize does not depend on an order for goods and that the consumer has not, in fact, placed such an order has no bearing on that interpretation.

(see para. 61, operative part)

In Case C-27/02,

REFERENCE 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 from the Oberlandesgericht Innsbruck (Austria), made by decision

14 January 2002

, registered at the Court

31 January 2002

, in the proceedings

Petra Engler

v

Janus Versand GmbH ,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann and R. Schintgen (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing

26 May 2004,

after considering the observations submitted on behalf of:

- Ms Engler, by K.-H. Plankel and S. Ganahl, Rechtsanwälte,

- Janus Versand GmbH, by A. Matt, Rechtsanwalt,

- the Austrian Government, by C. Pesendorfer, acting as Agent, and A. Klauser, Rechtsanwalt,

- the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on

8 July 2004,

gives the following

Judgment

Costs

62. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

The rules of jurisdiction 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, 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 must be interpreted in the following way:

- legal proceedings by which a consumer seeks an order, under the law of the Contracting State in which he is domiciled, that a mail order company established in another Contracting State award a prize ostensibly won by him is contractual in nature for the purpose of Article 5(1) of that convention, provided that, first, that company, with the intention of inducing the consumer to enter a contract, addresses to him in person a letter of such a kind as to give the impression that a prize will be awarded to him if he returns the payment notice' attached to the letter and, second, he accepts the conditions laid down by the vendor and does in fact claim payment of the prize announced;

- on the other hand, even though the letter also contains a catalogue advertising goods for that company and a request for a trial without obligation', the fact that the award of the prize does not depend on an order for goods and that the consumer has not, in fact, placed such an order has no bearing on that interpretation.

1. This reference for a preliminary ruling concerns the interpretation of Article 5(1) and (3) and Article 13, first paragraph, point 3, of the 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) (the Brussels Convention').

2. The reference was made in the course of proceedings between Ms Engler, an Austrian national domiciled in Lustenau (Austria), and Janus Versand GmbH, a mail order company incorporated under

German law established in Langenfeld (Germany), concerning an action for an order requiring Janus Versand to award Ms Engler a prize, since in a letter personally addressed to her it had given Ms Engler the impression that she had won a prize.

Legal background

The Brussels Convention

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

4. The first paragraph of Article 2 of the Brussels Convention, which forms part of Title II, Section 1, entitled General provisions', sets out the basic rule in the following terms:

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 appears 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. Articles 5 to 18 of the Brussels Convention, which make up Sections 2 to 6 of Title II thereof, lay down rules governing special, mandatory or exclusive jurisdiction.

7. Thus, under Article 5, which appears in 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;...

...

3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...'

8. Also under Title II of the Brussels Convention, Articles 13 and 14 form part of Section 4, entitled Jurisdiction over consumer contracts'.

9. Article 13 of the Brussels Convention is worded as follows:

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called the consumer, jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is:

(1) a contract for the sale of goods on instalment credit terms; or

(2) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(3) any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This section shall not apply to contracts of transport.'

10. The first paragraph of Article 14 of the Brussels Convention provides:

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.'

11. That rule of jurisdiction may be departed from only if there is compliance with the conditions laid down in Article 15 of the Brussels Convention.

The relevant national provisions

12. Paragraph 5j of the Konsumentenschutzgesetz (Austrian Consumer Protection Law) (BGBl. I, 1979, p. 140) is worded as follows:

Undertakings which send prize notifications or other similar communications to specific consumers, and by the wording of those communications give the impression that a consumer has won a particular prize, must give that prize to the consumer; it may also be claimed in legal proceedings.'

13. That provision was added to the Consumer Protection Law by Paragraph 4 of the Fernabsatz-Gesetz (Austrian Law on Distance Contracts) (BGBl. I, 1999, p. 185) when Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) was transposed into Austrian law.

14. That provision entered into force on 1 October 1999.

15. The Oberlandesgericht Innsbruck states in its order for reference that the aim of Paragraph 5j is to grant a right of action to the consumer in order to bring proceedings to enforce a prize notification', where the consumer was misled on account of the fact that a business person, who contacted him personally, gave him the impression that he had won a prize, whereas the real aim of that action, to induce him to place an order for goods, only appears in small print or in an obscure part of the letter and in terms which are not easily comprehensible.

The dispute in the main proceedings and the question for a preliminary ruling

16. It is apparent from the case file in the main proceedings that at the beginning of 2001 Ms Engler received a letter personally addressed to her at her domicile from Janus Versand, which carries on business as a mail order company. That letter contained a payment notice', whose form and content led her to believe that she had won a prize of ATS 455 000 in a cash prize draw' organised by Janus Versand, and a catalogue of goods marketed by the latter (which apparently also called itself, in its relations with its customers, Handelskontor Janus GmbH') with a request for a trial without obligation'. In the advertising brochure sent to Ms Engler Janus Versand stated that it could also be contacted on the Internet at the following address: www.janus-versand.com.

17. On the payment notice' the word confirmation' appears in the title together with the winning number printed in bold characters. The name and address of the addressee and beneficiary of the payment notice are those of Ms Engler, and it is accompanied by the words personal - not transferable'. The payment notice' states, also in bold print, the amount of the prize in figures (ATS 455 000) and the same amount in letters underneath, together with a confirmation signed by a Mr Ulrich Mändercke, certifying that the amount of the prize stated is correct and in accordance with the document in our possession', the words chambers and office of certified and sworn experts' accompany that signature.

Furthermore, Ms Engler was requested to affix to the payment notice', in the space provided for that purpose, the official stamp of the chambers' accompanying the letter and to return the request for the trial without obligation' to Janus Versand. A box for the date and signature, a request to fill it in' and a reference in small print to the terms and conditions and the award of the prize supposedly won also feature on the payment notice'. Ms Engler had to declare on the payment notice' that she had read and accepted those conditions. Finally, it also urged the addressee to return today' the document duly completed in order that it could be processed, and an envelope was attached for that purpose.

18. In those circumstances Ms Engler, as Janus Versand had requested, returned the payment notice' to it, as she believed that that was sufficient in order to obtain the promised prize of ATS 455 000.

19. At first Janus Versand did not react, it then refused to pay that sum to Ms Engler.

20. Ms Engler therefore brought an action against Janus Versand before the Austrian courts, based primarily on Paragraph 5j of the Konsumentenschutzgesetz, for an order that Janus Versand pay her the sum of ATS 455 000, plus costs and ancillary amounts. Ms Engler argues that that claim is a contractual claim since Janus Versand, by promising to award a prize, had encouraged her to conclude a contract with that company for sale of goods. However, such a claim is also founded on other grounds, in particular, the breach of pre-contractual obligations. In the alternative, Ms Engler takes the view that her claim is brought in tort, delict or quasi-delict.

21. Janus Versand contested the jurisdiction of the Austrian courts to hear the claim stating, first of all, that the letter on which that claim is founded did not come from it but from Handelskontor Janus GmbH, a company which is a separate legal entity; second, that it had not promised any prize to Ms Engler and, finally, that it did not have any contractual relationship with her.

22. On 2 October 2001 the Landesgericht Feldkirch (Austria) dismissed Ms Engler's action for lack of jurisdiction, since it held that she had not shown the connection between Janus Versand and the sender of the prize notification, namely Handelskontor Janus GmbH, Postfach 1670, Abt. 3 Z 4, D-88106 Lindau'.

23. Ms Engler appealed against that judgment to the Oberlandesgericht Innsbruck.

24. The Oberlandesgericht Innsbruck takes the view that in order to decide the question of jurisdiction regard must be had to the Brussels Convention. In that connection, it is necessary to establish whether the action brought by Ms Engler must be regarded as being founded on a contractual right for the purpose of Article 5(1) of the Brussels Convention, whether the action is in tort, delict or quasi-delict for the purpose of Article 5(3), or whether it is covered by Article 13, first paragraph, point 3, of that convention.

25. The national court points out that a similar question had already been referred to the Court by the Oberster Gerichtshof (Austria) in the case which gave rise to the judgment in Case C-96/00 Gabriel [2002] ECR I-6367, a judgment given after this reference for a preliminary ruling was made to the Court, but that the facts forming the basis of that case are different from those in the present case. In Gabriel the undertaking in question had made the participation in the lottery and, therefore, the payment of the prize allegedly won, dependent on an order which had to be placed beforehand by the consumer, whereas in this case the award of the prize is not subject either to the placing of an order for goods by the consumer or their delivery by Janus Versand. Sending the payment notice' was sufficient for that purpose.

26. However, at the same time as the communication relating to the alleged prize, the consumer received a catalogue of goods sold by Janus Versand and a request for a trial without obligation',

which was clearly to induce the addressee to conclude a contract for the purchase of goods offered by that company. The national court concludes that, whereas in Gabriel a contract for the sale of goods had been concluded, in this case, apart from the prize notification which could, if necessary, be assessed separately, only pre-contractual relations existed between the parties.

27. As it formed the view that, in those circumstances, the resolution of the dispute before it depended on the interpretation of the Brussels Convention, the Oberlandesgericht Innsbruck decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

For the purposes of the Brussels Convention..., does the provision in Paragraph 5j of the Austrian Konsumentenschutzgesetz..., in the version of Art I, para. 2, of the Austrian Fernabsatz-Gesetz..., which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute:

(a) a contractual claim under Article 13(3); or

(b) a contractual claim under Article 5(1); or

(c) a claim in respect of a tort, delict or quasi-delict under Article 5(3)

where on the basis of the documents sent to him a sensible consumer could have thought that all he had to do to claim the amount held for him was to return an enclosed payment notice, so that the payment of the prize did not depend on an order for and delivery of goods from the undertaking promising the prize, but where a catalogue and a request for a trial offer without obligation are sent to the consumer with the prize notification?'

The question referred for a preliminary ruling

28. Taking account of the factual background of the case in the main proceedings, the question posed must be construed as asking, essentially, whether the rules of jurisdiction set out in the Brussels Convention are to be interpreted as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to award a prize ostensibly won by him is contractual in nature for the purposes of Article 5(1) or Article 13, first paragraph, point 3, or constitutes a claim in respect of a tort, delict or quasi-delict for the purposes of Article 5(3), where that company had addressed to the consumer personally a letter of such a kind as to give the impression that a prize would be given to him when he requested payment by returning the payment notice' attached to that letter and where a catalogue advertising products for that company and a request for a trial without obligation' were also contained, but the award of the prize was not dependent on an order for goods and even though the consumer did not actually make such an order.

29. In order to answer the question thus reformulated, the Court observes at the outset that, according to settled case-law, the concept of matters relating to tort, delict or quasi-delict covered by Article 5(3) of the Brussels Convention includes 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) of that Convention (see, inter alia, Case 189/87 Kalfelis [1988] ECR 5565, paragraph 17; Case C-261/90 Reichert and Kockler [1992] ECR I-2149, paragraph 16; Case C-51/97 Réunion européenne and Others [1998] ECR I-6511, paragraph 22; Gabriel , paragraph 33; and Case C-167/00 Henkel [2002] ECR I-8111, paragraph 36).

30. It follows that it is necessary first to examine whether an action such as that at issue in the main proceedings is contractual in nature.

31. In that connection, Article 5(1) of the Brussels Convention relates to contractual matters

in general, whereas Article 13 thereof relates specifically to various types of contracts concluded by consumers.

32. As Article 13 of the Brussels Convention thus constitutes a lex specialis in relation to Article 5(1), it is first of all necessary to determine whether an action having the characteristics set out in the question referred for a preliminary ruling, as reformulated in paragraph 28 above, may fall within the scope of Article 13.

33. As the Court has repeatedly held, the concepts used in the Brussels Convention - and in particular those featured in Article 5(1) and (3) and Article 13 - must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that it is uniformly applied in all the Contracting States (see, in particular, Case 150/77 Bertrand [1978] ECR 1431, paragraphs 14, 15 and 16; Case C-89/91 Shearson Lehman Hutton [1993] ECR I139, paragraph 13; Case C-269/95 Benincasa [1997] ECR I-3767, paragraph 12; Case C-99/96 Mietz [1999] ECR I-2277, paragraph 26; and Gabriel , paragraph 37).

34. As regards, more specifically, Article 13, first paragraph, point 3, of the Brussels Convention, the Court has already held, on the basis of the criteria set out in the previous paragraph, that point 3 of that provision is applicable only in so far as, first, the claimant is a private final consumer not engaged in trade or professional activities, second, the legal proceedings relate to a contract between that consumer and the professional vendor for the sale of goods or services which has given rise to reciprocal and interdependent obligations between the two parties and, third, that the two conditions specifically set out in Article 13, first paragraph, point 3(a) and (b) are fulfilled (see the judgment in Gabriel , paragraphs 38 to 40 and 47 to 51).

35. However, it must be concluded that those conditions are not all satisfied in a case such as that in the main proceedings.

36. Although it is indisputable that in a situation of that kind the claimant in the main proceedings is a consumer covered by the first paragraph of Article 13 of the Brussels Convention and that the vendor made contact with the consumer in the manner provided for in point 3(a) of that provision, by sending her a personalised letter containing a prize notification together with a catalogue and an order form for the sale of its goods in the Contracting State where she resides in order to induce her to take up the vendor's offer, the fact remains that in this case the vendor's initiative was not followed by the conclusion of a contract between the consumer and the vendor for one of the purposes referred to in that provision and in the course of which the parties assumed reciprocal obligations.

37. It is common ground that, in the case in the main proceedings, the award of the prize allegedly won by the consumer was not subject to the condition that she order goods from Janus Versand and no order was in fact placed by Ms Engler. Furthermore, it does not appear anywhere in the file that, by claiming the award of the promised prize', Ms Engler assumed any obligation towards that company, even by incurring an expense in order to obtain the award of the prize.

38. In those circumstances, an action such as that brought by Ms Engler in the case in the main proceedings cannot be regarded as being contractual in nature for the purposes of Article 13, first paragraph, point 3, of the Brussels Convention.

39. Contrary to the submissions of Ms Engler and the Austrian Government, that finding is not invalidated by the objective underlying that provision, namely to ensure adequate protection for the consumer as the party deemed to be economically weaker, or by the fact that, in this case, the letter was sent by Janus Versand to the consumer in person accompanied by a claim form entitled request for trial without obligation' and clearly intended to induce her to place an order for goods sold by that company.

40. As is apparent from its wording, Article 13 clearly covers a contract concluded' by a consumer for the supply of goods or a contract for the supply of services'.

41. The interpretation in paragraphs 36 to 38 of the present judgment is supported by the position of the rules on jurisdiction over consumer contracts, set out in Title II, Section 4, of the Brussels Convention, in the scheme of that convention.

42. Articles 13 to 15 of the Convention constitute a derogation from the basic rule, provided for in the first paragraph of Article 2 of that convention, which confers jurisdiction on the courts of the Contracting State in which the defendant is domiciled.

43. It follows that, in accordance with settled case-law, the specific rules of jurisdiction provided for in Articles 13 to 15 of the Brussels Convention must give rise to a strict interpretation which cannot go beyond the cases envisaged by the Convention (see, in particular, the judgments in Bertrand , paragraph 17; Shearson Lehman Hutton , paragraphs 14 to 16; Benincasa , paragraph 13; and Mietz , paragraph 27).

44. Since Article 13, first paragraph, point 3, of the Brussels Convention is not applicable, therefore, in a case with the characteristics set out in the question as reformulated in paragraph 28 of the present judgment, it is therefore necessary to consider whether an action such as that at issue in the main proceedings may be regarded as being contractual in nature for the purposes of Article 5(1) of that convention.

45. In that connection it must be stated at the outset that, as it appears from its very wording, Article 5(1) of the Brussels Convention does not require the conclusion of a contract (see, to the same effect, the judgment in Case C-334/00 Tacconi [2002] ECR I-7357, paragraph 22).

46. It must also be recalled that the Court has already held that jurisdiction to hear disputes concerning the existence of a contractual obligation must be determined in accordance with Article 5(1) of the Brussels Convention and that that provision is therefore applicable even when the existence of the contract on which the claim is based is in dispute between the parties (see the judgment in Case 38/81 Effer v Kanter [1982] ECR 825, paragraphs 7 and 8).

47. Furthermore, it is clear from the case-law that the obligations which are based on the affiliation between an association and its members must be regarded as contractual for the purpose of Article 5(1) of the Brussels Convention, on the ground that the membership of a private law association creates between the members close links of the same kind as those which are created between the parties to a contract (see the judgment in Case 34/82 Peters [1983] ECR 987, paragraphs 13 and 15).

48. It follows from the foregoing that, as the Advocate General pointed out in point 38 of his Opinion, the concept of matters relating to contract' referred to in Article 5(1) of the Brussels Convention is not interpreted narrowly by the Court.

49. It follows that the finding made in paragraphs 38 and 44 of the present judgment that the legal action brought in the main proceedings is not contractual in nature for the purposes of the first paragraph of Article 13 of the Brussels Convention does not in itself prevent that action from relating to a contract for the purposes of Article 5(1).

50. In order to determine whether such is the case in the main proceedings, it must be observed that it is clear from the case-law, first, that although Article 5(1) of the Brussels Convention does not require the conclusion of a contract, the identification of an obligation is none the less essential for the application of that provision, since the jurisdiction of the national court is determined in matters relating to a contract by the place of performance of the obligation in question (see judgment in Tacconi , paragraph 22). Second, the Court has held on several occasions that

the definition of matters relating to contract within the meaning of Article 5(1) of the Brussels Convention is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (Case C-26/91 Handte [1992] ECR I-3967, paragraph 15; Réunion européenne and Others , paragraph 17; Tacconi , paragraph 23; and Case C-265/02 Frahuil [2004] ECR I-0000, paragraph 24).

51. Accordingly, the application of the rule of special jurisdiction provided for matters relating to a contract in Article 5(1) presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based.

52. In that regard, the national court held that in this case, first of all, a professional vendor sent on its own initiative to the consumer's domicile, without any request by her, a letter designating her by name as the winner of a prize.

53. Such a letter, sent to addressees and by the means chosen by the sender solely on its own initiative, may therefore constitute an obligation freely assumed' for the purpose of the case-law cited in paragraph 50 of the present judgment.

54. Furthermore, according to the national court, a prize notification made in such circumstances by a professional vendor who has not drawn attention to the existence of a loophole and has even used a formulation of such a kind as to mislead the consumer in order to induce him to enter a contract by acquiring the goods offered by that vendor, could reasonably lead the addressee of the letter to believe that a prize would be awarded to him if he returned the payment notice' attached.

55. Second, it is clear from the file submitted by the national court that the addressee of the letter at issue expressly accepted the prize notification made out in her favour by requesting payment of the prize she had ostensibly won.

56. From that moment at least, the intentional act of a professional vendor in circumstances such as those in the main proceedings must be regarded as an act capable of constituting an obligation which binds its author as in a matter relating to a contract. Therefore, and subject to the final classification of that obligation, which is a matter for the national court, the condition concerning the existence of a binding obligation by one party to the other, referred to in the case-law cited in paragraph 50 of the present judgment, may also be regarded as satisfied.

57. Legal proceedings such as those brought in the main proceedings by the consumer are intended to claim, as against a professional vendor, the award of a prize ostensibly won and whose payment has been refused by the latter. Therefore it is founded specifically on the prize notification, since the ostensible beneficiary invokes the failure to award the prize as the reason for bringing the proceedings.

58. It follows that all the conditions necessary for the application of Article 5(1) of the Brussels Convention are satisfied in a case such as that in the main proceedings.

59. For the reasons stated by the Advocate General in point 48 of his Opinion, the mere fact that the professional vendor did not genuinely intend to award the prize announced to the addressee of his letter is irrelevant in that respect. Having regard to what was stated in paragraph 45 of the present judgment, the same is true for the fact that the award of the prize did not depend on an order for goods and that the consumer did not in fact make such an order.

60. In those circumstances an action such as that brought by Ms Engler before the national court falls within the scope of Article 5(1) of the Brussels Convention so that, as is clear from paragraph 29 of the present judgment, there is no longer any need to consider whether Article 5(3) is applicable.

61. In the light of all the foregoing considerations, the answer to the question submitted must be that the rules of jurisdiction set out in the Brussels Convention must be construed in the following

way:

- legal proceedings by which a consumer seeks an order, under the law of the Contracting State in which he is domiciled, that a mail order company established in another Contracting State award a prize ostensibly won by him is contractual in nature for the purpose of Article 5(1) of that convention, provided that, first, that company, with the intention of inducing the consumer to enter a contract, addresses to him in person a letter of such a kind as to give the impression that a prize will be awarded to him if he returns the payment notice' attached to the letter and, second, he accepts the conditions laid down by the vendor and does in fact claim payment of the prize announced;

- on the other hand, even though the letter also contains a catalogue advertising goods for that company and a request for a trial without obligation', the fact that the award of the prize does not depend on an order for goods and that the consumer has not, in fact, placed such an order has no bearing on that interpretation.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2005 Page I-00481
DOC	2005/01/20
LODGED	2002/01/31
JURCIT	41968A0927(01)-A02L1 : N 42 41968A0927(01)-A05PT1 : N 29 - 33 45 -61 41968A0927(01)-A05PT3 : N 29 33 41968A0927(01)-A13L1PT3 : N 34 - 44 61977J0150 : N 33 43 61991J0089 : N 33 43 61981J0038 : N 46 61982J0034 : N 47 62000J0334 : N 45 50 61991J0026 : N 50 62002J0265 : N 50 61995J0095 : N 33 43 61999J0096 : N 33 43 62000J0096 : N 25 29 33 34 61997J0051 : N 29 50 62000J0167 : N 29 61987J0189 : N 29 61990J0261 : N 29

CONCERNS	Interprets 41968A0927(01) -A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Austria ; Member States ; Commission ; Institutions
NATIONA	Austria
NATCOUR	*A9* Oberlandesgericht Innsbruck, Beschluß vom 14/01/2002 ; - International Litigation Procedure 2003 p.40-49
NOTES	Fussenegger, Dieter ; Matt, Alexander: Paragraph 5 j KSchG und neue Aspekte des Gemeinschaftsrechts, Ecolex 2004 p.697-698 ; Leible, Stefan: Luxemburg locuta - Gewinnmitteilung finita?, Neue juristische Wochenschrift 2005 p.796-798 ; Palmieri, A.: Il Foro italiano 2005 IV Col.89-91 ; Añoveros Terradas, Beatriz: Delimitacion de los supuestos internacionales en los que se justifica el forum actoris a favor del consumidor, Diario La ley 2005 no 6264 p.1-10 ; Lorenz, Stephan ; Unberath, Hannes: Gewinnmitteilungen und kein Ende? - Neues zur internationalen Zuständigkeit, Praxis des internationalen Privat- und Verfahrensrechts 2005 p.219-223 ; McGuire, Mary-Rose: Internationale Zuständigkeit für "isolierte Gewinnzusagen", Ecolex 2005 p.489-492 ; Wasserer, Simone C. ; Wittwer, Alexander: Gewinnzusagen als Ansprüche aus Vertrag, European Law Reporter 2005 p.277-279 ; Mörsdorf-Schulte, Juliana: Autonome Qualifikation der isolierten Gewinnzusage, Juristenzeitung 2005 p.770-781 ; Mankowski, Peter: Entscheidungen zum Wirtschaftsrecht 2005 p.387-388 ; De Bari, Francescalberto: L'interpretazione degli obblighi della Commissione nel procedimento di controllo in materia di aiuti regionali destinati ai grandi progetti d'investimento, Diritto pubblico comparato ed europeo 2005 p.860-864 ; Capuano, Valeria: La Corte di giustizia e l'interpretazione della nozione di "materia contrattuale", Diritto pubblico comparato ed europeo 2005 p.953-958 ; Marmisse, Anne: Droit européen des affaires, Revue trimestrielle de droit commercial et de droit économique 2005 p.636-638 ; Remy-Corlay, Pauline: L'acquis communautaire: les avancées, Revue trimestrielle de droit civil 2005 p.350-354 ; Idot, Laurence: Matière contractuelle, Europe 2005 Mars Comm. no 103 p.27 ; Felke, Klaus: Gewinnzusage aus dem Ausland: Internationale Zuständigkeit für die Klage auf Auszahlung des Preises, Europäisches Wirtschafts- & Steuerrecht - EWS 2005 p.229-230 ; Añoveros Terradas, Beatriz: Jurisprudencia española y comunitaria de Derecho internacional privado, Revista española de Derecho Internacional 2005 p.929-934 ; Felke, Klaus ; Jordans, Roman: European Review of Private Law / Revue européenne de droit privé / Europäische Zeitschrift für Privatrecht 2006 p.130-135 ; Berrebi, Jacob: European Review of Private Law / Revue européenne de droit privé / Europäische Zeitschrift für Privatrecht 2006 p.135-142 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2006 no 389 ; Volders, Bart: Het begrip "consumentenovereenkomst" in kort bestek, Droit de la consommation 2006 p.87-93 ; De Cristofaro, Giovanni: Ancora sulle promesse di vincita transfrontaliere: della discutibile oscillazione fra "materia contrattuale" e "materia dei contratti dei consumatori", Il Corriere giuridico 2006 p.81-86 ; Tagaras, Haris: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles, Cahiers de

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Schintgen

DATES of document: 20/01/2005
of application: 31/01/2002

Order of the Court (First Chamber) of 22 March 2002

Marseille Fret SA v Seatrano Shipping Company Ltd. Reference for a preliminary ruling: Tribunal de commerce de Marseille - France. Brussels Convention - Protocol on the interpretation by the Court of Justice of the Convention - Regulation (EC) No 44/2001 - National courts which may request the Court to give a preliminary ruling - Court clearly lacking jurisdiction. Case C-24/02.

1. Convention on Jurisdiction and the Enforcement of Judgments - Protocol on the interpretation by the Court of Justice of the Convention - National courts which may request the Court to give a preliminary ruling - French Tribunal de commerce acting at first instance - Excluded - Court clearly lacking jurisdiction to give a preliminary ruling on the questions referred to it

(Protocol of 3 June 1971, Art. 2)

2. Preliminary rulings - Jurisdiction of the Court - Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments - National courts which may request the Court to give an interpretation - Courts or tribunals against whose decisions there is no judicial remedy under national law

(Arts 61(c) EC and 68(1) EC; Council Regulation No 44/2001)

In Case C-24/02,

REFERENCE to the Court by the Tribunal de commerce de Marseille (France) for a preliminary ruling in the proceedings pending before that court between

Marseille Fret SA

and

Seatrano Shipping Company Ltd,

on the interpretation of the 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), 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) and by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1),

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, M. Wathelet and A. Rosas, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By judgment of 22 January 2002, received at the Court on 31 January 2002, the Tribunal de commerce de Marseille (Commercial Court, Marseilles) referred to the Court for a preliminary ruling four

questions on the interpretation of the 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), 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), respectively the Convention and the Accession Conventions, and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 Those questions have been raised in the course of proceedings between Marseille Fret SA (Marseille Fret), established in Marseilles, and Seatrano Shipping Company Ltd (Seatrano Shipping), established in Limassol (Cyprus).

Dispute in the main proceedings and the questions referred for a preliminary ruling

3 On 6 November 2000, Marseille Fret sued Seatrano Shipping before the Tribunal de commerce de Marseille seeking an order for damages for financial loss suffered as a result of the intention to cause harm manifested by Seatrano Shipping in previous litigation, which led in October 1999 to an interim award by an arbitration tribunal sitting in London (United Kingdom).

4 On 20 March 2001 the High Court of Justice (United Kingdom), on the application of Seatrano Shipping, granted an anti-suit injunction ordering Marseille Fret to discontinue its action before the Tribunal de commerce de Marseille or face penalties in the United Kingdom.

5 Marseille Fret then decided to discontinue its action. Seatrano Shipping objected and counterclaimed for damages for abuse of process.

6 In those circumstances the Tribunal de commerce de Marseille, by reference to Article 177 of the EC Treaty (now Article 234 EC), decided to stay proceedings and to refer the following four questions to the Court for a preliminary ruling:

1. Does Title II of the Brussels Convention of 27 September 1968, as reproduced in Regulation (EC) No 44/2001 of 22 December 2000, permit a court of a Member State to restrain a citizen of another Contracting State from bringing proceedings before the courts of his home country, under either his national law or Community law?

2. May an English court, by way of an anti-suit injunction, purport to restrain a person from having access to another Community court which nevertheless has jurisdiction under the Brussels Convention of 27 September 1968, as reproduced in Regulation (EC) No 44/2001 of 22 December 2000?

3. May an English court, by means of that procedure, deprive other Community courts of the power to rule on matters falling within their own competence when that power appears to arise from the provisions of Chapter II of Regulation (EC) No 44/2001 of 22 December 2000?

4. Is an order compelling a Community national to withdraw an independent action already commenced before a French court, under threat of punitive sanctions such as those provided for by the English anti-suit injunction procedure, consistent with the fundamental principle of the right to access to a court, as protected by the Court of Justice of the European Communities?

Jurisdiction of the Court

7 Under Article 92(1) of the Rules of Procedure, where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may,

after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action by reasoned order.

8 It must be observed at the outset that the four questions referred to the Court for a preliminary ruling, although worded differently, have the same subject-matter. By those questions the national court seeks to ascertain, essentially, the likely effects of an anti-suit injunction issued by the High Court of Justice under the Convention and Regulation No 44/2001, in the context of the proceedings before it.

9 The jurisdiction of the Court to interpret the Convention is established by the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention (OJ 1975 L 304, p. 50), as amended by the Accession Conventions (the Protocol).

10 Unlike Article 234 EC, which is not applicable, the Protocol reserves to certain courts, referred to in Article 2, the power to request the Court of Justice to give preliminary rulings on questions of interpretation of the Convention, so that it is appropriate, in that regard, to examine whether the Court has jurisdiction to answer the questions which have been referred.

11 Article 2(1) and (3) of the Protocol set out expressly and exhaustively - the first directly, the second by reference to Article 37 of the Convention - the courts which may make references to the Court. Article 2(2) adds that the courts of the Contracting States sitting in an appellate capacity may also do so.

12 French Tribunaux de commerce are not mentioned in Article 2(1) of the Protocol or in Article 37 of the Convention. Furthermore, according to the file on the case in the main proceedings, the judgment referring questions to the Court was given in proceedings at first instance.

13 It follows that, in the main proceedings, the Tribunal de commerce de Marseille may not request the Court to give a preliminary ruling on the interpretation of the Convention.

14 As regards Regulation No 44/2001, it is sufficient to observe that it only entered into force on 1 March 2002, after the judgment referring questions to the Court was delivered. In addition, since the regulation was adopted on the basis of Article 61(c) EC, it follows from Article 68(1) EC that only a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law has jurisdiction to request the Court to give a preliminary ruling on its interpretation.

15 In those circumstances Article 92(1) of the Rules of Procedure must be applied, and it must be held that the Court clearly has no jurisdiction to rule on the questions put by the Tribunal de commerce de Marseille.

Costs

16 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 (First Chamber)

hereby orders:

The Court of Justice of the European Communities clearly has no jurisdiction to answer the questions put by the Tribunal de commerce de Marseille in its judgment of 22 January 2002.

DOCNUM	62002O0024
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2002 Page I-03383
DOC	2002/03/22
LODGED	2002/01/31
JURCIT	32001R0044 : N 1 6 8 41968A0927(01) : N 1 6 41968A0927(01)-A37 : N 11 12 31991Q0704(02)-A92P1 : N 7 15 41971A0603(02) : N 9 41971A0603(02)-A02 : N 10 - 12 11997E234 : N 10 11997E061-LC : N 14 11997E068-P1 : N 14
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction ; COJC
AUTLANG	French
NATIONA	France
NATCOUR	*A9* Tribunal de commerce de Marseille, jugement du 22/01/2002
PROCEDU	Reference for a preliminary ruling - inadmissible
ADVGEN	Geelhoed
JUDGRAP	Jann
DATES	of document: 22/03/2002 of application: 31/01/2002

Judgment of the Court (Sixth Chamber)
of 5 February 2004
Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation. Reference for a preliminary ruling: Arbejdsret - Denmark. Brussels Convention - Article 5(3) - Jurisdiction in matters relating to tort, delict or quasi-delict - Place where the harmful event occurred - Measure taken by a trade union in a Contracting State against the owner of a ship registered in another Contracting State. Case C-18/02.

1. Convention on Jurisdiction and the Enforcement of Judgments - Protocol on the Interpretation by the Court of Justice of the Convention - National courts which may request the Court to give a preliminary ruling - Arbejdsret, court of first and last instance under Danish law with jurisdiction over disputes relating to the legality of certain industrial action - Included - (Protocol of 3 June 1971, Art. 2)

2. Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction in matters relating to tort, delict or quasi-delict - Meaning - Case concerning the legality of industrial action which comes within the exclusive jurisdiction of a court other than the court which has jurisdiction to hear any associated claims for compensation - Included - (Brussels Convention of 27 September 1968, Art. 5(3))

3. Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction in matters relating to tort, delict or quasi-delict - Place where the harmful event occurred - Damage caused by industrial action initiated by a union in a Contracting State which had admitted a ship registered in another Contracting State into its waters - Damage deemed to have occurred in flag State - Account taken of the nationality of the ship - Limits - (Brussels Convention of 27 September 1968, Art. 5(3))

1. The Arbejdsret, a Danish court which has exclusive jurisdiction as a court of first and last instance in respect of certain disputes in the sphere of employment law, in particular those relating to the legality of industrial action seeking a collective agreement, may refer a question to the Court of Justice for a preliminary ruling under the second indent of Article 2(1) 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 Enforcements of Judgments in Civil and Commercial Matters. Although that court is not mentioned in Article 2(1) and does not sit in an appellate capacity, as required in Article 2(2), which lists the courts of the Contracting States which may request the Court of Justice to give preliminary rulings on questions of interpretation of the Brussels Convention, a ruling declaring that that court has no jurisdiction to refer questions to the Court of Justice for a preliminary ruling would have the unacceptable result that in Denmark questions concerning the interpretation of the Brussels Convention, arising in certain actions relating to employment law, could never be the subject of a reference for a preliminary ruling.

see paras 14-18

2. Article 5(3) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that a case concerning the legality of industrial action, in respect of which exclusive jurisdiction belongs, in accordance with the law of the Contracting State concerned, to a court other than the court which has jurisdiction to try the claims for compensation for the damage caused by that industrial action, falls within the definition of tort, delict or quasi-delict.

For Article 5(3) of the Brussels Convention to apply to such a situation, it is sufficient that the industrial action concerned is a necessary precondition of sympathy action which may result in harm. It is not essential that the harm incurred be a certain or probable consequence of the

industrial action in itself.

Lastly, the application of that provision is not affected by the fact that the implementation of industrial action was suspended by the party giving notice of the action pending a ruling on its legality.

see paras 28-29, 34, 38, operative part 1

3. Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State to which a ship registered in another Contracting State sails must not necessarily be regarded as having occurred in the flag State with the result that the shipowner can bring an action for damages against that trade union in the flag State.

In that connection, the State in which the ship is registered must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place. However, the flag State must necessarily be regarded as the place where the harmful event caused damage if the damage concerned arose aboard the ship in question.

see paras 44-45, operative part 2

In Case C-18/02,

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 Arbejdsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Danmarks Rederiforening, acting on behalf of DFDS Torline A/S,

and

LO Landsorganisationen i Sverige , acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation,

on the interpretation of Article 5(3) of the abovementioned 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), 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),

THE COURT (Sixth Chamber),

composed of:

V. Skouris,

acting on behalf of the President of the Sixth Chamber,

J.N. Cunha Rodrigues (Rapporteur),

J.-P. Puissochet,

R. Schintgen and

F. Macken, Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

Danmarks Rederiforening, acting on behalf of DFDS Torline A/S, by P. Voss, advokat,

LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation, by S. Gärde, advokat,

the Danish Government, by J. Molde and J. Bering Liisberg, acting as Agents,

the Swedish Government, by A. Kruse, acting as Agent,

the United Kingdom Government, by J.E. Collins, acting as Agent, and K. Beal, Barrister,

the Commission of the European Communities, by N. Rasmussen, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Danmarks Rederiforening, acting on behalf of DFDS Torline A/S, represented by P. Voss, LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation, represented by S. Gärde and H. Nielsen, advokat, the Danish Government, represented by J. Molde, the Swedish Government, represented by A. Kruse, and the Commission, represented by N. Rasmussen and A.-M. Rouchaud, acting as Agent at the hearing on 20 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 18 September 2003,

gives the following

Judgment

Costs

46. The costs incurred by the Danish, Swedish and United Kingdom 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Arbejdsret by order of 25 January 2002 , hereby rules:

1.

(a) Article 5(3) of the Brussels 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, must be interpreted as meaning that a case concerning the legality of industrial action, in respect of which exclusive jurisdiction belongs,

in accordance with the law of the Contracting State concerned, to a court other than the court which has jurisdiction to try the claims for compensation for the damage caused by that industrial action, falls within the definition of " tort, delict or quasi-delict".

(b) For the application of Article 5(3) of the Brussels Convention to a situation such as that in the dispute in the main proceedings, it is sufficient that that industrial action is a necessary precondition of sympathy action which may result in harm.

(c) The application of Article 5(3) of the Brussels Convention is not affected by the fact that the implementation of industrial action was suspended by the party giving notice pending a ruling on its legality.

2. In circumstances such as those in the main proceedings, Article 5(3) must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State to which a ship registered in another Contracting State sails must not necessarily be regarded as having occurred in the flag State, with the result that the shipowner can bring an action for damages against that trade union in the flag State.

1. By order of 25 January 2002, received at the Court on 29 January 2002, the Arbejdsret (Labour Court, Denmark) referred to the Court for a preliminary ruling, in accordance with 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 " the Protocol"), two questions on the interpretation of Article 5(3) 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, and amended version 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 f 29 November 1996 on the ccession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1) (" the Brussels Convention").

2. Those questions arose in the course of litigation between Danmarks Rederiforening (the Danish Association of Shipping Companies), acting on behalf of DFDS Torline A/S (hereinafter " DFDS"), a shipowner, and LO Landsorganisationen i Sverige (the Swedish Congress of Trade Unions, " LO"), acting on behalf of SEKO, Sjöfolk Facket för Service och Kommunikation (" SEKO"), a trade union, concerning the legality of industrial action, in respect of which notice was served on DFDS by SEKO.

Legal background

3. Article 2 of the Protocol provides:

" The following courts may request the Court of Justice to give preliminary rulings on questions of interpretation:

(1) ...

in Denmark: højesteret [Supreme Court]

...

(2) the courts of the Contracting States when they are sitting in an appellate capacity...

"

4. The first paragraph of Article 2 of the Brussels Convention provides:

" 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. Under Article 5(3) of the Brussels Convention:

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

...

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.

"

Dispute in the main proceedings and the questions referred for a preliminary ruling

6. The dispute in the main proceedings concerns the legality of a notice of industrial action given by SEKO against DFDS, with the object of securing a collective agreement for Polish crew of the cargo ship Tor Caledonia owned by DFDS, serving the route between Göteberg (Sweden) and Harwich (United Kingdom).

7. The Tor Caledonia is registered in the Danish international ship register and is subject to Danish law. At the time of the facts in the main proceedings, the Polish crew were employed on the basis of individual contracts, in accordance with a framework agreement between a number of Danish unions on the one hand, and three Danish associations of shipping companies on the other. Those contracts were governed by Danish law.

8. After DFDS rejected a request by SEKO on behalf of the Polish crew for a collective agreement, on 21 March 2001, SEKO served a notice of industrial action by fax, with effect from 28 March 2001, instructing its Swedish members not to accept employment on the Tor Caledonia . The fax also stated that SEKO was calling for sympathy action. Following that request, the Svenska Transportarbetareförbundet (Swedish Transport Workers Union, " STAF") gave notice, on 3 April 2001, of sympathy action with effect from 17 April 2001, refusing to engage in any work whatsoever relating to the Tor Caledonia , which would prevent the ship from being loaded or unloaded in Swedish ports.

9. On 4 April 2001, DFDS brought an action against SEKO and STAF, seeking an order that the two unions acknowledge that the principal and sympathy actions were unlawful and that they withdraw the notices of industrial action.

10. On 11 April 2001, the day of the first hearing before the Arbejdsret, SEKO decided to suspend the industrial action pending the court ' s final decision, while the STAF ' s notice of industrial action was withdrawn on 18 April 2001.

11. However, on 16 April 2001, the day before the first day of sympathy action called by STAF, DFDS decided to withdraw the Tor Caledonia from the Göteborg-Harwich route, which was served from 30 May by another ship leased for that purpose.

12. DFDS brought an action for damages against SEKO before the Sø- og Handelsret (Denmark), claiming that the defendant was liable in tort for giving notice of unlawful industrial action and inciting another Swedish union to give notice of sympathy action, which was also unlawful. The damages sought are for the loss allegedly suffered by DFDS as a result of immobilising the Tor Caledonia and leasing a replacement ship. The court decided to stay its decision on the action for damages pending the decision of the Arbejdsret.

13. Taking the view that, in order to decide the question raised by SEKO concerning its jurisdiction and the lawfulness of the industrial action in question, an interpretation of Article 5(3) of the Brussels Convention was necessary, the Arbejdsret decided to stay its proceedings and to refer

the following questions to the Court for a preliminary ruling:

" (1)

(a) Must Article 5(3) of the Brussels Convention be construed as covering cases concerning the legality of industrial action for the purpose of securing an agreement in a case where any harm which may result from the illegality of such industrial action gives rise to liability to pay compensation under the rules on tort, delict or quasi-delict, such that a case concerning the legality of notified industrial action can be brought before the courts of the place where proceedings may be instituted for compensation in respect of any harm resulting from that industrial action?

(b) Is it necessary, as the case may be, that any harm incurred must be a certain or probable consequence of the industrial action concerned in itself, or is it sufficient that that industrial action is a necessary condition governing, and may constitute the basis for, sympathy actions which will result in harm?

(c) Does it make any difference that implementation of notified industrial action was, after the proceedings had been brought, suspended by the notifying party until the court ' s ruling on the issue of its legality?

(2) Must Article 5(3) of the Convention be construed as meaning that damage resulting from industrial action taken by a trade union in a country to which a ship registered in another country (the flag State) sails for the purpose of securing an agreement covering the work of seamen on board that ship can be regarded by the ship ' s owners as having occurred in the flag State, with the result that the ship ' s owners can, pursuant to Article 5(3), bring an action for damages against the trade union in the flag State?

"

Admissibility of the request for a preliminary ruling

14. As a preliminary point, it must be observed that the Arbejdsret is not mentioned in the second indent of Article 2(1) of the Protocol, and does not sit in an appellate capacity, as required in Article 2(2), which lists the courts of the Contracting States which may request the Court of Justice to give preliminary rulings on questions of interpretation of the Brussels Convention.

15. It is clear, however, from the order for reference that, under Danish law, the Arbejdsret has exclusive jurisdiction to rule on certain disputes in the sphere of employment law, in particular, those relating to the legality of industrial action seeking a collective agreement. Therefore, the Arbejdsret is a court of first and last instance.

16. In those circumstances, a literal interpretation of the Protocol, declaring that the national court has no jurisdiction to refer questions for preliminary ruling, would have the result that in Denmark questions concerning the interpretation of the Brussels Convention, arising in actions such as the present, could never be the subject of a reference for a preliminary ruling.

17. Plainly such an interpretation of Article 2(1) and (2) of the Protocol would be contrary to the objectives stated in the preamble to the Brussels Convention, in particular, those relating to the determination of the international jurisdiction of the courts of the Contracting States and the protection of persons established therein.

18. It follows that the request for a preliminary ruling by the Arbejdsret is admissible.

Question 1(a)

19. By its first question, the national court asks, essentially, whether Article 5(3) of the Brussels Convention must be interpreted as meaning that a case concerning the legality of industrial action,

in respect of which exclusive jurisdiction belongs, in accordance with the law of the Contracting State concerned, to a court other than the court which has jurisdiction to try the claims for compensation for the damage caused by that industrial action, falls within the definition of " tort, delict or quasi-delict".

20. In Denmark, the Arbejdsret has jurisdiction to determine the lawfulness of industrial action, while other courts have jurisdiction to adjudicate claims for consequential damage.

21. SEKO argues that the dispute before the national court cannot be related to " tort, delict or quasi-delict" within the meaning of Article 5(3) of the Brussels Convention, because that court is not hearing a claim for damages. However, if the Arbejdsret found that the industrial action suspended by SEKO was unlawful, SEKO would have to withdraw its notice of industrial action and DFDS would not then have any ground for bringing a claim for damages. Accordingly, SEKO argues, Article 2 of the Brussels Convention is applicable.

22. Such reasoning cannot be accepted.

23. First, it is clear from settled case-law that the object of the Brussels Convention is not to unify the procedural rules of the Contracting States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments (see, in particular, Case C-68/93 Shevill and Others [1995] ECR I-415, paragraph 35, and Case C-80/00 Italian Leather [2002] ECR I-4995, paragraph 43).

24. Therefore, the Kingdom of Denmark is able to establish a system under which jurisdiction to determine the legality of industrial action and jurisdiction to hear actions for damages for any consequential loss do not belong to the same national courts.

25. Adopting the interpretation supported by SEKO would mean that in order to obtain compensation for loss arising from industrial action which took place in Denmark, and for which a party domiciled in another Contracting State is liable, a plaintiff would, first, have to bring proceedings before a court of the State where the defendant is domiciled, on the legality of the industrial action, and second, bring an action for damages before a Danish court.

26. Such an interpretation would be contrary to the principles of sound administration of justice, legal certainty and the avoidance of multiplication of bases of jurisdiction as regards the same legal relationship that the Court has repeatedly held to be objectives of the Brussels Convention (see, in particular, Case C-269/95 Benincasa [1997] ECR I-3767, paragraph 26, and Italian Leather , paragraph 51).

27. Second, the Court has already held that it is not possible to accept an interpretation of Article 5(3) of the Brussels Convention according to which application of that provision is conditional on the actual occurrence of damage. Likewise it has held that the finding that the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence, is equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage (Case C-167/00 Henkel [2002] ECR I-8111, paragraphs 46 and 48).

28. It follows from the foregoing, that the answer to Question 1(a) must be that Article 5(3) of the Brussels Convention must be interpreted as meaning that a case concerning the legality of industrial action, in respect of which exclusive jurisdiction belongs, in accordance with the law of the Contracting State concerned, to a court other than the court which has jurisdiction to try the claims for compensation for the damage caused by that industrial action, falls within the definition of " tort, delict or quasi-delict".

Question 1(b)

29. By Question 1(b), the national court asks, essentially, if it is necessary for the application of Article 5(3) of the Brussels Convention to a situation such as that in the dispute in the main proceedings, that the harm incurred must be a certain or probable consequence of the industrial action in itself, or whether it is sufficient that that industrial action is a necessary condition of sympathy action which may result in harm.

30. It is apparent from the file that, at the date of the facts in the main proceedings, DFDS employed only Polish sailors aboard the Tor Caledonia. Since the notice of industrial action given by SEKO consisted of a request to SEKO ' s Swedish members not to accept jobs on the ship in question, the industrial action could not in itself have caused harm to DFDS. However, it was necessary in order that sympathy action consisting, in this case, of a refusal to undertake any work relating to loading or unloading the Tor Caledonia in Swedish ports, could legally be carried out.

31. In the absence of SEKO ' s notice of industrial action, the harm that DFDS claims to have suffered, arising from the withdrawal of the Tor Caledonia from the Göteborg-Harwich route and the hire of another ship, would not, therefore, have occurred.

32. According to the case-law of the Court, liability in tort, delict or quasi-delict can only arise provided that a causal connection can be established between the damage and the event in which that damage originates (Case 21/76 Bier (" Mines de Potasse d ' Alsace ") [1976] ECR 1735, paragraph 16). It cannot but be noted that in a situation such as that at issue in the main proceedings, a causal link could be established between the harm allegedly suffered by DFDS and SEKO ' s notice of industrial action.

33. As regards SEKO ' s argument that, in order for the Danish courts to have jurisdiction the industrial action must have taken place and have caused harm giving rise to financial loss, and that a claim for damages must have been submitted, it is sufficient to point out that, as the Court has held in paragraph 27 hereof, Article 5(3) of the Brussels Convention may be applied to an action seeking to prevent the occurrence of future damage.

34. Accordingly, the answer to Question 1(b) must be that for the application of Article 5(3) of the Brussels Convention to a situation such as that in the dispute in the main proceedings, it is sufficient that the industrial action is a necessary precondition of sympathy action which may result in harm.

Question 1(c)

35. By Question 1(c) the national court asks, essentially, whether the application of Article 5(3) of the Brussels Convention is affected by the fact that the party which notified the industrial action has suspended its implementation pending a ruling on its legality.

36. In that regard, it must be observed that, according to settled case-law, the strengthening of the legal protection of persons established in the Community by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued, is one of the objectives of the Brussels Convention (Case C-256/00 Besix [2002] ECR I-1699, paragraphs 25 and 26, and Case C-334/00 Tacconi [2002] ECR I-7357, paragraph 20).

37. That objective would not be achieved if, after an action falling within Article 5(3) of the Brussels Convention is brought before the court of a Contracting State having jurisdiction, the suspension by the defendant of the tortious conduct giving rise to that action could have the effect of depriving the court seised of its jurisdiction, and of jurisdiction being assigned to a court in another Contracting State.

38. It follows that the answer to Question 1(c) must be that the application of Article 5(3) of the Brussels Convention is not affected by the fact that the implementation of industrial action was suspended by the party giving notice pending a ruling on its legality.

Second question

39. By its second question the national court asks, essentially, whether Article 5(3) of the Brussels Convention must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State to which a vessel registered in another Contracting State sails can be regarded as having occurred in the flag State, with the result that the shipowner can bring an action for damages against that trade union in the flag State.

40. Accord ing to settled case-law, where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression " place where the harmful event occurred" in Article 5(3) of the Brussels Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places (Mines de potasse d ' Alsace , paragraphs 24 and 25, Shevill and Others , paragraph 20, and Henkel , paragraph 44).

41. In this case, the event giving rise to the damage was the notice of industrial action given and publicised by SEKO in Sweden, the Contracting State where that union has its head office. Therefore, the place where the fact likely to give rise to tortious liability of the person responsible for the act can only be Sweden, since that is the place where the harmful event originated (see, to that effect, Shevill and Others , paragraph 24).

42. Furthermore, the damage allegedly caused to DFDS by SEKO consisted in financial loss arising from the withdrawal of the Tor Caledonia from its normal route and the hire of another ship to serve the same route.

43. It is for the national court to inquire whether such financial loss may be regarded as having arisen at the place where DFDS is established.

44. In the course of that assessment by the national court, the flag State, that is the State in which the ship is registered, must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place. The nationality of the ship can play a decisive role only if the national court reaches the conclusion that the damage arose on board the Tor Caledonia . In that case, the flag State must necessarily be regarded as the place where the harmful event caused damage.

45. In the light of the foregoing, the answer to Question 2 must be that, in circumstances such as those in the main proceedings, Article 5(3) must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State to which a ship registered in another Contracting State sails must not necessarily be regarded as having occurred in the flag State with the result that the shipowner can bring an action for damages against that trade union in the flag State.

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Judgment of the Court (Second Chamber)
of 20 January 2005
Johann Gruber v Bay Wa AG. Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Brussels Convention - Article 13, first paragraph - Conditions for application - Definition of "consumer contract" - Purchase of tiles by a farmer for roofing a farm building used partly for private and partly for business purposes. Case C-464/01.

Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction over consumer contracts - Definition of consumer contract' - Contract relating to goods intended partly for business and partly for private purposes - Excluded except where business use is limited - Determination by the national court - Criteria

(Convention of 27 September 1968, Arts 13 to 15)

The rules of jurisdiction laid down by 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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 must be interpreted in the following way:

- a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;

- it is for the court seised to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;

- to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.

(see para. 54, operative part)

In Case C-464/01,

REFERENCE 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, from the Oberster Gerichtshof (Austria), made by decision of

8 November 2001

, received at the Court on

4 December 2001

, in the proceedings

Johann Gruber

v

Bay Wa AG ,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann, R. Schintgen (Rapporteur), G. Arestis and J. Kluka, Judges,

Advocate General: F.G. Jacobs,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on

24 June 2004,

after considering the observations submitted on behalf of:

- Mr Gruber, by W. Graziani-Weiss, Rechtsanwalt,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the German Government, by R. Wagner, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello and G. Albenzio, avvocati dello Stato,

- the Portuguese Government, by L. Fernandes and M. Telles Romao, acting as Agents,

- the Swedish Government, by A. Kruse, acting as Agent,

- the Commission of the European Communities, by A.-M. Rouchaud and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on

16 September 2004,

gives the following

Judgment

Costs

56. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

The rules of jurisdiction laid down by 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, 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 must be interpreted as follows:

- a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited

as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;

- it is for the court seised to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;

- to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.

1. This reference for a preliminary ruling concerns the interpretation of the first paragraph of Article 13 of the 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) (the Brussels Convention').

2. The reference was made in the course of proceedings between Mr Gruber, domiciled in Austria, and Bay Wa AG (Bay Wa'), a company incorporated under German law, established in Germany, on account of the alleged defective performance of a contract that Mr Gruber had concluded with Bay Wa.

Legal background

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

4. The first paragraph of Article 2 of the Brussels Convention, which forms part of Title II, Section 1, entitled General Provisions', sets out the basic rule in the following terms:

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 appears 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. Articles 5 to 18 of the Brussels Convention, which make up Sections 2 to 6 of Title II thereof, lay down rules governing special, mandatory or exclusive jurisdiction.

7. Article 5(1) of the Brussels Convention, which is part of Title II, Section 2, entitled Special jurisdiction', provides:

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;...'.

8. Section 4, entitled Jurisdiction over consumer contracts', in Title II of the Brussels Convention,

consists of Articles 13 to 15.

9. Article 13 of the Brussels Convention is worded as follows:

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called the consumer, jurisdiction shall be determined by this Section... if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

...'

10. The first paragraph of Article 14 of the Brussels Convention provides:

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.'

11. That rule of jurisdiction may be departed from only if the conditions laid down in Article 15 of the Brussels Convention are complied with.

Dispute in the main proceedings and the questions referred for a preliminary ruling

12. According to the documents in the main proceedings Mr Gruber, a farmer, owns a farm building constructed around a square (Vierkanthof'), situated in Upper Austria, close to the German border. He uses about a dozen rooms as a dwelling for himself and his family. In addition over 200 pigs are kept there, and there are fodder silos and a large machine room. Between 10% and 15% of the total fodder necessary for the farm is also stored there. The area of the farm building used for residential purposes is slightly more than 60% of the total floor area of the building.

13. Bay Wa operates a number of separately managed businesses in Germany. In Pocking (Germany), not far from the Austrian border, it has a building materials business and a DIY and garden centre. The latter published brochures which were also distributed in Austria.

14. Wishing to replace the roof tiles of his farm building, Mr Gruber became aware of those advertising brochures, which were sent out with the Braunauer Rundschau , a local periodical distributed to households. The tiles offered for sale by Bay Wa's building materials department in Pocking did not feature in those brochures.

15. Mr Gruber made several telephone enquiries to an employee of Bay Wa concerning the different types of tiles and the prices, stating his name and address but not mentioning the fact that he was a farmer. The employee made him an offer by telephone but Mr Gruber wished to inspect the tiles on site. On his visit to Bay Wa's premises, he was given by the employee a written quotation dated 23 July 1998. During that meeting Mr Gruber told Bay Wa's employee that he had a farm and wished to tile the roof of the farm building. He stated that he also owned ancillary buildings that were used principally for the farm, but did not expressly state whether the building to be tiled was used mainly for business or for private purposes. The following day, Mr Gruber called the employee, from Austria, to say that he accepted Bay Wa's quotation. Bay Wa then faxed a confirmation

of the order to Mr Gruber's bank in Austria.

16. Mr Gruber considered that the tiles delivered by Bay Wa to tile the roof of his farm building showed significant variations in colour despite the warranty that the colour would be uniform. As a result the roof would have to be re-tiled. He therefore decided to bring proceedings on the basis of the warranty together with a claim for damages, seeking reimbursement of the cost of the tiles (ATS 258 123) and of the expense of removing them and re-tiling the roof (ATS 141 877) and a declaration of liability for any future expenses.

17. For that purpose, Mr Gruber commenced proceedings on 26 May 1999 before the Landesgericht Steyr (Austria), designated as the competent court in Austria by the Oberster Gerichtshof in accordance with Paragraph 28 of the Law of 1 August 1895 on the allocation of jurisdiction and the territorial jurisdiction of the ordinary courts in civil matters (Jurisdiktionsnorm, RGBl. 111).

18. By judgment of 29 November 2000, the Landesgericht (Regional Court) Steyr dismissed Bay Wa's objection of lack of jurisdiction and ruled that it was competent to hear the dispute.

19. According to the Landesgericht Steyr, the conditions for the application of Article 13 of the Brussels Convention are satisfied. Where a contract has a dual purpose, the predominant purpose, whether private or business, must be ascertained. Since the dividing line between private and business supplies is difficult to distinguish in the case of agricultural enterprises, the court found that the seller had had no way of ascertaining objectively whether one or other purpose predominated at the time when the contract was concluded so that, given the uncertainty, the contract was to be regarded as a consumer contract. Furthermore, in the context of Article 13(3)(a) of the Brussels Convention it mattered little whether the product ultimately bought by the consumer had itself been advertised. It was sufficient that there had been advertisements drawing attention to a particular undertaking. It was thanks to that advertising that Bay Wa was able to conclude a contract with Mr Gruber, even though it came from a department other than the one which supplied the goods. Finally, the condition that there be a specific invitation' by the seller within the meaning of that provision was satisfied in this case, since Mr Gruber had received an offer by telephone. Whether that offer was accepted was irrelevant.

20. By judgment of 1 February 2001 the Oberlandesgericht (Higher Regional Court) Linz (Austria) upheld Bay Wa's appeal, however, and dismissed Mr Gruber's claim on the ground that the Austrian courts do not have jurisdiction to hear the dispute.

21. According to the Oberlandesgericht Linz, for there to be a consumer contract within the meaning of Article 13 of the Brussels Convention the contract must constitute an act attributable to a purpose outside the trade or profession of the person concerned. In order to identify that purpose the intention of the recipient of the service is irrelevant. What matters are the circumstances of the supply which could be objectively ascertained by the other party to the contract. Articles 13 to 15 of the Brussels Convention are applicable only if the person concerned has acted predominantly outside his trade or profession and if the other party to the contract knew or should have been aware of the fact at the time when the contract was concluded, the existence of such knowledge being determined on the basis of all the objective evidence.

22. On the basis of the facts which could be objectively ascertained by Bay Wa, the supply at issue had at least essentially a business purpose. The purchase of tiles by a farmer to tile the roof of his farm building is, prima facie, connected with his agricultural business. In the case of an agricultural enterprise, the farm building is by nature business premises which also, but not primarily, serve as a residence for the farmer and his family. Living on a farm is usually a consequence of carrying on agricultural activities and thus has a particular connection with them;

for a large majority of the population, it is the farmer's place of work. When Mr Gruber stated that he owned an agricultural enterprise and wished to replace the tiles on the roof of his farm building Bay Wa was led, rightly, to assume that he was acting essentially for business purposes. The findings as to the floor areas used for private and for business purposes respectively cannot invalidate that conclusion, since those facts were not made known to Bay Wa. The seller had no reason to believe that Mr Gruber would use the tiles exclusively or principally for private purposes. Finally, from the seller's point of view, the large quantities purchased, 24 000 tiles in total, could reasonably constitute a decisive factor for concluding that the building was used essentially for business purposes.

23. Mr Gruber then brought an appeal before the Oberster Gerichtshof (Supreme Court) against the judgment of 1 February 2001 of the Oberlandesgericht Linz.

24. In support of his appeal, Mr Gruber claims that in order for him to be regarded as a consumer within the meaning of Article 13 of the Convention the private purpose of the supply must predominate. In this case, the private use of the farm building is greater than the business use thereof. The other party to the contract is under an obligation to make enquiries and to advise the client in that regard and bears the risk of any mistake. Mr Gruber argues that in this case Bay Wa had sufficient reason to consider that the farm building was used essentially for private purposes, and in case of doubt it should have made enquiries of the purchaser about this. Furthermore, the sale of the tiles was preceded by an advertisement circulated in Austria by Bay Wa which led Mr Gruber to deal with it, whereas before that advertisement he was unaware of that company. Finally, all the preparatory steps for the conclusion of the contract were taken by Mr Gruber in Austria.

25. Bay Wa replies that in an agricultural enterprise the farm building is above all a place of work, and that in general supplies relating to it cannot be made on the basis of consumer contracts. In this case, the private use was in any event secondary and Bay Wa was unaware of such use. The consumer should clearly state in which capacity he is acting where, as in this case, it is possible to suppose, prima facie, that he is acting for a business purpose. The other party to the contract has no obligation to make enquiries in that respect. Where there is doubt as to whether a party is a consumer the Brussels Convention rules of jurisdiction on consumer contracts should not be applied. Furthermore, Bay Wa's building materials department, from which the til es were ordered, did not benefit from the advertising by brochure, and its DIY and garden centres, for whose benefit the advertising was undertaken, do not sell roof tiles. In any event there was no advertising for the tiles. The steps necessary for the conclusion of the contract were not taken in Austria but in Germany, as, under German law, the statement of acceptance of the quotation by telephone constitutes evidence of intention requiring an acknowledgement, and the confirmation of the order by the seller was made by fax from Germany. Where offer and acceptance are not simultaneous, which is the case where the order is made by telephone on the basis of an earlier quotation, the contract is deemed to have been concluded in the place where the defendant is domiciled.

26. The Oberster Gerichtshof observes that whilst it follows from the case-law of the Court that the jurisdictional rules on consumer contracts in the Brussels Convention constitute a derogation from the principle that the courts of the Contracting State where the defendant is domiciled should have jurisdiction, so that the concept of consumer must be given a strict interpretation, the Court has not yet ruled on some of the conditions for the application of Article 13 of the Brussels Convention which are at issue in the case before it.

27. Taking the view that in those circumstances the resolution of the dispute before it depends on the interpretation of the Brussels Convention, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Where the purposes of a contract are partly private, does the status of consumer for the purposes

of Article 13 of the Convention depend on which of the private and the trade or professional purposes is predominant, and what criteria are to be applied in determining which of the private and the trade or professional purposes predominates?

2. Does the determination of the purpose depend on the circumstances which could be objectively ascertained by the other party to the contract with the consumer?

3. In case of doubt, is a contract which may be attributed both to private and to trade or professional activity to be regarded as a consumer contract?

4. Is the conclusion of a contract preceded by advertising within the meaning of Article 13(3)(a) of the Convention where the other party to the subsequent contract with the consumer advertised his products by brochure in the Contracting State of the consumer but did not advertise the products the consumer subsequently bought in it?

5. Is there a consumer contract within the meaning of Article 13 of the Convention where the seller makes an offer by telephone from his own State to the buyer who lives in a different State, and the offer is not accepted but the buyer subsequently buys the product thus offered in response to a written offer?

6. Does the consumer take the steps necessary for the conclusion of the contract in his own State within the meaning of Article 13(3)(b) of the Convention where an offer is made to him in the State of his contracting partner and he accepts that offer by telephone from his own State?'

The first three questions

28. By its first three questions, which it is appropriate to consider together, the national court asks, essentially, whether the rules of jurisdiction laid down by the Brussels Convention must be interpreted as meaning that a contract of the kind at issue in the main proceedings, which relates to activities which are partly business and partly private, must be regarded as having been concluded by a consumer for the purposes of the first paragraph of Article 13 of the Convention.

29. As is clear from the order for reference, the Oberster Gerichtshof wishes to know essentially whether, and if so in what circumstances, a contract which has a dual purpose, such as the contract that Mr Gruber concluded with Bay Wa, is covered by the special rules of jurisdiction laid down in Articles 13 to 15 of the Brussels Convention. More specifically, the national court asks for clarification as to the circumstances of which it must take account in order to classify such a contract, the relevance of whether the contract was made predominantly for private or for business purposes, and the effect of knowledge of the party to the contract other than the party served by those purposes of either the purpose of the contract or the circumstances in which it was concluded.

30. As a preliminary point, it must be recalled that Title II, Section 4, of the Brussels Convention lays down the rules of jurisdiction for consumer contracts. The notion of a consumer contract is defined, as shown by the wording of the first paragraph of Article 13 of the Convention, as a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession'.

31. According to settled case-law, the concepts used in the Brussels Convention - which include, in particular, that of consumer' for the purposes of Articles 13 to 15 of that Convention - must be interpreted independently, by reference principally to the scheme and purpose of the Convention, in order to ensure that it is uniformly applied in all the Contracting States (see, in particular, Case 150/77 Bertrand [1978] ECR 1431, paragraphs 14, 15 and 16; Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 13; Case C269/95 Benincasa [1997] ECR I-3767, paragraph 12; Case C-99/96 Mietz [1999] ECR I2277, paragraph 26; and Case C-96/00 Gabriel [2002] ECR I-6367, paragraph 37).

32. First of all, within the scheme of the Brussels Convention, the jurisdiction of the courts

of the Contracting State in which the defendant is domiciled constitutes the general principle enshrined in the first paragraph of Article 2, and it is only by way of derogation from that principle that the Convention provides for an exhaustive list of cases in which the defendant may or must be sued before the courts of another Contracting State. As a consequence, the rules of jurisdiction which derogate from that general principle are to be strictly interpreted, so that they cannot give rise to an interpretation going beyond the cases envisaged by the Convention (see, in particular, Bertrand , paragraph 17; Shearson Lehman Hutton , paragraphs 14, 15 and 16; Benincasa , paragraph 13, and Mietz , paragraph 27).

33. That interpretation must apply a fortiori with respect to a rule of jurisdiction, such as that contained in Article 14 of the Convention, which allows a consumer, within the meaning of the first paragraph of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the claimant is domiciled. Apart from the cases expressly provided for, the Convention does not appear to favour the attribution of jurisdiction to the courts of the claimant's domicile (see Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraphs 16 and 19; Shearson Lehman Hutton , paragraph 17; Benincasa , paragraph 14; and Case C-168/02 Kronhofer [2004] ECR I-0000, paragraph 20).

34. Second, the Court has repeatedly held that the special rules introduced by the provisions of Title II, Section 4, of the Brussels Convention, which derogate from the general rule laid down in the first paragraph of Article 2, and from the rules of special jurisdiction for contracts in general enshrined in Article 5(1) of the Convention, serve to ensure adequate protection for the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other, commercial, party to the contract, who must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled (see in particular Shearson Lehman Hutton , paragraph 18, and Gabriel , paragraph 39).

35. From the scheme of the rules of jurisdiction put in place by the Brussels Convention, as well as the rationale of the special rules introduced by the provisions of Title II, Section 4, the Court has concluded that those provisions only cover private final consumers, not engaged in trade or professional activities, as the benefit of those provisions must not be extended to persons for whom special protection is not justified (see to that effect inter alia Bertrand , paragraph 21; Shearson Lehman Hutton , paragraphs 19 and 22; Benincasa , paragraph 15; and Gabriel , paragraph 39).

36. In paragraphs 16 to 18 of the judgment in Benincasa the Court stated in that respect that the concept of consumer' for the purposes of the first paragraph of Article 13 and the first paragraph of Article 14 of the Brussels Convention must be strictly construed, reference being made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract and not to the subjective situation of the person concerned, since the same person may be regarded as a consumer in relation to certain supplies and as an economic operator in relation to others. The Court held that only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the Convention to protect the consumer as the party deemed to be the weaker party. Such protection is unwarranted in the case of contracts for the purpose of a trade or professional activity.

37. It follows that the special rules of jurisdiction in Articles 13 to 15 of the Brussels Convention apply, in principle, only where the contract is concluded between the parties for the purpose of a use other than a trade or professional one of the relevant goods or services.

38. It is in the light of those principles that it is appropriate to examine whether and to what

extent a contract such as that at issue in the main proceedings, which relates to activities of a partly professional and partly private nature, may be covered by the special rules of jurisdiction laid down in Articles 13 to 15.

39. In that regard, it is already clearly apparent from the purpose of Articles 13 to 15 of the Brussels Convention, namely to properly protect the person who is presumed to be in a weaker position than the other party to the contract, that the benefit of those provisions cannot, as a matter of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.

40. As the Advocate General stated in paragraphs 40 and 41 of his Opinion, inasmuch as a contract is entered into for the person's trade or professional purposes, he must be deemed to be on an equal footing with the other party to the contract, so that the special protection reserved by the Brussels Convention for consumers is not justified in such a case.

41. That is in no way altered by the fact that the contract at issue also has a private purpose, and it remains relevant whatever the relationship between the private and professional use of the goods or service concerned, and even though the private use is predominant, as long as the proportion of the professional usage is not negligible.

42. Accordingly, where a contract has a dual purpose, it is not necessary that the purpose of the goods or services for professional purposes be predominant for Articles 13 to 15 of the Convention not to be applicable.

43. That interpretation is supported by the fact that the definition of the notion of consumer in the first paragraph of Article 13 of the Brussels Convention is worded in clearly restrictive terms, using a negative turn of phrase (contract concluded... for a purpose ...outside [the] trade or profession'). Moreover, the definition of a contract concluded by a consumer must be strictly interpreted as it constitutes a derogation from the basic rule of jurisdiction laid down in the first paragraph of Article 2, and confers exceptional jurisdiction on the courts of the claimant's domicile (see paragraphs 32 and 33 of the present judgment).

44. That interpretation is also dictated by the fact that classification of the contract can only be based on an overall assessment of it, since the Court has held on many occasions that avoidance of multiplication of bases of jurisdiction as regards the same legal relationship is one of the main objectives of the Brussels Convention (see to that effect, in particular, Case C-256/00 Besix [2002] ECR I-1699, paragraph 27; Gabriel , paragraph 57; and Case C-18/02 DFDS Torline [2004] ECR I-0000, paragraph 26).

45. An interpretation which denies the capacity of consumer, within the meaning of the first paragraph of Article 13 of the Brussels Convention, if the link between the purpose for which the goods or services are used and the trade or profession of the person concerned is not negligible is also that which is most consistent with the requirements of legal certainty and the requirement that a potential defendant should be able to know in advance the court before which he may be sued, which constitute the foundation of that Convention (see in particular Besix , paragraphs 24 to 26).

46. Having regard to the normal rules on the burden of proof, it is for the person wishing to rely on Articles 13 to 15 of the Brussels Convention to show that in a contract with a dual purpose the business use is only negligible, the opponent being entitled to adduce evidence to the contrary.

47. In the light of the evidence which has thus been submitted to it, it is therefore for the court

seised to decide whether the contract was intended, to a non-negligible extent, to meet the needs of the trade or profession of the person concerned or whether, on the contrary, the business use was merely negligible. For that purpose, the national court should take into consideration not only the content, nature and purpose of the contract, but also the objective circumstances in which it was concluded.

48. Finally, as regards the national court's question as to whether it is necessary for the party to the contract other than the supposed consumer to have been aware of the purpose for which the contract was concluded and the circumstances in which it was concluded, it must be noted that, in order to facilitate as much as possible both the taking and the evaluation of the evidence, it is necessary for the court seised to base its decision mainly on the evidence which appears, de facto, in the file.

49. If that evidence is sufficient to enable the court to conclude that the contract served to a non-negligible extent the business needs of the person concerned, Articles 13 to 15 of the Brussels Convention cannot be applied in any event because of the status of those provisions as exceptions within the scheme introduced by the Convention. There is therefore no need to determine whether the other party to the contract could have been aware of the business purpose.

50. If, on the other hand, the objective evidence in the file is not sufficient to demonstrate that the supply in respect to which a contract with a dual purpose was concluded had a non-negligible business purpose, that contract should, in principle, be regarded as having been concluded by a consumer within the meaning of Articles 13 to 15, in order not to deprive those provisions of their effectiveness.

51. However, having regard to the fact that the protective scheme put in place by Articles 13 to 15 of the Brussels Convention represents a derogation, the court seised must in that case also determine whether the other party to the contract could reasonably have been unaware of the private purpose of the supply because the supposed consumer had in fact, by his own conduct with respect to the other party, given the latter the impression that he was acting for business purposes.

52. That would be the case, for example, where an individual orders, without giving further information, items which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, or mentions the possibility of recovering value added tax.

53. In such a case, the special rules of jurisdiction for matters relating to consumer contracts enshrined in Articles 13 to 15 of the Brussels Convention are not applicable even if the contract does not as such serve a non-negligible business purpose, and the individual must be regarded, in view of the impression he has given to the other party acting in good faith, as having renounced the protection afforded by those provisions.

54. In the light of all the foregoing considerations, the answer to the first three questions must be that the rules of jurisdiction laid down by the Brussels Convention are to be interpreted as follows:

- a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;

- it is for the court seised to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;

- to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.

The last three questions

55. Since the last three questions were referred only if the capacity of consumer within the meaning of the first paragraph of Article 13 of the Brussels Convention was established, and in view of the answer given in that respect to the first three questions, there is no longer any need to answer the last three questions, relating to the other conditions for the application of that provision.

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NATCOUR *A9* Oberster Gerichtshof, Beschluß vom 08/11/2001 ; - Juristische Blätter 2002 p.259-261 ; - Osterreichische Juristenzeitung 2002 p.260-262 ; - Osterreichisches Recht der Wirtschaft 2002 p.65 (résumé) ; - Praxis des internationalen Privat- und Verfahrensrechts 2002 p.VII (résumé) ; - Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht 2002 p.75 (résumé) ; - International Litigation Procedure 2002 p.669-678

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PROCEDU Reference for a preliminary ruling

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JUDGRAP Schintgen

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Judgment of the Court (Fifth Chamber)
of 15 January 2004
Freistaat Bayern v Jan Blijdenstein. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Brussels Convention - Special rules of jurisdiction - Article 5(2) - Maintenance - Action for recovery brought by a public body subrogated to the rights of the maintenance creditor. Case C-433/01.

Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction in matters relating to maintenance - Action for recovery brought by a public body subrogated to the rights of the maintenance creditor - Article 5(2) of the Convention does not apply - (Convention of 27 September 1968, Art. 5(2))

Article 5(2) 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, which provides for a special jurisdiction of the courts for the place where the maintenance creditor is domiciled or habitually resident in matters relating to maintenance, must be interpreted as meaning that it cannot be relied on by a public body which seeks, in an action for recovery, reimbursement of sums paid under public law by way of an education grant to a maintenance creditor, to whose rights it is subrogated against the maintenance debtor.

Where the maintenance creditor has benefited from the grant to which he could lay claim, there is no need to deny the maintenance debtor the protection offered by Article 2 of the Convention, particularly as the courts of the defendant are better placed to determine the latter ' s resources.

see paras 31, 34, operative part

In Case C-433/01,

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 Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Freistaat Bayern

and

Jan Blijdenstein,

on the interpretation of Article 5(2) of the abovementioned 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 text p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), and 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),

THE COURT (Fifth Chamber),

composed of:

P. Jann (Rapporteur), acting for the President of the Fifth Chamber,

C.W.A. Timmermans and

A. Rosas, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

the German Government, by R. Wagner, acting as Agent,

the Austrian Government, by C. Pesendorfer, acting as Agent,

the United Kingdom Government, by G. Amodeo, acting as Agent, and by K. Beal, barrister,

the Commission of the European Communities, by A.-M. Rouchaud and S. Grünheid, acting as Agents,

having regard to the Report for the Hearing,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1. By order of 26 September 2001, received at the Court on 9 November 2001, the Bundesgerichtshof (Federal Court of Justice) referred a question 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 for a preliminary ruling on the interpretation of Article 5(2) 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 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), and 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; " the Convention").

2. The question was raised in the course of an action for recovery brought by Freistaat Bayern, a German public body, against Mr Blijdenstein for reimbursement of sums of money it paid by way of an education grant to Mr Blijdenstein ' s child.

Relevant provisions

The Convention

3. The first paragraph of Article 1 provides that the Convention is to apply in civil and commercial matters.

4. Under the first paragraph of Article 2 of the Convention:

" 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. Article 5(2) of the Convention states:

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

...

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident

"

National legislation

6. Under Paragraph 1602 of the Bürgerliches Gesetzbuch (German Civil Code), parents are obliged to maintain their children. Paragraph 1610(2) of the Code states that this obligation extends to the whole of the cost of living, including the cost of reasonable vocational training.

7. The Bundesausbildungsförderungsgesetz (Federal Law on Educational Support; " the BAföG") entitles a student who does not have at his disposal the means necessary for his maintenance and education the right to an education grant. That grant is paid by the competent grant-paying Land.

8. Under Paragraph 11 of the BAföG, the calculation of the amount of the grant takes into account the maintenance obligations of the recipient ' s parents. In accordance with Paragraph 36(1) of the BAföG, should the student prove that his parents are not fulfilling their maintenance obligations, and that his training is at risk, the grant which he is awarded on request and after hearing the parents does not take into account the maintenance payable by them.

9. Paragraph 37(1) of the BAföG is worded as follows:

> " If the student has a maintenance claim against his parents under private law for the period in respect of which the education grant is paid to him, the Land is subrogated to that right... on payment, up to the amount of the payments made, but only to the extent that the income and the assets of the parents are to be taken into account under this Law in determining the student ' s needs."

The main proceedings and the question referred for a preliminary ruling

10. Mr Blijdenstein lives in the Netherlands.

11. In the 1993/94 academic year, his daughter began training in an establishment in Munich (Germany). From 1 September 1993, she received an education grant from Freistaat Bayern.

12. Freistaat Bayern brought, first, an action for recovery against Mr Blijdenstein before the Amtsgericht (Local Court) of Munich seeking reimbursement of the grant paid for the 1993/94 academic year. The action resulted in judgment being entered against the defendant.

13. Freistaat Bayern commenced a second action before the Amtsgericht of Munich claiming reimbursement from Mr Blijdenstein of the grants paid for the 1994/95 and 1995/96 academic years.

14. Mr Blijdenstein disputed the jurisdiction of the Amtsgericht of Munich. The Amtsgericht dismissed this plea of lack of jurisdiction and upheld Freistaat Bayern ' s claim.

15. On appeal by Mr Blijdenstein, the Oberlandesgericht (Higher Regional Court) of Munich (Germany) varied the judgment of the lower court, holding that Freistaat Bayern ' s claim was inadmissible on the ground that, under the first paragraph of Article 2 of the Convention, alone applicable to the dispute, the defendant could be sued only in the courts of the State in which he is domiciled.

16. Freistaat Bayern brought an appeal on a point of law against that judgment before the Bundesgerichtshof. That court, unsure whether Article 5(2) of the Convention was applicable in a case such as the one before it, decided to stay the proceedings and referred the following question to the Court for a preliminary ruling:

> " May a public body which has paid an education grant to a student for a certain period of time under public law rely on the special rule of jurisdiction in Article 5(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic of 26 May 1989, when it seeks, through a statutory subrogation, to enforce in an action for recovery a civil law maintenance claim against the recipient ' s parents in respect of the grant in question?"

The question referred for a preliminary ruling

17. In this question the referring court is, essentially, seeking to ascertain whether a public body which seeks, in an action for recovery, reimbursement of sums paid under public law by way of an education grant to a maintenance creditor, to whose rights it is subrogated against the maintenance debtor, may rely on the special rule of jurisdiction under Article 5(2) of the Convention which states that the courts for the place where the maintenance creditor is domiciled are to have jurisdiction.

Application of the Convention

18. First of all, the United Kingdom Government claims that an action brought by a public body to recover from the parents of a student sums paid to the student under public law by way of an education grant is not an act involving " civil matters" within the meaning of Article 1 of the Convention, even if the student has a maintenance claim against his parents founded on private law.

19. The German Government and the Commission of the European Communities believe, on the other hand, that an action for recovery based on a statutory subrogation comes within the scope of the Convention.

20. In Case C-271/00 Baten [2002] ECR I-10489, paragraph 37, the Court held that the first paragraph of Article 1 of the Convention must be interpreted as meaning that the concept of " civil matters" encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. The Court added however that, where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in " civil matters".

21. In the main action, according to the information supplied by the national court, the statutory subrogation enjoyed by the Länder against the parents of recipients of education grants under Article 37(1) of the BAföG is governed by civil law. In view of the criteria noted in the preceding paragraph, it appears therefore that the main proceedings fall within the concept of " civil matters" within the meaning of the first paragraph of Article 1 of the Convention.

Application of Article 5(2) of the Convention

22. The German, Austrian and United Kingdom Governments and the Commission submit that Article 5(2) of the Convention is not applicable to an action for recovery brought by a public body.

23. They argue, essentially, that jurisdiction for the courts where the maintenance creditor is domiciled provided for in Article 5(2) of the Convention is a derogation from the fundamental rule of jurisdiction of the courts of the domicile of the defendant, stated in Article 2 of the Convention. That derogation is justified by the aim of protecting the maintenance applicant, regarded as the weaker party, and it may therefore only be relied on by that party.

24. It should be remembered that the Convention must be interpreted independently, by reference to its system and objectives (see, in particular, Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 13; Case C-295/95 Farrell [1997] ECR I-1683, paragraphs 12 and 13; Case C-269/95 Benincasa [1997] ECR I-3767, paragraph 12, and Baten , cited above, paragraph 28).

25. In addition, the general principle in the system of the Convention is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction, and that rules of jurisdiction which derogate from this general principle cannot give rise to an interpretation going beyond the cases expressly envisaged by the Convention (see, in particular, Shearson Lehman

Hutton , cited above, paragraphs 14 and 16; Benincasa , cited above, paragraph 13, and Case C-412/98 Group Josi [2000] ECR I-5925, paragraph 49). This interpretation is even more compelling in relation to a rule of jurisdiction like that in Article 5(2) of the Convention, which enables the maintenance creditor to sue the defendant before the courts of the Contracting State in which the applicant is domiciled. Other than in the cases expressly provided for, the Convention appears hostile towards the attribution of jurisdiction to the courts of the applicant ' s domicile (see, to this effect, Shearson Lehman Hutton , cited above, paragraph 17; Benincasa , cited above, paragraph 14, and Group Josi , cited above, paragraph 50).

26. It is in the light of those principles that Article 5(2) of the Convention should be interpreted.

27. The wording of Article 5(2) of the Convention states only that this provision is applicable " in matters relating to maintenance" and does not contain any indication as to the party who may be the applicant. From that point of view, as the referring court pointed out, Article 5(2) of the Convention can be distinguished from Article 14 of the Convention. Article 14 lays down special rules of jurisdiction in matters relating to consumer contracts on the basis of the position of the consumer in the proceedings, which led the Court to hold that those rules protect the consumer only in so far as he personally is the plaintiff or defendant in proceedings (Shearson Lehmann Hutton , cited above, paragraph 23).

28. However, as the Commission points out, this difference in the drafting of the provisions is explained by the different position of Articles 5 and 14 of the Convention in the system established by it. Article 5 provides for a jurisdiction which does not preclude the application of the general jurisdiction in Article 2 of the Convention, whereas the provisions of Article 14 on jurisdiction are exhaustive. The different wording of these provisions cannot therefore be relied on to justify a wide application of Article 5(2) of the Convention by extending it to proceedings in which the maintenance creditor is not personally the applicant.

29. That analysis is borne out by the arguments developed by the Court in paragraph 19 of the Farrell judgment, cited above, in which it held that the derogation provided for in Article 5(2) of the Convention is intended to offer the maintenance applicant, who is regarded as the weaker party in such proceedings, an alternative basis of jurisdiction. According to the Court, in adopting that approach, the drafters of the Convention considered that that specific objective had to prevail over the objective of the rule contained in the first paragraph of Article 2 of the Convention, which is to protect the defendant as the party who, being the person sued, is generally in a weaker position.

30. However, a public body which brings an action for recovery against a maintenance debtor is not in an inferior position with regard to the latter. Moreover, the maintenance creditor, whose maintenance has been covered by the payments of the public body, is no longer in a precarious financial position.

31. It follows that, since the maintenance creditor has benefited from the grant to which she could lay claim, there is no need to deny the maintenance debtor the protection offered by Article 2 of the Convention, particularly as the courts of the defendant are better placed to determine the latter ' s resources.

32. Additional confirmation of this interpretation is provided by the Schlosser Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom to the Convention (OJ 1979 C 59, p. 71, paragraph 97). According to this report, " it is not ... the purpose of the special rules of jurisdiction in Article 5(2) to confer jurisdiction in respect of compensation claims on the courts of the domicile of the maintenance creditor or even those of the seat of the public authority whichever of the two abovementioned methods a legal system may

have opted for".

33. As to the argument raised by the referring court that maintenance creditors might be better protected if actions for recovery brought by public bodies fell within Article 5(2) of the Brussels Convention, as the competent bodies would have an incentive to pay maintenance creditors advances of maintenance, it is relevant, as the German Government has rightly stated, that these bodies make advances only in accordance with legal obligations set out by the national legislature according to the situation of the recipients concerned.

34. Therefore the answer to the question referred must be that Article 5(2) of the Convention must be interpreted as meaning that it cannot be relied on by a public body which seeks, in an action for recovery, reimbursement of sums paid under public law by way of an education grant to a maintenance creditor, to whose rights it is subrogated against the maintenance debtor.

Costs

35. The costs incurred by the German, Austrian and United Kingdom 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 Bundesgerichtshof by order of 26 September 2001, hereby rules:

Article 5(2) 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic must be interpreted as meaning that it cannot be relied on by a public body which seeks, in an action for recovery, reimbursement of sums paid under public law by way of an education grant to a maintenance creditor, to whose rights it is subrogated against the maintenance debtor.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
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CONCERNS	Interprets 41968A0927(01) -A05PT2
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; Austria ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Bundesgerichtshof, Beschluß vom 26/09/2001 (XII ZR 89/99) ; - Juristenzeitung 2002 p.36* (résumé) ; - Monatsschrift für deutsches Recht 2002 p.50-51 ; - Praxis des internationalen Privat- und Verfahrensrechts 2002 p.VII (résumé) ; - Zeitschrift für das gesamte Familienrecht 2002 p.21-23
NOTES	Wittwer, Alexander: Legalzession und Unterhaltsregress der öffentlichen Hand, European Law Reporter 2004 p.93-94 ; Schlosser, Peter: Juristenzeitung 2004 p.408-409 ; Neu, Sabine: Zuständigkeit bei Regressklage einer öffentlichen Einrichtung aus übergegangenem Recht des Unterhaltsberechtigten, Europäische Zeitschrift für Wirtschaftsrecht 2004 p.278-279 ; Blobel, Felix: The European legal forum 2004 p.46-50 (D) ; Martiny, Dieter: Unterhaltsrückgriff durch öffentliche Träger im europäischen internationalen Privat- und Verfahrensrecht, Praxis des internationalen Privat- und Verfahrensrechts 2004 p.195-205 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 2004 p.635-638 ; Alvarez Gonzalez, Santiago: Accion de regreso alimenticio y competencia judicial internacional: un nuevo paso en la progresiva delimitacion del artículo 5.2 del Convenio de Bruselas, Diario La ley 2004 n 6116 p.1-6 ; Pataut, Etienne: Revue critique de droit international privé 2004 p.471-479 ; Alvarez Gonzalez, Santiago: Jurisprudencia española y comunitaria de Derecho internacional privado, Revista española de Derecho Internacional 2004 p.839-843 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2005 no 411
PROCEDU	Reference for a preliminary ruling
ADVGEN	Tizzano
JUDGRAP	Jann
DATES	of document: 15/01/2004 of application: 09/11/2001

Judgment of the Court (Fifth Chamber)
of 15 May 2003
Préservatrice foncière TIARD SA v Staat der Nederlanden.
Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands.
Brussels Convention - Article 1 - Scope - Concept of civil and commercial matters - Concept of customs matters - Action based on a guarantee contract between the State and an insurance company - Contract entered into in order to satisfy a condition imposed by the State on associations of carriers, principal debtors, under Article 6 of the TIR Convention.
Case C-266/01.

In Case C-266/01,

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 Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Préservatrice foncière TIARD SA

and

Staat der Nederlanden,

on the interpretation of Article 1 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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) and 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),

THE COURT

(Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and A. Rosas, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Netherlands Government, by H.G. Sevenster, acting as Agent,

- the Commission of the European Communities, by A.-M. Rouchaud and H. van Vliet, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Préservatrice foncière TIARD SA, represented by R.S. Meijer, advocaat, of the Netherlands Government, represented by N.A.J. Bel, acting as Agent, and of the Commission, represented by A.-M. Rouchaud and H. van Vliet, at the hearing on 17 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2002,

gives the following

Judgment

Costs

45 The costs incurred by the Netherlands Government and 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 proceedings 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 questions referred to it by the Hoge Raad der Nederlanden by judgment of 18 May 2001, hereby rules:

The first paragraph of Article 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as follows:

- `civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person 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, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals;

- `customs matters', within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks 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, does 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.

1 By judgment of 18 May 2001, received at the Court on 5 July 2001, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) 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 two questions on the interpretation of Article 1 of that convention (OJ 1972 L 299, p. 32), 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) and 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) (`the Brussels Convention').

2 Those questions were raised in the context of proceedings between the Netherlands State and Préservatrice foncière TIARD SA (`PFA'), an insurance company governed by French law, concerning the enforcement of a guarantee contract (borgtochtovereenkomst) under which PFA agreed to pay the customs duties owed by the Netherlands associations of carriers authorised by the Netherlands State to issue TIR carnets.

Legal context

The Brussels Convention

3 The first paragraph of Article 1 of the Brussels Convention provides:

`This convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

The TIR Convention

4 The Customs Convention on the international transport of goods under cover of TIR carnets (`the TIR Convention') was signed at Geneva on 14 November 1975. The Kingdom of the Netherlands is a party to that convention. It was also approved on behalf of the European Community by Council Regulation (EEC) No 2112/78 of 25 July 1978 (OJ 1978 L 252, p. 1).

5 The TIR Convention provides, in particular, that goods carried under the TIR procedure, which it lays down, are not to be subject to the payment or deposit of import or export duties and taxes at customs offices en route.

6 For those facilities to be applied, the TIR Convention requires that the goods be accompanied, throughout the transport operations, by a standard document, the TIR carnet, which serves to check the regularity of the operation. It also requires that the transport operations be guaranteed by associations approved by the contracting parties, in accordance with the provisions of Article 6 of the Convention.

7 Article 6(1) of the TIR Convention, which forms part of Chapter II, entitled `Issue of TIR carnets - Liability of guaranteeing associations', states in the version applicable at the material time:

`Subject to such conditions and guarantees as it shall determine, each Contracting Party may authorise associations to issue TIR carnets, either directly or through corresponding associations, and to act as guarantors.'

8 Where there is an irregularity in the conduct of the TIR operation, in particular where the TIR carnet has not been discharged, import or export duties and taxes become payable. They are due directly from the holder of the TIR carnet - generally the carrier. Where he does not pay the sums owed, the national guaranteeing association is `jointly and severally' liable for payment, under Article 8(1) of the TIR Convention.

The main proceedings

9 By order of 5 March 1991, in accordance with Article 6 of the TIR Convention, the Netherlands State Secretary for Finance authorised three Netherlands associations of carriers to issue TIR carnets (`the authorised Netherlands associations'). Under Article 1 of that order, those associations undertake unconditionally to pay the duties and taxes due from the holders of the TIR carnets issued, for which they become jointly and severally liable. Article 5 states that the authorised Netherlands associations must provide a guarantee covering fulfilment of their obligations. That article states that the person who provides the guarantee must undertake to pay all the sums claimed by the Netherlands Minister for Finance from the authorised Netherlands associations. Article 19 states that the order will enter into force only when the Netherlands Minister for Finance has accepted the guarantee referred to in Article 5.

10 That guarantee was provided by PFA. By various documents, PFA bound itself vis-à-vis the Netherlands State, as guarantor and joint debtor, to pay as its own debt the import or export duties and taxes imposed under customs and excise legislation on the holders of TIR carnets issued by the national associations of carriers.

11 On 20 November 1996, the Netherlands State brought proceedings against PFA before the Rechtbank te Rotterdam (District Court, Rotterdam) (Netherlands), claiming that PFA should be ordered to pay it the sum of NLG 41 917 063 together with statutory interest. That action was based on the guarantee commitments undertaken by PFA vis-à-vis the Netherlands State and sought payment of the import or export duties and taxes owed by the authorised Netherlands associations.

12 PFA pleaded the lack of jurisdiction of the Rechtbank te Rotterdam on the ground that the dispute fell within the scope of the Brussels Convention and that the court with jurisdiction was to be determined in accordance with the provisions thereof.

13 The Rechtbank te Rotterdam and, on appeal, the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) (Netherlands) rejected the plea of lack of jurisdiction. The appellate court held that, in authorising associations of carriers to issue TIR carnets subject to the acceptance of the guarantee furnished by them, the Netherlands State had exercised a public-law power and that the conclusion by that State of the guarantee contract with PFA also formed part of the exercise of that power. It also found that the debts payable by PFA were customs debts.

14 Since it doubted the validity of that analysis, the Hoge Raad der Nederlanden, to which PFA had appealed, decided to stay proceedings and to refer the following questions to the Court:

`(1) Is a claim lodged by the State under a private-law guarantee contract (borgtochtovereenkomst) which it has concluded in fulfilment of a condition determined by it pursuant to Article 6(1) of the 1975 TIR Convention, and therefore in exercise of its public powers, to be regarded as a civil or commercial matter within the meaning of Article 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters?

(2) Must proceedings which are brought by the State and which have as their subject-matter a private-law guarantee contract be regarded as a customs matter within the meaning of Article 1 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, on the ground that pleas may be put forward by the defendant which necessitate an investigation into, and a ruling on, the existence and content of the customs debts to which that contract relates?'

The first question referred for a preliminary ruling

15 By this question, the national court seeks essentially to ascertain whether the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that `civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State.

Observations submitted to the Court

16 PFA, the Netherlands Government and the Commission all acknowledge that `civil and commercial matters' within the meaning of Article 1 of the Brussels Convention must be defined independently. Similarly, they all point out that proceedings between public administrative authorities and an individual may come within the scope of the Brussels Convention, in so far as those authorities have not acted in the exercise of their public powers.

17 However, their observations differ in respect of the application of those principles to the main proceedings.

18 The Netherlands Government adopts the analysis of the Gerechtshof te 's-Gravenhage. In its submission, there is a link between the act of guarantee and the system of taxes and duties whose payment it seeks to ensure, which is shown by the fact that the guarantee was a condition without

whose fulfilment the public-law relationship between the State and the authorised Netherlands associations would not have arisen. The content of the act of guarantee flows directly from rules of public law, as is demonstrated by the fact that its clauses reproduce almost literally the provisions of the order of 5 March 1991 approving national associations of carriers. In concluding that act, PFA undertook to take part in the public-law system for collecting duties and taxes which was put in place by the TIR Convention. In the light of those factors, the fact that the act took the form of a private-law guarantee contract is immaterial.

19 By contrast, according to PFA and the Commission, the Netherlands State has not, in its relationship with PFA, acted in the exercise of its public powers. The Netherlands State has not imposed any obligation on PFA, which concluded the guarantee contract of its own free will and is at liberty to terminate it subject to a period of notice. The Netherlands State's claim against PFA is founded solely in the guarantee contract, which is governed by private law.

The reply of the Court

20 It is settled case-law that, since Article 1 of the Brussels Convention serves to indicate the area of application of the Convention, it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. `Civil and commercial matters' must therefore be regarded as an independent concept to be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the national legal systems as a whole (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).

21 The Court has made it clear that that interpretation results in the exclusion of certain judicial decisions from the scope of the Brussels Convention, owing either to the legal relationships between the parties to the action or to its subject-matter (LTU, paragraph 4, and Baten, paragraph 29).

22 Thus the Court has held that, although certain judgments in actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (LTU, paragraph 4; Rüffer, paragraph 8, and Baten, paragraph 30).

23 In order to apply those principles in a case such as that in the main proceedings, it is therefore necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action (see, to that effect, Baten, paragraph 31).

24 As a preliminary point, it should be observed that, as the Netherlands Government submits, PFA has not bound itself solely as guarantor, but also as joint debtor liable to pay as its own debt the duties and taxes owed.

25 The question whether a stipulation of joint and several liability alters the nature of a guarantee undertaking, or modifies only some of its effects, is a question governed by national law.

26 In any event, in the present case the national court, which is responsible for analysing the nature of the relationship between PFA and the Netherlands State, has referred in the questions which it has submitted to the Court for a preliminary ruling only to a `guarantee' contract. Accordingly, in order to answer those questions, the Court must proceed on the basis of the hypothesis that proceedings have been brought against PFA only in its capacity as guarantor, and not as joint

debtor.

27 According to the general principles which stem from the legal systems of the contracting States, a guarantee contract represents a triangular process, by which the guarantor gives an undertaking to the creditor that he will fulfil the obligations assumed by the principal debtor if the debtor fails to fulfil them himself.

28 Such a contract creates a new obligation, assumed by the guarantor, to guarantee the performance of the principal obligation imposed on the debtor. The guarantor does not take the place of the debtor, but guarantees only to pay his debt, according to the conditions specified in the guarantee contract or laid down by legislation.

29 The obligation thus created is accessory, in the sense that, first, the creditor cannot bring proceedings against the guarantor unless the debt covered by the guarantor is payable and, second, the obligation assumed by the guarantor cannot be more extensive than that of the principal debtor. The accessory nature of the obligation does not however mean that the legal rules applicable to the obligation assumed by the guarantor must be in every particular identical to the legal rules applicable to the principal obligation (see, to that effect, Case C-208/98 Berliner Kindl Brauerei [2000] ECR I-1741).

30 In order to answer the first question, it is therefore necessary to examine whether the legal relationship between the Netherlands State and PFA, under the guarantee contract, is characterised by an exercise of public powers on the part of the State to which the debt is owed, in that it entails the exercise of powers going beyond those existing under the rules applicable to relations between private individuals (on that criterion, see Sonntag, paragraph 22).

31 Although it is for the national court to make that assessment, it seems none the less helpful for the Court to provide, in the light of the observations lodged before it, some guidelines as to the factors to be taken into consideration.

32 In the first place, the legal relationship between the Netherlands State and PFA is not governed by the TIR Convention. Although Chapter II of that convention defines the obligations of a national guaranteeing association authorised by a contracting State under Article 6 thereof, in the version applicable at the material time the TIR Convention does not contain any provisions defining the extent of the possible undertakings imposed on a guarantor by a State as a condition for a decision authorising national guaranteeing associations.

33 In the second place, account must be taken of the circumstances surrounding the conclusion of the contract. In the main proceedings, the case file shows that PFA's undertaking vis-à-vis the Netherlands State was freely given. According to the information relied on by the Commission, without being contradicted by the Netherlands Government, PFA freely determined with the principal debtors, that is, the authorised Netherlands associations, the amount of its remuneration for providing the guarantee. PFA and the Commission also stated, at the hearing, that PFA is free to terminate the guarantee contract at any moment, subject to 30 days' notice.

34 In the third place, it is necessary to take into consideration the terms of the contract defining the extent of the guarantor's undertaking. In that respect, the identity, noted in the main proceedings by the Netherlands Government, between the provisions of the order of 5 March 1991 approving national associations of carriers, on the one hand, and the clauses of the contract defining the guarantee obligation assumed by PFA, on the other, cannot be regarded as proof that the Netherlands State exercised its public powers in respect of the guarantor. The fact that the principal obligation and the guarantor's undertaking are the same in fact results from the accessory nature of the guarantee contract. In the main proceedings, it is hardly material that the extent of PFA's undertaking is determined by reference to the obligations of the authorised Netherlands associations, since

it is common ground that that undertaking was not imposed on PFA, but is the result of an expression of its free will.

35 As regards the fact, asserted by the Netherlands Government, that PFA waived the right to rely on certain provisions of the Netherlands Civil Code, such as those providing for the defence of set-off and the `benefits of discussion and division' (permitting the claim of a preliminary distraint on the principal debtor's assets and the guarantor's right to limit its liability in the event of a plurality of guarantors), it should be noted that such stipulations are common practice in commercial relationships. They could constitute an exercise of its public powers by the Netherlands State vis-à-vis the guarantor only if they exceeded the limits of the freedom conferred on the parties by the legislation applicable to the contract, which is for the national court to determine.

36 In the light of all these considerations, the answer to the first question must be that the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that `civil and commercial matters', within the meaning of the first sentence of that provision, covers a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person 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, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals.

The second question referred for a preliminary ruling

37 By this question, the national court seeks essentially to ascertain whether the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that `customs matters', within the meaning of the second sentence of that provision, covers a claim by which a contracting State seeks to enforce a guarantee contract intended to guarantee the payment of a customs debt, where the guarantor may raise pleas in defence which necessitate an investigation into the existence and content of the customs debt.

38 In that regard, it should be recalled that the second sentence of the first paragraph of Article 1 of the Brussels Convention was added 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 to the Brussels Convention in order to clarify, by means of examples, which matters do not fall within the scope of the Brussels Convention (see report on that convention submitted by Mr Schlosser, OJ 1979 C 59, p. 71, point 23). That sentence seeks only to draw attention to the fact that `customs matters' are not covered by the concept of `civil and commercial matters'. That clarification did not however have the effect of either limiting or modifying the scope of the latter concept.

39 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'.

40 As indicated in paragraph 36 above, `civil and commercial matters' must therefore cover a claim by which a contracting State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to guarantee the payment of a customs debt owed by a third person to that State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise of powers going beyond those existing under the rules applicable to relations between private individuals.

41 This analysis applies even if the guarantor may raise pleas in defence which necessitate an investigation into whether the customs debt, whose payment the guarantee contract guarantees, is owed.

42 In order to determine whether an action falls within the scope of the Brussels Convention,

only the subject-matter of that action must be taken into account. It would be contrary to the principle of legal certainty, which is one of the objectives pursued by that convention, for its applicability to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties (see, to that effect, Case C-190/89 Rich [1991] ECR I-3855, paragraphs 26 and 27, and Case C-129/92 Owens Bank [1994] ECR I-117, paragraph 34).

43 Where the subject-matter of an action is the enforcement of a guarantee obligation owed by a guarantor in circumstances which permit the inference that that obligation falls within the scope of the Brussels Convention, the fact that the guarantor may raise pleas in defence relating to whether the guaranteed debt is owed, based on matters excluded from the scope of the Brussels Convention, has no bearing on whether the action itself is included in the scope of that convention.

44 It follows from all the foregoing considerations that the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that `customs matters', within the meaning of the second sentence of that provision, does not cover a claim by which a contracting State seeks 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, does 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.

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61998J0208 : N 29
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CONCERNS Interprets 41968A0927(01)-A01L1

SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
OBSERV	Netherlands ; Member States ; Commission ; Institutions
NATIONA	Netherlands
PROCEDU	Reference for a preliminary ruling
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Judgment of the Court (Fifth Chamber)
of 8 May 2003
Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV.
Reference for a preliminary ruling: Oberster Gerichtshof - Austria.
Brussels Convention - Article 21 - Lis pendens - Setoff.
Case C-111/01.

In Case C-111/01,

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 Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Gantner Electronic GmbH

and

Basch Exploitatie Maatschappij BV,

on the interpretation of Article 21 of the abovementioned 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 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),

THE COURT

(Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and S. von Bahr, Judges,

Advocate General: P. Léger,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gantner Electronic GmbH, by A. Concin and H. Concin, Rechtsanwälte,

- Basch Exploitatie Maatschappij BV, by T. Frad, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the Italian Government, by U. Leanza, acting as Agent, and O. Fiumara, avvocato dello Stato,

- the United Kingdom Government, by G. Amodeo, acting as Agent, and D. Lloyd Jones QC,

- the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Gantner Electronic GmbH, Basch Exploitatie Maatschappij BV, the United Kingdom Government and the Commission, at the hearing on 10 July 2002,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2002,

gives the following

Judgment

Costs

42 The costs incurred by the Austrian, Italian and United Kingdom 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 proceedings 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 questions referred to it by the Oberster Gerichtshof by order of 22 February 2001, hereby rules:

Article 21 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, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, 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, must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.

1 By order of 22 February 2001, received at the Court on 12 March 2001, the Oberster Gerichtshof (Austrian Supreme Court) referred 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 (`the Protocol'), three questions on the interpretation of Article 21 of the abovementioned 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 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) (`the Convention').

2 Those questions have been raised in proceedings between Gantner Electronic GmbH (`Gantner'), a company incorporated under Austrian law, and Basch Exploitatie Maatschappij BV (`Basch'), a company incorporated under Netherlands law, following the termination of their commercial relations.

Legal framework

The Convention

3 According to its preamble, the aim of the Convention is to facilitate the reciprocal recognition and enforcement of judgments in accordance with Article 293 EC, and to strengthen the legal protection of persons established in the Community. The preamble also states that it is necessary for that

purpose to determine the international jurisdiction of the courts of the Contracting States.

4 The rules on jurisdiction are laid down in Title II of the Convention. Section 8 of Title II entitled `Lis pendens - related actions' is intended to prevent conflicting judgments and thus to ensure the proper administration of justice in the Community.

5 Article 21 of the Convention, dealing with lis pendens, provides as follows:

`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 stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

6 Article 22 of the Convention, which deals with related actions, provides as follows:

`Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

National laws

7 Under Netherlands and Austrian law set-off always requires a unilateral declaration by one party to the other. Statutory set-off, characterised by the extinction of mutual claims by operation of law, which is well known in other European national laws, does not exist in Netherlands and Austrian law. The declaration may be made either extra-judicially or in the course of proceedings. It has retroactive effect: the two claims are considered to be extinguished on the day on which the conditions for set-off are met and not on the day on which set-off is declared, and the court confines itself to making a declaration that set-off has been effected.

The dispute in the main proceedings and the questions referred for preliminary ruling

8 Gantner manufactures and markets carrier pigeon clocks. In the course of its commercial relations with Basch, it supplied Basch with its goods for resale in the Netherlands.

9 Taking the view that Basch had not paid the price of the goods delivered and invoiced up to June 1999, Gantner terminated their commercial relations.

10 By document of 7 September 1999, notified to Gantner on 2 December 1999, Basch brought an action before the Arrondissementsrechtbank (District Court) Dordrecht (Netherlands) in which it sought an order requiring Gantner to pay to it NLG 5 555 143.60 (EUR 2 520 814.26), primarily in respect of damages. Basch argued that, as Gantner had terminated a contractual relationship which had lasted more than 40 years, the period of notice ought to have been longer.

11 According to the order for reference, Basch considered that it was owed NLG 5 950 962 (EUR 2 700 428.82). However, it deducted from that sum NLG 376 509 (EUR 170 852.34), corresponding to the claims by Gantner that it considered to be justified, and accordingly limited its claim to NLG 5 555 143.60 (EUR 2 520 814.26). Basch accordingly effected a set-off by way of a declaration of intent.

12 In the proceedings before the Arrondissementsrechtbank Dordrecht, Gantner did not plead a counterclaim in its defence against Basch.

13 By document of 22 September 1999, notified to Basch on 21 December 1999, Gantner brought an action before the Landesgericht (Regional Court) Feldkirch (Austria) for an order requiring Basch to pay to it ATS 11 523 703.30 (EUR 837 460.18), corresponding to the sales price of the goods delivered to Basch up to 1999 which remained unpaid.

14 Basch argued that the claim should be dismissed. It contended that the portion of Gantner's claim that it considered to be justified, that is to say, EUR 170 852.34, was extinguished by the extra-judicial set-off that it had effected in the Netherlands. In regard to the balance of Gantner's claim (EUR 666 607.84), Basch argued that if, contrary to all probability, that claim was upheld, it would in any event be set off by the balance of its own claim for damages, which was the subject-matter of the dispute pending before the Arrondissementsrechtbank Dordrecht. Furthermore, Basch asked the Landesgericht to stay proceedings on the ground of lis pendens under Article 21, or on the ground that the proceedings constituted related actions within the meaning of Article 22 of the Convention.

15 The Landesgericht refused to suspend in their entirety the proceedings pending before it. It did, however, decide to stay its decision on the defence plea raised by Basch alleging set-off against the debt that it sought to recover before the Arrondissementsrechtbank Dordrecht.

16 Basch appealed to the Oberlandesgericht (Higher Regional Court) Innsbruck (Austria) against the Landesgericht's decision not to stay the proceedings in their entirety.

17 Taking the view that the defence plea alleging extra-judicial set-off effected by Basch in the Netherlands was capable of giving rise to lis pendens in regard to the two actions, the Oberlandesgericht set aside the first-instance decision in so far as it dismissed Basch's application for a stay on the basis of Article 21 of the Convention. On the other hand, the Oberlandesgericht upheld the dismissal of Basch's application for a stay of proceedings on the basis of Article 22 of the Convention, which thus became final.

18 Gantner appealed against that decision to the Oberster Gerichtshof.

19 The Oberster Gerichtshof takes the view, in the first place, that the respective claims of Basch and Gantner are not based on identical or similar facts. Before the Netherlands court, Basch seeks compensation for loss resulting from Gantner's wrongful termination of an alleged concession contract. In the proceedings which it subsequently brought before the Austrian courts, Gantner seeks payment of the sales price of goods delivered during the period prior to the termination of commercial relations. Conceptually, those claims are not based on conflicting assessments of the same facts and actions, but have different factual bases giving rise to different rights.

20 The Oberster Gerichtshof is, however, unsure whether, taking account of the relevant case-law of the Court (see Case 144/86 Gubisch Maschinenfabrik [1987] ECR 4861, paragraphs 16 to 18, and Case C-406/92 The Tatry [1994] ECR I-5439, paragraphs 30 to 34), there any grounds for holding that the requirements for lis pendens have been met in this case.

21 Second, the Oberster Gerichtshof points out that Basch relies on a contract for an indefinite period, whereas Gantner argues that there was a succession of sales contracts.

22 In that regard, the application brought by Basch before the Netherlands court raises the question of the existence of a contract for an indefinite period only as a preliminary issue. It is thus necessary to determine whether the decision which will be given by the Netherlands court, on an issue which legal theory in Austria still predominantly regards as being merely a preliminary issue, will have binding force for the subsequent proceedings in Austria. The Oberster Gerichtshof states

that this question is highly controversial in Austrian law.

23 The Oberster Gerichtshof accordingly decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

`1 Does the concept of "the same cause of action" in Article 21 of the Brussels Convention extend also to the defence of the defendant that he has extinguished a part of the claim sued for by extra-judicial set-off, where the part of this counterclaim that is allegedly not extinguished is the subject-matter of a legal dispute between the same parties on the basis of an action that has already been brought earlier in another Contracting State?

2 In the examination of the question whether "the same cause of action" has been brought, are exclusively the pleadings of the plaintiff in the proceedings initiated by a later action decisive and the defence and submissions of the defendant therefore irrelevant, in particular also the defence of the procedural objection of set-off concerning a claim that is the subject-matter of a legal dispute between the same parties on the basis of an action that has already been brought earlier in another Contracting State?

3. Where, on the basis of an action to enforce a contract seeking damages for unlawful termination of a long-term obligation, the question as to whether such a long-term obligation existed at all is decided, is that decision also binding in subsequent proceedings between the same parties?'

The first two questions

24 By its first two questions, which it is appropriate to examine together, the national court seeks to ascertain, essentially, whether Article 21 of the Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account must be taken not only of the claims of the respective applicants but also of the grounds of defence raised by a defendant.

25 In that regard it must be observed, first of all, that according to its wording Article 21 of the Convention applies where two actions are between the same parties and involve the same subject-matter (see Gubisch Maschinenfabrik, cited above, paragraph 14). Furthermore, the subject-matter of the dispute for the purpose of that provision means the end the action has in view (The Tatry, cited above, paragraph 41).

26 It thus appears from the wording of Article 21 of the Convention that it refers only to the applicants' respective claims in each of the sets of proceedings, and not to the defence which may be raised by a defendant.

27 Next, it follows from Case 129/83 Zelger v Salinitri [1984] ECR 2397, paragraphs 10 to 15, that, in so far as the substantive conditions laid down in paragraph 25 of the present judgment are met, lis pendens exists from the moment when two courts of different Contracting States are definitively seised of an action, that is to say, before the defendants have been able to put forward their arguments.

28 Although it is not applicable ratione temporis to the case in the main proceedings, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) confirms that interpretation.

29 That regulation specifies, in particular for the purpose of the application of the rules on lis pendens, when a court is deemed to be seised. Under Article 30, a court is deemed to be seised either 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, 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.

30 Finally, the objective and automatic character of the lis pendens mechanism should be stressed. As the United Kingdom Government correctly points out, Article 21 of the Convention adopts a simple method to determine, at the outset of proceedings, which of the courts seised will ultimately hear and determine the dispute. The court second seised is required, of its own motion, to stay its proceedings until the jurisdiction of the court first seised is established. Once that has been established, it must decline jurisdiction in favour of the court first seised. The purpose of Article 21 of the Convention would be frustrated if the content and nature of the claims could be modified by arguments necessarily submitted at a later date by the defendant. Apart from delays and expense, such a solution could have the result that a court initially designated as having jurisdiction under that article would subsequently have to decline to hear the case.

31 It follows that, in order to determine whether there is lis pendens in relation to two disputes, account cannot be taken of the defence submissions, whatever their nature, and in particular of defence submissions alleging set-off, on which a defendant might subsequently rely when the court is definitively seised in accordance with its national law.

32 In the light of the foregoing, the answer to the first two questions is that Article 21 of the Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.

The third question

33 By its third question, the national court seeks to ascertain whether the decision of a court of a Contracting State, which, in order to settle a claim, has had to determine the legal nature of the relations between the parties, is binding on the court of another Contracting State subsequently seised of a dispute between the same parties, in which the precise legal nature of the contractual relations between the parties is a matter of dispute.

34 As a preliminary point, it must be recalled that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts established by Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 59, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38, and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 18).

35 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which a case has been referred to it by the national court, in order to assess whether it has jurisdiction (PreussenElektra, cited above, paragraph 39, and Canal Satélite Digital, cited above, paragraph 19). The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see Bosman, cited above, paragraph 60, and Case C-451/99 Cura Anlagen [2002] ECR I-3193, paragraph 26).

36 It is therefore possible that there will be a refusal to rule on a question referred by a national

court for a preliminary ruling where, inter alia, the problem is hypothetical or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, for example, PreussenElektra, paragraph 39, and Canal Satélite Digital, paragraph 19).

37 In order to enable the Court to provide a useful interpretation of Community law, it is appropriate that, before making the reference to the Court, the national court should establish the facts of the case and settle the questions of purely national law (see Joined Cases 36/80 and 71/80 Irish Creamery Milk Suppliers Association [1981] ECR 735, paragraph 6). By the same token, it is essential for the national court to explain why it considers that a reply to its questions is necessary to enable it to give judgment (see Joined Cases 98/85, 162/85 and 258/85 Bertini and Others [1986] ECR 1885, paragraph 6, and Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 19).

38 That case-law may be transposed to orders for preliminary reference provided for by the Protocol (see, to that effect, Case C-220/95 Van den Boogaard [1997] ECR I-1147, paragraph 16; Case C-295/95 Farrell [1997] ECR I-1683, paragraph 11; and Case C-159/97 Castelletti [1999] ECR I-1597, paragraph 14).

39 In that connection it must be observed that in the case in the main proceedings the Austrian courts are seised of a claim for payment of the price of goods supplied. It is not clear from the order for reference how the exact legal nature of the contract on which Gantner bases its claim would be relevant for the purpose of giving judgment.

40 In those circumstances, the Court does not have sufficient information to indicate how an answer to the third question is necessary.

41 That question is therefore inadmissible.

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- Juristische Blätter 2001 p.796-800
- Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht 2001 p.192 (résumé)

PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Wathelet

DATES of document: 08/05/2003
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Judgment of the Court (Fifth Chamber)
of 10 April 2003
Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio. Reference for a preliminary ruling: Landesarbeitsgericht München - Germany. Brussels Convention - Article 5(1) - Court for the place of performance of the contractual obligation - Contract of employment - Place where the employee habitually carries out his work - First contract fixing the place of performance of the work in one Contracting State - Second contract concluded with reference to the first contract and under which the employee carries out his work in another Contracting State - First contract suspended during the performance of the second. Case C-437/00.

Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Court for the place of performance of the contractual obligation - Contract of employment - Place where the employee habitually carries out his work - Determination - Employee having successively concluded two contracts with two different employers, the first contract being suspended during the performance of the second - Dispute between the employee and the first employer - (Brussels Convention of 27 September 1968, Article 5(1), as amended by the Accession Conventions of 1978, 1982 and 1989)

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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as meaning that, in a dispute between an employee and a first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee ' s contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer. The existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case.

When such an interest is lacking on the part of the first employer, Article 5(1) of the Brussels Convention must be interpreted as meaning that the place where the employee carries out his work is the only place of performance of an obligation which can be taken into consideration in order to determine which court has jurisdiction.

see paras 26, 28, 30, operative part 1-2

In Case C-437/00,

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 Landesarbeitsgericht München (Germany) for a preliminary ruling in the proceedings pending before that court between

Giulia Pugliese

and

Finmeccanica SpA, Alenia Aerospazio Division,

on the interpretation of Article 5(1) of the abovementioned 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

THE COURT (Fifth Chamber),

composed of:

D.A.O. Edward acting as President of the Fifth Chamber,

A. La Pergola,

P. Jann (Rapporteur),

S. von Bahr and

A. Rosas, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

Ms Pugliese, by T. Simons, Rechtsanwalt,

the German Government, by R. Wagner, acting as Agent,

the United Kingdom Government, by G. Amodeo, acting as Agent, and A. Robertson, Barrister,

the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Pugliese and the Commission at the hearing on 13 June 2002,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2002,

gives the following

Judgment

Costs

31. The costs incurred by the German and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, for the parties to the main action, 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 (Fifth Chamber),

in answer to the questions referred to it by the Landesarbeitsgericht München by order of 11 February 2000, hereby rules:

1. 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as meaning that, in a dispute between an employee and a first employer,

the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee ' s contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer in a place decided on by the latter. The existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case.

2. Article 5(1) of the Brussels Convention must be interpreted as meaning that, in matters relating to contracts of employment, the place where the employee carries out his work is the only place of performance of an obligation which can be taken into consideration in order to determine which court has jurisdiction.

1. By order of 11 February 2000, received at the Court on 27 November 2000, the Landesarbeitsgericht München (Regional Labour Court, Munich) 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 (OJ 1978 L 304, p. 36) two questions on the interpretation of Article 5(1) of that Convention, 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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), (" the Convention").

2. Those questions have been raised in proceedings between Ms Pugliese, an Italian national domiciled in Rome, and Finmeccanica SpA, a company incorporated under Italian law, and its Alenia Aerospazio division (" Finmeccanica"), established in Rome, concerning the reimbursement of certain expenses and the application of certain disciplinary measures under the contract of employment concluded between the parties.

Legal framework

3. Article 5(1) of the Convention provides:

" 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; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated

" .

Dispute in the main proceedings and the questions referred for preliminary ruling

4. On 5 January 1990 Ms Pugliese and Aeritalia Aerospaziale Italiana SpA (" Aeritalia"), a company incorporated under Italian law, concluded a contract of employment under which Ms Pugliese was engaged from 17 January 1990 to work for Aeritalia at its establishment in Turin (Italy).

5. On 17 January 1990 Ms Pugliese asked Aeritalia to suspend her employment under the " regime di aspettativa" (arrangements for suspension of employment), owing to her transfer to a post with Eurofighter Jagdfluzeug GmbH (" Eurofighter"), a company incorporated under German law established in Munich (Germany), in which Aeritalia held some 21% of the shares.

6. By letter of 18 January 1990 Aeritalia acceded to that request with effect from 1 February 1990. It undertook, inter alia , to pay Ms Pugliese ' s voluntary insurance contributions in

Italy and to credit her on her return to the company with full seniority for the period worked at Eurofighter. Aeritalia also undertook to reimburse certain travel costs and to pay Ms Pugliese a rent allowance or her rental costs during her work with Eurofighter.

7. On 12 and 31 January 1990, Ms Pugliese and Eurofighter concluded a contract of employment under which she was engaged from 1 February 1990. From that date she worked in Munich.

8. In 1990 Aeritalia was acquired by Finmeccanica. In 1995 Finmeccanica informed Ms Pugliese that the suspension of her contract would be terminated on 29 February 1996. Following repeated demands by Ms Pugliese, Finmeccanica agreed to extend her secondment to Eurofighter until 30 June 1998. However, it refused to continue to reimburse her travel and accommodation costs after 1 June 1996.

9. As Ms Pugliese did not comply with Finmeccanica ' s request to report on 1 July 1998 to its premises in Turin to resume her employment, disciplinary measures were applied to her.

10. On 9 February 1998, Ms Pugliese brought an action before the Arbeitsgericht München (Labour Court, Munich) against Finmeccanica for the reimbursement of her rental costs from 1 June 1996 and her travel costs from the second half of 1996. She subsequently amended her claim in order also to contest the disciplinary measures taken against her.

11. By judgment of 19 April 1999 the Arbeitsgericht München dismissed the action on the ground that it lacked jurisdiction.

12. On appeal by Ms Pugliese the Landesarbeitsgericht München, taking the view that the dispute raised an issue of the interpretation of the Convention, decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

" (1) In a dispute between an Italian national and a company established under Italian law having its registered office in Italy arising from a contract of employment concluded between them which designates Turin as the place of work, is Munich the place where the employee habitually carried out his work under the second part of Article 5(1) of the Brussels Convention where, from the outset, the contract of employment is temporarily placed on non-active status at the request of the employee and, during that period, the employee carries out work, with the consent of the Italian employer, but on the basis of a separate contract of employment, for a company established under German law at its registered office in Munich, for the duration of which the Italian employer assumes the obligation to provide accommodation in Munich or to bear the costs of such accommodation and to bear the costs of two journeys home each year from Munich to the employee ' s native country?

(2) If the first question is answered in the negative, may the employee, in a legal dispute with her Italian employer arising from the contract of employment, rely, with reference to the payment of rental costs and travel costs for the two journeys home each year, on the argument that the court having jurisdiction is that for the place of performance of the obligation in question, pursuant to the first part of Article 5(1) of the Brussels Convention?

"

The first question

13. It should be noted at the outset that the case which the national court has to decide concerns an employee who successively concluded two contracts of employment with two different employers, the first employer being fully informed of the conclusion of the second contract and having agreed to the suspension of the first contract. The national court seeks to determine whether, as a German court, it has jurisdiction to resolve a dispute between the employee and the first employer, where the employee has carried out her work for the second employer in Germany, while the contract concluded with the first employer fixed the place of work in Italy.

14. In this context the national court asks, essentially, whether the second part of Article 5(1) of the Convention must be interpreted as meaning that in a dispute between an employee and a first employer, in respect of which the employee ' s obligations are suspended, the place where the employee performs her obligations to the second employer may be regarded as the place where she habitually carries out her work under her contract with the first employer.

15. In order to answer that question it is important, first of all, to consider the Court ' s case-law on the interpretation of Article 5(1) of the Convention when the dispute concerns an individual contract of employment.

16. First, it is clear from that case-law that, with regard to this type of contract, the place of performance of the obligation upon which the claim is based, as referred to in Article 5(1) of the Convention, must be determined by reference to uniform criteria which it is for the Court to lay down on the basis of the scheme and objectives of the Convention (see, inter alia , Case C-125/92 Mulox IBC [1993] ECR I-4075, paragraphs 10, 11 and 16; Case C-383/95 Rutten [1997] ECR I-57, paragraphs 12 and 13; and Case C-37/00 Weber [2002] ECR I-2013, paragraph 38). The Court has stressed that such an autonomous interpretation alone is capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued (Mulox IBC , cited above, paragraph 11; Rutten , cited above, paragraph 13).

17. Second, the Court takes the view that the rule on special jurisdiction in Article 5(1) of the Convention is justified by the existence of a particularly close relationship between a dispute and the court best placed, in order to ensure the proper administration of justice and effective organisation of the proceedings, to take cognisance of the matter, and that the courts for the place in which the employee is to carry out the agreed work are best suited to resolving disputes to which the contract of employment might give rise (see, inter alia , Mulox IBC , paragraph 17; Rutten , paragraph 16; and Weber , cited above, paragraph 39).

18. Third, in matters relating to contracts of employment, the interpretation of Article 5(1) of the Convention must take account of the concern to afford proper protection to the employee as the weaker of the contracting parties from the social point of view. Such protection is best assured if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the employee discharges his obligations towards his employer, as that is the place where it is least expensive for the employee to commence or defend court proceedings (Mulox IBC , paragraphs 18 and 19; Rutten , paragraph 17; and Weber , paragraph 40).

19. From this the Court infers that Article 5(1) of the Convention must be interpreted as meaning that in matters relating to contracts of employment the place of performance of the relevant obligation, for the purposes of that provision, is the place where the employee actually performs the work covered by the contract with his employer (Mulox IBC , paragraph 20; Rutten , paragraph 15; and Weber , paragraph 41). In the case where the employee performs the obligations arising under his contract of employment in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer (Mulox IBC , paragraph 26; Rutten , paragraph 23; and Weber , paragraph 58).

20. The present case differs from those which gave rise to the judgments in Mulox IBC , Rutten and Weber in that, during the period relevant to the dispute in the main proceedings, Ms Pugliese

' s work was undertaken in one place. However, that place is not the place determined by the contract of employment concluded with the defendant employer in the dispute in the main proceedings, but another place determined by a different contract of employment concluded with a separate employer.

21. As is acknowledged in all the observations submitted to the Court, the question whether the place where an employee performs his obligations vis-à-vis an employer can be treated as the place where he habitually carries out his work for purposes of the application of Article 5(1) of the Convention, in a dispute concerning another contract of employment, depends on the extent to which those two contracts are connected.

22. The conditions which that connection must satisfy must be determined with regard to the objectives of Article 5(1) of the Convention, as defined by the case-law cited in paragraphs 16 to 19 of this judgment. If that case-law cannot be fully transposed to the present case, it remains relevant, however, in so far as it emphasises that Article 5(1) of the Convention must be so interpreted to avoid a multiplicity of courts with jurisdiction, enable the defendant to reasonably predict before which courts he may be sued and to ensure adequate protection to the employee as the weaker contracting party.

23. The first two objectives require that, when an employee is connected to two different employers, the first employer can be sued before the courts of the place where the employee carries out his work for the second employer only when, at the time of the conclusion of the second contract of employment, the first employer itself has an interest in the employee ' s performance of the service for the second employer in a place decided on by the latter.

24. The third objective requires that the existence of that interest does not have to be strictly verified according to formal and exclusive criteria, but must be determined in an overall manner taking into consideration all the facts of the case. The relevant factors may include:

the fact that the conclusion of the second contract was envisaged when the first was being concluded,

the fact that the first contract was amended on account of the conclusion of the second contract,

the fact that there is an organisational or economic link between the two employers,

the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts,

the fact that the first employer retains management powers in respect of the employee,

the fact that the first employer is able to decide the duration of the employee ' s work for the second employer.

25. It is for the national court to determine, in the light of those or other relevant factors, whether the circumstances of the case in the main proceedings point to an interest on the first employer ' s part in the performance of the service in Germany by Ms Pugliese under her contract of employment with the second employer.

26. The answer to the first question must therefore be that Article 5(1) of the Convention is to be interpreted as meaning that, in a dispute between an employee and a first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee ' s contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer in a place decided on by the latter. The existence of such an interest must be determined on a comprehensive basis, taking into consideration all the circumstances of the case.

The second question

27. By this question the national court seeks to ascertain whether, if it does not have jurisdiction as the court for the place where the employee habitually carries out his work, it may base its jurisdiction on some other factor. It asks, essentially, whether the first part of Article 5(1) of the Brussels Convention must be interpreted as meaning that, in matters relating to individual contracts of employment, the place of performance of an obligation other than that of carrying out work, such as the employer ' s obligation to pay rental costs in another country and travel costs to the country of origin can be used to found its jurisdiction.

28. That question need be answered only to the extent to which, following an overall assessment of the circumstances of the case in the main proceedings, the national court cannot establish that the first employer has an interest in the performance of the service in Germany by Ms Pugliese under the second contract of employment with Eurofighter.

29. It is clear from the Court ' s case-law cited in paragraph 19 of this judgment that in a dispute which is based on a contract of employment, the only obligation to be taken into account for the application of Article 5(1) of the Convention is the obligation on the employee to carry out the work agreed with his employer.

30. The answer to the second question must therefore be that Article 5(1) of the Convention is to be interpreted as meaning that, in matters relating to contracts of employment, the place where the employee carries out his work is the only place of performance of an obligation which can be taken into consideration in order to determine which court has jurisdiction.

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JURCIT	41968A0927(01)-A05PT1 : N 13 - 30 61992J0125 : N 16 - 20 61995J0383 : N 16 - 20 62000J0037 : N 16 - 20
CONCERNS	Interprets 41968A0927(01) -A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German

OBSERV Federal Republic of Germany ; United Kingdom ; Member States ; Commission ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Landesarbeitsgericht München, Beschluß vom 11/02/2000 (10 Sa 485/00) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 2000 p.247-251 ; - Franzen, Martin: The European Legal Forum 2001 p.295-298 (D, EN) ; - Franzen, Martin: The European Legal Forum 2001 p.296-298 (I) ; - Franzen, Martin: The European Legal Forum 2001 p.295-298 (D, EN) ; - Franzen, Martin: The European Legal Forum 2001 p.296-298 (I)

NOTES Wittwer, Alexander: Zwei Arbeitgeber, zwei Arbeitsverträge - Erfüllungsort Turin oder München, European Law Reporter 2003 p.230-231 ; Michinel Alvarez, Miguel Angel: Sobre la determinacion del lugar de trabajo habitual como foro de competencia en el Convenio de Bruselas de 27 de Septiembre de 1968, La ley - Union Europea 2003 no 5836 p.1-8 ; Simons, Thomas: Foro competente e legge applicabile al contratto nel rapporto di lavoro complesso, The European Legal Forum 2003 p.163-166 (I) ; Simons, Thomas: Jurisdiction and the law applicable to contracts in complex employment relationships, The European Legal Forum 2003 p.164-167 (EN) ; Simons, Thomas: Gerichtsstand und Vertragsstatut im komplexen Anstellungsverhältnis, The European legal forum 2003 p.163-167 (D) ; Moizard, N.: Compétence juridictionnelle en cas de succession de contrats de travail avec plusieurs employeurs, Revue de jurisprudence sociale 2003 p.754-756 ; Zabalo Escudero, Elena: Sucesion de lugares de trabajo y competencia judicial internacional: Nuevos problemas planteados ante el TJCE, Revista de Derecho Comunitario Europeo 2003 p.225-239 ; Vaquero Lopez, Carmen: De nuevo sobre la sentencia Pugliese, Diario La ley 2003 no 5903 p.1-4 ; Rodière, Pierre: Coordination des droits nationaux, loi applicable, compétence juridictionnelle, Revue trimestrielle de droit européen 2003 p.529-552 ; X: Giustizia civile 2003 I p.2669-2670 ; Beghini, Valentina: Luogo di svolgimento abituale dell'attività lavorativa e sospensione del rapporto di lavoro con distacco del lavoratore presso una consociata estera, Rivista italiana di diritto del lavoro 2003 II p.699-705 ; Junker, Abbo: Zeitschrift für Zivilprozeß International 2003 Bd.8 p.491-498 ; Mankowski, Peter: Rumpfarbeitsverhältnis und lokales Arbeitsverhältnis (komplexe Arbeitsverhältnisse) im Internationalen Privat- und Prozessrecht, Recht der internationalen Wirtschaft 2004 p.133-141 ; Marchal Escalona, Nuria: Lugar en el que el trabajador desempeña habitualmente su trabajo: Ayer, hoy y mañana, Diario La ley 2004 no 5986 p.1-16 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 2004 p.632-635 ; Krebber, Sebastian: Gerichtsstand des Erfüllungsortes bei mehreren, aber aufeinander abgestimmten Arbeitsverhältnissen, Praxis des internationalen Privat- und Verfahrensrechts 2004 p.309-315 ; Volken, Paul: Schweizerische Zeitschrift für internationales und europäisches Recht 2004 p.621-622 ; Borzaga, Matteo: "Prestito" trasnazionale di lavoratori fra società collegate e criteri di individuazione del foro competente, Il Corriere giuridico 2005 p.67-71 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2007 no 416

PROCEDU	Reference for a preliminary ruling
ADVGEN	Jacobs
JUDGRAP	Jann
DATES	of document: 10/04/2003 of application: 27/11/2000

Judgment of the Court
of 17 September 2002
Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS).
Reference for a preliminary ruling: Corte suprema di cassazione - Italy.
Brussels Convention - Article 5(1) and (3) - Special jurisdiction - Pre-contractual liability.
Case C-334/00.

In Case C-334/00,

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 Corte suprema di cassazione (Italy) for a preliminary ruling in the proceedings pending before that court between

Fonderie Officine Meccaniche Tacconi SpA

and

Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS),

on the interpretation of Article 5(1) and (3) of the abovementioned 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet, M. Wathelet, R. Schintgen, J.N. Cunha Rodrigues (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Fonderie Officine Meccaniche Tacconi SpA, by F. Franchi, avvocato,

- Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), by M.P. Ginelli, avvocato, and R. Rudek, Rechtsanwalt,

- the Commission of the European Communities, by A.-M. Rouchaud and G. Bisogni, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2002,

gives the following

Judgment

1 By order of 9 June 2000, received at the Court on 11 September 2000, the Corte suprema di cassazione (Court of Cassation) 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 (OJ 1978 L 304, p. 36) three questions on the interpretation of Article 5(1) and (3) of that convention, 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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) (hereinafter `the Brussels Convention').

2 Those questions were raised in proceedings between Fonderie Officine Meccaniche Tacconi SpA (`Tacconi'), a company incorporated under Italian law, established in Perugia (Italy), and Heinrich Wagner Sinto Maschinenfabrik GmbH (`HWS'), a company incorporated under German law, established in the Federal Republic of Germany, concerning compensation claimed from HWS by Tacconi to make good the damage allegedly caused to Tacconi by HWS's breach of its duty to act honestly and in good faith on the occasion of negotiations with a view to the formation of a contract.

Legal background

The Brussels Convention

3 The first paragraph of Article 2 of the Brussels Convention provides:

`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.'

4 Article 5(1) and (3) of the Brussels Convention provides:

`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;...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred'.

National law

5 Article 1337 of the Italian Codice Civile (Civil Code) provides that, in the context of the negotiation and formation of a contract, the parties must act in good faith.

The main proceedings and the questions referred for a preliminary ruling

6 On 23 January 1996 Tacconi brought an action against HWS in the Tribunale di Perugia (District Court, Perugia) for a declaration that a contract between HWS and a leasing company B.N. Commercio e Finanza SpA (`BN') for the sale of a moulding plant, in respect of which BN and Tacconi had already, with the agreement of HWS, concluded a leasing contract, had not been concluded because of HWS's unjustified refusal to carry out the sale, and hence its breach of its duty to act honestly and in good faith. HWS thereby infringed the legitimate expectations of Tacconi, which had relied on the contract of sale being concluded. Tacconi therefore asked the court to order HWS to make good all the damage allegedly caused, which was calculated at ITL 3 000 000 000.

7 In its defence, HWS pleaded that the Italian court lacked jurisdiction because of the existence of an arbitration clause and, in the alternative, because Article 5(1) of the Brussels Convention was applicable. On the substance, it contended that Tacconi's claim should be dismissed and, `strictly in the alternative and as a counterclaim', that Tacconi should be ordered to pay it DEM 450 248.36.

8 By application served on 16 March 1999, Tacconi applied, pursuant to Article 41 of the Italian Codice di Procedura Civile (Code of Civil Procedure) concerning preliminary decisions on jurisdiction, to the Corte suprema di cassazione for a declaration that the Italian courts had jurisdiction over

the main proceedings. Tacconi claimed that no agreement had been reached between it and HWS because its proposals had all been met by counter-proposals. It therefore relied on the pre-contractual liability of HWS on the basis of Article 1337 of the Italian Civil Code and submitted that under Article 5(3) of the Brussels Convention the `place where the harmful event occurred' must also be understood as the place where the person claiming to have been harmed has sustained loss. The loss at issue in the main proceedings was incurred in Perugia, where Tacconi has its office.

9 In its order for reference, the national court considered that the criterion for special jurisdiction in Article 5(1) of the Brussels Convention does not appear to apply to pre-contractual liability, which does not result from the non-performance of a contractual obligation. No such obligation existed in the case at issue in the main proceedings, since no contract was concluded.

10 Since it considered that an interpretation of the Brussels Convention was thus needed in order to decide the issue of jurisdiction, the Corte suprema di cassazione decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

`1. Does an action against a defendant seeking to establish pre-contractual liability fall within the scope of matters relating to tort, delict or quasi-delict (Article 5(3) of the Brussels Convention)?

2. If not, does it fall within the scope of matters relating to a contract (Article 5(1) of the Brussels Convention), and if it does, what is "the obligation in question"?

3. If not, is the general criterion of the domicile of the defendant the only criterion applicable?'

Question 1

11 By its first question the national court asks whether an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Observations submitted to the Court

12 Tacconi and the Commission submit, citing the case-law of the Court (Case 189/87 Kalfelis [1988] ECR 5565, Case C-261/90 Reichert and Kockler [1992] ECR I-2149, and Case C-26/91 Handte [1992] ECR I-3967), that since pre-contractual liability does not derive from obligations freely assumed by one party towards another, it is a matter relating to tort, delict or quasi-delict.

13 According to Tacconi, it is quite plain that at the pre-contractual stage, since the contract has not yet been concluded, there is no contractual link which could bind the parties to each other.

14 The Commission submits that, on the basis of the Court's case-law, it is possible to state a general principle that all claims referred to by the Brussels Convention seeking to establish the liability of a defendant give rise, in any event, to the application of one of the two criteria of special jurisdiction in Article 5(1) and (3) of the convention.

15 The Commission concludes that disputes concerning pre-contractual liability fall within the scope of Article 5(3) of the Brussels Convention, since, first, an action founded on the defendant's pre-contractual liability is by definition a claim seeking to establish liability on the part of the defendant and, second, that liability is not based on obligations freely assumed by the defendant towards the claimant, but on duties as to conduct imposed, more or less specifically, by a source external to the parties involved in the pre-contractual relationship.

16 HWS submits, on the other hand, that pre-contractual liability is of a different nature from liability in tort, delict or quasi-delict. The latter applies to any person who breaches the general rule against causing harm to others and infringes `absolute' rights.

17 Pre-contractual liability, however, may be imputed only to a person who has a special relationship

with the person who has suffered harm, namely that resulting from the negotiation of a contract. Consequently, by contrast with the principles applicable to matters relating to tort, delict or quasi-delict, pre-contractual liability cannot be assessed except by reference to the content of the negotiations.

18 Moreover, submitting that Article 5(1) of the Brussels Convention cannot be applied either in this case, since Tacconi's claim rests on the hypothesis that no contract was concluded, HWS argues that pre-contractual liability is neither liability in tort, delict or quasi-delict nor liability in contract, and that the German courts therefore have jurisdiction to hear the case in accordance with the general provision in Article 2 of the Convention.

Findings of the Court

19 It should be observed at the outset that the Court has consistently held (see Case 34/82 Martin Peters Bauunternehmung [1983] ECR 987, paragraphs 9 and 10, Reichert and Kockler, paragraph 15, and Handte, paragraph 10) that the expressions `matters relating to a contract' and `matters relating to tort, delict or quasi-delict' in Article 5(1) and (3) of the Brussels Convention are to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention. Those expressions cannot therefore be taken as simple references to the national law of one or the other of the Contracting States concerned.

20 Only such an interpretation is capable of ensuring the uniform application of the Brussels Convention, which is intended in particular to lay down common rules on jurisdiction for the courts of the Contracting States and to strengthen the legal protection of persons established in the Community by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued (see Case C-295/95 Farrell [1997] ECR I-1683, paragraph 13, and Case C-256/00 Besix [2002] ECR I-1737, paragraphs 25 and 26).

21 As the Court has held, the concept of `matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Brussels Convention 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) of the Convention (Kalfelis, paragraph 18, Reichert and Kockler, paragraph 16, and Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 22).

22 Moreover, while Article 5(1) of the Brussels Convention does not require a contract to have been concluded, it is nevertheless essential, for that provision to apply, to identify an obligation, since the jurisdiction of the national court is determined, in matters relating to a contract, by the place of performance of the obligation in question.

23 Furthermore, it should be noted that, according to the Court's case-law, the expression `matters relating to contract' within the meaning of Article 5(1) of the Brussels Convention is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another (Handte, paragraph 15, and Réunion Européenne and Others, paragraph 17).

24 It does not appear from the documents in the case that there was any obligation freely assumed by HWS towards Tacconi.

25 In view of the circumstances of the main proceedings, the obligation to make good the damage allegedly caused by the unjustified breaking off of negotiations could derive only from breach of rules of law, in particular the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract.

26 In those circumstances, it is clear that any liability which may follow from the failure to conclude the contract referred to in the main proceedings cannot be contractual.

27 In the light of all the foregoing, the answer to the first question must be that, in circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed

by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention.

Questions 2 and 3

28 As the first question has been answered in the affirmative, there is no need to answer the other questions put by the national court.

Costs

29 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Corte suprema di cassazione by order of 9 June 2000, hereby rules:

In circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.

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CONCERNS	Interprets 41968A0927(01)-A05PT3
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Italian
OBSERV	Commission ; Institutions
NATIONA	Italy
NATCOUR	*A9* Corte di Cassazione, Sezioni unite civili, ordinanza del 09/06/2000 26/07/2000 (93/00) - Giurisprudenza italiana (Recentissime) 2000 p.181-182 (résumé)
NOTES	Buhrow, Astrid: European Law Reporter 2002 p.395 Meyer, Olaf: Revue de droit uniforme 2002 p.1222-1227 Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2003 no 46 Mankowski, Peter: Praxis des internationalen Privat- und Verfahrensrechts 2003 p.127-135 Veenstra, K.J.: Nederlands tijdschrift voor burgerlijk recht 2003 p.138-142 Bertoli, Paolo: Rivista di diritto internazionale privato e processuale 2003 p.109-134
PROCEDU	Reference for a preliminary ruling
ADVGEN	Geelhoed
JUDGRAP	Cunha Rodrigues
DATES	of document: 17/09/2002 of application: 11/09/2000

Judgment of the Court (Fifth Chamber)
of 14 November 2002
Gemeente Steenbergen v Luc Baten.
Reference for a preliminary ruling: Hof van Beroep te Antwerpen - Belgium.
Brussels Convention - Scope - Action under a right of recourse under national legislation providing for payment of allowances by way of social assistance - Concept of 'civil matters' - Concept of 'social security'.
Case C-271/00.

In Case C-271/00,

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 Hof van Beroep te Antwerpen (Belgium), for a preliminary ruling in the proceedings pending before that court between

Gemeente Steenbergen

and

Luc Baten,

on the interpretation of Article 1 of the abovementioned 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) and by 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.W.A. Timmermans, President of the Fourth Chamber, acting as President of the Fifth Chamber, D.A.O. Edward, A. La Pergola, P. Jann (Rapporteur) and S. von Bahr, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Gemeente Steenbergen, by J. Jespers, advocaat,

- Mr Baten, by J. de Meester, avocat,

- the Netherlands Government, by V.J.M. Koningsberger, acting as Agent,

- the Austrian Government, by H. Dossi, acting as Agent,

- the Swedish Government, by A. Kruse, acting as Agent,

- the United Kingdom Government, by J.E. Collins, acting as Agent, with K. Beal, Barrister,

- the Commission of the European Communities, by J.L. Iglesias Buhigues and W. Neirinck, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom Government, represented by J.E. Collins and K. Beal, and the Commission, represented by A.-M. Rouchaud and H.M.H. Speyart, acting as Agents, at the hearing on 15 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2002,

gives the following

Judgment

Costs

50 The costs incurred by the Netherlands, Austrian, Swedish and United Kingdom Governments, which 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 questions referred to it by the Hof van Beroep te Antwerpen by order of 27 June 2000, hereby rules:

1. The first paragraph of Article 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, must be interpreted as meaning that the concept of `civil matters' encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in `civil matters'.

2. Point 3 of the second paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that the concept of `social security' does not encompass the action under a right of recourse by which a public body seeks from a person governed by private law recovery in accordance with the rules of the ordinary law of sums paid by it by way of social assistance to the divorced spouse and the child of that person.

1 By order of 27 June 2000, received at the Court on 5 July 2000, the Hof van Beroep te Antwerpen (Court of Appeal, Antwerp) referred to the Court for a preliminary ruling 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 two questions on the interpretation of Article 1 of the abovementioned 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) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter `the Brussels Convention').

2 Those questions were raised in a legal action under a right of recourse brought by Gemeente Steenbergen, a Netherlands local authority, against Mr Baten, resident in Belgium, in order to recover sums of money paid by that authority, by way of social assistance, to the divorced spouse and the child of Mr Baten.

Legal framework

The Brussels Convention

3 The scope of the Brussels Convention is defined in Article 1 thereof, which provides:

`This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

...

3. social security;

...'

4 Under Article 26 of the Brussels Convention, a judgment given in a Contracting State is to be automatically recognised in the other Contracting States without any special procedure being required.

5 However, Article 27 of the Brussels Convention specifies exhaustively the cases in which recognition is to be refused. It is worded as follows:

`A judgment shall not be recognised:

...;

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

...'

6 Under Article 55 the Brussels Convention supersedes, for the States which are parties to it, certain conventions listed therein. These include `the Convention between Belgium and the Netherlands on jurisdiction, bankruptcy and the validity and enforcement of judgments, arbitration awards and authentic instruments signed in Brussels on 28 March 1925' (hereinafter the Belgium-Netherlands Convention of 1925).

7 Under Article 56 of the Brussels Convention the conventions mentioned in Article 55 thereof are to continue to have effect in relation to matters to which the Brussels Convention does not apply.

Netherlands legislation

8 The Algemene Bijstandswet (Law on general assistance, Staatsblad 1995, No 1999, p. 1, hereinafter the `ABW') establishes a system of social security in favour of persons residing in the Netherlands without resources.

9 General assistance (algemene bijstand) comprises a monthly contribution linked to the statutory minimum wage and intended to enable the recipient to meet the essential costs of subsistence. The assistance is granted by the municipality in which the person concerned is resident.

10 Article 93 of the ABW provides:

`The cost of assistance shall be recovered, up to the limit of the extent of the maintenance obligation under Book I of the Civil Code:

(a) from a person who, living apart from his family, does not, or does not fully, meet his maintenance obligation in respect of his spouse or infant child...;

(b) from persons who do not, or do not fully, meet their maintenance obligations following a divorce...;

(c) ...'

11 Article 94 of the ABW provides:

`An agreement under which spouses or former spouses stipulate that, after their divorce..., they shall in no way be mutually bound by a maintenance obligation or that such obligation shall be limited to a specific amount, shall not preclude recovery... from one of the parties and shall be without prejudice to determination of the amount to be recovered.'

12 Where the person against whom the municipality decides to seek recovery is not prepared to pay voluntarily, the municipality may bring an action under a right of recourse, in accordance with Article 102 et seq. of the ABW. Such action is governed by the rules of civil procedure.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 The marriage between Mr Baten and Mrs Kil was dissolved by a divorce decree granted by consent on 14 May 1987 by a Belgian court. In the agreement prior to the divorce entered into on 25 March 1986 before a notary established in Belgium, the spouses agreed that no maintenance would be payable as between themselves and that Mr Baten would pay BEF 3 000 per month by way of contribution to the maintenance of the infant child of the marriage.

14 Mrs Kil and her child settled in the municipality of Steenbergen (Netherlands), which granted them an allowance by way of social assistance under the ABW.

15 Subsequently, the municipality of Steenbergen sought recovery from Mr Baten under Article 93 et seq. of the ABW of the amounts paid. Since Mr Baten did not accede to that claim, the municipality of Steenbergen brought an action under a right of recourse against him under Article 102 of the ABW before the Arrondissementstrechtbank te Breda (District Court, Breda) (Netherlands).

16 By order of 22 July 1996 the Arrondissementsrechtbank te Breda ordered Mr Baten to pay to the municipality of Steenbergen the amounts granted to Mrs Kil and her child by way of social assistance.

17 By order of 11 February 1998 the President of the Rechtbank van eerste aanleg te Turnhout (Court of First Instance, Turnhout) (Belgium) declared the order of 22 July 1996 enforceable.

18 Mr Baten appealed against that order. By judgments of 17 March and 23 June 1999 the Rechtbank van eerste aanleg te Turnhout declared that appeal well founded and held that enforcement of the order of 22 July 1996 of the Arrondissementsrechtbank te Breda was not possible `owing to the incompatibility of that decision with the divorce decree by consent of 14 May 1987 which by implication includes and confirms the instrument notarised on 25 March 1986'.

19 The municipality of Steenbergen appealed against those two judgments to the Hof van Beroep te Antwerpen. It claimed that, since the dispute concerns a matter of social security it comes not within the scope of the Brussels Convention but within that of the Belgium-Netherlands Convention of 1925.

20 Under those circumstances the Hof van Beroep te Antwerpen decided to stay proceedings and refer the two following questions to the Court for a preliminary ruling:

`1. Is a legal action under a right of recourse under the Netherlands Algemene Bijstandswet (Law on General Assistance) brought by a municipality entitled to seek recovery against a person liable to pay maintenance, as referred to in Article 93 of the Algemene Bijstandswet, a civil matter within the meaning of the first paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and does a judicial decision delivered in such an action come for that reason within the scope of that Convention?

2. Is a legal action under a right of recourse under the Netherlands Algemene Bijstandswet brought by a municipality entitled to seek recovery against a person liable to pay maintenance, as referred to in Article 93 of the Algemene Bijstandswet, a case relating to social security within the meaning of Article 1, second paragraph, point 3, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, and does a judicial decision delivered in such an action for that reason fall outside the scope of that Convention?'

The first question

21 In this question the referring court is, essentially, seeking to ascertain whether the concept of `civil matters' in the first paragraph of Article 1 of the Brussels Convention encompasses an action under a right of recourse under which a public body seeks recovery from a private person of sums paid by it by way of social assistance to the divorced spouse and the child of that person.

Observations submitted to the Court

22 In their observations to the Court the parties to the main proceedings, the Member States and the Commission are at one in acknowledging that the concept of `civil matters' in Article 1 of the Brussels Convention must be defined autonomously. They are also at one in pointing out that disputes between the public authority and an individual may come within the scope of the Brussels Convention provided that the public authority has not acted in the exercise of its public powers.

23 However, the observations are at variance in regard to the application of those principles to the dispute in the main proceedings.

24 The municipality of Steenbergen and the United Kingdom Government maintain that a public authority which brings an action against an individual in order to recover sums paid by it by way of social assistance is acting in the exercise of its public powers.

25 The Commission, too, supported that view during the written procedure, on the basis of the fact that under the ABW the municipality granting social assistance has a broad discretion in determining both the persons entitled to and the amount of assistance, and in deciding whether or not to recover that amount. However, at the hearing it altered its view, basing itself on a different reading of the ABW. On that reading, the municipality is obliged to seek recovery once there is a person under a statutory obligation to pay maintenance, although the action under a right of recourse can be availed of only within the limits of the maintenance obligation not complied with by that person. The municipality is thus exercising a right of a civil-law nature.

26 The Austrian and Swedish Governments likewise contend that the action under a right of recourse in point here is linked to a civil-law right to maintenance, in the present case vested in Mrs Kil and her daughter vis-à-vis Mr Baten. The fact that that right was transferred to a public authority did not alter its character.

27 The Netherlands Government also contends that the action in point in the main proceedings is an action in a civil matter. However, it prefers to regard it as an action for reparation of the loss occasioned to the municipality concerned as a result of the fact that it had to pay an allowance by way of social assistance to a person without resources to whom maintenance was owed.

Findings of the Court

28 It is settled case-law that, since Article 1 of the Brussels Convention serves to indicate the area of application of the Convention, it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. The concept referred to must therefore be regarded as an independent concept to be interpreted by reference, first, to

the objectives and, secondly, to the general principles which stem from the national legal systems as a whole (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; and Case C-172/91 Sonntag [1993] ECR I-1963, paragraph 18).

29 The Court has made it clear that that interpretation results in the exclusion of certain judicial decisions from the scope of the Brussels Convention, owing either to the legal relationships between the parties to the action or to its subject-matter (LTU, cited above, paragraph 4).

30 Thus the Court has held that, although certain judgments in actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (LTU, cited above, paragraph 4, and Rüffer, paragraph 8).

31 In order to determine whether that is so in a case such as that in point in the main proceedings, in which a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the former spouse and the child of that person, it is necessary to examine the basis and the detailed rules governing the bringing of that action.

32 In that regard, it appears from Article 93 of the ABW that the costs of social assistance are recoverable up to the limit of the maintenance obligation under Book I of the Netherlands Civil Code. Thus it is the rules of the civil law which determine the cases in which the public body may bring an action under a right of recourse, namely where there is a person under a statutory obligation to pay maintenance. It is on the basis of those same rules that the person against whom the public body may proceed, namely the person under a statutory obligation to pay maintenance, is identified, and that the limits to the amounts recoverable by that body are determined, those limits being coterminous with those of the statutory maintenance obligation itself.

33 As regards the detailed rules governing the bringing of an action under a right of recourse, Article 103 of the ABW states that that action must be brought before the civil courts and is that it governed by the rules of civil procedure.

34 Accordingly, as the Advocate General stated at paragraph 36 of his Opinion, the legal situation of the public body vis-à-vis the person liable for maintenance is comparable to that of an individual who, having paid on whatever ground another's debt, is subrogated to the rights of the original creditor, or is comparable to the situation of a person who, having suffered loss as a result of an act or omission imputable to a third party, seeks reparation from that party.

35 However, that finding calls for some qualification by reason of Article 94 of the ABW under which an agreement between spouses or former spouses for the purpose of precluding or limiting their maintenance obligations after their divorce does not preclude recovery from one of the parties and is without prejudice to determination of the amounts to be recovered.

36 To the extent to which that provision allows the public body, in a proper case, to disregard an agreement lawfully entered into between spouses or former spouses, producing binding effects between them and enforceable against third parties, it places the public body in a legal situation which derogates from the ordinary law. That is all the more so inasmuch as that provision allows the public body to disregard an agreement approved by a judicial decision and covered by the force of res judicata attaching to that decision. In those circumstances, the public body is no longer acting under rules of the civil law but under a prerogative of its own, specifically conferred on it by the legislature.

37 In light of the foregoing considerations, the reply to the first question must be that the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that the concept

of `civil matters' encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in `civil matters'.

Second question

38 In this question the referring court is, essentially, seeking to ascertain whether the concept of `social security' at point 3 of the second paragraph of Article 1 of the Brussels Convention encompasses an action under a right of recourse by which a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person.

Observations submitted to the Court

39 The Netherlands, Austrian and United Kingdom Governments, and the Commission, note that the Brussels Convention does not define the concept of `social security' and refer in that regard to Article 4 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1, hereinafter `Regulation No 1408/71').

40 Those governments maintain, none the less, as does the Commission, that the exclusion of social-security disputes from the scope of the Brussels Convention must be strictly construed. It concerns only disputes between the institutions and recipients of benefits and does not extend to actions brought by an institution against a third party.

Findings of the Court

41 As a preliminary point, it should be observed that a reply to this question is called for only if the public body is acting in accordance with the rules of the ordinary law and where the decision in the action under a right of recourse brought by it may be regarded as a decision in `civil matters' under the first paragraph of Article 1 of the Brussels Convention.

42 Inasmuch as the concept of `social security' serves to indicate the area of application of the Brussels Convention, it must, as the Court has stated at paragraph 28 above, be regarded as an independent concept, to be interpreted by reference to the objectives and scheme of the Brussels Convention.

43 In view of the link between the Brussels Convention and Community law (see Case C-398/92 Mund Fester [1994] ECR I-467, paragraph 12, and Case C-7/98 Krombach [2000] ECR I-1935, paragraph 24), regard must be had to the substance of that concept in Community law.

44 By adopting Regulation No 1408/71 on the basis of Article 51 of the EEC Treaty (subsequently Article 51 of the EC Treaty, and now, after amendment, Article 42 EC), the Community legislature laid down rules coordinating national legislation on social security. As the Advocate General noted at paragraphs 46 and 47 of his Opinion, those rules establish a system under which as a matter of principle the exclusive legislative competence of a Member State is matched by the competence of the administrative and judicial authorities of the same State. It follows that legal situations are effectively protected by the designation of a national system competent in its entirety and do not require recognition of judgments relating to that area.

45 It must therefore be held that the substance of the concept of `social security' in the second

paragraph of Article 1 of the Brussels Convention encompasses the matters covered by Regulation No 1408/71, as defined in Article 4 thereof and clarified in the Court's case-law.

46 However, irrespective of how, in the light of Article 4 of Regulation No 1408/71, benefits paid by way of social assistance by a public body to persons without resources are to be characterised, the action under a right of recourse brought by that body against a third party, a person governed by private law, as the subject of an obligation to pay maintenance to the persons assisted, is not concerned with the conditions under which the benefits in question are granted but with recovery of the sums paid in that regard.

47 It follows that, in any event, the subject-matter of the dispute does not concern the application of Regulation No 1408/71.

48 That interpretation is borne out by both the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, pp. 1, 12 and 13) and the Schlosser Report on the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, p. 71, paragraph 60). According to those reports the exclusion of social security from the scope of the Brussels Convention concerns only litigation in that area, that is to say disputes arising out of the relationship between the administration and employers or employees. Those reports add that the Brussels Convention is applicable where the administration exercises a direct right of action against a third party liable for injury or is subrogated as regards that third party to the rights of a victim insured by it, because it is then acting under the rules of the ordinary law.

49 In the light of the foregoing considerations, the reply to the question submitted must be that point 3 of the second paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that the concept of `social security' does not encompass the action under a right of recourse by which a public body seeks from a person governed by private law recovery in accordance with the rules of the ordinary law of sums paid by it by way of social assistance to the divorced spouse and the child of that person.

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PROCEDU Reference for a preliminary ruling

ADVGEN Tizzano

JUDGRAP Jann

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Judgment of the Court
of 19 February 2002
Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH KG (Plafog).
Reference for a preliminary ruling: Cour d'appel de Bruxelles - Belgium.
Brussels Convention - Article 5(1) - Jurisdiction in matters relating to a contract - Place of performance of the obligation in question - Obligation not to do something, applicable without geographical limit - Undertakings given by two companies not to bind themselves to other partners when tendering for a public contract - Application of Article 2.
Case C-256/00.

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),

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

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.

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.

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PROCEDU Reference for a preliminary ruling

ADVGEN Alber

JUDGRAP Schintgen

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Judgment of the Court (Sixth Chamber)
of 1 October 2002
Verein für Konsumenteninformation v Karl Heinz Henkel. Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Brussels Convention - Article 5(3) - Jurisdiction in matters relating to tort, delict or quasidelict - Preventive action by associations - Consumer protection organisation seeking an injunction to prevent a trader from using unfair terms in consumer contracts. Case C-167/00.

In Case C-167/00,

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 Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Verein für Konsumenteninformation

and

Karl Heinz Henkel,

on the interpretation of Article 5(3) of the abovementioned 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), 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),

THE COURT

(Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,

Registrar: M.-F. Contet, Administrator,

after considering the written observations submitted on behalf of:

- the Verein für Konsumenteninformation, by H. Kosesnik-Wehrle, Rechtsanwalt,

- Mr Henkel, by L.J. Kempf and J. Maier, Rechtsanwälte,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the German Government, by R. Wagner, acting as Agent,

- the French Government, by R. Abraham and R. Loosli-Surrans, acting as Agents,

- the United Kingdom Government, by G. Amodeo, acting as Agent, and A. Robertson, barrister,

- the Commission of the European Communities, by J.L. Iglesias Buhigues and C. Ladenburger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Verein für Konsumenteninformation, represented by S. Langer, Rechtsanwalt; of the French Government, represented by R. Loosli-Surrans; of the United Kingdom Government, represented by A. Robertson, and of the Commission, represented by C. Ladenburger,

at the hearing on 11 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2002,

gives the following

Judgment

Costs

51 The costs incurred by the Austrian, German, French and United Kingdom 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the question referred to it by the Oberster Gerichtshof by order of 13 April 2000, hereby rules:

The rules on jurisdiction laid down in 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic 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, must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

1 By order of 13 April 2000, received at the Court on 8 May 2000, the Oberster Gerichtshof (Supreme Court, Austria) 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(3) 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, and - amended version - 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 ïf 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) (`the Brussels Convention').

2 That question was raised in proceedings between the Verein für Konsumenteninformation (`the VKI'), an association constituted under Austrian law, established in Austria, and Mr Henkel, a German national domiciled in Germany, concerning Mr Henkel's use in contracts concluded with Austrian consumers of terms which the VKI considered to be unfair.

Legal background

The Brussels Convention

3 The first paragraph of Article 1 of the Brussels Convention, which comprises Title I, entitled `Scope', states:

`This convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

4 The rules on jurisdiction laid down by the Brussels Convention are set out in Title II thereof, which consists of Articles 2 to 24.

5 The first paragraph of Article 2, which forms part of Section 1, entitled `General provisions', of Title II of the Brussels Convention, sets out the basic rule in the following terms:

`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.'

6 The first paragraph of Article 3 of the Brussels Convention, which appears in the same section, provides as follows:

`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.'

7 Articles 5 to 18 of the Brussels Convention, which make up Sections 2 to 6 of Title II thereof, lay down rules governing special, mandatory or exclusive jurisdiction.

8 Under Article 5, which appears in 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...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...'.

Directive 93/13/EEC

9 Article 7(1) and (2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) provides:

`1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'

The relevant provisions of national law

10 In Austria, the Konsumentenschutzgesetz (Consumer Protection Law) of 8 March 1979 (BGBl. 1979/140; `the KSchG') came into force on 1 October 1979.

11 The KSchG has been amended on several occasions, inter alia by a law transposing Directive

93/13 (BGBl. 1997/6).

12 Paragraph 28 of the KSchG, as amended, provides, with effect from 1 January 1997:

`(1) An injunction may be sought against anyone who in commercial dealings lays down, in general terms and conditions which he uses as a basis for contracts concluded by him or in forms used for contracts in that connection, conditions which are contrary to a statutory prohibition or are unconscionable, and against anyone who recommends such conditions for commercial dealings. This prohibition shall also include the prohibition on relying on such a condition in so far as it has been agreed to in an impermissible manner.

(2) There ceases to be any danger of the use and recommendation of such conditions where a trader gives, within a reasonable period, a declaration of discontinuance secured by an appropriate contractual penalty (Paragraph 1336 of the Allgemeines Bürgerliches Gesetzbuch) following a warning by a body entitled to bring an action under Paragraph 29.'

13 The VKI is one of the bodies referred to in Paragraph 29 of the KSchG which are entitled to bring such an action.

The main proceedings and the question referred for a preliminary ruling

14 It is clear from the documents relating to the case in the main proceedings that the VKI is a non-profit-making organisation whose object is the protection of consumers and their interests.

15 Mr Henkel is a trader, domiciled in Munich (Germany), who organises sales-promotion trips, inter alia in Austria.

16 In the context of his contractual dealings with consumers domiciled in Vienna (Austria), Mr Henkel used general terms and conditions that the VKI considers to be contrary to certain provisions of Austrian legislation.

17 As an association, the VKI brought an action pursuant to Paragraph 28 of the KSchG before the Handelsgericht Wien (Commercial Court, Vienna), seeking an injunction against Mr Henkel to prevent him from using the contested terms in contracts concluded with Austrian clients.

18 Mr Henkel claimed that the Austrian courts had no jurisdiction. In his submission, the action brought by the VKI cannot be regarded as relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention on the ground that there has been neither harmful behaviour nor damage suffered within the territorial jurisdiction of the court seized.

19 The Handelsgericht Wien found that the VKI was not pleading any damage arising out of a tort or delict and hence declared that it had no jurisdiction.

20 That decision was overturned on appeal by the Oberlandesgericht Wien (Higher Regional Court, Vienna) which considered that Article 5(3) of the Brussels Convention also covers preventive actions brought by an association such as the VKI without requiring it to have personally sustained any damage.

21 An appeal on a point of law was brought before the Oberster Gerichtshof which is uncertain whether the action at issue in the main proceedings falls within the scope of Article 5(3) of the Brussels Convention or whether it is a matter relating to a contract within the meaning of Article 5(1) of that convention.

22 According to that court it is not obvious that that action is a matter relating to tort or delict. The VKI does not plead any damage to its property. While it is true that its right to bring an action stems not from a contract, but from statute, and serves to avert future damage to consumers, such damage is none the less contractual in origin. The application of Article 5(1) of the Brussels

Convention is therefore conceivable. However, it is also possible to consider that the unlawful act consists of the undermining of legal stability by a trader's use of unfair terms.

23 Moreover, the question arises whether a preventive action, which is by its very nature brought before any damage occurs, is capable of coming within the scope of Article 5(3) of the Brussels Convention, given that that provision, which refers to the place where the harmful event occurred, appears to presuppose the existence of damage.

24 The Oberster Gerichtshof took the view that, in those circumstances, the outcome of the case before it required an interpretation of the Brussels Convention and it therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

`Does the right to obtain an injunction to prohibit the use of unlawful or unconscionable general terms and conditions provided for in Paragraph 28 of the [KSchG], which is asserted by a consumer protection organisation pursuant to Paragraph 29 of the KSchG and in accordance with Article 7(2) of... Directive 93/13/EEC..., constitute a claim arising out of matters relating to tort, delict or quasi-delict which may be asserted in courts with the special jurisdiction provided for in Article 5(3) of the Brussels Convention ... ?'

The national court's question

25 The first point to be noted is that the United Kingdom Government submits that an action such as that brought by the VKI does not fall within the scope of the Brussels Convention. Pursuant to the first paragraph of Article 1 thereof, that convention applies only `in civil and commercial matters', whereas a consumer protection organisation such as the VKI must be regarded as a public authority and its right to obtain an injunction to prevent the use of unfair terms in contracts, which is exercised in the main proceedings, constitutes a public law power. An organisation of that kind takes on the task, in the public interest, of ensuring the protection of the entire class of consumers, and its right to bring proceedings to obtain an injunction preventing unlawful behaviour by traders stems from statute, independent of any private law relationship arising out of a contract between a professional and a private individual.

26 However, it is settled case-law that actions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention only in so far as that authority is acting in the exercise of public powers (see, to that effect, Case 29/76 LTU v Eurocontrol [1976] ECR 1541, paragraph 4; Case 814/79 Rüffer [1980] ECR 3807, paragraph 8, and Case C-172/91 Sonntag [1993] ECR I-1963, paragraph 20).

27 That is the case in a dispute which concerns the recovery of charges payable by a person governed by private law to a national or international body governed by pubic law for the use of equipment and services provided by that body, in particular where such use is obligatory and exclusive (see LTU, cited above, paragraph 4).

28 Similarly, the Court has held that the concept of `civil and commercial matters' within the meaning of the first paragraph of Article 1 of the Brussels Convention does not include actions brought by the State responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal of a wreck carried out by or at the instigation of that administering agent in the exercise of its public authority (Rüffer, cited above, paragraphs 9 and 16).

29 Although it thus follows from the case-law of the Court that certain types of dispute must be regarded as excluded from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action (see LTU, paragraph 4), the case-law arising from LTU and Rüffer cannot be applied to an action such as that at issue

in the main proceedings.

30 Not only is a consumer protection organisation such as the VKI a private body, but in addition, as the German Government correctly observed, the subject-matter of the main proceedings is not an exercise of public powers, since those proceedings do not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals. On the contrary, the action pending before the national court concerns the prohibition on traders' using unfair terms in their contracts with consumers and thus seeks to make relationships governed by private law subject to review by the courts. Hence, an action of that kind is a civil matter within the meaning of the first paragraph of Article 1 of the Brussels Convention.

31 In those circumstances, the objection raised by the United Kingdom Government cannot be accepted.

32 As to the question referred by the national court, it should be noted at the outset that Articles 13 to 15, which comprise Section 4, entitled `Jurisdiction over consumer contracts', of Title II of the Brussels Convention, are not applicable in the main proceedings.

33 As the Court held in Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers.

34 It follows that, in order to answer the question referred by the national court, it need only be determined whether a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention, or in fact a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

35 In that regard, the Court has repeatedly held that the concepts of `matters relating to a contract' and `matters relating to tort, delict or quasi-delict' in paragraphs 1 and 3 respectively of Article 5 of the Brussels Convention are to be interpreted independently, having regard primarily to the objectives and general scheme of that convention, in order to ensure that it is both given full effect and applied uniformly in all the Contracting States (see, in particular, Case 34/82 Peters [1983] ECR 987, paragraphs 9 and 10; Case 189/87 Kalfelis [1988] ECR 5565, paragraphs 15 and 16, and Case C-261/90 Reichert and Kockler [1992] ECR I-2149, paragraph 15).

36 It is also settled case-law that the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention covers all actions which seek to establish the liability of a defendant and are not matters relating to a contract within the meaning of Article 5(1) of that convention (see, in particular, Kalfelis, cited above, paragraph 17; Reichert and Kockler, cited above, paragraph 16; Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 22, and Case C-96/00 Gabriel [2002] ECR I-0000, paragraph 33).

37 It is therefore necessary in the first instance to examine whether an action such as that at issue in the main proceedings is contractual in nature.

38 In a situation such as that in the main proceedings, the consumer protection organisation and the trader are in no way linked by any contractual relationship.

39 Admittedly, it is likely that the trader has already entered into contracts with a number of consumers. However, whether the court action is subsequent to a contract already concluded between the trader and a consumer or that action is purely preventive in nature and its sole aim is to prevent

the occurrence of future damage, the consumer protection organisation which brought that action is never itself a party to the contract. The legal basis for its action is a right conferred by statute for the purpose of preventing the use of terms which the legislature considers to be unlawful in dealings between a professional and a private final consumer.

40 In those circumstances, an action such as that brought in the main proceedings cannot be regarded as a matter relating to a contract within the meaning of Article 5(1) of the Brussels Convention.

41 By contrast, such an action meets all the criteria established by the Court in the case-law referred to in paragraph 36 of this judgment inasmuch as, first, it does not concern matters relating to a contract within the meaning of Article 5(1) of the Brussels Convention and, second, it seeks to establish the liability of the defendant in tort, delict or quasi-delict, in the present case in respect of the trader's non-contractual obligation to refrain in his dealings with consumers from certain behaviour deemed unacceptable by the legislature.

42 The concept of `harmful event' within the meaning of Article 5(3) of the Brussels Convention is broad in scope (Case 21/76 Bier (`Mines de Potasse d'Alsace') [1976] ECR 1735, paragraph 18) so that, with regard to consumer protection, it covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which it is the task of associations such as the VKI to prevent.

43 Furthermore, that is the only interpretation consistent with the purpose of Article 7 of Directive 93/13. Accordingly, the efficacy of the actions under that provision to prevent the continued use of unlawful terms would be considerably diminished if those actions could be brought only in the State where the trader is domiciled.

44 Mr Henkel and the French Government have, however, submitted that Article 5(3) of the Brussels Convention refers to the place where the harmful event occurred and therefore presupposes, according to its actual terms, the existence of damage. They argue that the same conclusion is dictated by the Court's interpretation of that provision, according to which the expression `place where the harmful event occurred' must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to that damage, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places (see, in particular, Mines de Potasse d'Alsace, cited above, paragraphs 24 and 25; Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraph 10; Case C-68/93 Shevill and Others [1995] ECR I-415, paragraph 20, and Case C-364/93 Marinari [1995] ECR I-2719, paragraph 11). In their submission, it follows that Article 5(3) of the Brussels Convention cannot be applied to purely preventive actions which are brought before any actual damage has occurred and are intended to prevent the occurrence of a future harmful event.

45 That objection is not however well founded.

46 The rule of special jurisdiction laid down in Article 5(3) of the Brussels Convention is based on the existence of a particularly close connecting factor between a dispute and the courts for the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (see to that effect, inter alia, Mines de Potasse d'Alsace, paragraphs 11 and 17; Dumez France and Tracoba, paragraph 17; Shevill and Others, paragraph 19, and Marinari, paragraph 10). The courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence. Those considerations are equally relevant whether the dispute concerns compensation for damage which has already occurred or relates to an action seeking to prevent the occurrence of damage.

47 That interpretation is moreover supported by the Report by Professor Schlosser on the Convention

on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, pp. 71, 111), which states that Article 5(3) of the Brussels Convention also covers actions whose aim is to prevent the imminent commission of a tort (or delict).

48 It is therefore not possible to accept an interpretation of Article 5(3) of the Brussels Convention according to which application of that provision is conditional on the actual occurrence of damage. Furthermore, it would be inconsistent to require that an action to prevent behaviour considered to be unlawful, such as that brought in the main proceedings, whose principal aim is precisely to prevent damage, may be brought only after that damage has occurred.

49 Finally, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), while not applicable ratione temporis to the main proceedings, is such as to confirm the interpretation that Article 5(3) of the Brussels Convention does not presuppose the existence of damage. That regulation clarified the wording of Article 5(3) of the Brussels Convention that the new version of that provision resulting from that regulation refers to `the place where the harmful event occurred or may occur'. In the absence of any reason for interpreting the two provisions in question differently, consistency requires that Article 5(3) of the Brussels Convention be given a scope identical to that of the equivalent provision of Regulation No 44/2001. This is all the more necessary given that that regulation is intended to replace the Brussels Convention in relations between Member States with the exception of the Kingdom of Denmark, with that convention continuing to apply between the Kingdom of Denmark and the Member States bound by that regulation.

50 In the light of all the foregoing considerations, the answer to the question referred by the national court must be that the rules on jurisdiction laid down in the Brussels Convention must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention.

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Schintgen

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Judgment of the Court (Sixth Chamber)
of 11 July 2002
Rudolf Gabriel. Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Brussels Convention - Request for interpretation of Articles 5(1) and (3) and 13, first paragraph, point 3 - Entitlement of a consumer to whom misleading advertising has been sent to seek payment, in judicial proceedings, of the prize which he has apparently won - Classification - Action of a contractual nature covered by Article 13, first paragraph, point 3 - Conditions. Case C-96/00.

In Case C-96/00,

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 Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings brought before that court by

Rudolf Gabriel,

"on the interpretation of Articles 5(1) and (3) and 13, first paragraph, point 3, of the abovementioned 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 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),

THE COURT

(Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann, R. Schintgen (Rapporteur), V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Gabriel, by A. Klauser, Rechtsanwalt,

- the Austrian Government, by H. Dossi, acting as Agent,

- the German Government, by R. Wagner, acting as Agent,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, acting as Agent, assisted by B. Wägenbaur, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Gabriel, represented by A. Klauser, and the Commission, represented by A.-M. Rouchaud, acting as Agent, assisted by B. Wägenbaur, at the hearing on 11 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2001,

gives the following

Judgment

Costs

61 The costs incurred by the Austrian and German Governments and by the Commission, which have submitted observations to the Court, are not recoverable. As 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

(Sixth Chamber),

in answer to the question referred to it by the Oberster Gerichtshof by order of 15 February 2000, hereby rules:

The jurisdiction rules set out in 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, 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, are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Article 13, first paragraph, point 3, of that Convention.

1 By order of 15 February 2000, received at the Court on 13 March 2000, the Oberster Gerichtshof (Supreme Court, Austria) referred to the Court for a preliminary ruling, 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, a question on the interpretation of Articles 5(1) and (3) and 13, first paragraph, point 3, 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 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) (`the Brussels Convention').

2 That question has arisen in proceedings brought before the Oberster Gerichtshof by Mr Gabriel, an Austrian national domiciled in Vienna, for the purpose of determining the court having jurisdiction ratione loci to give judgment in the action which he proposes to bring in his State of domicile against a mail-order company established in Germany.

The legal framework

The Brussels Convention

3 The rules on jurisdiction laid down by the Brussels Convention are set out in Title II thereof,

which consists of Articles 2 to 24.

4 The first paragraph of Article 2 of the Brussels Convention, which forms part of Section 1, entitled `General provisions', of Title II, sets out the basic rule in the following terms:

`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 features 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 Articles 5 to 18 of the Brussels Convention, which make up Sections 2 to 6 of Title II thereof, lay down rules governing special, mandatory or exclusive jurisdiction.

7 Thus, under Article 5, which appears in 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;...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...'.

8 Also under Title II of the Brussels Convention, Articles 13 and 14 form part of Section 4, entitled `Jurisdiction over consumer contracts'.

9 Article 13 of the Brussels Convention is worded as follows:

`In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.'

10 The first paragraph of Article 14 of the Brussels Convention provides:

`A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.'

11 That rule of jurisdiction may be departed from only if there is compliance with the conditions laid down in Article 15 of the Brussels Convention, which also features in Section 4 of Title II thereof.

The relevant provisions of national law

12 Under Paragraph 28.1.1 of the Austrian Law of 1 August 1895 on the exercise of jurisdiction and the competence of the ordinary courts in civil matters (Jurisdiktionsnorm (Law on Jurisdiction), RGBl. 111), the Oberster Gerichtshof must, when so requested by a party, designate, from among the courts having jurisdiction ratione materiae to deal with a civil matter, the court which will be territorially competent where the Austrian court having local jurisdiction is not designated by the rules laid down in that Law or by any other legal provision, but jurisdiction must none the less be exercised pursuant to an international convention.

13 It is common ground that the Brussels Convention is an international convention within the meaning of that provision.

14 Paragraph 5j of the Austrian Consumer Protection Law (BGBl. I, 1979, p. 140) reads:

`Undertakings which send prize notifications or other similar communications to specific consumers, and by the wording of those communications give the impression that a consumer has won a particular prize, must give that prize to the consumer; it may also be claimed in legal proceedings.'

15 That provision was added to the Consumer Protection Law by Paragraph 4 of the Austrian Law on Distance Contracts (BGBl. I, 1999, p. 185) when Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19) was transposed into Austrian law.

16 That provision entered into force on 1 October 1999.

17 In its order for reference, the Oberster Gerichtshof points out that the purpose of Paragraph 5j is to grant consumers who have been misled by reason of the fact that a professional contacted them personally, creating within them the impression that they had won a prize, whereas the true nature of the transaction is explained only in small print or in an inconspicuous place in the correspondence and in terms difficult to understand, a right to bring legal proceedings to seek enforcement of such a `promise of financial benefit'.

The case in the main proceedings and the question submitted for preliminary ruling

18 According to the documents relating to the case in the main proceedings, Schlank & Schick GmbH (`Schlank & Schick'), a company established under German law and having its registered office in Lindau (Germany), sells goods by mail order in, inter alia, Germany, Austria, France, Belgium and Switzerland.

19 In October 1999 Mr Gabriel received at his private address and in a sealed envelope several personalised letters from Schlank & Schick which he claims were of such a kind as to lead him to believe that, following a draw, he was the lucky winner of ATS 49 700 and that he was entitled to receive that amount simply on demand, subject only to the condition that he ordered at the same time from that company goods to a minimum value of ATS 200, to be selected in a catalogue and entered on an order form attached to those letters.

20 Those letters stated inter alia as follows: `Dear Mr Rudolf Gabriel, you have not yet claimed your cash credit.... Do you really want to forfeit your money?... You are still entitled to your

cash credit, but now you really must act quickly. The attached letter from European Credit explains everything in greater detail... PS. By way of proof for you, Mr Gabriel, I have attached the payment receipt. You are entitled to 100% of your cash credit on condition that you also order goods without incurring any obligation.'

21 A letter annexed to that mail, headed `European Credit' and entitled `Official confirmation of payment', to which were annexed the copy of a `receipt' and the facsimile of a `savings book', both of which bore Mr Gabriel's name and the amount of ATS 49 700, was worded as follows: `Dear Mr Rudolf Gabriel, we hereby confirm to you once again the payment to our account of the cash credit amount totalling ATS 49 700. We have attached specially for you a copy of a receipt. In order to seize your opportunity and speed up payment of the sum of ATS 49 700, all you have to do is return the copy of the receipt together with your test order, which does not involve any obligation ... There is now nothing further to prevent payment. In order that you can receive your money as quickly as possible, I shall simply send you a cheque after the receipt has been received. You will then be able to encash it as you please at the financial institution of your choice.'

22 It appears, however, from various statements printed in relatively small characters and featuring in part on the reverse side of the documents sent to Mr Gabriel that the sum of ATS 49 700 did not constitute a firm promise on the part of Schlank & Schick to pay the prize.

23 Thus, on the reverse of the letter from `European Credit', it was stated inter alia, under the heading `Award Conditions', that participation in the `winning game', governed by German law, was subject to the placing of a `test order, which does not involve any obligation', that the expiry date for this `action' was 30 November 1999 and that all judicial proceedings were excluded. Reference was also made to the fact that the draw had been made by the mail-order company, that the cash prizes were divided into `different lots' being the subject of several payments split up according to the number of copies of receipts returned to the organiser with the properly filled-out order form, and that, on grounds of cost, the `credits' having a value lower than ATS 35 would not result in any payment but would be placed in the jackpot for a later draw.

24 Mr Gabriel duly filled out and returned to Schlank & Schick the relevant documents to claim payment of the financial benefit promised and placed an order for goods in that company's catalogue for an amount in excess of ATS 200.

25 Schlank & Schick subsequently delivered to him the goods which he had ordered but did not send him the sum of ATS 49 700 which he claimed to have won.

26 Mr Gabriel accordingly decided to institute legal proceedings for an order requiring Schlank & Schick to pay him that amount, together with interest and legal costs, pursuant to Paragraph 5j of the Austrian Consumer Protection Law.

27 As he wished to bring that action in Austria - the State in which he is domiciled - pursuant to the first paragraph of Article 14 of the Brussels Convention, but as he considered that Austrian law does not contain any provision determining the national court having territorial jurisdiction to hear and determine the case, Mr Gabriel, before lodging the application containing his substantive claim, referred the matter to the Oberster Gerichtshof in order that it might designate that court pursuant to Paragraph 28.1.1 of the Austrian Law of 1 August 1895.

28 The Oberster Gerichtshof takes the view that, while the action which Mr Gabriel proposes to bring appears to be covered by Paragraph 5j of the Austrian Consumer Protection Law, the question whether his application for designation of the national court having territorial jurisdiction should be granted depends on the nature of the action which Mr Gabriel intends to bring against Schlank & Schick.

29 If that action relates to a contract concluded by a consumer within the meaning of Article 13, first paragraph, point 3, of the Brussels Convention, such a designation will be indispensable because that Convention allows a consumer only to bring the dispute before the courts of the Contracting State in which he is domiciled but does not determine directly which court of that State has jurisdiction to give judgment in that regard.

30 In contrast, the application pending before the Oberster Gerichtshof would serve no purpose if Mr Gabriel's right of action were contractual in nature, within the meaning of Article 5(1) of the Brussels Convention, or relating to tort, delict or quasi-delict within the meaning of Article 5(3) thereof, on the ground that those provisions specifically designate the courts having territorial jurisdiction, that is to say, respectively, the courts for the place of performance of the contractual obligation in question or those for the place where the harmful event occurred.

31 As it formed the view that, in those circumstances, the reply to the request which Mr Gabriel had made to it depended on the interpretation of the Brussels Convention, the Oberster Gerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

`For the purposes of the Brussels Convention..., does the provision in Paragraph 5j of the Austrian Consumer Protection Law..., in the version of Art I, para. 2, of the Austrian Law on Distance Contracts ..., which entitles certain consumers to claim from undertakings in the courts prizes ostensibly won by them where the undertakings send (or have sent) them prize notifications or other similar communications worded so as to give the impression that they have won a particular prize, constitute:

(1) a contractual claim under Article 13(3); or

(2) a contractual claim under Article 5(1); or

(3) a claim in respect of a tort, delict or quasi-delict under Article 5(3)?'

The question submitted for preliminary ruling

32 Having regard to the factual background to the case in the main proceedings, the question posed must be construed as asking essentially whether the jurisdiction rules set out in the Brussels Convention are to be interpreted as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Articles 5(1) or 13, first paragraph, point 3, of the Brussels Convention, or relating to tort, delict or quasi-delict within the meaning of Article 5(3) thereof.

33 In order to reply to the question as thus reformulated, it should be noted at the outset that, according to settled case-law, the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention 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) of that Convention (see, inter alia, Case 189/87 Kalfelis [1988] ECR 5565, paragraph 17; Case C-261/90 Reichert and Kockler [1992] ECR I-2149, paragraph 16; and Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 22).

34 It is thus necessary in the first instance to examine whether an action such as that in point in the main proceedings is contractual in nature.

35 In that connection, it must be observed that Article 5(1) of the Brussels Convention relates to contractual matters in general, whereas Article 13 thereof specifically covers various types of contracts concluded by consumers.

36 As Article 13 of the Brussels Convention thus constitutes a lex specialis in relation to Article 5(1) thereof, it is first of all necessary to determine whether an action having the characteristics set out in the question referred for a preliminary ruling, as reformulated, can fall within the scope of the former of those two provisions.

37 According to settled case-law, the concepts used in Article 13 of the Brussels Convention must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that it is fully effective (see, in particular, Case 150/77 Bertrand [1978] ECR 1431, paragraphs 14, 15 and 16; Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 13; Case C-269/95 Benincasa [1997] ECR I-3767, paragraph 12; and Case C-99/96 Mietz [1999] ECR I-2277, paragraph 26).

38 It follows from the actual wording of Article 13 that it is applicable only in so far as the action relates generally to a contract concluded by a consumer for a purpose outside his trade or profession.

39 It follows from that wording, and from the purpose of the special regime introduced by the provisions of Title II, Section 4, of the Brussels Convention, which is to ensure adequate protection for the consumer as the contracting party deemed to be economically weaker and less experienced in legal matters than his professional co-contractor, that those provisions cover only a private final consumer, not engaged in trade or professional activities, who is bound by one of the three types of contract listed in Article 13 of that Convention and who is also personally a party to the action, in accordance with Article 14 thereof (see Shearson Lehman Hutton, cited above, paragraphs 19, 20, 22 and 24).

40 With regard, more specifically, to a contract for the supply of services - other than a contract of transport, which is excluded from the scope of Section 4 of Title II of the Brussels Convention pursuant to the third paragraph of Article 13 thereof - or a contract for the supply of goods, as referred to in Article 13, first paragraph, point 3, that provision sets out two additional conditions of application, namely that the conclusion of the contract was preceded in the State of the consumer's domicile by a specific invitation addressed to him or by advertising, and that the consumer took in that State the steps necessary for the conclusion of that contract.

41 As is clear from the Schlosser Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, p. 71, at p. 118), those two concurrent conditions are designed to ensure that there are close connections between the contract in issue and the State in which the consumer is domiciled.

42 With regard to the scope of the concepts employed in those conditions, Professor Schlosser refers, at page 119 of his report, to the Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations (OJ 1980 C 282, p. 1), which was opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1) (`the Rome Convention'), in view of the fact that Article 5(2), first indent, of that Convention, relating to consumer contracts, contains two conditions which use wording identical to that in Article 13, first paragraph, point 3(a) and (b), of the Brussels Convention.

43 According to the Giuliano and Lagarde Report, that provision of the Rome Convention is intended to cover situations in which the trader has taken steps to market his goods or services in the country where the consumer resides and, inter alia, situations of mail-order and doorstep selling (see the above Report, pages 23 and 24).

44 The concepts of `advertising' and `specific invitation addressed' featuring in the first of those conditions common to the Brussels and Rome Conventions cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman.

45 With regard to the second of those conditions, the expression `steps necessary for the conclusion' of the contract refers to any document written or any other step whatever taken by the consumer in the State in which he is domiciled and which expresses his wish to take up the invitation made by the professional.

46 It must be concluded that all of those conditions are satisfied in a case such as that in the main proceedings.

47 First, it is common ground that Mr Gabriel has in this case the capacity of a private final consumer covered by the first paragraph of Article 13 of the Brussels Convention inasmuch as it is clear from the case-file that he ordered goods offered by Schlank & Schick for his personal use, without that transaction having any connection whatever with his trade or profession.

48 Second, in a situation such as that in point in the main proceedings, the consumer and the professional vendor were indubitably linked contractually once Mr Gabriel had ordered goods offered by Schlank & Schick, thereby demonstrating his acceptance of the offer - including all conditions attaching thereto - which that company had sent to him in person.

49 Furthermore, that concordance of intention between the two parties gave rise to reciprocal and interdependent obligations within the framework of a contract which has specifically one of the objects described in Article 13, first paragraph, point 3, of the Brussels Convention.

50 Thus, in regard to a case such as that in the main proceedings, that contract relates more specifically to the supply, through a mail-order sale, of goods ordered by a consumer on the basis of a proposal made and at a price specified by the vendor.

51 Third, the two conditions specifically set out in Article 13, first paragraph, point 3(a) and (b), of the Brussels Convention are also satisfied.

52 The vendor addressed the consumer in the Contracting State in which the latter was domiciled by sending him several personalised letters, to which were attached a sales catalogue and an order form, with a view to persuading him to contract on the basis of those proposals and the conditions relating thereto. Furthermore, as a result of those letters, the consumer took in that State the steps necessary to conclude the contract by placing an order for the amount stipulated by the vendor and by sending to the vendor the order form together with the copy of the `receipt'.

53 In those circumstances, where a consumer has been contacted at his home by one or more letters sent by a professional vendor for the purpose of bringing about the placement of an order for goods offered under the conditions determined by that vendor, and where the consumer has in fact placed such an order in the Contracting State in which he is domiciled, the action by which such a consumer seeks through judicial proceedings brought against the vendor to obtain a prize which he has apparently won is an action relating to a contract concluded by a consumer within the meaning of Article 13, first paragraph, point 3, of the Brussels Convention.

54 As is evident from the case-file placed before the Court, the right of a consumer to bring an action is intimately linked to the contract concluded between the parties inasmuch as, in a situation such as that in point in the main proceedings, the correspondence which the professional sent to that consumer establishes an indissociable relationship between the promise of financial benefit

and the order for goods, that order being presented by the vendor as constituting the prerequisite for the grant of the promised financial benefit, specifically for the purpose of persuading the consumer to enter into a contract. Furthermore, the consumer concluded the contract for the purchase of goods essentially, if indeed not exclusively, by reason of the vendor's proposal involving a promise of financial benefit significantly greater than the minimum amount required for the order and the consumer otherwise met all of the conditions laid down by the professional, thereby accepting that professional's proposal in its entirety.

55 Consequently, judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled, requiring a mail-order company established in another Contracting State to send to him a prize which he has apparently won must be capable of being brought before the same court as that which has jurisdiction to deal with the contract concluded by that consumer.

56 An interpretation of Article 13, first paragraph, of the Brussels Convention which would have the result that certain claims under a contract concluded by a consumer fall within the jurisdiction rules of Articles 13 to 15 of that Convention, whereas other actions that are linked so closely to that contract as to be indissociable are subject to other rules cannot be accepted.

57 The Court has in this regard recently recalled the need to avoid, so far as possible, a situation in which several courts have jurisdiction in respect of one and the same contract (see, by way of analogy, with regard to Article 5(1) of the Brussels Convention, Case C-256/00 Besix [2002] ECR I-0000, paragraph 27).

58 That need is all the more compelling in the case of a contract such as that in issue in the main proceedings. In view of the fact that a multiplicity of courts having jurisdiction risks placing at a particular disadvantage a party deemed to be weak, such as a consumer, it is in the interest of the proper administration of justice that the latter should be able to bring before one and the same court - in casu that of his place of domicile - all of the difficulties that are likely to arise from a contract which the consumer has been induced to conclude by reason of the professional's use of forms of wording liable to mislead the other contracting party.

59 An action such as that which Mr Gabriel proposes to bring before the competent national court therefore falls within the scope of Article 13, first paragraph, point 3, of the Brussels Convention, and it is for that reason unnecessary to examine whether it is covered by Article 5(1) thereof.

60 In the light of all the foregoing considerations, the answer to the question submitted must be that the jurisdiction rules set out in the Brussels Convention are to be construed as meaning that judicial proceedings by which a consumer seeks an order, in the Contracting State in which he is domiciled and pursuant to that State's legislation, requiring a mail-order company established in another Contracting State to pay him a financial benefit in circumstances where that company had sent to that consumer in person a letter likely to create the impression that a prize would be awarded to him on condition that he ordered goods to a specified amount, and where that consumer actually placed such an order in the State of his domicile without, however, obtaining payment of that financial benefit, are contractual in nature in the sense contemplated in Article 13, first paragraph, point 3, of the Brussels Convention.

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NATCOUR	*A9* Oberster Gerichtshof, Beschluß vom 15/02/2000 ; - Praxis des internationalen Privat- und Verfahrensrechts 2003 p.50-54 ; - International Litigation Procedure 2000 p.677-687 ; - Rauscher, Thomas ; Schülke, Clemens: Transborder Prize Notification: Linkage and International Jurisdiction, The European legal forum 2001 p.334-338 (EN) ; - Rauscher, Thomas ; Schülke, Clemens: Comunicazione oltreconfine delle vincite: collegamento e competenza internazionale, The European legal forum 2001 p.334-338 (I) ; - Rauscher, Thomas ; Schülke, Clemens: Transborder Prize Notification: Linkage and International Jurisdiction, The European legal forum 2001 p.334-338 (EN) ; - Rauscher, Thomas ; Schülke, Clemens: Comunicazione oltreconfine delle vincite: collegamento e competenza internazionale, The European legal forum 2001 p.334-338 (I)
NOTES	Mankowski, Peter: Entscheidungen zum Wirtschaftsrecht 2002 p.873-874 ; Wittwer, Alexander: Verbrauchergerichtsstand für grenzüberschreitende Gewinnzusagen, European Law Reporter 2002 p.393-394 ; Feuchtmeyer, E.: EuGH in Sachen Gabriel und weiter? - Neues zur gerichtlichen Zuständigkeit bei º 661 a BGB, Neue juristische Wochenschrift 2002 p.3598-3599 ; Fetsch, Johannes: Grenzüberschreitende Gewinnzusagen im europäischen Binnenmarkt, Recht der internationalen Wirtschaft 2002 p.936-945 ; Idot, L.: Consommateurs, Europe 2002 Octobre Comm. no 353 p.28 ; X: Il Foro italiano 2002 IV Col.568-569 ; García Gutiérrez, L.: Revista española de Derecho Internacional

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Schintgen

DATES of document: 11/07/2002
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Judgment of the Court (Fifth Chamber)
of 6 June 2002
Italian Leather SpA v WECO Polstermöbel GmbH Co..
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention - Article 27(3) - Irreconcilability - Enforcement procedures in the State where enforcement is sought.
Case C-80/00.

In Case C-80/00,

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 Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Italian Leather SpA

and

WECO Polstermöbel GmbH Co.,

on the interpretation of Title III, headed `Recognition and enforcement', of the abovementioned 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 text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

THE COURT

(Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Italian Leather SpA, by J. Kummer, Rechtsanwalt,

- WECO Polstermöbel GmbH Co., by J. Schütze, Rechtsanwalt,

- the German Government, by R. Wagner, acting as Agent,

- the Greek Government, by S. Khala and K. Grigoriou, acting as Agents,

- the Italian Government, by U. Leanza, acting as Agent, and O. Fiumara, avvocato dello Stato,

- the United Kingdom Government, by G. Amodeo, acting as Agent, and A. Layton QC,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, acting as Agent, and B. Wägenbaur, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Italian Leather SpA, represented by J. Kummer; the Greek Government, represented by K. Grigoriou; the United Kingdom Government, represented by A. Layton; and the Commission, represented by A.-M. Rouchaud, acting as Agent, and B. Wägenbaur, at the

hearing on 22 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

Costs

54 The costs incurred by the German, Greek, Italian and United Kingdom Governments and 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 questions referred to it by the Bundesgerichtshof by order of 10 February 2000, hereby rules:

1. On a proper construction of Article 27(3) 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

2. Where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.

1 By order of 10 February 2000, received at the Court on 7 March 2000, the Bundesgerichtshof (Federal Court of Justice) 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 three questions on the interpretation of Title III, headed `Recognition and enforcement', 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 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) and 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) (hereinafter `the Brussels Convention').

2 Those questions were raised in proceedings between Italian Leather SpA (hereinafter `Italian Leather'), a company governed by Italian law established in Bironto (Italy), and WECO Polstermöbel GmbH Co. (hereinafter `WECO'), a limited partnership governed by German law established in Leimbach (Germany), concerning the conditions of use of a brand name under a contract for the exclusive distribution of leather-upholstered furniture.

Legal context

The Brussels Convention

3 As stated in the first paragraph of Article 1, the Brussels Convention applies in civil and commercial matters whatever the nature of the court or tribunal.

4 Article 24 of the Brussels Convention states:

`Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

5 Title III of the Brussels Convention lays down the rules under which judgments given by the courts of a Contracting State are recognised and enforced in the other Contracting States.

6 Article 25 of the Brussels Convention provides:

`For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.'

7 The first paragraph of Article 26 of the Brussels Convention states:

`A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required.'

8 Article 27 of the Brussels Convention is worded as follows:

`A judgment shall not be recognised:

...

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

...'

9 The first paragraph of Article 31 of the Brussels Convention states:

`A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.'

10 The first paragraph of Article 34 of the Brussels Convention provides:

`The court applied to shall give its decision without delay; the party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.'

German legislation

11 According to the Bundesgerichtshof, under Paragraph 935 of the Zivilprozessordnung (German Code of Civil Procedure, hereinafter `the ZPO') an interim measure may be granted if it is feared that a change in the current situation could prevent or substantially impede the assertion by a party of his rights. Accordingly, the court seised is called on essentially to maintain the status quo.

12 The Bundesgerichtshof further points out that, under Paragraph 940 of the ZPO, the court seised may also make an interim order regulating a legal relationship, in so far as that appears to be necessary in order to prevent substantial prejudice or imminent use of force or for other reasons.

13 Under Paragraph 890(1) of the ZPO, decisions of German courts which impose restraining orders

may also give rise to an administrative penalty payment or, where such payment cannot be recovered, to imprisonment.

The main proceedings and the questions referred for a preliminary ruling

14 Italian Leather is a company which sells leather-upholstered furniture under the name `LongLife'. WECO sells furniture of the same type.

15 In 1996 Italian Leather granted WECO, under an `exclusive contract', the right to distribute its goods for five years within a specified geographical area. That contract contained inter alia the following clauses:

`(2) Dealers may use the LongLife brand name only when marketing suites that are covered in LongLife leather.

...

(4) No dealer may use the LongLife brand name for its own advertising without written authorisation from the supplier.'

16 The parties agreed that the courts of Bari (Italy) would have jurisdiction to deal with disputes relating to that contract.

17 In 1998 WECO complained of defective performance of the contract by Italian Leather. It informed Italian Leather that, as a consequence, it would not be a party to any joint sales message at forthcoming exhibitions and that it would present its own WECO mark.

18 Italian Leather brought proceedings for interim relief against WECO before the Landgericht Koblenz (Regional Court, Koblenz, Germany), the court within whose jurisdiction WECO's registered office is situated, to restrain it from marketing products presented as being in easy-care leather under the brand name `naturia longlife by Maurizio Danieli'.

19 By judgment of 17 November 1998 the Landgericht Koblenz, which had been seised in accordance with Article 24 of the Brussels Convention, dismissed the application because there was no `ground justifying the grant of interim relief'.

20 The Landgericht Koblenz took the view that to grant Italian Leather's application would be tantamount to ordering WECO to perform the contract. However, Italian Leather had not proved that there was a risk of irreparable damage or of a definitive loss of rights, conditions which had to be met under German law before the relief sought could be granted. Furthermore, WECO had already taken concrete steps to advertise and market its products with leather from other suppliers. Accordingly, it too would suffer considerable damage if the prohibition sought were granted.

21 A few days before the Landgericht Koblenz delivered its judgment of 17 November 1998, Italian Leather had applied to the Tribunale di Bari (Bari District Court) for interim measures. In its order of 28 December 1998, the Tribunale di Bari took a different view on the condition of urgency. It held in this regard that `the periculum in mora (urgency) lies in the plaintiff's economic loss and the possible "extinction" of its rights resulting therefrom, for which there would be no compensation'.

22 Consequently, the Tribunale di Bari prohibited WECO from using the word `LongLife' for the distribution of its leather furniture products in certain Member States, including Germany.

23 On application by Italian Leather, the Landgericht Koblenz, by order of 18 January 1999 (hereinafter `the order for enforcement'), endorsed a warrant for execution in the order of the Tribunale di Bari, coupling it with a financial penalty on the basis of Paragraph 890(1) of the ZPO.

24 On an appeal brought by WECO, the Oberlandesgericht (the competent Higher Regional Court)

varied the order for enforcement, holding that the order of the Tribunale di Bari was irreconcilable, within the meaning of Article 27(3) of the Brussels Convention, with the judgment of 17 November 1998 by which the Landgericht Koblenz had dismissed Italian Leather's application seeking to prohibit WECO from using the LongLife brand name for the marketing of its leather products.

25 Italian Leather appealed against the decision of the Oberlandesgericht to the Bundesgerichtshof.

26 The Bundesgerichtshof is unsure as to the correct interpretation of Article 27(3) of the Brussels Convention.

27 According to the Bundesgerichtshof, the Court of Justice's case-law on whether the legal consequences of different judgments are mutually exclusive has, until now, only concerned situations in which there were divergences in substantive law. However, the case before the Bundesgerichtshof has the particular feature that the conflict between the two decisions on interim measures at issue is attributable only to divergences as to procedural requirements.

28 The Bundesgerichtshof states that, if those decisions are irreconcilable, the court of the State in which enforcement is sought should nevertheless have the power to disapply Article 27(3) of the Brussels Convention if it considers that, from the point of view of that State, the divergence is not sufficiently significant. The sole purpose of Article 27(3) is to prevent the rule of law in a Contracting State from being disrupted by advantage being taken of two conflicting judgments. The risk of such disruption in a given case is to be assessed solely from the point of view of the State in which enforcement is sought.

29 The Bundesgerichtshof is also uncertain whether, if it were to uphold the order for enforcement, it may, or must, maintain the financial penalty which the Landgericht Koblenz, on the basis of German law, attached to the order of the Tribunale di Bari in case the latter order was not enforced.

30 Pointing out that the Brussels Convention is designed to further the transnational recognition of judgments, the Bundesgerichtshof interprets the first paragraph of Article 31 and the first paragraph of Article 34 of the Convention as, in general terms, requiring the court of the State where enforcement of a foreign judicial decision is sought to create, so far as possible, the same favourable conditions for its enforcement as apply to a comparable decision of a national court.

31 In this connection, the Bundesgerichtshof observes that under Italian law there is no direct method of enforcement of restraining orders other than payment of damages.

32 Accordingly, the application of coercive measures provided for by German law in order to enforce immediately a restraining order made by an Italian court would have more powerful effects than those envisaged by the law of the State of origin. The Bundesgerichtshof has doubts as to whether the first paragraph of Article 31 and the first paragraph of Article 34 of the Brussels Convention permit or require such a solution.

33 Consequently, the Bundesgerichtshof decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

`(1) Can judgments be irreconcilable within the meaning of Article 27(3) of the Brussels Convention when the only difference between them lies in the specific requirements for the adoption of a particular type of autonomous provisional measure (within the meaning of Article 24 of the Convention)?

(2) May and must the court of the State of enforcement which has declared a foreign judgment requiring the party against whom enforcement is sought to desist from certain activities to be enforceable in accordance with the first paragraph of Article 34 and the first paragraph of Article 31 of the Convention at the same time order the measures necessary, under the law of the State of enforcement, for enforcement of a restraining order?

(3) If the answer to Question 2 is in the affirmative, must the measures necessary, under the law of the State of enforcement, for enforcement of the restraining order be ordered even if the judgment to be recognised does not itself include comparable measures in accordance with the law of the State of origin, and that law makes no provision at all for the immediate enforceability of such restraining orders?'

Question 1

34 By this question, the national court is essentially asking, first, whether, on a proper construction of Article 27(3) of the Brussels Convention, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought, even though the respective effects of those decisions are attributable to divergences as to the procedural requirements for the grant of such an order under the national law of the State of origin and of the State where recognition is sought. If so, it asks, second, whether a court of the latter State is required to refuse to recognise the foreign decision or whether the Brussels Convention allows it to refuse recognition only if it finds that the coexistence of two conflicting decisions would cause real and appreciable disruption to the rule of law in the State where recognition is sought.

Observations of the parties

35 So far as concerns the first part of the first question, the United Kingdom Government submits in its written observations that the concept of irreconcilability requires the court of the State in which recognition is sought to draw certain distinctions, such as that existing between the procedural requirements for the adoption of a particular type of measure and the effects of the judgment adopting or refusing to grant such a measure, or the distinction between the substantive and procedural requirements upon which grant of the measure sought is conditional.

36 The United Kingdom Government observes with regard to the first distinction that Article 27(3) of the Brussels Convention concerns solely the legal effects of a judgment and not the procedural requirements for its adoption. Examination of those requirements may, however, be necessary in order to determine the legal effects of the judgment concerned and to assess, by way of consequence, to what extent it is irreconcilable with another judgment. That is particularly the case where the measure sought has been refused. It may then be necessary to refer to the requirements for the adoption of the measure in order to understand the content of the judgment refusing to grant it.

37 As regards the second distinction referred to in paragraph 35 of the present judgment, the court may, in order to appraise the content and effect of each of the competing judgments, examine whether the requirements for the adoption of the measures in question are substantive or procedural. That will be particularly true where the court of the State in which recognition is sought is faced with a judgment refusing to order a particular measure because, in that case, there will be no `measure' as such to examine.

38 At the hearing, the United Kingdom Government inferred therefrom that, in the main proceedings, it was difficult to regard the negative effects of the judgment of 17 November 1998 of the Landgericht Koblenz as being irreconcilable with the positive effects of the order of the Tribunale di Bari of 28 December 1998. Only if the respective criteria applied by those two courts and the evidence adduced before them were identical could the effects of the decisions made by them be regarded as irreconcilable.

Findings of the Court

39 By way of preliminary point, the Court proceeds on the assumption that, the court competent to adjudicate on the substance being the Tribunale di Bari, the Landgericht Koblenz did not by its judgment of 17 November 1998 exceed the limits, as interpreted by the Court, of the jurisdiction which it derived from Article 24 of the Brussels Convention (see Case C-391/95 Van Uden [1998] ECR I-7091, paragraphs 37 to 47, and Case C-99/96 Mietz [1999] ECR I-2277, paragraphs 42, 46 and 47).

40 First, it is clear from the Court's case-law that, in order to ascertain whether two judgments are irreconcilable within the meaning of Article 27(3) of the Brussels Convention, it should be examined whether they entail legal consequences that are mutually exclusive (Case 145/86 Hoffmann [1988] ECR 645, paragraph 22).

41 Second, it is unimportant whether the judgments at issue have been delivered in proceedings for interim measures or in proceedings on the substance. As Article 27(3) of the Brussels Convention, following the example of Article 25, refers to `judgments' without further precision, it has general application. Consequently, decisions on interim measures are subject to the rules laid down by the Convention concerning irreconcilability in the same way as the other `judgments' covered by Article 25.

42 Third, it is equally immaterial that national procedural rules as to interim measures are liable to vary from one Contracting State to another to a greater degree than rules governing proceedings on the substance.

43 The object of the Brussels Convention is not to unify the procedural rules of the Contracting States, but to determine which court has jurisdiction in disputes concerning civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments (see Case C-365/88 Hagen [1990] ECR I-1845, paragraph 17, and Case C-68/93 Shevill and Others [1995] ECR I-415, paragraph 35).

44 Moreover, as follows from paragraph 22 of the judgment in Hoffmann, cited above, irreconcilability lies in the effects of judgments. It does not concern the requirements governing admissibility and procedure which determine whether judgment can be given and which may vary from one Contracting State to another.

45 In the light of the foregoing, it is clear that decisions on interim measures such as the decisions here at issue in the main proceedings are irreconcilable.

46 The Tribunale di Bari granted the application made by Italian Leather seeking to prohibit WECO from using the LongLife brand name for the marketing of its leather products after the Landgericht Koblenz had dismissed an identical application made by the same plaintiff against the same defendant.

47 The answer to the first part of the first question must therefore be that, on a proper construction of Article 27(3) of the Brussels Convention, a foreign decision on interim measures ordering an obligor not to carry out certain acts is irreconcilable with a decision on interim measures refusing to grant such an order in a dispute between the same parties in the State where recognition is sought.

48 As regards the second part of the first question, concerning the consequences which result where a foreign judgment and a judgment of a court of the State in which recognition is sought are irreconcilable, it should be noted first of all that, as stated in the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 45), `there can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments'.

49 Next, it must be remembered that Article 27(3) of the Brussels Convention provides that a judgment is not to be recognised if it is irreconcilable with a judgment given in a dispute between the same

parties in the State in which recognition is sought.

50 Article 27(3) of the Brussels Convention therefore sets out a ground for refusing to recognise judgments which is mandatory, in contrast to the second paragraph of Article 28 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9), under which recognition of a judgment may be refused in any case provided for in Articles 54B(3) or 57(4) of that Convention.

51 Finally, it would be contrary to the principle of legal certainty, which the Court has repeatedly held to be one of the objectives of the Brussels Convention (see Case 38/81 Effer [1982] ECR 825, paragraph 6, Case C-440/97 GIE Groupe Concorde and Others [1999] ECR I-6307, paragraph 23, and Case C-256/00 Besix [2002] ECR I-0000, paragraph 24), to interpret Article 27(3) as conferring on the court of the State in which recognition is sought the power to authorise recognition of a foreign judgment when it is irreconcilable with a judgment given in that Contracting State.

52 In view of the foregoing, the answer to the second part of the first question must be that, where a court of the State in which recognition is sought finds that a judgment of a court of another Contracting State is irreconcilable with a judgment given by a court of the former State in a dispute between the same parties, it is required to refuse to recognise the foreign judgment.

Questions 2 and 3

53 In view of the answer given to the first question, there is no need to answer the second and third questions.

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NATCOUR *A9* Bundesgerichtshof, Beschluß vom 10/02/2000 (IX ZB 31/99)
- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 2000 p.325-330
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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Wathelet

DATES of document: 06/06/2002
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Judgment of the Court (Sixth Chamber)
of 27 February 2002
Herbert Weber v Universal Ogden Services Ltd. Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands. Brussels Convention - Article 5(1) - Courts for the place of performance of the contractual obligation - Contract of employment - Place where the employee habitually carries out his work - Definition - Work performed partly at an installation positioned over the continental shelf adjacent to a Contracting State and partly in the territory of another Contracting State. Case C-37/00.

1. Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Court for the place of performance of the contractual obligation - Contract of employment - Work carried out in the territory of a Contracting State - Meaning - Work carried out in the area of the continental shelf adjacent to a Contracting State - Included

(Convention of 27 September 1968, Art. 5(1), as amended by the Accession Conventions of 1978, 1982 and 1989)

2. Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Court for the place of performance of the contractual obligation - Contract of employment - Place where the employee habitually carries out his work - Determination, where work carried out in more than one Contracting State - Criteria

(Convention of 27 September 1968, Art. 5(1), as amended by the Accession Conventions of 1978, 1982 and 1989)

1. Work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Contracting State, in the context of the prospecting and/or exploitation of its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying 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, the Convention of 25 October 1982 on the Accession of the Hellenic Republic and the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.

(see para. 36, operative part 1)

2. 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, the Convention of 25 October 1982 on the Accession of the Hellenic Republic and the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as meaning that where an employee performs the obligations arising under his contract of employment in several Contracting States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer.

In the case of a contract of employment under which an employee performs for his employer the same activities in more than one Contracting State, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of Article 5(1). Failing other criteria, that will be the place where the employee has worked the longest. It will only be otherwise if, in light of the facts of the case, the subject-matter of the dispute is more closely connected with a different place of work, which would, in that case, be the relevant place for the purposes of applying Article

5(1) of the Convention.

In the event that the criteria laid down by the Court of Justice do not enable the national court to identify the habitual place of work, as referred to in Article 5(1) of the Convention, the employee will have the choice of suing his employer either in the courts for the place where the business which engaged him is situated, or in the courts of the Contracting State in whose territory the employer is domiciled.

Moreover, national law applicable to the main dispute has no bearing on the interpretation of the concept of the place where an employee habitually works, within the meaning of Article 5(1) of the Convention.

(see paras 58, 62, operative part 2-3)

In Case C-37/00,

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 Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Herbert Weber

and

Universal Ogden Services Ltd,

on the interpretation of Article 5(1) of the abovementioned 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric, J.-P. Puissochet, R. Schintgen (Rapporteur) and V. Skouris, Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Mr Weber, by E. van Staden ten Brink, advocaat,

- Universal Ogden Services Ltd, by C.J.J.C. van Nispen and S.J. Schaafsma, advocaten,

- the Netherlands Government, by M.A. Fierstra, acting as Agent,

- the United Kingdom Government, by G. Amodeo, acting as Agent, and K. Smith, Barrister,

- the Commission of the European Communities, by J.L. Iglesias Buhigues and W. Neirinck, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 18 October 2001,

gives the following

Judgment

Costs

63 The costs incurred by the Netherlands and United Kingdom 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 action, 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 (Sixth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 4 February 2000, hereby rules:

1. Work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Contracting State, in the context of the prospecting and/or exploitation of its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying 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, the Convention of 25 October 1982 on the Accession of the Hellenic Republic and the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic.

2. Article 5(1) of that convention must be interpreted as meaning that where an employee performs the obligations arising under his contract of employment in several Contracting States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer.

In the case of a contract of employment under which an employee performs for his employer the same activities in more than one Contracting State, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of Article 5(1).

Failing other criteria, that will be the place where the employee has worked the longest.

It will only be otherwise if, in light of the facts of the case, the subject-matter of the dispute is more closely connected with a different place of work, which would, in that case, be the relevant place for the purposes of applying Article 5(1) of the convention.

In the event that the criteria laid down by the Court of Justice do not enable the national court to identify the habitual place of work, as referred to in Article 5(1) of the convention, the employee will have the choice of suing his employer either in the courts for the place where the business which engaged him is situated, or in the courts of the Contracting State in whose territory the employer is domiciled.

3. National law applicable to the main dispute has no bearing on the interpretation of the concept of the place where an employee habitually works, within the meaning of Article 5(1) of the convention, to which the second question relates.

1 By judgment of 4 February 2000, received at the Court on 10 February 2000, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) 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 (OJ 1978 L 304, p. 36) three questions on the interpretation of Article 5(1) of that convention, 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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) (hereinafter the Brussels Convention).

2 Those questions were raised in proceedings between Mr Weber, a German national residing in Krefeld (Germany), and his employer Universal Ogden Services Ltd (hereinafter UOS), a company incorporated under Scottish law and established in Aberdeen (United Kingdom), following the termination of Mr Weber's contract of employment by UOS.

Relevant law

The Brussels Convention

3 The rules on jurisdiction laid down by the Brussels Convention are to be found in Title II thereof, which contains Articles 2 to 24.

4 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 appears 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 In Sections 2 to 6 of Title II, the Brussels Convention lays down rules on special or exclusive jurisdiction.

7 Thus, under Article 5, which appears in 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; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated;

....

Applicable international law

8 The Convention on the Continental Shelf, concluded in Geneva on 29 April 1958 (hereinafter the Geneva Convention) came into force on 10 June 1964 and was ratified by the Kingdom of the Netherlands on 18 February 1996. The United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982, on the other hand, was not ratified by the Kingdom of the Netherlands until 28 June 1996 and consequently was not applicable in that State at the material time.

The relevant national provisions

9 In the Netherlands, the Wet arbeid mijnbouw Noordzee (Law relating to Employment in Extraction Industries in the North Sea, hereinafter the WAMN) of 2 November 1992 entered into force on 1 February 1993.

10 Article 1(a) of the WAMN provides that, for the purposes of that law, the continental shelf has the same meaning as in the Mijnwet continentaal plat (Law on Mining on the Continental Shelf) of 23 September 1965, that is to say that part of the seabed and substratum situated below the North Sea outside the territorial waters over which the Kingdom of the Netherlands exercises sovereign rights, in particular under the Geneva Convention (hereinafter the Netherlands continental shelf).

11 Under Article 1(b) of the WAMN the term mining installation means, for the purposes of that law, an installation positioned on or above the Netherlands continental shelf for the purposes of prospecting or extracting minerals, or a group of installations of which at least one fits that description.

12 It is clear from the explanatory notes to Article 1 of the WAMN that that definition of mining installation also includes drilling vessels and all mineral prospecting or extracting installations situated outside territorial waters, whether they be fixed or (immobilised) floating installations.

13 Article 1(c) of the WAMN provides that, for the purposes of that law, employee means:

1. a person who works on or from a mining installation under a contract of employment;

2. a person, other than a person referred to in subparagraph 1, engaged under a contract of employment for a period of at least 30 days to carry out charting or mineral prospecting or mining work on or from a ship situated within territorial waters or above the continental shelf under the North Sea outside territorial waters.

14 Article 2 of the WAMN is worded as follows:

Employees' contracts of employment are governed by the Netherlands law of employment contracts and any rules of private international law relating thereto. For the purposes of applying rules of private international law, work carried out by an employee is deemed to have been carried out in the territory of the Netherlands.

15 Article 10(1) of the WAMN provides:

Subject to Articles 98(2) and 126 of the Code of Civil Procedure, the Kantonrechter te Alkmaar shall have jurisdiction in disputes concerning employees' contracts of employment and concerning the application of this Law.

16 The explanatory notes to Article 10 of the WAMN stipulate that that provision does not derogate from the rules laid down in the Brussels Convention.

The main proceedings and the questions referred

17 It is apparent from the case-file in the main proceedings that, from July 1987 to 30 December 1993, Mr Weber was employed by UOS as a cook.

18 The national court observes that, until 21 September 1993, part of Mr Weber's work for UOS was carried out on board mining vessels or on mining installations covered by the WAMN and stationed over the Netherlands continental shelf.

19 According to the national court, precisely when, during the period between the commencement of his employment relationship with UOS in July 1987 and 21 September 1993, Mr Weber worked in the Netherlands continental shelf area has not been established; nor have the exact dates on

which he worked on mining installations or vessels covered by the WAMN.

20 Mr Weber in fact alleges that, during that period, he worked principally in the Netherlands continental shelf area on mining installations and ships flying the Dutch flag. UOS, however, disputes the accuracy of that assertion.

21 On the other hand, it is common ground that, from 21 September to 30 December 1993, Mr Weber worked as a cook on board a floating crane deployed in Danish territorial waters for the construction of a bridge over the Great Belt (Denmark).

22 On 29 June 1994 Mr Weber brought an action against UOS before the Kantonrechter (Cantonal Court) te Alkmaar (Netherlands), in accordance with Article 10(1) of the WAMN, alleging that the company had terminated his employment unlawfully.

23 That court dismissed, on the basis of Netherlands law, a plea of lack of jurisdiction raised by UOS and held part of Mr Weber's action to be well founded.

24 UOS thereupon brought an appeal before the Rechtbank (District Court) te Alkmaar (Netherlands). That court found, again on the sole basis of Netherlands law, that the Kantonrechter had erred in finding that it had jurisdiction to hear Mr Weber's case. The Rechtbank te Alkmaar ruled, in substance, that no account could be taken of Mr Weber's employment before 1 February 1993, the date on which the WAMN entered into force, and that the three months he spent working in Danish territorial waters should be given more weight than the time he spent working in the Netherlands continental shelf area.

25 On 7 January 1998 Mr Weber appealed against that decision before the Hoge Raad der Nederlanden, which ruled that the Rechtbank te Alkmaar had erred in law in failing to consider of its own motion whether the rules of the Brussels Convention conferred jurisdiction on the Netherlands courts. In this connection, the Hoge Raad raises two questions: whether, for the purposes of applying Article 5(1) of the Brussels Convention, the work done by Mr Weber in the Netherlands continental shelf area is to be regarded as having been carried out in the Netherlands (and, thus, within the territory of a Contracting State) and whether Mr Weber had, since taking up employment with UOS in July 1987, habitually worked in the Netherlands, within the meaning of Article 5(1).

26 Taking the view that, in the circumstances, resolution of the dispute called for interpretation of the Brussels Convention, the Hoge Raad der Nederlanden decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

1. Must work carried out on the Netherlands section of the continental shelf under the North Sea by an employee as defined in the WAMN be regarded as or treated as equivalent to work carried out in the Netherlands for the purposes of the application of Article 5(1) of the Brussels Convention?

2. If so, in order to answer the question whether the employee must be regarded as having carried out his work "habitually" in the Netherlands, must account be taken of the entire period of his employment or is only his most recent period of employment relevant?

3. In answering Question 2 must a distinction be drawn between the period before the WAMN entered into force - when Netherlands law had not yet designated a court with territorial jurisdiction to deal with a case such as the present - and the period after the WAMN entered into force?

The first question

27 In order to answer the first question it must first be remembered that, according to settled case-law, Article 5(1) of the Brussels Convention is not applicable to contracts of employment performed entirely outside the territory of the Contracting States, since the employee carries out all his work in non-contracting countries (Case 32/88 Six Constructions [1989] ECR 341, paragraph

22).

28 Article 5(1) applies only where the individual contract of employment under which the employee carries out his work has a connection with the territory of at least one Contracting State.

29 Secondly, Article 29 of the Vienna Convention on the Law of Treaties of 23 May 1969 states that unless a different intention appears from the treaty or is otherwise established, a treaty is binding on each party in respect of its entire territory.

30 Those are the factors which determine whether or not work carried out in the Netherlands continental shelf area, such as the work in point in the main proceedings, is, for the purposes of applying Article 5(1) of the Brussels Convention, to be regarded as being carried out in the territory of the Netherlands, and thus in the territory of a Contracting State.

31 In the absence of any provision in the Brussels Convention governing that aspect of its scope or any other indication as to the answer to be given to this question, reference must be made to the principles of public international law relating to the legal regime applicable to the continental shelf and, in particular, the Geneva Convention, which applied to the Netherlands at the material time.

32 Under Article 2 of the Geneva Convention, the coastal State exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources. Those rights are exclusive and do not depend on any express proclamation.

33 Under Article 5 of the same convention, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources. Article 5 further provides that those installations and devices are under the jurisdiction of the coastal State.

34 Furthermore, the International Court of Justice has ruled that the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea exist ipso facto and ab initio by virtue of the State's sovereignty over the land and by extension of that sovereignty in the form of the exercise of sovereign rights for the purposes of the exploration of the seabed and the exploitation of its natural resources (judgment of 20 February 1969 in the so-called North Sea Continental Shelf cases, Reports, 1969, p. 3, paragraph 19).

35 Moreover, it is in conformity with those principles of public international law that Article 10(1) of the WAMN provides that the courts of the Netherlands have jurisdiction in disputes concerning the contracts of employment of employees who work on or from mining installations positioned on or above the Netherlands continental shelf area for the purposes of prospecting and/or exploiting its natural resources.

36 It follows that the answer to the first question must be that work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Contracting State, in the context of the prospecting and/or exploitation of its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying Article 5(1) of the Brussels Convention.

The second question

37 In order to answer the second question it is necessary to recall, at the outset, the case-law of the Court of Justice on the interpretation of Article 5(1) of the Brussels Convention where the dispute concerns an individual contract of employment.

38 First of all, it is clear from that case-law that, as regards this type of contract, the place of performance of the obligation upon which the claim is based, as referred to in Article 5(1)

of the Brussels Convention, must be determined not by reference to the applicable national law in accordance with the conflict rules of the court before which the matter is brought, as is the case for most other contracts (settled case-law since Case 12/76 Tessili [1976] ECR 1473), but by reference to uniform criteria which it is for the Court to lay down on the basis of the scheme and objectives of the Brussels Convention (see, inter alia, Case C-125/92 Mulox IBC [1993] ECR I-4075, paragraphs 10, 11 and 16, Case C-383/95 Rutten [1997] ECR I-57, paragraphs 12 and 13, and Case C-440/97 GIE Groupe Concorde and Others [1999] ECR I-6307, paragraph 14).

39 Secondly, the Court takes the view that the rule on special jurisdiction in Article 5(1) of the Brussels Convention is justified by the existence of a particularly close relationship between a dispute and the court best placed, in order to ensure the proper administration of justice and effective organisation of the proceedings, to take cognisance of the matter, and that the courts for the place in which the employee is to carry out the agreed work are best suited to resolving disputes to which the contract of employment might give rise (see, inter alia, Mulox IBC, cited above, paragraph 17, and Rutten, cited above, paragraph 16).

40 Thirdly, in matters relating to contracts of employment, interpretation of Article 5(1) of the Brussels Convention must take account of the concern to afford proper protection to the employee as the weaker of the contracting parties from the social point of view. Such protection is best assured if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the employee discharges his obligations towards his employer, since that is the place where it is least expensive for the employee to commence or defend court proceedings (see, inter alia, Mulox IBC, paragraphs 18 and 19, and Rutten, paragraph 17).

41 It follows that Article 5(1) of the Brussels Convention must be interpreted as meaning that, as regards contracts of employment, the place of performance of the relevant obligation, for the purposes of that provision, is the place where the employee actually performs the work covered by the contract with his employer (Mulox IBC, paragraph 20, Rutten, paragraph 15, and GIE Groupe Concorde, paragraph 14).

42 The Court has also held that, where work is performed in more than one Contracting State, it is important to avoid any multiplication of courts having jurisdiction 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 and that, consequently, Article 5(1) of the Brussels Convention cannot be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee performs part of his work (Mulox IBC, paragraphs 21 and 23, and Rutten, paragraph 18).

43 As a result, the Court held, at paragraphs 25 and 26 of its judgment in Mulox IBC, that, in such a case, the place of performance of the obligation characterising the contract of employment, 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. It further held that it was necessary to take account of the fact that the work entrusted to the employee was carried out from an office in a Contracting State, where the employee in question had established his residence, from which he worked for his employer and to which he returned after each business trip to another country.

44 In Rutten the Court held, in similar circumstances, that the place where an employee habitually carries out his work, within the meaning of Article 5(1) of the Brussels Convention, is the place where he has established the effective centre of his working activities and that, when identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organises his work for his employer and to which he returns after each business trip abroad.

45 As regards identifying the place where an employee habitually works, as referred to in Article 5(1), it is appropriate, in a case such as that in the main proceedings, to remember that the factual background of the dispute between Mr Weber and his employer has not yet been fully and clearly established before the national courts.

46 Thus, whilst it is common ground that, from 21 September to 30 December 1993, Mr Weber worked as a cook on board a floating crane in Danish territorial waters, as to the rest, the case-file shows only that he was employed by UOS in the Netherlands continental shelf area on mining vessels or installations within the meaning of the WAMN for at least part of the period from July 1987 to 21 September 1993. In particular, the parties to the main proceedings disagree as to the exact dates within that period on which Mr Weber worked in the area. Nor does the case-file reveal whether, during that same period, Mr Weber worked for UOS in another place or, if he did, the country or countries concerned and the duration of his work there. The observations of the Rechtbank te Alkmaar indicate only that between 1 February and 21 September 1993 Mr Weber spent 79 days working in the Netherlands continental shelf area, without clearly establishing whether, during the remaining 144 days, he worked elsewhere or took leave.

47 Despite that uncertainty, it is common ground that, during his period of employment with UOS, Mr Weber was engaged in at least two different Contracting States.

48 Furthermore, unlike the employees in Mulox IBC and Rutten, Mr Weber did not have an office in a Contracting State that constituted the effective centre of his working activities or from which he performed the essential part of his duties vis-à-vis his employer.

49 The Court's case-law cannot, therefore, be applied in its entirety to the present case. Nevertheless, it remains relevant to the extent that it means that, where a contract of employment is performed in several Contracting States, Article 5(1) of the Brussels Convention must - in view of the need to establish the place with which the dispute has the most significant link, so that it is possible to identify the courts best placed to decide the case in order to afford proper protection to the employee as the weaker party to the contract and to avoid multiplication of the courts having jurisdiction - be understood as referring to the place where or from which the employee actually performs the essential part of his duties vis-à-vis his employer. That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend such proceedings and where the courts best suited to resolving disputes relating to the contract of employment are situated (see Rutten, paragraphs 22 to 24).

50 That being so, in a case such as that in the main proceedings, the relevant criterion for establishing an employee's habitual place of work, for the purposes of Article 5(1) of the Brussels Convention, is, in principle, the place where he spends most of his working time engaged on his employer's business.

51 In a case such as that in the main proceedings, in which the employee continuously performed the same job for his employer, namely that of cook, throughout the entire period of employment in question, any qualitative criteria relating to the nature and importance of work done in various places within the Contracting States are irrelevant.

52 The logical implication of the temporal criterion mentioned in paragraph 50 of the present judgment, which is based on the relative duration of periods of time spent working in the various Contracting States in question, is that all of an employee's term of employment must be taken into account in establishing the place where he carries out the most significant part of his work and where, in such a case, his contractual relationship with his employer is centred.

53 It would only be if, taking account of the facts of the present case, the subject-matter of the dispute were more closely connected with a different place of work that the principle set out in the preceding paragraph would fail to apply.

54 For example, weight will be given to the most recent period of work where the employee, after having worked for a certain time in one place, then takes up his work activities on a permanent basis in a different place, since the clear intention of the parties is for the latter place to become a new habitual place of work within the meaning of Article 5(1) of the Brussels Convention.

55 On the other hand, in the event that the criteria mentioned in paragraphs 50 to 54 of the present judgment do not enable the national courts to establish the habitual place of work for the purposes of applying Article 5(1) of the Brussels Convention, either because there are two or more places of work of equal importance or because none of the various places where the employee carries on his work activity has a sufficiently permanent and close connection with the work done to be regarded as the main link for the purposes of determining the courts with jurisdiction, it is necessary, as is clear from paragraphs 42 and 49 of the present judgment, to avoid a multiplication of the courts having jurisdiction over a single legal relationship. Article 5(1) of the Brussels Convention cannot, therefore, be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee carries on some of his work.

56 In this connection it must be borne in mind that, as is clear from the report of Mr Jenard on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 22), the rules on special jurisdiction merely give the applicant an additional option without, however, affecting the general principle set out in the first paragraph of Article 2 of the convention that persons domiciled in the territory of a Contracting State may be sued in the courts of that State regardless of the nationality of the parties. Furthermore, the last part of Article 5(1) of the convention provides that, if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated.

57 Consequently, in the situation mentioned in paragraph 55 of the present judgment, an employee will have the choice of bringing his action against his employer either before the courts for the place where the business which engaged him is situated, in accordance with the last part of Article 5(1) of the Brussels Convention, or before the courts of the Contracting State on whose territory the employer is domiciled, in accordance with the first paragraph of Article 2 of the convention, assuming those two forums are not one and the same.

58 In light of all of the foregoing considerations, the answer to the second question must be that Article 5(1) of the Brussels Convention must be interpreted as meaning that where an employee performs the obligations arising under his contract of employment in several Contracting States the place where he habitually works, within the meaning of that provision, is the place where, or from which, taking account of all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer.

In the case of a contract of employment under which an employee performs for his employer the same activities in more than one Contracting State, it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works, within the meaning of Article 5(1).

Failing other criteria, that will be the place where the employee has worked the longest.

It will only be otherwise if, in light of the facts of the case, the subject-matter of the dispute is more closely connected with a different place of work, which would, in that case, be the relevant place for the purposes of applying Article 5(1) of the Brussels Convention.

In the event that the criteria laid down by the Court of Justice do not enable the national court to identify the habitual place of work, as referred to in Article 5(1) of the Brussels Convention, the employee will have the choice of suing his employer either in the courts for the place where the business which engaged him is situated, or in the courts of the Contracting State in whose

territory the employer is domiciled.

The third question

59 For this question, it is appropriate first to observe that the object of the Brussels Convention is to determine the jurisdiction of the courts of the Contracting States in the intra-Community legal order in civil and commercial matters with the result that national procedural laws are set aside in matters governed by the convention in favour of the provisions thereof (see Case 25/79 Sanicentral [1979] ECR 3423, paragraph 5).

60 Next, it is appropriate to recall that it is settled case-law that the terms used in Article 5(1) of the Brussels Convention must, in matters relating to employment contracts, be interpreted autonomously so as to ensure the full effectiveness and uniform application in all the Contracting States of this convention, whose objectives include unification of the rules on jurisdiction of the Contracting States (see, inter alia, Mulox IBC, cited above, paragraphs 10 and 16, and Rutten, cited above, paragraphs 12 and 13).

61 It follows that national law has no bearing on the application of Article 5(1) of the Brussels Convention and so the date of entry into force of the WAMN has no bearing upon the effect of the provision.

62 That being so, the answer to the third question must be that national law applicable to the main dispute has no bearing on the interpretation of the concept of the place where an employee habitually works, within the meaning of Article 5(1) of the convention, to which the second question relates.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2002 Page I-02013
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JURCIT	41968A0927(01)-A02 : N 56 57 41968A0927(01)-A05PT1 : N 27 - 62 61976J0012 : N 38 61992J0125 : N 38 - 43 48 60 61995J0383 : N 38 - 42 44 48 49 60 61997J0440 : N 38 41 61979J0025 : N 59
CONCERNS	Interprets 41968A0927(01) -A05PT1

SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
OBSERV	Netherlands ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Netherlands
NATCOUR	*P1* Hoge Raad, 1e kamer, arrest van 31/01/2003 (C98/053HR) ; - Jurisprudentie arbeidsrecht 2003 no 71 ; - Nederlands internationaal privaatrecht 2003 no 108 ; - Nederlands juristenblad 2003 p.384-386 ; - Rechtspraak van de week 2003 no 29 ; - Sociaal maandblad arbeid 2003 p.175 (résumé) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2005 no 337 ; - International Litigation Procedure 2005 p.217-221 ; - Mankowski, Peter: Das internationale Arbeitsrecht und die See - die Fortsetzung folgt -, Praxis des internationalen Privat- und Verfahrensrechts 2005 p.58-61 ; - De Boer, Th.M.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2005 no 337 ; *A9* Hoge Raad, 1e kamer, arrest van 04/02/2000 (C98/053HR) ; - Jurisprudentie arbeidsrecht 2000 no 64 ; - Nederlands internationaal privaatrecht 2000 no 127 ; - Nederlands juristenblad 2000 p.418-420 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2000 p.969 (résumé) ; - Rechtspraak van de week 2000 no 42 ; - Praxis des internationalen Privat- und Verfahrensrechts 2003 p.45-50
NOTES	Simon, Denys: Europe 2002 Avril Comm. no 119 p.9 ; Idot, Laurence: Europe 2002 Avril Comm. no 160 p.24-25 ; Moreau, Marie-Ange: Compétence juridictionnelle internationale: détermination du lieu d'exécution habituel du travail, Revue de jurisprudence sociale 2002 p.511-512 ; Chaumette, Patrick: Conflit de juridictions pour un travail effectué dans les eaux territoriales et sur le plateau continental de deux Etats membres de l'Union européenne, Le droit maritime français 2002 p.640-648 ; Buy, Frédéric: Compétence juridictionnelle et pluralité de lieux de travail, Droit social 2002 p.967-971 ; Giannopoulos, Panagiotis: Elliniki Epitheorisi Evropaïkou Dikaiou 2002 p.388-390 ; Zaccaria, Laura: La Convenzione di Bruxelles e i contratti individuali di lavoro: brevi note sull'interpretazione dell'art. 5.1, Giustizia civile 2002 I p.2703-2709 ; Palao Moreno, Guillermo: Revista española de Derecho Internacional 2002 p.862-868 ; Mankowski, Peter: Europäisches Internationales Arbeitsprozessrecht - Weiteres zum gewöhnlichen Arbeitsort, Praxis des internationalen Privat- und Verfahrensrechts 2003 p.21-28 ; Ibili, F.: Ondernemingsrecht 2003 p.237-238 ; Bertoli, Paolo: "Territorialità" della piattaforma continentale e competenza in materia di attività lavorativa prestata in più Stati, Il Corriere giuridico 2003 p.123-127 ; Zabalo Escudero, Elena: Sucesion de lugares de trabajo y competencia judicial internacional: Nuevos problemas planteados ante el TJCE, Revista de Derecho Comunitario Europeo 2003 p.225-239 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 2003 p.661-668 ; Rodière, Pierre: Coordination des droits nationaux, loi applicable, compétence juridictionnelle, Revue trimestrielle de droit européen 2003 p.529-552 ; Volken, Paul: Schweizerische Zeitschrift für internationales und europäisches Recht 2004 p.631-632
PROCEDU	Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Schintgen

DATES of document: 27/02/2002
of application: 10/02/2000

Order of the Court (Sixth Chamber)
of 5 April 2001
Richard Gaillard v Alaya Chekili. Reference for a preliminary ruling: Cour d'appel de Bruxelles - Belgium. Article 104(3) of the Rules of Procedure - Brussels Convention - Article 16(1) - Exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property - Scope - Action for rescission of a contract of sale of immovable property and for damages. Case C-518/99.

1. Preliminary rulings - Answer admitting of no reasonable doubt - Application of Article 104(3) of the Rules of Procedure

(Rules of Procedure of the Court of Justice, Art. 104(3))

2. Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - Proceedings which have as their object rights in rem in immovable property - Definition - Action for rescission of a contract of sale of immovable property and for damages for rescission - Excluded

(Convention of 27 September 1968, Art. 16(1))

In Case C-518/99,

REFERENCE to the Court pursuant to Article 5(1) 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 Cour d'appel de Bruxelles (Belgium) for a preliminary ruling in the proceedings pending before that court between

Richard Gaillard

and

Alaya Chekili,

on the interpretation of Article 16(1) of the 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 - see p. 77 for the amended text) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissochet, R. Schintgen (Rapporteur) and N. Colneric, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

after considering the written observations submitted under Article 20 of the Statute of the Court of Justice of the EC:

- on behalf of Mr Gaillard, by C. Dabin-Serlez, avocat,

- on behalf of Mr Chekili, by L. Defalque and B. Lombart, avocats,

- on behalf of the German Government, by R. Wagner, acting as Agent,

- on behalf of the Spanish Government, by M. Lopez-Monís Gallego, acting as Agent,

- on behalf of the United Kingdom Government, by R. Magrill, of the Treasury Solicitor's Department, acting as Agent,

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

the national court having been informed that the Court proposes to give its decision by reasoned order pursuant to Article 104(3) of its Rules of Procedure,

the persons referred to in Article 20 of the Statute of the Court of Justice of the EC having been invited to submit any observations they may have on that proposal,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By judgment of 22 December 1999, received at the Court on 31 December 1999, the Cour d'appel de Bruxelles, Belgium, referred to the Court for a preliminary ruling 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 a question on the interpretation of Article 16(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 - see p. 77 for the amended text) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1, hereinafter the Brussels Convention).

2 This question was raised in proceedings brought by Mr Gaillard against Mr Chekili concerning a contract for the sale of several immovable properties located in France.

The Brussels Convention

3 The first paragraph of Article 2 of the Brussels Convention, which is comprised in Section 1, headed General Provisions, of Title II, relating to Jurisdiction, provides:

[S]ubject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

4 Article 16, which forms Section 5, headed Exclusive Jurisdiction, of Title II of the Convention, states:

[T]he following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated;

...

5 According to Article 12(1) of the Convention of 25 October 1982:

[T]he 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention and this Convention, shall apply only to legal proceedings instituted ... after the entry into force of this Convention in the State of origin...

6 The Convention of 25 October 1982 entered into force in Belgium on 1 April 1989.

The main proceedings

7 The file relating to the main proceedings shows that by a contract of sale of 4 October 1991 Mr Gaillard sold to Mr Chekili two properties and a number of plots of land situated in France for an aggregate sum of BEF 30 000 000. On the same day, the purchaser paid to the seller a deposit

of 10% of the sale price. Under the general conditions of the contract, the officially attested instrument of sale was to be signed no later than four months after the conclusion of the contract.

8 As the officially attested instrument of sale had none the less not been executed pursuant to the contract, by summons to appear before the Tribunal de Première Instance de Bruxelles, Belgium, of 14 December 1992, Mr Gaillard brought proceedings against Mr Chekili for rescission of the contract of sale and for damages in accordance with the general conditions of the contract of sale entered into by the parties. Those conditions provide, on the one hand, that if one of the parties is in default in the performance of his contractual obligations, and is served with a formal notice which is not complied with within a period of 15 days following service, the other party may seek either specific performance of the contract or rescission of the sale, with the sums paid by way of deposit remaining with the seller where the purchaser is in default, and, on the other hand, that in cases of late payment, the purchaser must pay interest to the seller at an annual rate of 10% on the amount remaining due.

9 That court having declined jurisdiction by reason of Article 16(1) of the Brussels Convention, on the grounds that the properties that were the subject of the contract of sale were situated in France, Mr Gaillard appealed to the Cour d'Appel de Bruxelles which decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Does an action for rescission of a contract for the sale of land and consequential damages amount to proceedings "which have as their object rights in rem of immovable property" within the meaning of Article 16 of the Convention of 27 September 1968 between the Member States of the European Economic Community on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Brussels on 27 September 1968?

The question referred for a preliminary ruling

10 By this question, the national court asks in substance whether the action for rescission of a contract of sale relating to immovable property and for consequential damages falls within the scope of the rule on exclusive jurisdiction in proceedings having as their object rights in rem of immovable property laid down by Article 16(1) of the Brussels Convention.

11 Considering that, in the light of the Court's settled case-law, the answer to that question admits of no reasonable doubt, the Court informed the national court pursuant to Article 104(3) of its Rules of Procedure that it proposed to give its decision by reasoned order and invited the Member States together with the other persons referred to in Article 20 of the EC Statute of the Court of Justice to submit any observations they might have on that proposal.

12 Mr Gaillard, the German Government and the Commission made no objection to the Court's proposal to give its decision by reasoned order. However, the Spanish Government expressed a contrary view.

13 For the purpose of deciding the question referred for a preliminary ruling, it must first be observed that it follows from settled case-law that in order to ensure that the rights and obligations arising out of the Brussels Convention for the Contracting States and for individuals concerned are as equal and uniform as possible, an independent definition must be given in Community law to the phrase in proceedings which have as their object rights in rem in immovable property within the meaning of Article 16(1) of the Convention (see, in particular, the judgment in Case C-115/88 Reichert and Kockler [1990] ECR I-27, paragraph 8).

14 Next, the Court has repeatedly held that Article 16 of the Brussels Convention, being an exception to the general rule of jurisdiction set out in the first paragraph of Article 2 of the Convention, must not be given a wider interpretation than is required by its objective, given that it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain

cases, results in their being brought before a court which is not that of the domicile of any of them (see the judgments in Cases 73/77 Sanders [1977] ECR 2383, paragraphs 17 and 18, Reichert and Kockler, paragraph 9, C-292/93 Lieber [1994] ECR I-2535, paragraph 12, and C-8/98 Dansommer [2000] ECR I-393, paragraph 21).

15 In those circumstances, the Court has held that Article 16(1) of the Brussels Convention must be interpreted as meaning that the exclusive jurisdiction of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest (see the judgment in Reichert and Kockler, paragraph 11).

16 It is also settled case-law that it is not sufficient, for Article 16(1) to apply, that a right in rem in immovable property be involved in the action or that the action have a link with immovable property. On the contrary, the action must be based on a right in rem and not on a right in personam, save in the case of the exception concerning tenancies of immovable property (see the judgments in C-294/92 Webb [1994] ECR I-1717, paragraph 14, Lieber, paragraph 13, and Dansommer, paragraph 22).

17 In this regard, it is clear from the Schlosser Report 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 (OJ 1979 C 59, p. 71, at p. 120, hereinafter the Schlosser Report) that the difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect erga omnes, whereas the latter can only be claimed against the debtor (see the judgment in Lieber, paragraph 14).

18 Even if, in some circumstances, proceedings for rescission of a contract for the sale of immovable property may have some impact on the title to the property, they are none the less based on the personal right that the claimant obtains under the contract entered into between the parties and consequently may only be raised against the other party to the contract. By raising these proceedings, one party to the contract seeks to be released from his contractual obligations towards the other party, by reason of the latter's failure to perform the contract. Furthermore, the decision of the court which is to decide the case is capable of having effect only as regards the party against whom the order of rescission is made. It follows that the proceedings do not have as their object rights which relate directly to immovable property and can be raised erga omnes.

19 It follows that the action for rescission in the main proceedings does not constitute proceedings which have as their object rights in rem in immovable property within the meaning of Article 16(1) of the Brussels Convention, but is an action in personam.

20 The same applies to the claim for damages which seeks compensation for the harm alleged by one party to have been suffered by it as a result of the rescission of a contract for the sale of immovable property by reason of the other party to the contract's failure to perform its contractual obligations (see also the Schlosser Report, p. 120, and the judgment in Lieber).

21 That interpretation is moreover confirmed by the Schlosser Report (p. 122) which states that in the case of mixed actions, such as an action for restitution of property raised by a party where the other party to the contract is not performing his obligations under the contract for sale of the property, there are numerous factors which support the view that such actions are predominantly actions in personam and accordingly that Article 16(1) of the Brussels Convention does not apply.

22 It follows that the answer to the question referred is that an action for rescission of a contract for the sale of land and consequential damages is not within the scope of the rules on exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property under Article 16(1) of the Brussels Convention.

Costs

23 The costs incurred by the German, Spanish and United Kingdom 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 (Sixth Chamber),

in answer to the question referred to it by the Cour d'appel de Bruxelles by judgment of 22 December 1999, hereby rules:

An action for rescission of a contract for the sale of land and consequential damages is not within the scope of the rules on exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property under Article 16(1) of the Convention of 27 September 1968 between the Member States of the European Economic Community 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 and by the Convention of 25 October 1982 on the accession of the Hellenic Republic.

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AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 2001 Page I-02771
DOC	2001/04/05
LODGED	1999/12/31
JURCIT	31991Q0704(02)-A104P3 : N 11 41968A0927(01)-A02L1 : N 14 41968A0927(01)-A16PT1 : N 13 - 22 61988J0115 : N 13 - 15 61993J0292 : N 14 16 17 20 61977J0073 : N 14 61998J0098 : N 14 16 61992J0294 : N 16

CONCERNS	Interprets 41968A0927(01) -A16PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Federal Republic of Germany ; Spain ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Belgium
NATCOUR	*A9* Cour d'appel de Bruxelles, chambre supplémentaire I, arrêt du 22/12/1999 (1995/AR/2462 ; No 8834 ; R.No 1999/6036 927) ; - International Litigation Procedure 2000 p.695-696
NOTES	Wittwer, Alexander: Auflösung eines Kaufvertrags über ein Grundstück und Schadenersatz - forum rei sitae?, European Law Reporter 2001 p.293-295 ; Maseda Rodríguez, Javier: Derechos reales y derechos personales en el ambito del artículo 16.1 del Convenio de Bruselas de 1968, Diario La ley 2001 no 5430 p.1-4 ; Consolo, Claudio ; De Cristofaro, Marco: Giudizio di risoluzione di preliminare "improprio" di vendita immobiliare: inapplicabilità del criterio esclusivo del forum rei sitae, Supplément à : Il corriere giuridico 2002 p.11-14 ; Marmisse, Anne: Droit européen des affaires, Revue trimestrielle de droit commercial et de droit économique 2002 p.207-209 ; Johansson, Sirpa: Defensor Legis 2002 no 3 p.567-571 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2002 no 418 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 2002 p.621-623 ; Giannopoulos, Panagiotis S.: Elliniki Epitheorisi Evropaïkou Dikaiou 2002 p.397-400 ; Gardeñes Santiago, Miguel: Jurisprudencia española y comunitaria de Derecho Internacional Privado, Revista española de Derecho Internacional 2002 p.361-365
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Schintgen
DATES	of document: 05/04/2001 of application: 31/12/1999

Judgment of the Court (Sixth Chamber)
of 13 July 2000
Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC).
Reference for a preliminary ruling: Cour d'appel de Versailles - France.
Brussels Convention - Personal scope - Plaintiff domiciled in a non-Contracting State - Material scope - Rules of jurisdiction in matters relating to insurance - Dispute concerning a reinsurance contract.
Case C-412/98.

1. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction - Conditions for the application of Title II - Domicile of the defendant in a Contracting State - Domicile of the plaintiff in third country - Lack of bearing subject to an express provision of the Convention

(Convention of 27 September 1968, Title II)

2. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction in matters relating to insurance - Objective - Protection of the weaker party - Scope - Disputes between professionals in connection with a reinsurance contract - Exclusion

(Convention of 27 September 1968, Arts 7 to 12a)

3. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction in matters relating to insurance - Objective - Protection of the weaker party - Scope - Disputes between a private individual and a reinsurer - Inclusion

(Convention of 27 September 1968, Arts 7 to 12a)

1. Title II 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State. Such is the case where the plaintiff exercises the option open to him under Article 5(2), point 2 of the first paragraph of Article 8 and the first paragraph of Article 14 of the Convention, and also in matters relating to prorogation of jurisdiction under Article 17 of the Convention, solely where the defendant's domicile is not situated in a Contracting State.

(see paras 47, 61, and operative part 1)

2. The rules of special jurisdiction in matters relating to insurance set out in Articles 7 to 12a of the Convention of 27 September 1968, 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, do not refer to disputes between a reinsurer and a reinsured in connection with a reinsurance contract. In affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, those rules reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically. No particular protection is justified as regards the relationship between a reinsured and his reinsurer. Since both parties to the reinsurance contract are professionals, neither of whom can be presumed

to be in a weak position compared with the other party to the contract.

(see paras 64, 66, 76, and operative part 2)

3. Although the rules of special jurisdiction in matters relating to insurance set out in Articles 7 to 12 of the Convention of 27 September 1968 do not refer to disputes between a reinsured and his reinsurer in connection with a reinsurance contract, they are, on the other hand, fully applicable where, under the law of a Contracting State, the policy-holder, the insured or the beneficiary of an insurance contract has the option to approach directly any reinsurer of the insurer in order to assert his rights under that contract as against that reinsurer. In such a situation, the plaintiff is in a weak position compared with the professional reinsurer, so that the objective of special protection inherent in Article 7 et seq. of the Convention justifies the application of the special rules which it lays down.

(see para. 75)

In Case C-412/98,

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, Versailles, France, for a preliminary ruling in the proceedings pending before that court between

Group Josi Reinsurance Company SA

and

Universal General Insurance Company (UGIC),

on the interpretation of the provisions of Title II of the Convention of 27 September 1968, cited above (OJ 1972 L 299, p. 32), 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 at p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

THE COURT (Sixth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Schintgen (Rapporteur), J.-P. Puissochet, G. Hirsch and F. Macken, Judges,

Advocate General: N. Fennelly,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Group Josi Reinsurance Company SA, by C. Bouckaert, of the Paris Bar,

- Universal General Insurance Company (UGIC), by B. Mettetal, of the Paris Bar,

- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargé de Mission in the same directorate, acting as Agents,

- the United Kingdom Government, by R. Magrill, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Lloyd Jones, Barrister,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, and A.X. Lewis, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government and the Commission at the hearing on 10 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 9 March 2000,

gives the following

Judgment

Costs

77 The costs incurred by the French and United Kingdom 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 (Sixth Chamber),

in answer to the questions referred to it by the Cour d'Appel, Versailles, by judgment of 5 November 1998, hereby rules:

1. Title II 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of that convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State.

2. The rules of special jurisdiction in matters relating to insurance set out in Articles 7 to 12a of that convention do not cover disputes between a reinsurer and a reinsured in connection with a reinsurance contract.

1 By judgment of 5 November 1998, received at the Court on 19 November 1998, the Cour d'Appel (Court of Appeal), Versailles, 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 two questions on the interpretation of the provisions of Title II of that convention (OJ 1972 L 299, p. 32), 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 at p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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) (hereinafter the Convention).

2 Those questions were raised in proceedings between Universal General Insurance Company (UGIC), in liquidation, an insurance company incorporated under Canadian law, having its registered office in Vancouver, Canada, and Group Josi Reinsurance Company SA (Group Josi), a reinsurance company

incorporated under Belgian law, having its registered office in Brussels, concerning a sum of money claimed by UGIC from Group Josi in its capacity as party to a reinsurance contract.

The Convention

3 The rules of jurisdiction laid down by the Convention are to be found in Title II thereof, which contains Articles 2 to 24.

4 Article 2 of the 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.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

5 The first paragraph of Article 3 of the Convention, which is part of 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 The second paragraph of Article 3 of the Convention prohibits a plaintiff from relying on special rules of jurisdiction in force in the Contracting States which are based, in particular, on the nationality of the parties and on the plaintiff's domicile or residence.

7 Article 4, which also forms part of Section 1 of Title II of the Convention, states:

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.

As against such a defendant, any person domiciled in a Contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of Article 3, in the same way as the nationals of that State.

8 In Sections 2 to 6 of Title II, the Convention lays down rules of special or exclusive jurisdiction.

9 Thus, under Article 5, which is part of Section 2, entitled Special jurisdiction, of Title II of the 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;...

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident...

...

10 Articles 7 to 12a constitute Section 3, entitled Jurisdiction in matters relating to insurance, of Title II of the Convention.

11 Article 7 of the Convention states:

In matters relating to insurance, jurisdiction shall be determined by this section...

12 Article 8 of the Convention provides:

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 policy-holder is domiciled, or

3. if he is a co-insurer, in the courts of a Contracting State in which proceedings are brought against the leading insurer.

An insurer who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

13 Section 4 of Title II of the Convention contains rules of jurisdiction over consumer contracts.

14 The first paragraph of Article 14, which is part of that section, states:

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

15 Article 16, which constitutes Section 5 of Title II of the Convention, lays down certain rules of exclusive jurisdiction and states that they are to apply regardless of domicile.

16 Under the first paragraph of Article 17, which is part of Section 6, entitled Prorogation of jurisdiction, of Title II of the Convention:

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....

17 Article 18, which also forms part of Section 6, states:

Apart from jurisdiction derived from other provisions of this convention, a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 16.

The main proceedings

18 It is apparent from the documents in the case in the main proceedings that UGIC instructed its broker, Euromepa, a company incorporated under French law, having its registered office in France, to procure a reinsurance contract with effect from 1 April 1990 in relation to a portfolio of comprehensive home-occupiers' insurance polices based in Canada.

19 By fax dated 27 March 1990, Euromepa offered Group Josi a share in that reinsurance contract, stating that the main reinsurers are Union Ruck with 24% and Agrippina Ruck with 20%.

20 By fax of 6 April 1990, Group Josi agreed to acquire a 7.5% share.

21 On 28 March 1990, Union Ruck had told Euromepa that it did not intend to retain its share after 31 May 1990 and, by letter of 30 March 1990, Agrippina Ruck had informed the same broker that it would reduce its share to 10% with effect from 1 June 1990, the reason for those withdrawals being changes in economic policy imposed by the American-based parent companies of those insurance undertakings.

22 On 25 February 1991, Euromepa sent Group Josi first a statement of account showing a debit balance and then a final calculation showing that Group Josi owed CAD 54 679.34 in respect of its share in the reinsurance transaction.

23 By letter of 5 March 1991, Group Josi refused to pay that amount, essentially on the ground that it had been induced to enter into the reinsurance contract by the provision of information which subsequently turned out to be false.

24 In those circumstances, on 6 July 1994, UGIC brought proceedings against Group Josi before the Tribunal de Commerce (Commercial Court), Nanterre, France.

25 Group Josi argued that that court lacked jurisdiction since the Tribunal de Commerce, Brussels, within whose territorial jurisdiction it has its registered office, had jurisdiction, and it relied, first, on the Convention and, second, in the event of the general law being found to apply, on Article 1247 of the French Code Civil (Civil Code).

26 By judgment of 27 July 1995, the Tribunal de Commerce, Nanterre, held that it had jurisdiction on the ground that UGIC is a company incorporated under Canadian law without a place of business in the Community and that the objection of lack of jurisdiction raised on the basis of the Convention cannot be applied to it. On the substance, the court ordered Group Josi to pay the sum claimed by UGIC, plus statutory interest as from 6 July 1994.

27 Group Josi subsequently appealed against that judgment before the Cour d'Appel, Versailles.

28 In support of its appeal, Group Josi submitted that the Convention applies to any dispute in which a connecting factor with the Convention is apparent. In the present case, the Convention should apply. The main connecting factor is that specified in the first paragraph of Article 2 of the Convention, namely the defendant's domicile. Since Group Josi has its registered office in Brussels and no subsidiary place of business in France, it can, in accordance with that provision, be sued only in a Belgian court. In addition, Group Josi relied on Article 5(1) of the Convention, arguing in this respect that the obligation in question, being payment of a contractual debt, was, in the absence of any stipulation to the contrary in the reinsurance contract, to be performed in the debtor's place of domicile, namely Brussels.

29 UGIC, on the other hand, contended that the rules of jurisdiction established by the Convention can apply only if the plaintiff is also domiciled in a Contracting State. Since UGIC is a company incorporated under Canadian law with no subsidiary place of business in a Contracting State, the Convention is not applicable in the present case.

30 The Cour d'Appel observed, first, that, although a dispute may be regarded as sufficiently integrated into the European Community to justify jurisdiction being vested in the courts of a Contracting State where, as in the present case, the defendant is domiciled in a Contracting State, it is a different question whether the specific rules of that convention can be used against a plaintiff domiciled in a non-Contracting State, which would necessarily entail extending Community law to non-member countries.

31 Second, the Cour d'Appel noted that Article 7 of the Convention simply refers to matters relating to insurance without specifying further, so that the question arises whether reinsurance falls within the scope of the autonomous system of jurisdiction established by Articles 7 to 12a of the Convention. In this respect, it might be considered that the purpose of those articles is to protect the insured as the weak party to the insurance contract and that there is no such characteristic in matters of reinsurance, but, on the other hand, the text of the Convention does not contain any exclusion on that point.

The questions referred for preliminary ruling

32 Taking the view that, in those circumstances, the resolution of the dispute required an interpretation of the Convention, the Cour d'Appel, Versailles, decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

1. Does the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters apply not only to "intra-Community" disputes but also to disputes which are "integrated into the Community"? More particularly, can a defendant established in a Contracting State rely on the specific rules on jurisdiction set out in that convention against a plaintiff domiciled in Canada?

2. Do the rules on jurisdiction specific to matters relating to insurance set out in Article 7 et seq. of the Brussels Convention apply to matters relating to reinsurance?

The first question

33 By its first question, the national court essentially seeks to ascertain whether the rules of jurisdiction laid down by the Convention apply where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country.

34 In order to answer that question, it is important to state at the outset that the system of common rules on conferment of jurisdiction established in Title II of the 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.

35 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, to that effect, Case C-26/91 Handte v Traitements Mécano-chimiques des Surfaces [1992] ECR I-3967, paragraph 14; see also the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, 18)).

36 It is only by way of derogation from that fundamental principle, that the courts of the Contracting State in which the defendant has its domicile or seat are to have jurisdiction, that the Convention provides, under the first paragraph of Article 3 thereof, for the cases, exhaustively listed in Sections 2 to 6 of Title II, in which a defendant domiciled or established in a Contracting State may, where the situation is covered by a rule of special jurisdiction, or must, where it is covered by a rule of exclusive jurisdiction or a prorogation of jurisdiction, be excluded from the jurisdiction of the courts of the State in which it is domiciled and sued in a court of another Contracting State.

37 In that context, Sections 2 to 6 of Title II of the Convention include certain specific provisions which, for the purpose of determining which court has jurisdiction, depart from the general criterion of the domicile of the defendant by according, exceptionally, a certain influence to the domicile of the plaintiff.

38 Thus, first, in order to facilitate the proceedings brought by a maintenance creditor, Article 5(2) of the Convention gives that person the option to sue the defendant, in a Contracting State other than that of the defendant's domicile, in the courts for the place where the plaintiff is domiciled or habitually resident.

39 Similarly, also with the aim of protecting the party deemed to be weaker than the other party to the contract, point 2 of the first paragraph of Article 8 and the first paragraph of Article 14 of the Convention provide, respectively, that a holder of an insurance policy and a consumer have the right to bring proceedings against the other party to their contract in the courts of the Contracting State in which they are domiciled.

40 Although those rules of special jurisdiction give importance, exceptionally, to the plaintiff's domicile being in a Contracting State, they none the less constitute only an additional option for the plaintiff, alongside the forum of the courts of the Contracting State where the defendant is domiciled, which constitutes the general rule underlying the Convention.

41 Second, Article 17 of the Convention provides for the exclusive jurisdiction of a court or

the courts of a Contracting State chosen by the parties, so long as one of the parties is domiciled in a Contracting State.

42 That condition does not necessarily refer to the defendant's domicile, so that the place of the plaintiff's domicile may, where appropriate, be decisive. However, it also follows from that provision that the rule of jurisdiction set out therein is applicable if the defendant is domiciled in a Contracting State, even if the plaintiff is domiciled in a non-member country (see, to that effect, the Jenard Report, cited above, p. 38).

43 On the other hand, the other provisions in Sections 2 to 6 of Title II of the Convention do not attach any importance to the plaintiff's domicile.

44 Admittedly, under Article 18 of the Convention, the voluntary appearance of the defendant establishes the jurisdiction of a court of a Contracting State before which the plaintiff has brought proceedings, without the place of the defendant's domicile being relevant.

45 However, although the court seised must be that of a Contracting State, that provision does not further require that the plaintiff be domiciled in such a State.

46 The same conclusion can be drawn from Article 16 of the Convention, which states that the rules of exclusive jurisdiction which it lays down are to apply without the domicile of the parties being taken into consideration. The fundamental reason for those rules of exclusive jurisdiction is the existence of a particularly close connection between the dispute and a Contracting State, irrespective of the domicile both of the defendant and of the plaintiff (as regards, more specifically, in proceedings having as their object tenancies of immovable property, the exclusive jurisdiction of the courts of the Contracting State in which the property is situated, see, in particular, Case C-8/98 Dansommer v Götz [2000] ECR I-393, paragraph 27).

47 In the light of the foregoing, the Court finds that it is only in quite exceptional cases that Title II of the Convention accords decisive importance, for the purpose of conferring jurisdiction, to the plaintiff's domicile being in a Contracting State. That is the case only if the plaintiff exercises the option open to him under Article 5(2), point 2 of the first paragraph of Article 8 and the first paragraph of Article 14 of the Convention, and also in matters relating to prorogation of jurisdiction under Article 17 of the Convention, solely where the defendant's domicile is not situated in a Contracting State.

48 None of those specific cases is applicable in the case in the main proceedings.

49 Furthermore, it is settled case-law that the rules of jurisdiction which derogate from the general principle, set out in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled or established are to have jurisdiction, cannot give rise to an interpretation going beyond the cases expressly envisaged by the Convention (see, in particular, Handte, paragraph 14; Case C-89/91 Shearson Lehman Hutton v TVB [1993] ECR I-139, paragraphs 15 and 16; Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, paragraph 13; and Case C-51/97 Réunion Européenne and Others [1998] ECR I-6511, paragraph 16).

50 In addition, as is already clear from the second paragraph of Article 3 of the Convention, which prohibits a plaintiff from invoking against a defendant domiciled in a Contracting State national rules of jurisdiction based, in particular, on the plaintiff's domicile or residence, the Convention appears clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile (see Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraph 16; and Shearson Lehman Hutton, paragraph 17). It follows that the Convention must not be interpreted as meaning that, otherwise than in the cases expressly provided for, it recognises the jurisdiction of the courts of the plaintiff's domicile and therefore enables a plaintiff to determine the court

with jurisdiction by his choice of domicile (see, to that effect, Dumez France and Tracoba, paragraph 19).

51 Article 4 of the Convention provides, admittedly, for a derogation from the rule laid down in the second paragraph of Article 3. Article 4 states that, if the defendant is not domiciled in a Contracting State, jurisdiction is to be determined by the law in force in each Contracting State, subject only to Article 16, which applies regardless of domicile, and that, as against such a defendant, a plaintiff domiciled in a Contracting State has the right to avail himself in that State of the special rules of jurisdiction there in force of which an illustrative list appears in the second paragraph of Article 3 of the Convention.

52 However, in so far as Article 4 of the Convention provides that the rules of jurisdiction laid down by the Convention are not applicable where the defendant is not domiciled in a Contracting State, it constitutes a confirmation of the fundamental principle set out in the first paragraph of Article 2 of the Convention.

53 In the light of all the foregoing, it must be concluded that the system of rules on conferment of jurisdiction established by the Convention is not usually based on the criterion of the plaintiff's domicile or seat.

54 Moreover, as is clear from the wording of the second paragraph of Article 2 and the second paragraph of Article 4 of the Convention, nor is that system based on the criterion of the nationality of the parties.

55 The Convention enshrines, on the other hand, the fundamental principle that the courts of the Contracting State in which the defendant is domiciled or established are to have jurisdiction.

56 As is clear from paragraph 47 above, it is only by way of exception to that general rule that the Convention includes certain specific provisions which, in clearly defined cases, accord an influence to the plaintiff's domicile.

57 It follows that, as a general rule, the place where the plaintiff is domiciled is not relevant for the purpose of applying the rules of jurisdiction laid down by the Convention, since that application is, in principle, dependent solely on the criterion of the defendant's domicile being in a Contracting State.

58 It would be otherwise only in exceptional cases where the Convention makes that application of the rules of jurisdiction expressly dependent on the plaintiff being domiciled in a Contracting State.

59 Consequently, the Convention does not, in principle, preclude the rules of jurisdiction which it sets out from applying to a dispute between a defendant domiciled in a Contracting State and a plaintiff domiciled in a non-member country.

60 As the Advocate General observed in paragraph 21 of his Opinion, it is thus fully in accordance with that finding that the Court has interpreted the rules of jurisdiction laid down by the Convention in cases where the plaintiff had his domicile or seat in a non-member country, although the provisions of the Convention in question did not establish any exception to the general principle that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction (see Case C-190/89 Rich [1991] ECR I-3855; and Case C-406/92 The Tatry [1994] ECR I-5439).

61 In those circumstances, the answer to the first question must be that Title II of the Convention is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting

State.

The second question

62 In this respect, it must be observed, first, that the rules of jurisdiction in matters relating to insurance, laid down in Section 3 of Title II of the Convention, apply expressly to certain specific types of insurance contracts, such as compulsory insurance, liability insurance, insurance of immovable property and marine and aviation insurance. Furthermore, point 3 of the first paragraph of Article 8 of the Convention expressly refers to co-insurance.

63 On the other hand, reinsurance is not mentioned in any of the provisions of that section.

64 First, according to settled case-law, it is apparent from a consideration of the provisions of Section 3 of Title II of the Convention in the light of the documents leading to their enactment that, in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically (Case 201/82 Gerling and Others v Amministrazione del Tesoro dello Stato [1983] ECR 2503, paragraph 17).

65 The role of protecting the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract which is fulfilled by those provisions implies, however, that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified (see, by analogy, in respect of Article 13 et seq. of the Convention in relation to jurisdiction over consumer contracts, Shearson Lehmann Hutton, paragraph 19).

66 No particular protection is justified as regards the relationship between a reinsured and his reinsurer. Both parties to the reinsurance contract are professionals in the insurance sector, neither of whom can be presumed to be in a weak position compared with the other party to the contract.

67 It is thus in accordance with both the letter and the spirit and purpose of the provisions in question to conclude that they do not apply to the relationship between a reinsured and his reinsurer in connection with a reinsurance contract.

68 That interpretation is confirmed by the system of rules of jurisdiction established by the Convention.

69 Thus Section 3 of Title II of the Convention includes rules which confer jurisdiction on courts other than those of the Contracting State in which the defendant is domiciled. In particular, point 2 of the first paragraph of Article 8 of the Convention provides that the courts for the place where the policy-holder is domiciled are to have jurisdiction.

70 As has already been noted in paragraph 49 above, it is settled case-law that the rules of jurisdiction which derogate from the general principle, laid down in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction, cannot give rise to an interpretation going beyond the cases envisaged by the Convention.

71 That interpretation is all the more valid in the case of a rule of jurisdiction such as that laid down in point 2 of the first paragraph of Article 8 of the Convention, which enables the policy-holder to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled.

72 For the reasons more fully set out in paragraph 50 above, the framers of the Convention demonstrated their hostility towards the attribution of jurisdiction to the courts of the plaintiff's domicile otherwise than in the cases for which it expressly provides.

73 It follows that Section 3 of Title II of the Convention may not be regarded as applying to the relationship between a reinsured and his reinsurer in connection with a reinsurance contract.

74 That interpretation is also supported by the Schlosser Report on the Convention of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention (OJ 1979 C 59, p. 71, 117), according to which [r]einsurance contracts cannot be equated with insurance contracts. Accordingly, Articles 7 to 12 do not apply to reinsurance contracts.

75 However, as the Commission rightly pointed out, although the rules of special jurisdiction in matters relating to insurance do not refer to disputes between a reinsured and his reinsurer in connection with a reinsurance contract, such as that at issue in the main proceedings, they are, on the other hand, fully applicable where, under the law of a Contracting State, the policy-holder, the insured or the beneficiary of an insurance contract has the option to approach directly any reinsurer of the insurer in order to assert his rights under that contract as against that reinsurer, for example in the case of the bankruptcy or liquidation of the insurer. In such a situation, the plaintiff is in a weak position compared with the professional reinsurer, so that the objective of special protection inherent in Article 7 et seq. of the Convention justifies the application of the special rules which it lays down.

76 In the light of all the foregoing, the answer to the second question must be that the rules of special jurisdiction in matters relating to insurance set out in Articles 7 to 12a of the Convention do not cover disputes between a reinsurer and a reinsured in connection with a reinsurance contract.

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SUB Brussels Convention of 27 September 1968 ; Jurisdiction

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NATCOUR *A8* Cour d'appel de Versailles, 12e chambre, 2e section, arrêt du 15/01/1998 (9795/95)
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A9 Cour d'appel de Versailles, 12e chambre, 2e Section, arrêt du 05/11/1998 (9795/95)
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PROCEDU Reference for a preliminary ruling

ADVGEN Fennelly

JUDGRAP Schintgen

DATES

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Judgment of the Court (Fifth Chamber)
of 9 November 2000
Coreck Maritime GmbH v Handelsveem BV and Others.
Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands.
Brussels Convention - Article 17 - Clause conferring jurisdiction - Formal conditions - Effects.
Case C-387/98.

1. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Jurisdiction clause - Parties' consent - Criteria - Need to formulate the clause so that the court having jurisdiction can be determined on its wording alone - No such need

(Convention of 27 September 1968, Art. 17)

2. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Scope of the first paragraph of Article 17 - Clause entered into by at least one party domiciled in a Contracting State conferring jurisdiction on a court in a Contracting State

(Convention of 27 September 1968, Art. 17)

3. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Jurisdiction clause in a bill of lading - Enforceability as against third party bearer - Conditions

(Convention of 27 September 1968, Art. 17)

1. The words have agreed in the first sentence of the first paragraph of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters cannot be interpreted as meaning that it is necessary for a jurisdiction clause to be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case.

(see para. 15 and operative part 1)

2. Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters only applies if, first, at least one of the parties to the original contract is domiciled in a Contracting State and, secondly, the parties agree to submit any disputes to a court or the courts of a Contracting State.

A court situated in a Contracting State must, if it is seised notwithstanding a jurisdiction clause designating a court in a third country, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits.

(see paras 19, 21 and operative part 2)

3. The first paragraph of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as meaning that a jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in that provision.

(see para. 27 and operative part 3)

In Case C-387/98,

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 Hoge Raad der Nederlanden, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Coreck Maritime GmbH

and

Handelsveem BV and Others,

on the interpretation of the first paragraph of Article 17 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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) and 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),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, acting as President of the Fifth Chamber, P. Jann (Rapporteur) and L. Sevon, Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Coreck Maritime GmbH, by R.S. Meijer, of the Hague Bar, and G.J.W. Smallegange, of the Rotterdam Bar,

- Handelsveem BV and Others, by J.K. Franx, of the Hague Bar,

- the Netherlands Government, by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent,

- the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and O. Fiumara, Avvocato dello Stato,

- the United Kingdom Government, by R. Magrill, of the Treasury Solicitor's Department, acting as Agent, and L. Persey QC,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, and P. van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Coreck Maritime GmbH, Handelsveem BV and Others, the United Kingdom Government and the Commission at the hearing on 10 February 2000,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2000,

gives the following

Judgment

Costs

33 The costs incurred by the Netherlands, Italian and United Kingdom 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 proceedings 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 questions referred to it by the Hoge Raad der Nederlanden by judgment of 23 October 1998, hereby rules:

The first paragraph of Article 17 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as follows:

1. It does not require that a jurisdiction clause be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case.

2. It applies only if, first, at least one of the parties to the original contract is domiciled in a Contracting State and, secondly, the parties agree to submit any disputes before a court or the courts of a Contracting State.

3. A jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of Article 17 of the Convention, as amended.

1 By judgment of 23 October 1998, lodged at the Court on 29 October 1998, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred 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 (hereinafter the Protocol) four questions on the interpretation of the first paragraph of Article 17 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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) and 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, hereinafter the Convention).

2 Those questions were raised in proceedings relating to the validity of a jurisdiction clause in bills of lading between Coreck Maritime GmbH, a company incorporated according to German law established in Hamburg, Germany, the issuer of the bills of lading (hereinafter Coreck) on the one hand, and Handelsveem BV, the holder in due course of the bills of lading, V. Berg and Sons Ltd and Man Producten Rotterdam BV, the owners of the cargo under the bills of lading, and The People's Insurance Company of China, the insurer of that cargo (hereinafter referred to collectively

as Handelsveem) on the other.

The Convention

3 The first and second paragraphs of Article 17 of the Convention provide:

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

(b) in a form which accords with practices which the parties have established between themselves; or

(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.

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

The main proceedings

4 Consignments of groundnut kernels were transported from Qingdao in China to Rotterdam in the Netherlands in 1991 aboard a ship belonging to Sevryba, a company incorporated under Russian law established in Murmansk, Russia, pursuant to a contract of carriage concluded with the shipper by Coreck, the time charterer of the vessel.

5 Various bills of lading were issued by Coreck in respect of the carriage containing, inter alia, the following clauses:

3. Jurisdiction

Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein.

17. Identity of Carrier

The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that the said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.

It is further understood and agreed that as the Line, Company or Agents who has [sic] executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier or bailee of the goods.

6 The following words appeared on the face of the bills of lading:

"Coreck" Maritime G.m.b.H.

Hamburg.

7 By a document of 5 March 1993, Handelsveem summoned Sevryba and Coreck, under Article 5(1) of the Convention, to appear before the Rechtbank (District Court) in Rotterdam - being the court for the area where the port of discharge designated in the bills of lading was situated - for an order for payment of compensation for the damage alleged sustained by the cargo during transportation.

8 Coreck, relying on the jurisdiction clause in the bills of lading, claimed that that court did not have jurisdiction. In a judgment of 24 February 1995 the Rechtbank in Rotterdam held the clause to be inapplicable and declared that it did have jurisdiction on the ground that, in order for such a clause to be valid, it must be possible to ascertain the court having jurisdiction without difficulty, which was not the case here. On appeal by Coreck, the Gerechtshof (Regional Court of Appeal) in The Hague, in a judgment of 22 April 1997, upheld the decision given at first instance.

9 Coreck appealed to the Hoge Raad der Nederlanden, which decided to stay the proceedings and refer the following four questions to the Court for a preliminary ruling:

1. Must the first sentence of Article 17 of the Brussels Convention (in particular, the words "have agreed"), read in conjunction with the case-law of the Court of Justice according to which "the purpose of Article 17 is to ensure that the [consent of the] parties... to such a clause, which derogates from the ordinary jurisdiction rules laid down in Articles 2, 5 and 6 of the Convention,... is clearly and precisely demonstrated", be interpreted as meaning:

(a) that, in order for a clause vesting jurisdiction in a given court, as provided for in that article, to be valid as between the parties, it is necessary in each case for that clause to be formulated in such a way that its wording alone makes it quite clear, or at least easy to ascertain, (even) for persons other than the parties - and in particular to the court concerned - which court is to have jurisdiction to settle disputes arising from the legal relationship in the context of which that clause is stipulated; or

(b) that - generally or now, in consequence of or in connection with the progressive relaxation of the rules in Article 17 of the Brussels Convention, together with the case-law of the Court of Justice concerning the circumstances in which such a clause is to be regarded as having been validly concluded - in order for such a clause to be valid, it is enough that the parties themselves clearly know, on the basis (inter alia) of the (other) circumstances of the case, which court is to have jurisdiction to settle such disputes?

2. Does Article 17 of the Brussels Convention also govern the validity, as against a third party holding a bill of lading, of a clause which specifies as the forum having jurisdiction to settle disputes "under this Bill of Lading" the courts of the place where the carrier has his "principal place of business" and which is laid down in a bill of lading also containing an "identity of carrier" clause, that bill of lading being issued for the purposes of the carriage of goods, where (a) the shipper and one of the possible carriers are not established in a Contracting State and (b) the second possible carrier is indeed established in a Contracting State but it is not certain whether his "principal place of business" is situated in that State or in a State which is not a party to the Convention?

3. If the answer to Question 2 is in the affirmative:

(a) Does the fact that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper mean that it is also binding on any third party holding the bill of lading, or is that the position only as regards a third party who, upon acquiring the bill of lading, succeeds by virtue of the applicable national law to the shipper's rights and obligations?

(b) Assuming that the jurisdiction clause contained in the bill of lading must be regarded as valid as between the carrier and the shipper, does the answer to the question whether it is also binding on a third party holding the bill of lading also possibly depend to some extent on the contents of the bill of lading and/or the particular circumstances of the case, such as the particular state of knowledge of the third party concerned or the fact that the latter has a long-standing business relationship with the carrier and, if so, can the third party be deemed to be aware of the particular circumstances of the case if the contents of the bill of lading do not make it sufficiently clear to him that the clause in question is valid?

4. If the answer to Question 3(a) is as just suggested, which national law governs the decision as to whether the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations, and what is the position if the national law in question has not hitherto provided, either in its legislation or in its case-law, an answer to the question whether the third party, upon acquiring the bill of lading, succeeds to the shipper's rights and obligations?

The first question

10 As regards the first question, the national court essentially asks whether the words have agreed in the first sentence of the first paragraph of Article 17 of the Convention must be interpreted as meaning that the jurisdiction clause must be formulated in such a way that it is possible to identify the court having jurisdiction on its wording alone.

11 Handelsveem considers that that question must be answered in the affirmative, given the particular need for legal certainty where the choice of forum is concerned. The Italian and Netherlands Governments for their part emphasise how important it is that the court chosen by the parties be identified clearly and precisely, so that the court seised can determine whether it is has jurisdiction.

12 On the other hand, Coreck, the United Kingdom Government and the Commission argue that it is sufficient that the court having jurisdiction be identifiable from the wording of the clause considered in the light of the actual circumstances of the individual case.

13 The Court has held that, by making the validity of a jurisdiction clause subject to the existence of an agreement between the parties, Article 17 of the Convention imposes on the court before which the matter is brought the duty of examining first whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the requirements as to form imposed by Article 17 is to ensure that consensus between the parties is in fact established (Case 24/76 Estasis Salotti v RÜWA [1976] ECR 1831, paragraph 7, Case 25/76 Segoura v Bonakdarian [1976] ECR 1851, paragraph 6, and Case C-106/95 MSG v Gravières Rhénanes [1997] ECR 1-911, paragraph 15).

14 However, if the purpose of Article 17 of the Convention is to protect the wishes of the parties concerned, it must be construed in a manner consistent with those wishes where they are established. Article 17 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the Convention, other than those which are expressly excluded pursuant to the fourth paragraph of Article 17 (Case 23/78 Meeth v Glacetal [1978] ECR 2133, paragraph 5).

15 It follows that the words have agreed in the first sentence of the first paragraph of Article 17 of the Convention cannot be interpreted as meaning that it is necessary for a jurisdiction clause to be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by

the particular circumstances of the case.

The second question

16 By its second question, the national court asks about the conditions of application of the first paragraph of Article 17 of the Convention. It essentially asks whether that provision applies if the jurisdiction clause designates the court for the area where one of the parties to the original contract has its principal place of business but it is not proven that that place of business is situated in a Contracting State.

17 As the wording of the first sentence of the first paragraph of Article 17 of the Convention itself makes clear, that provision only applies where the twofold condition is satisfied that, first, at least one of the parties to the contract is domiciled in a Contracting State and, secondly, the jurisdiction clause designates a court or the courts of a Contracting State. So, that rule, which owes its existence to the fact that the Convention is intended to facilitate the mutual recognition and enforcement of judicial decisions, lays down a requirement as to precision which the jurisdiction clause must satisfy.

18 In relation to the first condition, the first paragraph of Article 53 of the Convention provides that the seat of a company is to be treated as its domicile for the purposes of the Convention. Under that provision, the court seised must, in order to determine that seat, apply its rules of private international law. Consequently, the criteria for identifying the seat of a legal person and particularly for determining the significance of the principal place of business in that process must be established by the national law which is applicable under the conflict of laws rules of the court seised.

19 As to the second condition, Article 17 of the Convention does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits (Report by Professor Schlosser on 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 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, OJ 1979 C 59, p. 71, paragraph 176).

20 Furthermore, it is settled case-law that the validity of a jurisdiction clause under Article 17 of the Convention must be assessed by reference to the relationship between the parties to the original contract (see to that end Case 71/83 Tilly Russ v Nova [1984] ECR 2417, paragraph 24, and Case C-159/97 Castelletti v Trumpy [1999] ECR I-1597, paragraphs 41 and 42). It follows that it is in relation to those parties, which it is for the national court to identify, that the conditions of application of Article 17 of the Convention must be assessed. The circumstances in which a jurisdiction clause may be enforced against a person who was not privy to the original contract are the subject-matter of the third question, which is considered below.

21 That being so, the reply to the second question must be that the first paragraph of Article 17 of the Convention only applies if, first, at least one of the parties to the original contract is domiciled in a Contracting State and, secondly, the parties agree to submit any disputes to a court or the courts of a Contracting State.

The third question

22 By its third question, the national court essentially asks whether a jurisdiction clause which has been agreed between a carrier and a shipper and appears in a bill of lading is valid as against any third party bearer of the bill of lading or whether it is only valid as against a third party

bearer of the bill of lading who succeeded by virtue of the applicable national law to the shipper's rights and obligations when he acquired the bill of lading.

23 It is sufficient to note that the Court has held that, in so far as the jurisdiction clause incorporated in a bill of lading is valid under Article 17 of the Convention as between the shipper and the carrier, it can be pleaded against the third party holding the bill of lading so long as, under the relevant national law, the holder of the bill of lading succeeds to the shipper's rights and obligations (Tilly Russ, paragraph 24, and Castelletti, paragraph 41).

24 It follows that the question whether a party not privy to the original contract against whom a jurisdiction clause is relied on has succeeded to the rights and obligations of one of the original parties must be determined according to the applicable national law.

25 If he did, there is no need to ascertain whether he accepted the jurisdiction clause in the original contract. In 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. The third party holding the bill of lading thus becomes vested with all the rights, and at the same time becomes subject to all the obligations, mentioned in the bill of lading, including those relating to the agreement on jurisdiction (Tilly Russ, paragraph 25).

26 On the other hand, if, under the applicable national law, the party not privy to the original contract did not succeed to the rights and obligations of one of the original parties, 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.

27 Accordingly, the reply to the third question must be that a jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of Article 17 of the Convention.

The fourth question

28 By its fourth question, the national court is essentially asking what the applicable national law is for the purposes of determining the rights and obligations of a third party bearer of a bill of lading and, in the event that the relevant national law provides no solution, what are the rules which should be applied.

29 Under Article 1 of the Protocol, the Court has jurisdiction to give rulings on the interpretation of the Convention.

30 The question which national law is applicable for the purposes of determining the rights and obligations of a third party bearer of a bill of lading is not one of interpretation of the Convention; it falls within the jurisdiction of the national court, which must apply its rules of private international law.

31 Similarly, the question how to supply a lacuna in the applicable national law, apart from being hypothetical, is not one of the interpretation of the Convention.

32 It follows that the fourth question is inadmissible.

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PROCEDU	Reference for a preliminary ruling

ADVGEN Alber

JUDGRAP Jann

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Judgment of the Court (Fifth Chamber)
of 11 May 2000
Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento.
Reference for a preliminary ruling: Corte d'appello di Torino - Italy.
Brussels Convention - Enforcement of judgments - Intellectual property rights relating to vehicle body parts - Public policy.
Case C-38/98.

1. Convention on Jurisdiction and the Enforcement of Judgments - Protocol on the interpretation by the Court of Justice of the Convention - National courts which may request the Court to give a preliminary ruling - Courts sitting in an appellate capacity - Definition - Italy - Corte d'Appello seised of an appeal against a decision dismissing an application for a declaration of enforceability - Included

(Convention of 27 September 1968, Art. 40, first para.; Protocol of 3 June 1971, Art. 2(2))

2. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Assessment by the court before which enforcement is sought - Limits - Review by the Court

(Convention of 27 September 1968, Art. 27(1))

3. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Definition

(Convention of 27 September 1968, Art. 27(1))

4. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - National law or Community law misapplied by the original court - Excluded

(EC Treaty, Art. 177 (now Art. 234 EC); Convention of 27 September 1968, Arts 27, 29 and 34, third para.)

5. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Existence in the State of origin of intellectual property rights relating to vehicle body parts

(Convention of 27 September 1968, Art. 27(1))

1. The Corte d'Appello, seised of an appeal against a decision dismissing an application for a declaration of enforceability on the basis of the first paragraph of Article 40 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, must be regarded as sitting in an appellate capacity and thus having power under Article 2(2) of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention, to request the Court of Justice to give a preliminary ruling on a question of interpretation of the Convention.

Although in Italy the two stages of the procedure for a declaration of enforceability provided for under Article 31 et seq. of the Convention take place before the Corte d'Appello, that coincidence, which is the result of the choice made by the Italian Republic, cannot be permitted to obscure the fact that the procedure under the first paragraph of Article 32, concerning the application for a declaration of enforceability, differs from that provided for in the first paragraph of Article

40. In the first case, the Corte d'Appello rules, in accordance with the first paragraph of Article 34, without the party against whom enforcement is sought being able at this stage of the procedure to submit observations. In the second case, by contrast, the party against whom enforcement is sought must be summoned to appear before the Corte d'Appello as required by the second paragraph of Article 40.

(see paras 27-28)

2. While the Contracting States remain free in principle, by virtue of the proviso in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, to determine according to their own conception what public policy requires, the limits of that concept are a matter of interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State.

(see paras 27-28)

3. Recourse to the clause on public policy in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

(see para. 30)

4. The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision. On the contrary, it must be considered whether, in such cases, the system of legal remedies in each Contracting State, together with the preliminary ruling procedure provided for in Article 177 of the Treaty (now Article 234 EC), affords a sufficient guarantee to individuals.

(see para. 33)

5. Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognising the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.

(see para. 34 and operative part)

In Case C-38/98,

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 Corte d'Appello di Torino, Italy, for a preliminary ruling in the proceedings pending before that court between

Régie Nationale des Usines Renault SA

and

Maxicar SpA,

Orazio Formento

on the interpretation of Article 27, point 1, of the abovementioned 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) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), and of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) and Article 86 of the EC Treaty (now Article 82 EC),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevon, J.-P. Puissochet, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: S. Alber,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Régie National des Usines Renault SA, by M. Argan, of the Turin Bar, A. Braun, E. Cornu, both of the Brussels Bar, M.-P. Escande and S. Havard-Duclos, both of the Paris Bar,

- Maxicar SpA and Mr Formento, by G. Floridia and M. Lamandini, of the Milan Bar,

- the Belgian Government, by J. Devadder, Director of Administration in the Legal Department of the Ministry of Foreign Affairs, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, chargée de mission in that Directorate, acting as Agents,

- the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, P. Stancanelli, of its Legal Service, and M. Desantes Real, a national civil servant seconded to its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Régie Nationale des Usines Renault SA, Maxicar SpA and Mr Formento, the French Government and the Commission at the hearing on 28 April 1999,

after hearing the Opinion of the Advocate General at the sitting on 22 June 1999,

gives the following

Judgment

Costs

36 The costs incurred by the Belgian, French, and Netherlands Government 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 proceedings 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 questions referred to it by the Corte d'Appello di Torino by order of 19 November 1997, hereby rules:

Article 27, point 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognising the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.

1 By order of 19 November 1997, received at the Court on 16 February 1998, the Corte d'Appello di Torino (Court of Appeal, Turin) referred to the Court for a preliminary ruling 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 a question on the interpretation of Article 27, point 1, of the abovementioned 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) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter the Convention), and, pursuant to Article 177 of the EC Treaty (now Article 234 EC), two questions on the interpretation of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) and Article 86 of the EC Treaty (now Article 82 EC).

2 The questions were raised in proceedings between Régie Nationale des Usines Renault SA (Renault), whose registered office is in France, and Maxicar SpA (Maxicar), whose registered office is in Italy, and Mr Formento, who resides in Italy, concerning the enforcement in that Contracting State of a judgment delivered on 12 January 1990 by the Cour d'Appel (Court of Appeal), Dijon, France, ordering Maxicar and Mr Formento to pay Renault damages of FRF 100 000 for loss incurred as a result of activities found to constitute forgery.

The Convention

3 The first sentence of the first paragraph of Article 1 provides that the Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal.

4 In matters relating to the recognition and enforcement of judgments, the general rule, set out in the first paragraph of Article 31 of the Convention, is that a judgment given in a Contracting State and enforceable in that State is to be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there.

5 Under the second paragraph of Article 34, [t]he application may be refused only for one of the reasons specified in Articles 27 and 28.

6 Article 27, point 1, of the Convention states:

A judgment shall not be recognised:

1. if such recognition is contrary to public policy in the State in which recognition is sought.

7 Article 32, first paragraph, of the Convention states that in Italy the application shall be submitted to the Corte d'Appello.

8 If enforcement is authorised, Article 36 of the Convention allows the party against whom enforcement is sought to appeal against the decision. Article 37 provides that in Italy such an appeal shall be lodged, in accordance with the rules governing procedure in contentious matters, with the Corte d'Appello.

9 Article 40 provides that if the application for enforcement is refused the applicant may appeal, in the case of Italy to the Corte d'Appello.

10 Article 2 of the Protocol on the interpretation by the Court of Justice of the Convention (the Protocol) provides:

The following courts may request the Court of Justice to give preliminary rulings on questions of interpretation:

1. ...

- in Italy: la Corte Suprema di Cassazione,

...

2. the courts of the Contracting States when they are sitting in an appellate capacity;

3. in the cases provided for in Article 37 of the Convention, the courts referred to in that Article.

The main proceedings

11 By judgment of 12 January 1990 the Cour d'Appel, Dijon, found Mr Formento guilty of forgery for having manufactured and marketed body parts for Renault vehicles. It also declared him jointly and severally liable with Maxicar, the company of which he was director, to pay FRF 100 000 by way of damages to Renault, which had applied to join the proceedings as a civil party. The judgment became final after an appeal lodged before the French Cour de Cassation (Court of Cassation) was dismissed on 6 June 1991.

12 On 24 December 1996 Renault applied to the Corte d'Appello di Torino for a declaration of enforceability of that judgment in Italy under Articles 31 and 32 of the Convention.

13 By decision of 25 February 1997, the Corte d'Appello di Torino dismissed the application on the ground that since the decision was given in criminal proceedings, the application ought to have been made within the time-limit laid down in Article 741 of the Italian Code of Criminal Procedure.

14 On 28 March 1997 Renault appealed against that decision to the Corte d'Appello di Torino, in accordance with Article 40 of the Convention, arguing that the Convention applied in civil and commercial matters whatever the nature of the court or tribunal involved. Mr Formento and Maxicar contended that the judgment of the Cour d'Appel, Dijon, could not be declared enforceable in Italy because it was irreconcilable with a decision given in a dispute between the same parties in Italy and was contrary to public policy in economic matters.

15 In those circumstances, the Corte d'Appello di Torino decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

(1) Are Articles 30 to 36 of the EC Treaty to be interpreted as precluding the holder of industrial

or intellectual property rights in a Member State from asserting the corresponding exclusive right so as to prevent third parties from manufacturing, selling and exporting to another Member State component parts which together make up the bodywork of a car already on the market, that is to say, components intended to be sold as spare parts for that car?

(2) Is Article 86 of the EC Treaty to be applied so as to prohibit the abuse of the dominant position held by each car manufacturer in the market for spare parts for cars of its manufacture, which consists in seeking to eliminate any competition from independent manufacturers of spare parts through the exercise of its industrial and intellectual property rights and the attendant judicial penalties?

(3) Is, therefore, a judgment handed down by a court of a Member State to be considered contrary to public policy within the meaning of Article 27 of the Brussels Convention if it recognises industrial or intellectual property rights over such component parts which together make up the bodywork of a car, and affords protection to the holder of such purported exclusive rights by preventing third parties trading in another Member State from manufacturing, selling, transporting, importing or exporting in that Member State such component parts which together make up the bodywork of a car already on the market, or, in any event, by sanctioning such conduct?

16 The third question, which should be examined first because consideration of the first two questions will depend on the reply to that question, seeks an interpretation from the Court of Justice of a provision of the Convention and, more particularly, a ruling on the concept of public policy in the State in which recognition is sought in Article 27, point 1, of the Convention.

Admissibility

17 Renault contends that the Corte d'Appello di Torino has no power to ask the Court to give a preliminary ruling concerning the interpretation of the Convention. The Italian court delivered judgment at first instance and the case was brought before it on the basis of Article 40 of the Convention, not Article 37, a situation not covered by any of the cases provided for in Article 2 of the Protocol.

18 Maxicar and Mr Formento, together with the French Government and the Commission, submit that the Corte d'Appello di Torino was seised under Article 40 of the Convention, that is to say in what must be regarded as appellate proceedings. The situation is thus covered by Article 2(2) of the Protocol.

19 In the alternative, the Commission submits that the balance struck by the Convention in procedural matters and the requirement of equal treatment of the parties support a broad interpretation of Article 2(3) of the Protocol, extending it to the courts mentioned in Article 40 of the Convention.

20 It should be remembered the purpose of the Convention is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure (see, inter alia, judgment of 28 March 2000 in Case C-7/98 Krombach [2000] ECR I-1935, paragraph 19).

21 In order to obtain enforcement of a judgment, Article 31 et seq. of the Convention provide for a procedure in two stages in order to reflect the general spirit of the Convention, which seeks to reconcile the necessary surprise effect in proceedings of this nature with respect for the defendant's right to a fair hearing. That is why the defendant is not entitled to be heard in the lower court, whereas on appeal he must be given a hearing (Case 178/83 Firma P v Firma K [1984] ECR 3033, paragraph 11).

22 It is true that in Italy the two stages of the procedure take place before the Corte d'Appello. That coincidence, which is the result of the choice made by the Italian Republic, cannot be permitted

to obscure the fact that the procedure under the first paragraph of Article 32 differs from that provided for in the first paragraph of Article 40. In the first case, the Corte d'Appello rules, in accordance with the first paragraph of Article 34, without the party against whom enforcement is sought being able at this stage of the procedure to submit observations. In the second case, by contrast, the party against whom enforcement is sought must be summoned to appear before the Corte d'Appello as required by the second paragraph of Article 40.

23 Accordingly, in this case the appeal court seised under the first paragraph of Article 40 of the Convention must be regarded as sitting in an appellate capacity and thus having power under Article 2(2) of the Protocol to request the Court of Justice to give a preliminary ruling on a question of interpretation of the Convention.

Substance

24 Maxicar and Mr Formento wish the Court to define the concept of public policy in economic matters. In particular, they wish it to confirm that Community law, and in particular the principle of free movement of goods and freedom of competition, supports the approach taken by Italian law, which, unlike French law, does not recognise the existence of industrial property rights in spare parts for cars, and to declare that that approach is a principle of public policy in economic matters.

25 The French and Netherlands Governments, and the Commission, after noting that the preliminary issue is whether and to what extent the Court of Justice has jurisdiction to rule on the concept of public policy in the State in which recognition is sought used in Article 27, point 1, of the Convention, argue in favour of a narrow interpretation of the concept, which should only be applied in exceptional instances. An alleged error in interpreting the rules of Community law is not sufficient, they maintain, to justify recourse to the clause on public policy.

26 The first point to note is that Article 27 of the Convention must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention (Case C-414/92 Solo Kleinmotoren [1994] ECR I-2237, paragraph 20, and Krombach, paragraph 21). With regard more specifically to the clause on public policy in Article 27, point 1, of the Convention, the Court has made it clear that it may be relied on only in exceptional cases (Case 145/86 Hoffmann v Krieg [1988] ECR 645, paragraph 21, and Case C-78/95 Hendrikman and Feyen v Magenta Druck Verlag [1996] ECR I-4943, paragraph 23).

27 The Court has held that it follows that, while the Contracting States remain free in principle, by virtue of the proviso in Article 27, point 1, of the Convention, to determine according to their own conception what public policy requires, the limits of that concept are a matter of interpretation of the Convention (Krombach, paragraph 22).

28 Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State (Krombach, paragraph 23).

29 It should be noted that by disallowing any review of a foreign judgment as to its substance, Article 29 and the third paragraph of Article 34 of the Convention prohibit the courts of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin (Krombach, paragraph 36).

30 Recourse to the clause on public policy in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (Krombach, paragraph 37).

31 In this case, what has led the court of the State in which enforcement was sought to question the compatibility of the foreign judgment with public policy in its own State is the possibility that the court of the State of origin erred in applying certain rules of Community law. The court of the State in which enforcement was sought is in doubt as to the compatibility with the principles of free movement of goods and freedom of competition of recognition by the court of the State of origin of the existence of an intellectual property right in body parts for cars enabling the holder to prohibit traders in another Contracting State from manufacturing, selling, transporting, importing or exporting such body parts in that Contracting State.

32 The fact that the alleged error concerns rules of Community law does not alter the conditions for being able to rely on the clause on public policy. It is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by Community law.

33 The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that national or Community law was misapplied in that decision. On the contrary, it must be considered whether, in such cases, the system of legal remedies in each Contracting State, together with the preliminary ruling procedure provided for in Article 177 of the Treaty, affords a sufficient guarantee to individuals.

34 Since an error of law such as that alleged in the main proceedings does not constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought, the reply to the third question must be that Article 27, point 1, of the Convention must be interpreted as meaning that a judgment of a court or tribunal of a Contracting State recognising the existence of an intellectual property right in body parts for cars, and conferring on the holder of that right protection by enabling him to prevent third parties trading in another Contracting State from manufacturing, selling, transporting, importing or exporting in that Contracting State such body parts, cannot be considered to be contrary to public policy.

35 Having regard to the reply given to the third question, it is not necessary to reply to the first and second questions.

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61998J0007-N23 : N 28

61998J0007-N36 : N 29
61998J0007-N37 : N 30

CONCERNS	Interprets 41968A0927(01)-A27PT1
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	Italian
OBSERV	Belgium ; France ; Netherlands ; Commission ; Member States ; Institutions
NATIONA	Italy
NATCOUR	*A9* Corte d'Appello di Torino, ordinanza del 19/11/1997 16/01/1998 (978/97) *P1* Corte d'Appello di Torino, ordinanza del 09/05/2001 24/07/2001 (963/01) *A9* Corte d'Appello di Torino, ordinanza del 19/11/1997 16/01/1998 (978/97) - Gewerblicher Rechtsschutz und Urheberrecht, internationaler Teil 1998 p.990-993 - Floridia, Giorgio ; Lamandini, Marco: Gewerblicher Rechtsschutz und Urheberrecht, internationaler Teil 1998 p.994-997 *P1* Corte d'Appello di Torino, ordinanza del 09/05/2001 24/07/2001 (963/01) - Floridia, Giorgio ; Lamandini, Marco: Gewerblicher Rechtsschutz und Urheberrecht, internationaler Teil 1998 p.994-997
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PROCEDU	Reference for a preliminary ruling
ADVGEN	Alber
JUDGRAP	Jann
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Judgment of the Court (Sixth Chamber)
of 27 January 2000
Dansommer A/S v Andreas Götz.
Reference for a preliminary ruling: Landgericht Heilbronn - Germany.
Brussels Convention - Article 16(1) - Exclusive jurisdiction in proceedings having as their object tenancies of immovable property - Scope.
Case C-8/98.

Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - Proceedings `which have as their object tenancies of immovable property' - Definition - Action for damages for taking poor care of premises and causing damage to holiday accommodation - Included - Plaintiff, a professional tour operator, subrogated to the rights of the owner of the property - No effect

(Convention of 27 September 1968, Art. 16(1)(a))

$$The rule laid down in Article 16(1)(a) 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, conferring exclusive jurisdiction in proceedings having as their object tenancies of immovable property is applicable to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.

The ancillary clauses relating to insurance in the event of cancellation and to guarantee of repayment of the price paid by the client, which are contained in the general terms and conditions of the contract concluded between that organiser and the tenant, and which do not form the subject of the dispute in the main proceedings, do not affect the nature of the tenancy as a tenancy of immovable property within the meaning of that provision of the Convention.

(see para. 38 and operative part)

In Case C-8/98,

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 Landgericht Heilbronn (Germany) for a preliminary ruling in the proceedings pending before that court between

Dansommer A/S

and

Andreas Götz

on the interpretation of Article 16(1)(a) of the abovementioned 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 text - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), and 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),

THE COURT

(Sixth Chamber),

composed of: R. Schintgen (Rapporteur), President of the Second Chamber, acting as President of the Sixth Chamber, P.J.G. Kapteyn and G. Hirsch, Judges,

Advocate General: A. La Pergola,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Dansommer A/S, by I. Schulze, Rechtsanwalt, Flensburg,

- A. Götz, by L. Zürn, Rechtsanwalt, Heilbronn,

- the Spanish Government, by R. Silva de Lapuerta, Abogado del Estado, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Deputy Head of the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargée de Mission in that Directorate, acting as Agents,

- the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and O. Fiumara, Avvocato dello Stato,

- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and M. Hoskins, Barrister,

- the Commission of the European Communities, by J.L. Iglesias, Legal Adviser, acting as Agent, assisted by B. Wägenbaur, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of the Spanish, French, Italian and United Kingdom Governments and the Commission at the hearing on 10 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 9 September 1999,

gives the following

Judgment

1 By order of 16 June 1997, received at the Court on 14 January 1998, the Landgericht (Regional Court) Heilbronn (Germany) 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 16(1)(a) 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 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) and 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) (hereinafter `the Convention').

2 That question has arisen in a dispute between Dansommer A/S, a company incorporated under Danish law and having its registered office in Denmark (`Dansommer'), and Andreas Götz, a German national who is resident in Germany.

The Convention

3 Article 16(1) of the Brussels Convention, in the version prior to the amendment made by the Convention of 26 May 1989, provided as follows:

`The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated'.

4 As amended by the Convention of 26 May 1989 (`the San Sebastian Convention'), that provision is now worded as follows:

`The following courts shall have exclusive jurisdiction, regardless of domicile:

1. (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;

(b) however, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Contracting State in which the defendant is domiciled shall also have jurisdiction, provided that the landlord and the tenant are natural persons and are domiciled in the same Contracting State'.

5 Article 29(1) of the San Sebastian Convention provides:

`The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention, the 1982 Convention and this Convention, shall apply only to legal proceedings instituted... after the entry into force of this Convention in the State of origin...'.

6 The San Sebastian Convention entered into force in Germany on 1 December 1994.

The dispute in the main proceedings

7 On 27 February 1995, Mr Götz rented from Dansommer a house in Denmark owned by a private individual resident in Denmark, with a view to spending his holidays there from 29 July 1995 to 12 August 1995.

8 In its capacity as a professional tour operator, Dansommer merely acted as intermediary.

9 Under the general terms and conditions of the contract concluded between Dansommer and Mr Götz, the price payable by the latter as consideration for the provision of the accommodation during the contractual period included a premium for insurance to cover the costs in the event of cancellation of the contract.

10 Those general terms and conditions also provided that, in accordance with Article 651k(3) of the Bürgerliches Gesetzbuch (German Civil Code), Dansommer guaranteed reimbursement of the price paid by Mr Götz in the event of the organiser's insolvency.

11 It is common ground that Dansommer was not under an obligation to provide any other services.

12 After Mr Götz had stayed in the house in question, Dansommer brought proceedings against him as lessee before the Amtsgericht (Local Court) Heilbronn. In those proceedings, Dansommer, which had previously been subrogated to the rights of the owner of the house rented by Mr Götz, claimed damages from him on the ground that he had failed to clean the house properly before his departure and had damaged the carpeting and the oven safety mechanism.

13 Following the dismissal of its action, Dansommer appealed to the referring court.

14 Since it was unsure whether it had jurisdiction to hear the dispute, the Landgericht Heilbronn decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

`Is Article 16(1)(a) of the Brussels Convention applicable if the tour operator's performance obligation is limited to making available a holiday home and automatic provision of travel cost

and cancellation insurance, but the owner and lessee of the holiday home are not domiciled in the same Contracting State?'

The question referred for preliminary ruling

15 By way of derogation from the general principle set out in the first paragraph of Article 2 of the Convention, according to which persons domiciled in a Contracting State must be sued in the courts of that State, Article 16(1) of the Convention provides that, in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, exclusive jurisdiction lies with the courts of the Contracting State in which the property is situated.

16 The dispute in the main proceedings is, however, manifestly unconnected with any right in rem in immovable property, within the meaning of Article 16(1).

17 Although the case of which the national court is seised results from the short-term letting of a holiday home, it must be stressed, as the Landgericht Heilbronn points out in its order for reference, that Article 16(1)(b), which contains a specific provision relating to short-term tenancies which was added to Article 16(1) of the Brussels Convention by the San Sebastian Convention, is not relevant to this case since not all the conditions laid down in that provision are satisfied. Thus, in the case before the national court, the owner and tenant of the property are not domiciled in the same Contracting State.

18 The national court is thus asking the Court whether Article 16(1)(a), resulting from the San Sebastian Convention, which is applicable to the dispute in the main proceedings, but the wording of which has remained unchanged in relation to Article 16(1) of the Brussels Convention in its earlier versions, covers judicial proceedings such as those of which it is seised.

19 Finally, it must be pointed out that the fact, mentioned in the question submitted, that the owner of the property and the lessee are not domiciled in the same Contracting State is immaterial, since, as is clear from the actual wording of Article 16 and subject to the proviso in subparagraph 1(b) thereof, which, as has just been held in paragraph 17 above, is not applicable to this case, the domicile of the parties is irrelevant for the purposes of Article 16 of the Convention (see, to this effect, Case 73/77 Sanders v Van der Putte [1977] ECR 2383, paragraph 10).

20 In those circumstances, the question submitted must be construed as essentially seeking to ascertain whether the rule laid down in Article 16(1)(a) of the Convention conferring exclusive jurisdiction in proceedings having as their object tenancies of immovable property is applicable to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.

21 It should be noted in this regard that Article 16, being an exception to the general rule of jurisdiction set out in the first paragraph of Article 2 of the Convention, must not be given an interpretation broader than is required by its objective, since the article deprives the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them (see Sanders, cited above, paragraphs 17 and 18; Case C-115/88 Reichert and Kockler [1990] ECR I-27, paragraph 9; and Case C-292/93 Lieber [1994] ECR I-2535, paragraph 12).

22 So, it is established in case-law that, in order for Article 16(1) of the Brussels Convention to apply, it is not sufficient for the action to be connected with immovable property (Case C-294/92 Webb [1994] ECR I-1717, paragraph 14, and Lieber, cited above, paragraph 13).

23 Nevertheless, it follows from that same case-law that, in a case such as that before the national court, which concerns not a right in rem in immovable property but a tenancy of immovable property, Article 16(1) applies to any proceedings concerning rights and obligations arising under an agreement for the letting of immovable property, irrespective of whether the action is based on a right in rem or on a right in personam (Lieber, paragraphs 10, 13 and 20).

24 That is precisely the position in the instant case, since the proceedings brought by Dansommer, after partial failure to perform a tenancy agreement, is based on the tenant's obligation to maintain the property let in a proper condition and to repair any damage which he has caused to it.

25 The subject-matter of the proceedings before the referring court is thus directly linked to a leasing contract concerning immovable property and consequently to a tenancy of immovable property within the meaning of Article 16(1)(a) of the Convention, with the result that those proceedings fall within the exclusive jurisdiction rule laid down in that provision.

26 This interpretation, which is, moreover, the only interpretation which does not render ineffective the rule of exclusive jurisdiction in regard to tenancies of immovable property, is borne out by the underlying purpose of the provision in question.

27 It is clear from both the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1, at p. 35) and case-law that the essential reason for conferring exclusive jurisdiction on the courts of the Contracting State in which the property is situated is that the courts of the locus rei sitae are the best placed, for reasons of proximity, to ascertain the facts satisfactorily, by carrying out checks, inquiries and expert assessments on the spot, and to apply the rules and practices which are generally those of the State in which the property is situated (see, in particular, Sanders, paragraph 13, and Reichert and Kockler, paragraph 10).

28 This interpretation is also borne out by the fact that the Jenard Report (cited above, pp. 34 and 35) states that the jurisdiction rules set out in Article 16 of the Brussels Convention take as their criterion the subject-matter of the action and, with specific regard to the rule of exclusive jurisdiction in the matter of tenancies of immovable property in Article 16(1), the Convention draftsmen intended it to cover, inter alia, disputes over compensation for damage caused by tenants.

29 The reasoning set out above cannot be called in question by the judgment in Case C-280/90 Hacker [1992] ECR I-1111.

30 In that judgment, the Court held, in paragraph 15, that a complex contract concerning a range of services provided in return for a lump sum paid by the customer did not constitute a tenancy of immovable property within the meaning of Article 16(1) of the Brussels Convention.

31 The contract at issue in Hacker had been concluded between a professional travel organiser and its customer at the place where both were domiciled, and even though that contract provided for a service concerning the use of short-term holiday accommodation, it also included other services, such as information and advice, where the travel organiser proposed a range of holiday offers, the reservation of accommodation during the period chosen by the customer, the reservation of seats in connection with travel arrangements, reception at the destination and the possibility of travel cancellation insurance (Hacker, cited above, paragraph 14).

32 However, the unavoidable conclusion is that the circumstances of the case now under consideration are different from those of Hacker.

33 The contract now at issue concerns exclusively the letting of immovable property.

34 The clause in the general terms and conditions of the contract relating to insurance to cover the costs in the event of cancellation is only an ancillary provision which cannot alter the status of the tenancy agreement to which it relates, especially since this clause is not in issue before

the referring court.

35 The same applies in regard to the guarantee - which is, moreover, required by German legislation - of repayment of the price paid in advance by the customer in the event of the organiser's insolvency.

36 Finally, Article 16(1)(a) of the Convention is not rendered inapplicable merely because the dispute in this case is not directly between the owner and the tenant of the immovable property, given that Dansommer brought legal proceedings against the tenant after being subrogated to the rights of the owner of the property which was the subject of the lease concluded between Dansommer and Mr Götz.

37 Suffice it to note in this regard that, through subrogation, one person steps into the shoes of another in order to enable the former to exercise rights belonging to the latter, so that, in the main proceedings in this case, Dansommer is not acting in its capacity as a professional tour operator but as if it were the owner of the property in question.

38 In view of the foregoing, the answer to be given to the question referred must be that the rule laid down in Article 16(1)(a) of the Convention conferring exclusive jurisdiction in proceedings having as their object tenancies of immovable property is applicable to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.

The ancillary clauses relating to insurance in the event of cancellation and to guarantee of repayment of the price paid by the client, which are contained in the general terms and conditions of the contract concluded between that organiser and the tenant, and which do not form the subject of the dispute in the main proceedings, do not affect the nature of the tenancy as a tenancy of immovable property within the meaning of that provision of the Convention.

Costs

39 The costs incurred by the Spanish, French, Italian and United Kingdom 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

(Sixth Chamber),

in answer to the question referred to it by the Landgericht Heilbronn by order of 16 June 1997, hereby rules:

The rule laid down in Article 16(1)(a) 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, conferring exclusive jurisdiction in proceedings having as their object tenancies of immovable property is applicable to an action for damages for taking poor care of premises and causing damage to accommodation which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property

but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.

The ancillary clauses relating to insurance in the event of cancellation and to guarantee of repayment of the price paid by the client, which are contained in the general terms and conditions of the contract concluded between that organiser and the tenant, and which do not form the subject of the dispute in the main proceedings, do not affect the nature of the tenancy as a tenancy of immovable property within the meaning of that provision of the Convention.

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SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
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PROCEDU	Reference for a preliminary ruling
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JUDGRAP	Schintgen
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Judgment of the Court
of 28 March 2000
Dieter Krombach v André Bamberski.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention - Enforcement of judgments - Public policy.
Case C-7/98.

1. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Assessment by the court before which enforcement is sought - Limits - Review by the Court

(Convention of 27 September 1968, Art. 27(1))

2. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Jurisdiction of the original court founded on the nationality of the victim of an offence - Account taken by the court before which enforcement is sought - Not permissible

(Convention of 27 September 1968, Art. 27(1))

3. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Definition

(Convention of 27 September 1968, Art. 27(1)

4. Convention on Jurisdiction and the Enforcement of Judgments - Recognition and enforcement of judgments - Grounds for refusal - Contrary to the public policy of the State in which enforcement is sought - Defendant prosecuted for an intentional offence - Refusal of the original court to allow the defendant to have his defence presented unless he appeared in person - Account taken by the court before which enforcement is sought - Whether permissible

(Convention of 27 September 1968, Art. 27(1) and Protocol, Art. II)

1. While the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention. Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.

(see paras 22-23)

2. The court of the State in which enforcement is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

(see para. 34 and operative part)

3. Recourse to the public-policy clause in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting

State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

(see para. 37)

4. Recourse to the public-policy clause in Article 27, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the European Convention on Human Rights. Consequently, Article II of the Protocol annexed to the Convention, which recognizes the right of persons domiciled in one Contracting State, who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals, to have their defence presented even if they do not appear in person only where the offence in question was not intentionally committed, cannot be construed as precluding the court of the State in which enforcement is sought from being entitled, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, to take account, in relation to the public-policy clause in Article 27, point 1, of the fact that the court of the State of origin refused to allow the defendant to have his defence presented unless he appeared in person.

(see paras 44-45 and operative part)

In Case C-7/98,

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 Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Dieter Krombach

and

André Bamberski

on the interpretation of Article 27, point 1, of the abovementioned 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) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevon, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: A. Saggio,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Bamberski, by H. Klingelhöffer, Rechtsanwalt, Ettlingen,

- the German Government, by R. Wagner, Regierungsdirektor in the Federal Ministry of Justice, acting as Agent,

- the French Government, by K. Rispal-Bellanger, Deputy Head of the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargée de Mission in that Directorate, acting as Agents,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, acting as Agent, assisted by B. Wägenbaur, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government and the Commission at the hearing on 2 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 23 September 1999,

gives the following

Judgment

Costs

47 The costs incurred by the German and French 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 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 questions referred to it by the Bundesgerichtshof by order of 4 December 1997, hereby rules:

Article 27, point 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, must be interpreted as follows:

(1) The court of the State in which enforcement is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of that Convention, of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

(2) The court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of that Convention, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.

1 By order of 4 December 1997, received at the Court on 14 January 1998, the Bundesgerichtshof (Federal Court of Justice), Germany, referred to the Court for a preliminary ruling 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 three questions concerning the interpretation of Article 27, point 1, of the abovementioned 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) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter the Convention).

2 Those questions have arisen in proceedings between Mr Bamberski, who is domiciled in France, and Mr Krombach, who is domiciled in Germany, relating to the enforcement, in the latter Contracting State, of a judgment delivered on 13 March 1995 by the Cour d'Assises de Paris (Paris Assizes) which ordered Mr Krombach to pay to Mr Bamberski, the plaintiff in a civil claim, compensation in the amount of FRF 350 000.

The Convention

3 The first paragraph of Article 1 provides that the Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal.

4 With regard to jurisdiction, the rule of principle, set out in the first paragraph of Article 2 of the Convention, states that persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State. The second paragraph of Article 3 prohibits a plaintiff from relying on certain rules of exorbitant jurisdiction, in particular, so far as France is concerned, those based on nationality which derive from Articles 14 and 15 of the Code Civil (Civil Code).

5 The Convention also sets out special rules of jurisdiction. Thus, Article 5 of the Convention provides:

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

...

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings.

6 In matters relating to the recognition and enforcement of judgments, the rule of principle, set out in the first paragraph of Article 31 of the Convention, provides that a judgment given in a Contracting State and enforceable in that State is to be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.

7 Under the second paragraph of Article 34, [t]he application may be refused only for one of the reasons specified in Articles 27 and 28.

8 Article 27, point 1, of the Convention states:

A judgment shall not be recognised:

1. if such recognition is contrary to public policy in the State in which recognition is sought.

9 Article 28, third paragraph, of the Convention states:

Subject to the provisions of the first paragraph, the jurisdiction of the court of the State of origin may not be reviewed; the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction.

10 Article 29 and the third paragraph of Article 34 of the Convention provide:

Under no circumstances may a foreign judgment be reviewed as to its substance.

11 Article II of the Protocol annexed to the Convention (hereinafter the Protocol), which, according

to Article 65 of the Convention, forms an integral part thereof, provides:

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person.

However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Contracting States.

The dispute in the main proceedings

12 Mr Krombach was the subject of a preliminary investigation in Germany following the death in Germany of a 14-year-old girl of French nationality. That preliminary investigation was subsequently discontinued.

13 In response to a complaint by Mr Bamberski, the father of the young girl, a preliminary investigation was opened in France, the French courts declaring that they had jurisdiction by virtue of the fact that the victim was a French national. At the conclusion of that investigation, Mr Krombach was, by judgment of the Chambre d'Accusation (Chamber of Indictments) of the Cour d'Appel de Paris (Paris Court of Appeal), committed for trial before the Cour d'Assises de Paris.

14 That judgment and notice of the introduction of a civil claim by the victim's father were served on Mr Krombach. Although Mr Krombach was ordered to appear in person, he did not attend the hearing. The Cour d'Assises de Paris thereupon applied the contempt procedure governed by Article 627 et seq. of the French Code of Criminal Procedure. Pursuant to Article 630 of that Code, under which no defence counsel may appear on behalf of the person in contempt, the Cour d'Assises reached its decision without hearing the defence counsel instructed by Mr Krombach.

15 By judgment of 9 March 1995 the Cour d'Assises imposed on Mr Krombach a custodial sentence of 15 years after finding him guilty of violence resulting in involuntary manslaughter. By judgment of 13 March 1995, the Cour d'Assises, ruling on the civil claim, ordered Mr Krombach, again as being in contempt, to pay compensation to Mr Bamberski in the amount of FRF 350 000.

16 On application by Mr Bamberski, the President of a civil chamber of the Landgericht (Regional Court) Kempten (Germany), which had jurisdiction ratione loci, declared the judgment of 13 March 1995 to be enforceable in Germany. Following dismissal by the Oberlandesgericht (Higher Regional Court) of the appeal which he had lodged against that decision, Mr Krombach brought an appeal on a point of law (Rechtsbeschwerde) before the Bundesgerichtshof in which he submitted that he had been unable effectively to defend himself against the judgment given against him by the French court.

17 Those are the circumstances in which the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. May the provisions on jurisdiction form part of public policy within the meaning of Article 27, point 1, of the Brussels Convention where the State of origin has based its jurisdiction as against a person domiciled in another Contracting State (first paragraph of Article 2 of the Brussels Convention) solely on the nationality of the injured party (as in the second paragraph of Article 3 of the Brussels Convention in relation to France)?

If Question 1 is answered in the negative:

2. May the court of the State in which enforcement is sought (first paragraph of Article 31 of the Brussels Convention) take into account under public policy within the meaning of Article 27,

point 1, of the Brussels Convention that the criminal court of the State of origin did not allow the debtor to be defended by a lawyer in a civil-law procedure for damages instituted within the criminal proceedings (Article II of the Protocol of 27 September 1968 on the interpretation of the Brussels Convention) because he, a resident of another Contracting State, was charged with an intentional offence and did not appear in person?

If Question 2 is also answered in the negative:

3. May the court of the State in which enforcement is sought take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the court of the State of origin based its jurisdiction solely on the nationality of the injured party (see Question 1 above) and additionally prevented the defendant from being legally represented (see Question 2 above)?

Preliminary observations

18 By its questions, the national court is essentially asking the Court how the term public policy in the State in which recognition is sought in point 1 of Article 27 of the Convention should be interpreted.

19 The Convention is intended to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure (see, inter alia, Case C-414/92 Solo Kleinmotoren v Boch [1994] ECR I-2237, paragraph 20, and Case C-267/97 Coursier v Fortis Bank [1999] ECR I-2543, paragraph 25).

20 It follows from the Court's case-law that this procedure constitutes an autonomous and complete system independent of the legal systems of the Contracting States and that the principle of legal certainty in the Community legal system and the objectives of the Convention in accordance with Article 220 of the EC Treaty (now Article 293 EC), on which it is founded, require a uniform application in all Contracting States of the Convention rules and the relevant case-law of the Court (see, in particular, Case C-432/93 SISRO v Ampersand [1995] ECR I-2269, paragraph 39).

21 So far as Article 27 of the Convention is concerned, the Court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention (Solo Kleinmotoren, cited above, paragraph 20). With regard, more specifically, to recourse to the public-policy clause in Article 27, point 1, of the Convention, the Court has made it clear that such recourse is to be had only in exceptional cases (Case 145/86 Hoffmann v Krieg [1988] ECR 645, paragraph 21, and Case C-78/95 Hendrikman and Feyen v Magenta Druck Verlag [1996] ECR I-4943, paragraph 23).

22 It follows that, while the Contracting States in principle remain free, by virtue of the proviso in Article 27, point 1, of the Convention, to determine, according to their own conceptions, what public policy requires, the limits of that concept are a matter for interpretation of the Convention.

23 Consequently, while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.

24 It should be noted in this regard that, since the Convention was concluded on the basis of Article 220 of the Treaty and within the framework which it defines, its provisions are linked to the Treaty (Case C-398/92 Mund Fester v Hatrex Internationaal Transport [1994] ECR I-467, paragraph 12).

25 The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures (see, in particular, Opinion 2/94 [1996] ECR

I-1759, paragraph 33). For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) has particular significance (see, inter alia, Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 18).

26 The Court has thus expressly recognised the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraphs 20 and 21, and judgment of 11 January 2000 in Joined Cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-0000, paragraph 17).

27 Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU) embodies that case-law. It provides: The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

28 It is in the light of those considerations that the questions submitted for a preliminary ruling fall to be answered.

The first question

29 By this question, the national court is essentially asking whether, regard being had to the public-policy clause contained in Article 27, point 1, of the Convention, the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State, take into account the fact that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

30 It should be noted at the outset that it follows from the specific terms of the first paragraph of Article 1 of the Convention that the Convention applies to decisions given in civil matters by a criminal court (Case C-172/91 Sonntag v Waidmann and Others [1993] ECR I-1963, paragraph 16).

31 Under the system of the Convention, with the exception of certain cases exhaustively listed in the first paragraph of Article 28, none of which corresponds to the facts of the case in the main proceedings, the court before which enforcement is sought cannot review the jurisdiction of the court of the State of origin. This fundamental principle, which is set out in the first phrase of the third paragraph of Article 28 of the Convention, is reinforced by the specific statement, in the second phrase of the same paragraph, that the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction.

32 It follows that the public policy of the State in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another Contracting State solely on the ground that the court of origin failed to comply with the rules of the Convention which relate to jurisdiction.

33 Having regard to the generality of the wording of the third paragraph of Article 28 of the Convention, that statement of the law must be regarded as being, in principle, applicable even where the court of the State of origin wrongly founded its jurisdiction, in regard to a defendant domiciled in the territory of the State in which enforcement is sought, on a rule which has recourse to a criterion of nationality.

34 The answer to the first question must therefore be that the court of the State in which enforcement

is sought cannot, with respect to a defendant domiciled in that State, take account, for the purposes of the public-policy clause in Article 27, point 1, of the Convention, of the fact, without more, that the court of the State of origin based its jurisdiction on the nationality of the victim of an offence.

The second question

35 By this question, the national court is essentially asking whether, in relation to the public-policy clause in Article 27, point 1, of the Convention, the court of the State in which enforcement is sought can, with respect to a defendant domiciled in its territory and charged with an intentional offence, take into account the fact that the court of the State of origin refused to allow that defendant to have his defence presented unless he appeared in person.

36 By disallowing any review of a foreign judgment as to its substance, Article 29 and the third paragraph of Article 34 of the Convention prohibit the court of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin.

37 Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

38 With regard to the right to be defended, to which the question submitted to the Court refers, this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States.

39 More specifically still, the European Court of Human Rights has on several occasions ruled in cases relating to criminal proceedings that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, is one of the fundamental elements in a fair trial and an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing (see the following judgments of the European Court of Human Rights: judgment of 23 November 1993 in Poitrimol v France, Series A No 277-A; judgment of 22 September 1994 in Pelladoah v Netherlands, Series A No 297-B; judgment of 21 January 1999 in Van Geyseghem v Belgium, not yet reported).

40 It follows from that case-law that a national court of a Contracting State is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right.

41 The national court is, however, unsure as to whether the court of the State in which enforcement is sought can take account, in relation to Article 27, point 1, of the Convention, of a breach of this nature having regard to the wording of Article II of the Protocol. That provision, which involves extending the scope of the Convention to the criminal field because of the consequences which a judgment of a criminal court may entail in civil and commercial matters (Case 157/80 Rinkau [1981] ECR 1391, paragraph 6), recognises the right to be defended without appearing in person before the criminal courts of a Contracting State for persons who are not nationals of that State and who are domiciled in another Contracting State only in so far as they are being prosecuted

for an offence committed unintentionally. This restriction has been construed as meaning that the Convention clearly seeks to deny the right to be defended without appearing in person to persons who are being prosecuted for offences which are sufficiently serious to justify this (Rinkau, cited above, paragraph 12).

42 However, it follows from a line of case-law developed by the Court on the basis of the principles referred to in paragraphs 25 and 26 of the present judgment that observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see, inter alia, Case C-135/92 Fiskano v Commission [1994] ECR I-2885, paragraph 39, and Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21).

43 The Court has also held that, even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing (Case 49/84 Debaecker and Plouvier v Bouwman [1985] ECR 1779, paragraph 10).

44 It follows from the foregoing developments in the case-law that recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred to in Article 27, point 1, of the Convention, of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that that person was not present at the hearing.

45 The answer to the second question must therefore be that the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of the Convention, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.

The third question

46 In light of the reply to the second question, it is unnecessary to answer the third question.

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A9 Bundesgerichtshof, Vorlagebeschluß vom 04/12/1997 (IX ZB 23/97)
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PROCEDU Reference for a preliminary ruling

ADVGEN Saggio

JUDGRAP Jann

DATES of document: 28/03/2000
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Judgment of the Court
of 28 September 1999
GIE Groupe Concorde and Othes v The Master of the vessel "Suhadiwarno Panjan" and Others.
Reference for a preliminary ruling: Cour de cassation - France.
Brussels Convention - Jurisdiction in contractual matters - Place of performance of the obligation.
Case C-440/97.

Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Court for the place of performance of the contractual obligation - Determination of the place of performance of the obligation in accordance with the law applicable under the conflict rules of the court seised

(Convention of 27 September 1968, Art. 5(1))

$$On a proper construction of 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, the place of performance of the obligation, within the meaning of that provision, is to be determined in accordance with the law governing the obligation in question according to the conflict rules of the court seised.

The principle of legal certainty, which is one of the objectives of the Convention, requires, in particular, that the jurisdictional rules which derogate from the basic principle of the Convention, such as 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. Determination of the place of performance by reference to the nature of the relationship of obligation and the circumstances of the case would, as Article 5(1) stands at present, be insufficient to resolve all questions linked to application of that provision. Moreover there is no risk that the law applicable to the determination of the place of performance will vary depending on the court seised, since the conflict rules enabling the law applicable to the contract to be determined have been standardised in the Contracting States by the Convention of 19 June 1980 on the Law applicable to Contractual Obligations

In Case C-440/97,

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

GIE Groupe Concorde and Others

and

The Master of the vessel Suhadiwarno Panjan and Others,

on the interpretation of Article 5(1) of the abovementioned 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Rapporteur) (Presidents of Chambers), J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevon, M. Wathelet and R. Schintgen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- GIE Groupe Concorde and Others, by Didier Le Prado, Avocat before the Conseil d'Etat and the Cour de Cassation,

- Pro Line Ltd and Sveriges Angarts Assurans Forening, by Jean-Christophe Balat, Avocat before the Conseil d'Etat and the Cour de Cassation,

- the French Government, by Kareen Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédérik Million, Chargé de Mission in that Directorate, acting as Agents,

- the German Government, by Rolf Wagner, Regierungsdirektor in the Federal Ministry of Justice, acting as Agent,

- the Italian Government, by Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and Oscar Fiumara, Avvocato dello Stato,

- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Lionel Persey QC,

- the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, and Xavier Lewis, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government, the Italian Government, the United Kingdom Government and the Commission at the hearing on 15 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 March 1999,

gives the following

Judgment

Costs

33 The costs incurred by the French, German, Italian and United Kingdom 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 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 de Cassation by judgment of 9 December 1997, hereby rules:

On a proper construction of 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, the place of performance of the obligation, within the meaning of that provision, is to be determined in accordance with the law governing the obligation in question according to the conflict rules of the court seised.

1 By judgment of 9 December 1997, received at the Court on 29 December 1997, the French Cour de Cassation (Court of Cassation) 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 and - amended version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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) (hereinafter `the Brussels Convention').

2 That question has arisen in a dispute between seven insurance companies and GIE Groupe Concorde, their lead insurer, which has its registered office in Paris (hereinafter `the insurers'), on the one hand, and, on the other, the Master of the vessel Suhadiwarno Panjan, Pro Line Ltd (hereinafter `Pro Line'), which has its registered office in Hamburg (Germany), and four other defendants, after a cargo of bottles of wine in cartons was found on delivery to be damaged.

The Brussels Convention

3 Article 5(1) of the Brussels Convention provides that:

`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; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work...'

The main proceedings

4 Cartons containing bottles of wine were loaded in containers on board the vessel Suhadiwarno Panjan in the port of Le Havre (France). They were to be carried by sea to the port of Santos (Brazil) by Pro Line. Upon arrival at their destination, the goods were found to be damaged and short-delivered.

5 The insurers paid compensation to the consignee. Having been subrogated to the latter's rights, the insurers commenced proceedings, by application of 22 September 1991, against, inter alios, the Master of the vessel and Pro Line before the Tribunal de Commerce (Commercial Court), Le Havre, which, by a decision of 3 January 1995, declined jurisdiction.

6 On appeal by the insurers, the Cour d'Appel (Court of Appeal), Rouen, by judgment of 24 May 1995, confirmed that the first court lacked jurisdiction on the ground, in particular, that Le Havre was not the place where the contract of carriage was to be performed.

7 The insurers appealed to the Cour de Cassation on a point of law against that judgment on two grounds. Their first ground of appeal was dismissed by the Cour de Cassation. By their second ground of appeal, the insurers claim that the Cour d'Appel, Rouen, was wrong to rule that the place of performance of the obligation at issue was not Le Havre without first investigating which law governed the contract of carriage.

8 The Cour de Cassation found that, in its judgment in Case 12/76 Tessili v Dunlop [1976] ECR

1473, the Court of Justice had held that the place of performance of the obligation within the meaning of Article 5(1) of the Brussels Convention is to be determined in accordance with the law which governs the obligation in question according to the conflict rules of the court before which the matter is brought, which may include the provisions of an international convention laying down uniform law (Case C-288/92 Custom Made Commercial v Stawa Metallbau [1994] ECR I-2913), unless the parties themselves specify that place by means of a clause which is valid under the law applicable to the contract (Case 56/79 Zelger v Salinitri [1980] ECR 89). However, the Cour de Cassation considered it appropriate to ask the Court of Justice whether an independent Community solution could be found.

9 It therefore decided to stay proceedings and refer the following question to the Court:

`With a view to the application of Article 5(1) of the Brussels Convention ..., must the place of performance of the obligation, within the meaning of that provision, be determined in accordance with the law which, pursuant to the rules on conflicts of laws of the court seised, governs the obligation at issue, or should national courts determine the place of performance of the obligation by seeking to establish, having regard to the nature of the relationship creating the obligation and the circumstances of the case, the place where performance actually took place or should have taken place, without having to refer to the law which, under the rules on conflict of laws, governs the obligation at issue?'

The question submitted for preliminary ruling

10 By its question, the national court is essentially asking whether the expression `place of performance of the obligation in question' used in Article 5(1) of the Brussels Convention to establish special jurisdiction in contractual matters is to be construed as referring to the substantive law applicable under the conflict rules of the court seised or whether it must be given an independent interpretation.

11 As far as possible, the Court of Justice gives the terms used in the Brussels Convention an autonomous interpretation, rather than by reference to national law, so as to ensure that the Convention is fully effective, having regard to the objectives of Article 220 of the EC Treaty (now Article 293 EC), in the implementation of which the Convention was adopted (Case C-125/92 Mulox IBC v Geels [1993] ECR I-4075, paragraph 10).

12 The Court has, however, made it clear that neither option excludes the other, since the appropriate choice can be made only in relation to each of the provisions of the Brussels Convention (Tessili, paragraph 11, and Case 144/86 Gubisch Maschinenfabrik v Palumbo [1987] ECR 4861, paragraph 7).

13 As regards the expression `place of performance of the obligation in question', the Court has repeatedly ruled that this expression is to be interpreted as referring to the law which governs the obligation in question according to the conflict rules of the court seised (Tessili, paragraph 13, and Custom Made Commercial, paragraph 26).

14 It is true that, in the case of contracts of employment, the Court has ruled 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 the objectives of the Brussels Convention (Mulox IBC, paragraph 16). These 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).

15 The German and United Kingdom Governments and the Commission advocate that the approach adopted in Mulox IBC should be extended to cover all types of contract. They submit that the objectives of the Brussels Convention, which are to enable potential litigants to foresee which courts will

have jurisdiction and to provide legal certainty and equal treatment, favour the establishment of uniform criteria so that, for each type of contractual obligation, or at least for each type of contract, the place of performance for the purposes of Article 5(1) of the Brussels Convention could be determined independently.

16 The French and Italian Governments, however, argue that the Court's present case-law should not be changed. They accept that recourse to conflict rules to determine the place of performance may cause difficulties of implementation and lead to unsatisfactory results. But they point out that an autonomous interpretation of place of performance could work only in the case of a few simple contracts and that this solution would be incompatible with the constant evolution of contractual practice in international trade. Given the diversity of the alternative proposals, it is for the Contracting States, should they consider it expedient, to make a choice in the context of the review of the Brussels Convention.

17 It should be noted that in paragraph 14 of Tessili the Court, in explaining its reasons for determining the place of performance of contractual obligations by reference to the law applicable to the contract, pointed out that determination of the place of performance depends on the contractual context of the obligations in question and that the contract laws of the Contracting States had very divergent views of the place of performance.

18 In the case of contracts of employment, however, abandonment of the criterion of reference to the law applicable to the contract for the purpose of determining the place of performance and preferring the place where the acts constituting performance of the relevant obligation were localised could be justified by the particular characteristics of this type of contract (see Mulox IBC, paragraph 15). These had already led the Court to hold that, in the case of such contracts, the obligation to be taken into consideration for the purpose of applying Article 5(1) of the Brussels Convention is always the obligation which characterises the contract, namely the employee's obligation to carry out the work stipulated (see, in particular, Case 133/81 Ivenel v Schwab [1982] ECR 1891, paragraph 20, and Mulox IBC, paragraph 14).

19 The Court has confirmed that, where no such particular features exist, it is neither necessary nor appropriate to identify the obligation which characterises the contract and to centralise at its place of performance a jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract (Case 266/85 Shenavai v Kreischer [1987] ECR 239, paragraph 17).

20 That interpretation, as regards both maintenance of the general rule applicable to all contracts and the special rule laid down for contracts of employment, was corroborated by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic to the Brussels Convention, which gave to Article 5(1) of the Brussels Convention the version at present in force.

21 Moreover, a review of the Brussels Convention is at present being carried out, in which the difficulties associated with the application of Article 5(1), in its present version as hitherto interpreted by the Court, have been raised. Several proposals for reforming this provision have been submitted and examined.

22 Argument before the Court in the present case has also highlighted, not only the contradictory positions of, on the one hand, two governments which submitted observations in favour of keeping the present case-law and, on the other, two other governments and the Commission, which advocate a new approach, but also substantial differences between the alternative proposals put forward.

23 In these circumstances, it must be stressed that the principle of legal certainty is one of the objectives of the Brussels Convention (see, in particular, Case C-129/92 Owens Bank v Fulvio Bracco and Bracco Industria Chimica [1994] ECR I-117, paragraph 32).

24 This principle requires, in particular, that the jurisdictional rules which derogate from the basic principle of the Brussels Convention, such as 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 (Case C-26/91 Handte v Traitements Mécano-chimiques des Surfaces [1992] ECR I-3967, paragraph 18).

25 Determination of the place of performance by reference to the nature of the relationship of obligation and the circumstances of the case, as suggested by the national court, would, as Article 5(1) of the Brussels Convention stands at present, be insufficient to resolve all questions linked to application of that provision.

26 Some of the questions which might arise in this context, such as identification of the contractual obligation forming the basis of proceedings, as well as the principal obligation where there are several obligations, could hardly be resolved without reference to the applicable law.

27 It follows that adoption of the criteria proposed by the national court would not make it entirely unnecessary for the court seised to determine the law governing the obligation in dispute, in order to rule on its jurisdiction under Article 5(1) of the Brussels Convention.

28 Moreover, bearing in mind the important position generally accorded by national contract law to the intention of the parties, the Court has held that, if the parties to the contract are permitted by the applicable law, subject to the conditions it lays down, to specify the place of performance of an obligation without satisfying any special condition of form, that agreement on the place of performance of the obligation is sufficient to found jurisdiction in that place within the meaning of Article 5(1) of the Brussels Convention (Zelger, paragraph 5), on condition that this place has a real connection with the true substance of the contract (Case C-106/95 MSG v Gravières Rhénanes [1997] ECR I-911, paragraphs 30 and 31).

29 In these circumstances, it does not appear justified to substitute the criteria proposed by the national court for the interpretation previously given by the Court, to the effect that the place of performance must be determined in accordance with the law which governs the obligation at issue. That solution also has the advantage that the competent court is the court of the place where the obligation in question is to be performed in accordance with the law applicable to it. Indeed, it was because the place of performance usually constitutes the closest connecting factor between the dispute and the court of competent jurisdiction that, with a view to efficient organisation of procedure, the rule of special jurisdiction provided for by Article 5(1) of the Brussels Convention in contractual matters was adopted (Shenavai, paragraph 18, and Custom Made Commercial, paragraphs 12 and 13).

30 It should be added that there is no risk that the law applicable to the determination of the place of performance will vary depending on the court seised, since the conflict rules enabling the law applicable to the contract to be determined have been standardised in the Contracting States by the Convention of 19 June 1980 on the Law applicable to Contractual Obligations (OJ 1980 L 266, p. 1), as amended by the Convention of 10 April 1984 on the Accession of the Hellenic Republic (OJ 1984 L 146, p. 1), by the Convention of 18 May 1992 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1992 L 333, 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. 10).

31 It is for the national legislature, which has exclusive competence in this field, to define a place of performance which takes fairly into account both the interests of the sound administration of justice and the interests of adequate protection for individuals. It may well be that, in so far as national law allows, the national court will have to determine the place of performance by

reference to the criteria suggested by the referring court - i.e. by identifying, by reference to the nature of the obligations undertaken and the circumstances of the case, the place where the thing or service contracted for was, or should have been, provided.

32 It follows from all of the foregoing considerations that, on a proper construction of Article 5(1) of the Brussels Convention, the place of performance of the obligation, within the meaning of that provision, is to be determined in accordance with the law governing the obligation in question according to the conflict rules of the court seised.

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Jann

DATES of document: 28/09/1999
of application: 29/12/1997

Judgment of the Court
of 5 October 1999
Leathertex Divisione Sintetici SpA v Bodetex BVBA.
Reference for a preliminary ruling: Hof van Cassatie - Belgium.
Brussels Convention - Interpretation of Articles 2 and 5(1) - Commercial agency agreement - Action founded on separate obligations arising from the same contract and regarded as equal in rank - Jurisdiction of the court seised to hear the whole action.

1 Convention on Jurisdiction and the Enforcement of Judgments - Protocol on the interpretation by the Court of Justice of the Convention - Preliminary rulings - Jurisdiction of the Court - Limits

(Convention of 27 September 1968; Protocol of 3 June 1971, Art. 5; EC Statute of the Court of Justice, Art. 20)

2 Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Court for the place of performance of the contractual obligation - Action founded on obligations of equal rank arising from the same contract - One of the obligations to be performed in the State of the court seised and the other in another Contracting State - Court seised not having jurisdiction to hear the whole action

(Convention of 27 September 1968, Art. 5(1))

1 In view of the allocation of jurisdiction under the preliminary ruling procedure provided for by 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, it is for the national court seised of an action founded on separate obligations arising from the same contract to assess the relative importance of the contractual obligations at issue for the purposes of the application of Article 5(1) of the Convention, and for the Court of Justice to interpret the Convention in the light of the findings made in this respect by the national court. To alter the substance of the question referred by the latter for a preliminary ruling would be incompatible with the Court's function under the Protocol and with its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations pursuant to Article 5 of the Protocol and Article 20 of the Statute of the Court, bearing in mind that, under Article 20, only the order of the referring court is notified to the interested parties.

2 On a proper construction of 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, the same court does not have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another Contracting State. While there are disadvantages in having different courts ruling on different aspects of the same dispute, the plaintiff always has the option, under Article 2 of the Convention, of bringing his entire claim before the courts for the place where the defendant is domiciled.

In Case C-420/97,

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 Hof van Cassatie, Belgium, for a preliminary ruling in the proceedings pending before that court between

Leathertex Divisione Sintetici SpA

and

Bodetex BVBA

on the interpretation of Articles 2 and 5(1) of the abovementioned 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 text - p. 77),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), J.C. Moitinho de Almeida (Rapporteur), C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevon, M. Wathelet and R. Schintgen, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Leathertex Divisione Sintetici SpA, by S. Beele and F. Busschaert, of the Courtrai Bar,

- Bodetex BVBA, by D. van Poucke and B. Demeulenaere, of the Ghent Bar,

- the German Government, by R. Wagner, Regierungsdirektor in the Federal Ministry of Justice, acting as Agent,

- the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, and O. Fiumara, Avvocato dello Stato,

- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and M. Hoskins, Barrister,

- the Commission of the European Communities, by J.L. Iglesias Buhigues, Legal Adviser, and P. van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government, represented by O. Fiumara, of the United Kingdom Government, represented by L. Persey QC, and of the Commission, represented by J.L. Iglesias Buhigues and P. van Nuffel, at the hearing on 15 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 March 1999,

gives the following

Judgment

Costs

43 The costs incurred by the German, Italian and United Kingdom 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,

in answer to the question referred to it by the Hof van Cassatie by judgment of 4 December 1997, hereby rules:

On a proper construction of 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, the same court does not have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another Contracting State.

1 By judgment of 4 December 1997, received at the Court on 11 December 1997, the Hof van Cassatie (Court of Cassation) 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 (hereinafter `the Protocol') a question on the interpretation of Articles 2 and 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 and - amended text - p. 77, hereinafter `the Convention').

2 That question was raised in proceedings between Leathertex Divisione Sintetici SpA (hereinafter `Leathertex'), whose registered office is in Montemurlo, Italy, and Bodetex BVBA (hereinafter `Bodetex'), whose registered office is in Rekkem-Menen, Belgium, concerning the payment of arrears of commission and of compensation in lieu of notice, which Bodetex, the commercial agent of Leathertex in the Belgian and Netherlands markets, is claiming from Leathertex.

The Convention

3 The first paragraph of Article 2 of the Convention 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.'

4 The first paragraph of Article 3 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.'

5 Article 5 provides:

`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;

...'

6 Article 6(1) adds that where such a person is one of a number of defendants, he may be sued in the courts for the place where any one of them is domiciled.

7 Finally, the first paragraph of Article 22 provides:

`Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.'

The main proceedings

8 For a number of years Bodetex acted as commercial agent for Leathertex in the Belgian and Netherlands

markets under a long-term arrangement. It received 5% commission by way of remuneration.

9 After asking Leathertex to no avail during 1987 for payment of commission which it considered to be owing to it, Bodetex regarded its commercial agency agreement as terminated and, by letter of 9 March 1988, took formal note of the termination and demanded from Leathertex payment of arrears of commission and compensation in lieu of notice.

10 Since Leathertex did not reply to that letter, on 2 November 1988 Bodetex sued it for payment in the Rechtbank van Koophandel (Commercial Court), Courtrai.

11 By judgment of 1 October 1991, the Rechtbank van Koophandel found that two separate obligations formed the basis of the action. It held that the first, namely the obligation to give a reasonable period of notice on termination of a commercial agency agreement and, in the event of failure to give such notice, to pay compensation in lieu, was to be performed in Belgium, whereas the second, namely the obligation to pay commission, was to be performed in Italy under the principle that debts are payable where the debtor is resident. The Rechtbank van Koophandel accordingly found that it had jurisdiction in respect of the obligation to pay compensation in lieu of notice, by virtue of Article 5(1) of the Convention, and then declared that it had jurisdiction over the whole proceedings given the connection between that obligation and the obligation to pay commission. It ordered Leathertex to pay Bodetex arrears of commission and compensation in lieu of notice.

12 Leathertex appealed against that judgment to the Hof van Beroep (Court of Appeal), Ghent, which, by judgment of 29 October 1993, confirmed that the Rechtbank van Koophandel had jurisdiction to hear the action brought by Bodetex. The Hof van Beroep held that two separate obligations arising from the agency agreement formed the basis of the action, that the obligation to pay commission could not be regarded as the principal obligation and that the two obligations had to be regarded as equal in rank, so that there was nothing to prevent Bodetex from bringing its action before the courts for the place of performance of either of those two obligations. It therefore ruled that the Rechtbank van Koophandel had jurisdiction to hear the main proceedings as the court for the place where the obligation to give a reasonable period of notice was to be performed.

13 Leathertex appealed on a point of law to the Hof van Cassatie. It submitted, first, that the Hof van Beroep had misconstrued Article 5(1) of the Convention in holding that it had jurisdiction to deal with the head of claim concerning payment of the arrears of commission when the obligation to pay that commission was to be performed in Italy. According to Leathertex, if a court is unable to identify the principal obligation and the ancillary obligations from among the various obligations forming the basis of an action, it is competent to rule only on the obligations for which the place of performance is located, in accordance with its own conflict rules, in its jurisdiction. Leathertex maintained, secondly, that the Hof van Beroep had misinterpreted Article 22 of the Convention in holding that it had jurisdiction to hear the whole of the dispute, since that provision can apply only where related actions have been brought in the courts of two or more Contracting States.

14 In its order for reference, the Hof van Cassatie states first of all that Article 22 of the Convention was not applied in the judgment under appeal and rejects on this ground Leathertex's plea based on the misinterpretation of that provision.

15 So far as concerns the alleged infringement of Article 5(1) of the Convention, the Hof van Cassatie notes that, in Case 266/85 Shenavai v Kreischer [1987] ECR 239, at paragraph 19, the Court held that, in the particular case of a dispute concerned with a number of obligations arising under the same contract and forming the basis of the proceedings brought by the plaintiff, the court before which the matter is brought should, when determining whether it has jurisdiction, be guided by the maxim accessorium sequitur principale so that, where a number of obligations are at issue, it will be the principal obligation which will determine its jurisdiction.

16 The Hof van Cassatie states that, in the present case, it is common ground that the obligation to pay commission cannot be regarded as the principal obligation in the context of the action brought by Bodetex, that the Belgian courts have jurisdiction to rule on the obligation to pay compensation in lieu of notice since that obligation is contractual in nature and is to be performed in Belgium, and that the two abovementioned obligations are of equal rank.

17 The Hof van Cassatie inquires whether it is possible to disapply the general rule set out in Article 2 of the Convention in the case of a dispute concerning various obligations arising under the same agency agreement where none of the obligations is subordinate to the others and only one, having regard to its place of performance, supports the jurisdiction of the court before which the matter has been brought.

18 In those circumstances, the Hof van Cassatie decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

`Are Articles 5(1) and 2 of the Brussels Convention, in the version applicable to the present case, to be interpreted as meaning that a composite claim founded on different obligations arising from the same contract may be brought before the same court, even though, according to the jurisdictional rules of the State in which the proceedings are brought, one of the contractual obligations on which the claim is based is to be performed in that State and the other is to be performed in another EC Member State, having regard to the fact that the court before which the proceedings are brought decides, on the basis of the claim brought before it, that neither of the two obligations forming the subject-matter of the claim is subordinate to the other and that they are of equal rank?'

Consideration of the question submitted

19 By its question, the national court is essentially asking whether, on a proper construction of Articles 2 and 5(1) of the Convention, the same court has jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract even though, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another Contracting State.

20 The United Kingdom Government submits that, of the two obligations upon which the main action is founded, the obligation to pay commission forms its principal basis. According to the order for reference, the sole reason why Bodetex regarded the contract as having been terminated without notice was the failure to pay the disputed commission. So compensation in lieu of notice is to be paid only if it is established that the disputed commission is in fact due. The United Kingdom Government therefore proposes that the question referred for a preliminary ruling should be reformulated and the answer given that, in a situation such as that in the main proceedings, the contractual obligation which forms the principal basis of the legal proceedings and upon which jurisdiction may be founded under Article 5(1) of the Convention is the obligation to pay commission.

21 As to that, in view of the allocation of jurisdiction under the preliminary ruling procedure provided for by the Protocol, it is for the national court to assess the relative importance of the contractual obligations at issue in the main proceedings and for the Court of Justice to interpret the Convention in the light of the findings made by the national court.

22 Moreover, to alter the substance of the question referred for a preliminary ruling would be incompatible with the Court's function under the Protocol and with its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations pursuant to Article 5 of the Protocol and Article 20 of the EC Statute of the Court, bearing in mind that, under Article 20, only the order of the referring court is notified to the interested parties (see, in relation to the procedure under Article 177 of the EC Treaty (now Article 234 EC), Case C-352/95 Pytheron International v Bourdon [1997] ECR I-1729, paragraph

14, and Case C-235/95 AGS Assedic v Dumon and Froment [1998] ECR I-4531, paragraph 26).

23 The question referred for a preliminary ruling must therefore be answered on the basis that, as stated in the order for reference, the two contractual obligations on which the action is founded are of equal rank.

24 Leathertex, the German Government and the United Kingdom Government, in an alternative submission, submit that a court of a Contracting State does not have jurisdiction under Article 5(1) of the Convention to hear the whole of an action founded on several obligations of equal rank arising from the same contract when the place of performance of one or a number of those obligations is in another Member State.

25 In their view, Article 5(1) of the Convention must be interpreted strictly. Where the two obligations which form the basis of an action are regarded as equal in rank by the court before which the action has been brought, jurisdiction to deal with each of them should lie with the court of the place where each is to be performed and any resultant fragmenting of jurisdiction should be accepted. Such an interpretation of Article 5(1) of the Convention is, they argue, consistent with the rationale for that provision, which is to guarantee to each party in matters relating to a contract that claims will be considered by the courts for the place where the obligation in dispute is to be performed.

26 Bodetex maintains, first, that the agreement giving rise to the two obligations at issue in the main proceedings is analogous to a commercial representative's contract of employment. Thus, when Article 5(1) of the Convention is applied in the case of an action founded on different obligations resulting from the same agency agreement, it is appropriate, as in the case of contracts of employment, to take account of the obligation which characterises that contract, namely, in the present case, the obligation to find new customers and to distribute Leathertex's products, in particular in Belgium. In a number of Contracting States, case-law and academic legal writing have extended that solution to concession agreements, with which commercial agency agreements likewise have similarities.

27 Bodetex argues, second, that the obligation to pay commission is linked to the obligation to pay compensation in lieu of notice. Both result from the agency agreement. In addition, failure to perform the obligation to pay commission was the reason why the agreement was terminated, thereby giving rise to the obligation to pay compensation in lieu of notice. That link provides the justification for the court with jurisdiction to rule on the obligation to pay compensation in lieu of notice to have jurisdiction to rule on the obligation to pay commission as well.

28 According to Bodetex, such an interpretation of Article 5(1) of the Convention allows proceedings to be conducted effectively while avoiding a fragmenting of jurisdiction.

29 Finally, the Commission submits that, where a plaintiff brings two claims based on two obligations of equal rank, a court which has jurisdiction to hear one of the claims under Article 5(1) of the Convention also has jurisdiction to hear the other claim if there is such a close relationship between the claims that it is advantageous to hear and decide them at the same time in order to avoid the possibility of irreconcilable decisions if the cases were decided separately.

30 According to the Commission, such a solution corresponds most closely to the scheme of the Convention. First, it is comparable, mutatis mutandis, with the solution for which Article 6(1) of the Convention provides where there are a number of defendants. Second, it is called for by Article 22 of the Convention. In a dispute such as that before the national court, if the plaintiff decided, in accordance with Article 5(1) of the Convention, to bring the action for payment of compensation in one Contracting State and that for payment of the arrears of commission in another Contracting State, Article 22 of the Convention would apply because of the relation between the two actions. Article 5(1) of the Convention should therefore be interpreted in such a way as to avoid in advance

situations to which Article 22 of the Convention would be applicable.

31 It should be noted first of all that, in paragraphs 8, 9 and 10 of the judgment in Case 14/76 De Bloos v Bouyer [1976] ECR 1497, after observing that the Convention was intended to determine the international jurisdiction of the courts of the Contracting States, to facilitate the recognition of judgments and to introduce an expeditious procedure for securing their enforcement, the Court held that those objectives implied the need to avoid, so far as possible, creating a situation in which a number of courts had jurisdiction in respect of one and the same contract and that Article 5(1) of the Convention could not therefore be interpreted as referring to any obligation whatsoever arising under the contract in question. The Court concluded, in paragraphs 11 and 13 of the same judgment, that, for the purposes of determining the place of performance within the meaning of Article 5(1), the obligation to be taken into account was that which corresponded to the contractual right on which the plaintiff's action was based. It stated in paragraph 14 that, in a case where the plaintiff asserted the right to be paid damages or sought dissolution of the contract on the ground of the wrongful conduct of the other party, that obligation was still that which arose under the contract and the non-performance of which was relied upon to support such claims.

32 This interpretation was corroborated 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, which amended certain language versions of Article 5(1) of the Convention in order to specify that the obligation whose place of performance determines which court has jurisdiction in matters relating to a contract is the obligation which forms the basis of the claim (in the English version `the obligation in question').

33 Also, the Court has held on several occasions that the place of performance of the obligation in question is to be determined by the law governing that obligation according to the conflict rules of the court seised (Case 12/76 Tessili v Dunlop [1976] ECR 1473, paragraph 13, Case C-288/92 Custom Made Commercial v Stawa Metallbau [1994] ECR I-2913, paragraph 26, and Case C-440/97 Groupe Concorde and Others v The Master of the Vessel Suhadiwarno Panjan and Others [1999] ECR I-0000, paragraph 32).

34 In the present case, the Belgian courts have held, in accordance with the case-law cited above, that the obligation to pay compensation in lieu of notice was to be performed in Belgium while the obligation to pay commission was to be performed in Italy.

35 Furthermore, it is apparent from the order for reference and the file forwarded by the national court that the contract at issue in the main proceedings, under which the claims for payment of commission and of compensation in lieu of notice have been brought, does not constitute a contract of employment.

36 When the specific features of a contract of employment do not exist, 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 (Shenavai, cited above, paragraph 17).

37 Therefore, the obligation which characterises the agency agreement is not to be taken into account in the main proceedings in order to determine jurisdiction based on place of performance.

38 Nor can the court which has jurisdiction to hear the claim for payment of compensation in lieu of notice found its jurisdiction in respect of the claim for payment of commission on any relation between those two claims. As the Court has made clear, Article 22 of the Convention is intended to establish how related actions which have been brought before courts of different Contracting States are to be dealt with. It does not confer jurisdiction. In particular, it does not accord jurisdiction to a court of a Contracting State to try an action which is related to another action

of which that court is seised pursuant to the rules of the Convention (see Case 150/80 Elefanten Schuh v Jacqmain [1981] ECR 1671, paragraph 19, and Case C-51/97 Réunion Européenne and Others v Spliethoff's Bevrachtingskantor and Another [1998] ECR I-6511, paragraph 39).

39 Finally, when a dispute relates to a number of obligations of equal rank arising from the same contract, the court before which the matter is brought cannot, when determining whether it has jurisdiction, be guided by the maxim accessorium sequitur principale referred to by the Court in paragraph 19 of the judgment in Shenavai, cited above.

40 The same court does not therefore have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another Contracting State.

41 It should be remembered that, while there are disadvantages in having different courts ruling on different aspects of the same dispute, the plaintiff always has the option, under Article 2 of the Convention, of bringing his entire claim before the courts for the place where the defendant is domiciled.

42 The answer to be given to the question referred for a preliminary ruling must therefore be that, on a proper construction of Article 5(1) of the Convention, the same court does not have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another Contracting State.

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AUTHOR Court of Justice of the European Communities

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CONCERNS Interprets 41968A0927(01)-A05PT1

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG Dutch

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NATIONA Belgium

NATCOUR *A9* Hof van cassatie (Belgie), eerste kamer, arrest van 04/12/1997 (C.95.0318.N)
- International Litigation Procedure 1998 p.505-510
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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Moitinho de Almeida

DATES of document: 05/10/1999
of application: 11/12/1997

Judgment of the Court (Fifth Chamber)
of 29 April 1999
Eric Coursier v Fortis Bank and Martine Coursier, née Bellami. Reference for a preliminary ruling: Cour supérieure de justice - Grand Duchy of Luxemburg. Brussels Convention - Enforcement of decisions - Article 31 - Enforceability of a decision - Collective proceedings for the discharge of debts. Case C-267/97.

Convention on Jurisdiction and the Enforcement of Judgments - Enforcement - Judgments `enforceable' in the State of origin - Meaning - Enforceability in formal terms - Proceedings for enforcement in the State in which enforcement is sought - Effect of a subsequent decision falling outside the scope of the Convention and granting immunity from enforcement in the State of origin - Appraisal by the court of the State in which enforcement is sought

(Convention of 27 September 1968, Art. 31, first para. and Art. 36)

$$The term `enforceable' in the first paragraph of Article 31 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as referring solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. It is for the court of the State in which enforcement is sought, in appeal proceedings against the order for enforcement of such a decision brought under Article 36 of the Convention, to determine, in accordance with its domestic law, including the rules of private international law, the legal effects in its territory of another decision given in the State of origin in relation to a court-supervised liquidation, a matter not falling within the scope of the Convention.

In Case C-267/97,

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 Supérieure de Justice (Luxembourg) for a preliminary ruling in the proceedings pending before that court between

ric Coursier

and

Fortis Bank SA,

Martine Coursier, née Bellami,

on the interpretation of the first paragraph of Article 31 of the abovementioned Convention of 27 September 1968 (OJ 1975 L 204, p. 28), 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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),

THE COURT

(Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, P. Jann, J.C. Moitinho de Almeida, C. Gulmann and D.A.O. Edward (Rapporteur), Judges,

Advocate General: A. La Pergola,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Eric Coursier, by Jean Kauffman, of the Luxembourg Bar,

- Fortis Bank SA, by Jean-Paul Noesen, of the Luxembourg Bar,

- the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, and Gérard Berscheid, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Coursier, Fortis Bank SA and the Commission at the hearing on 2 April 1998,

after hearing the Opinion of the Advocate General at the sitting on 28 May 1998,

gives the following

Judgment

1 By judgment of 26 June 1997, received at the Court Registry on 22 July 1997, the Cour Supérieure de Justice (High Court of Justice), Luxembourg, 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 the first paragraph of Article 31 of the abovementioned Convention of 27 September 1968 (OJ 1975 L 204, p. 28), 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), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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, hereinafter `the Brussels Convention').

2 That question was raised in proceedings brought by Eric Coursier, who lives in France, against Fortis Bank SA (`Fortis'), established in Luxembourg, and Mrs Coursier, née Bellami, who lives in France, concerning the enforcement in Luxembourg of a judgment delivered on 6 January 1993 by the Cour d'Appel (Court of Appeal), Nancy (France) (`the contested judgment'), ordering Mr and Mrs Coursier to repay to Fortis a loan granted by it to them.

3 On 13 August 1990 Fortis granted a loan of LUF 480 000 to Mrs and Mrs Coursier. Following their failure to meet their obligations, on 22 March 1991 Fortis called the loan in and commenced proceedings against them before the courts of the State in which they were domiciled pursuant to Articles 13 and 14 of the Brussels Convention, which concern jurisdiction in respect of contracts concluded by consumers. The contested judgment granted Fortis an order requiring Mr and Mrs Coursier to repay the sum of LUF 563 282 together with interest at the contractual rate and costs. That judgment was served on the debtors on 24 February 1993.

4 By judgment of 1 July 1993, the Tribunal de Commerce (Commercial Court), Briey (France), converted the court-supervised receivership of Mr Coursier's business - a bar in Rehon (France) - into a court-supervised liquidation, in the context of which Fortis gave notice of a claim.

5 By judgment of 16 June 1994, the Tribunal de Commerce closed the court-supervised liquidation on the ground that there were insufficient assets and stated that `the right of creditors to bring individual proceedings shall be reinstated only under the conditions specified in Article 169 of the Law of 25 January 1985'.

6 The first paragraph of Article 169 of Law No 85-98 of 25 January 1985 on liquidation of assets and court-supervised liquidation of undertakings, which forms part of Section II, headed `Discontinuation

of court-supervised liquidation proceedings', is worded as follows, in the version in force from 1 October 1994, which does not, for the purposes of this case, change the meaning of the earlier version:

`A judgment closing liquidation proceedings as a result of insufficient assets does not reinstate the right of creditors to bring proceedings individually against the debtor unless their claim derives from:

1. a finding against the debtor in criminal proceedings relating either to circumstances not connected with the profession or occupation of the debtor or to tax evasion, such right in the latter case being available only to the public revenue authorities;

2. rights vested in the creditor personally.

However, a surety or co-obligor who has made payment for the debtor may take proceedings against the latter.'

7 Mr Coursier having thereafter obtained employment in Luxembourg, as a frontier worker, Fortis instituted proceedings before the Justice de Paix, Luxembourg, for attachment of Mr Coursier's salary. In those proceedings, the President of the Tribunal d'Arrondissment, Luxembourg, granted an order on 2 July 1996 for enforcement of the contested judgment under the Brussels Convention.

8 By applications of 9 and 14 August 1996, Mr Coursier appealed, in accordance with Article 36 of the Brussels Convention, against that order to the Cour Supérieure de Justice, contending that since, by virtue of the first paragraph of Article 169 of Law No 85-98, the contested judgment was no longer enforceable in France, no order for its enforcement could be granted in Luxembourg under Article 31 of the Brussels Convention.

9 The Brussels Convention, pursuant to the first paragraph of Article 1 thereof, is to apply in civil and commercial matters whatever the nature of the court or tribunal. However, according to subparagraph 2 of the second paragraph of that article, bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from its scope.

10 The first paragraph of Article 31, which is in Section 2, entitled `Enforcement', of Title III of the Brussels Convention, provides:

`A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.'

11 Considering that the dispute raised a problem concerning the interpretation of the Brussels Convention, the Cour Supérieure de Justice stayed proceedings pending a preliminary ruling from the Court of Justice on the following question:

`Does a judgment delivered in the State of origin in the context of a court-supervised liquidation - a matter which is excluded from the scope of the Brussels Convention - and which is not open to recognition under the national law of the State in which enforcement is sought, but which, in the State in which it was given, confers on one of the parties immunity from execution of the judgment whose enforcement is sought, affect the quality of enforceability which, according to the first paragraph of Article 31 of the Convention, a judgment must possess in order to be recognised and enforced?'

The scope of the question

12 In replying to the question submitted, it is appropriate to focus first on the aspects of the case relating to the scope and legal effects of the contested judgment and those of the insolvency

judgment.

13 It is clear from the terms of the contested judgment that it bears an order for enforcement. That judgment was served on Mr and Mrs Coursier on 24 February 1993 and, in the absence of any appeal against it, has become final.

14 It is common ground that a decision of that kind falls within the scope of the Brussels Convention and, as such, can qualify for recognition and enforcement under the rules contained in Title III thereof.

15 It is clear from the documents before the Court that Mr and Mrs Coursier do not contend that the obligation to pay the debt, which has been judicially recognised, has been extinguished through payment of the debt or some other cause, such as expiry of a limitation period.

16 The insolvency judgment, for its part, concerns a matter (insolvency) which is expressly excluded from the scope of the Brussels Convention by subparagraph 2 of the second paragraph of Article 1 thereof.

17 The documents on the file of the Tribunal de Commerce de Briey show that the latter declared the court-supervised liquidation closed, under Article 167 of Law No 85-98, because the lack of assets made further proceedings impossible.

18 Under the first paragraph of Article 169 of Law No 85-98, the judgment closing the court-supervised liquidation for lack of assets has the effect of preventing creditors individually from bringing actions against the debtor. According to the information before the Court, that provision does not extinguish the debtor's obligation to pay, so that a natural obligation continues to attach to him, and if, on his own initiative, he discharges his debt, such payment cannot be deemed to be one that was not due and so subject to repayment.

The question on which a ruling is sought

19 According to Fortis, Article 169 of Law No 85-98 confers a degree of immunity from enforcement on Mr Coursier alone - and only in France - which does not divest the contested judgment of its intrinsic enforceability under the first paragraph of Article 31 of the Brussels Convention.

20 Mr Coursier considers that the contested judgment has, by virtue of Article 169 of Law No 85-98, ceased to be enforceable against him. It is clear, in his view, particularly from the wording of the first paragraph of Article 31 of the Brussels Convention that the personal immunity from enforcement that he enjoys in France also operates in his favour in the other Contracting States.

21 According to the Commission, the contested judgment does not fulfil the condition laid down in the first paragraph of Article 31 of the Brussels Convention whereby a decision must be duly enforceable in the State of origin. The contested judgment cannot be accorded greater authority and effectiveness than it already has in the State of origin. Even if the insolvency judgment is excluded from the scope of the Brussels Convention by virtue of subparagraph 2 of the second paragraph of Article 1 thereof, its effect is inseparable from enforcement of the contested judgment.

22 In view of the terms of the question submitted, it is important to note that a judgment such as the contested judgment is, in principle, one to which the rules on recognition of decisions contained in Section I of Title III (Articles 26 to 30) of the Brussels Convention apply.

23 The rules on enforcement of decisions are contained in Section 2 of Title III (Articles 31 to 45) of the Brussels Convention. It is clear from the first paragraph of Article 31, which forms part of those rules, that the enforceability of a decision in the State of origin is a precondition for its enforcement in the State in which enforcement is sought.

24 However, the question whether a decision is, in formal terms, enforceable in character must

be distinguished from the question whether that decision can any longer be enforced by reason of payment of the debt or some other cause.

25 The Brussels Convention is intended to facilitate the free movement of judgments by establishing a simple and rapid procedure in the Contracting State where enforcement of a foreign decision is applied for. That enforcement procedure constitutes an autonomous and complete system (see to that effect Case 148/84 Deutsche Genossenschaftsbank v Brasserie du Pêcheur [1985] ECR 1981, paragraph 17, and Case C-172/91 Sonntag v Waidmann [1993] ECR I-1963, paragraphs 32 and 33).

26 Thus, under Article 34 of the Brussels Convention, the procedure for obtaining authorisation for enforcement is carried out with the utmost speed, without the party against whom enforcement is sought being able, at that stage of the procedure, to make submissions.

27 Under Article 36 of the Brussels Convention, the party against whom enforcement is sought may make submissions only at a later stage in the procedure, namely in an appeal against the decision authorising enforcement before one of the courts mentioned in Article 37(1) of the Convention.

28 Thus, the Court has held that the Brussels Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought (see Deutsche Genossenschaftsbank, cited above, paragraph 18, and Case 145/86 Hoffmann v Krieg [1988] ECR 645, paragraph 27).

29 In those circumstances, it follows from the general scheme of the Brussels Convention that the term `enforceable' in Article 31 thereof refers solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin.

30 That interpretation is supported by the Report on the Convention of 26 May 1989 (OJ 1990 C 189, p. 35). According to paragraph 29 of that report, although the expression `when it has been declared enforceable' in Article 31 of the Brussels Convention replaced the expression `when the order for its enforcement has been issued' which appeared in its original version in order to bring the convention into line with the Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1988 L 319, p. 9), those two expressions may be considered virtually equivalent.

31 It follows that a decision such as the contested judgment, which bears a formal order for enforcement, must, in principle, be covered by the rules on enforcement in Title III of the Brussels Convention.

32 As regards a judgment such as the insolvency judgment which concerns a matter expressly excluded from the purview of the Brussels Convention, it is for the court of the State in which enforcement is sought, in appeal proceedings brought under Article 36 of the Brussels Convention, to determine, in accordance with its domestic law including the rules of private international law, the legal effects of that judgment within its territory.

33 The answer to the question submitted must therefore be that the term `enforceable' in the first paragraph of Article 31 of the Brussels Convention is to be interpreted as referring solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. It is for the court of the State in which enforcement is sought, in appeal proceedings brought under Article 36 of the Brussels Convention, to determine, in accordance with its domestic law including the rules of private international law, the legal effects of a decision given in the State of origin in relation to a court-supervised liquidation.

Costs

34 The costs incurred by the Commission of the European Communities, 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

(Fifth Chamber)

in answer to the questions referred to it by the Cour Supérieure de Justice by judgment of 26 June 1997, hereby rules:

The term `enforceable' in the first paragraph of Article 31 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, is to be interpreted as referring solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. It is for the court of the State in which enforcement is sought, in appeal proceedings brought under Article 36 of the Brussels Convention, to determine, in accordance with its domestic law including the rules of private international law, the legal effects of a decision given in the State of origin in relation to a court-supervised liquidation.

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JURCIT	41968A0927(01)-A01L1 : N 9 41968A0927(01)-A01L2PT2 : N 9 16 41968A0927(01)-A31 : N 29 30 41968A0927(01)-A31L1 : N 1 10 11 23 33 41968A0927(01)-A34 : N 26 41968A0927(01)-A36 : N 27 32 33 61984J0148-N17 : N 25 61984J0148-N18 : N 28

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CONCERNS Interprets 41968A0927(01) -A31L1
Interprets 41968A0927(01) -A36

SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

AUTLANG French

OBSERV Commission ; Institutions

NATIONA Luxembourg

NATCOUR *A9* Cour d'appel, 8e chambre (Grand-Duché de Luxembourg), arrêt du 26/06/1997 (19837) ; - Recht der internationalen Wirtschaft 1998 p.146-147 ; - International Litigation Procedure 1998 p.674-680

NOTES Paulus, Christoph G.: Entscheidungen zum Wirtschaftsrecht 1999 p.951-952 ; Moustaïra, Elina N.: Koinodikion 1999 p.135-138 ; Requejo Isido, Marta: Sobre ejecucion y exequatur, La ley 1999 Vol.5 p.1898-1901 ; Volken, Paul: Schweizerische Zeitschrift für internationales und europäisches Recht 1999 p.491-494 ; Linke, Hartmut: Zur grenzüberschreitenden Wirkung konkursbedingter Vollstreckungsbeschränkungen, insbesondere nach Art. 169 des französischen Insolvenzgesetzes vom 25.1.1985, Praxis des internationalen Privat- und Verfahrensrechts 2000 p.8-11 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 2000 p.534-538 ; Droz, Georges A.L.: Revue critique de droit international privé 2000 p.242-244 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2000 no 477 ; Bos, T.M.: Ondernemingsrecht 2000 p.391 ; Montanari, Massimo: Exequatur comunitario e procedura concorsuale nello Stato a quo: la sentenza Coursier dinanzi al supremo giudice tedesco, Il Corriere giuridico 2002 p.123-128

PROCEDU Reference for a preliminary ruling

ADVGEN La Pergola

JUDGRAP Edward

DATES of document: 29/04/1999
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Judgment of the Court (Fifth Chamber)
of 17 June 1999
Unibank A/S v Flemming G. Christensen.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention - Interpretation of Article 50 - Meaning of 'document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State' - Document drawn up without any involvement of a public officer - Articles 32 and 36.
Case C-260/97.

Convention on Jurisdiction and the Enforcement of Judgments - Enforcement of a document which has been formally drawn up and registered as an authentic instrument and is enforceable in a Contracting State - Definition of `authentic instruments' - Document drawn up without any involvement of a competent authority - Excluded

(Convention of 27 September 1968, Art. 50)

$$An acknowledgment of indebtedness enforceable under the law of the State of origin whose authenticity has not been established by a public authority or other authority empowered for that purpose by that State does not constitute an authentic instrument within the meaning of Article 50 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

The authentic nature of such instruments must be established beyond dispute so that the court in the State in which enforcement is sought is in a position to rely on their authenticity, since the instruments covered by Article 50 are enforced under exactly the same conditions as judgments.

In Case C-260/97,

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 Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Unibank A/S

and

Flemming G. Christensen,

on the interpretation of Articles 32, 36 and 50 of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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) and by 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: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur), L. Sevon and M. Wathelet, Judges,

Advocate General: A. La Pergola,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Unibank A/S, by Hans Klingelhöffer, Rechtsanwalt, Ettlingen,

- Mr Christensen, by Rüdiger Stäglich, Rechtsanwalt, Darmstadt,

- the German Government, by Rolf Wagner, Regierungsdirektor, Federal Ministry of Justice, acting as Agent,

- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and

- the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, acting as Agent, assisted by Bertrand Wägenbaur, of the Brussels Bar,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 2 February 1999,

gives the following

Judgment

1 By order of 26 June 1997, received at the Court on 18 July 1997, the Bundesgerichtshof (Federal Court of Justice) 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, two questions on the interpretation of Articles 32, 36 and 50 of that Convention (OJ 1972 L 299, p. 32), 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) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter `the Brussels Convention').

2 Those questions have been raised in proceedings between Unibank A/S (`Unibank') and Mr Christensen concerning the former's application for three acknowledgements of indebtedness to be declared enforceable.

Legal background

3 Article 32(2) of the Brussels Convention provides:

`The jurisdiction of local courts shall be determined by reference to the place of domicile of the party against whom enforcement is sought. If he is not domiciled in the State in which enforcement is sought, it shall be determined by reference to the place of enforcement.'

4 Article 36 of the Brussels Convention states:

`If enforcement is authorised, the party against whom enforcement is sought may appeal against the decision within one month of service thereof.

If that party is domiciled in a Contracting State other than that in which the decision authorising enforcement was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.'

5 Article 50 of the Brussels Convention provided:

`A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, have an order for its enforcement issued there, on application made in accordance with the procedures provided for in Article 31 et seq. The application may be refused only if enforcement of the instrument is contrary to public policy in the State addressed.

The instrument produced must satisfy the conditions necessary to establish its authenticity in

the State of origin.

The provisions of Section 3 of Title III shall apply as appropriate.'

6 The first sentence of the first paragraph of Article 50 of the Brussels Convention was amended by Article 14 of the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1, hereinafter `the Third Accession Convention'), as follows:

`A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided for in Article 31 et seq.'

7 Following that amendment, the wording of Article 50 of the Brussels Convention coincides exactly with that of Article 50 of the Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1988 L 319, p. 9, hereinafter `the Lugano Convention').

8 Under Article 478(1)(5) of the Retsplejelov (Danish Code of Civil Procedure), execution may be levied on the basis of written acknowledgements of indebtedness provided that they contain an express provision to that effect.

The dispute in the main proceedings and the questions referred to the Court

9 Between 1990 and 1992 Mr Christensen signed in favour of Unibank, a bank established under Danish law in Arhus (Denmark) three acknowledgments of indebtedness (Gældsbrev) for DKK 270 000, DKK 422 000 and DKK 138 000, together with interest thereon. The three documents are typewritten and also bear the signature of a third person, apparently an employee of Unibank, who witnessed the debtor's signature. The documents expressly state that they may be used, pursuant to Article 478 of the Retsplejelov, as a basis for execution to be levied.

10 When the acknowledgments of indebtedness were drawn up, the debtor resided in Denmark. He then moved to Weiterstadt, Germany, where the acknowledgments of indebtedness were presented to him for payment. At the request of Unibank, the Landgericht Darmstadt, in whose jurisdiction Weiterstadt is located, authorised enforcement of those documents. Mr Christensen appealed against that decision to the Oberlandesgericht (Higher Regional Court) Frankfurt am Main. In the course of the proceedings, Mr Christensen had indicated that he had left Germany, but had not disclosed his new address. The appeal court thereupon held that Unibank no longer had an interest in pursuing proceedings since it could no longer levy execution in respect of the acknowledgments of indebtedness in Germany and, accordingly, upheld the appeal.

11 Unibank appealed to the Bundesgerichtshof, which stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

`1. Is an acknowledgment of indebtedness signed by a debtor without the involvement of a public official - such as the Gældsbrev under Danish law (Paragraph 478(1)(5) of the Danish Code of Civil Procedure) - an authentic instrument within the meaning of Article 50 of the Brussels Convention, if that acknowledgment of indebtedness expressly specifies that it can serve as the basis for enforcement and if it can constitute the basis for enforcement under the law of the State in which it was drawn up, albeit subject to the condition that the court with jurisdiction to enforce it may refuse the creditor's application for enforcement if, as a result of objections to the basis for enforcement, there are doubts as to whether enforcement proceedings should be continued?

If the answer to Question 1 is in the affirmative:

2. Can an application for recognition of a decision or authentic instrument submitted to a court having local jurisdiction within the meaning of Article 32(2) of the Brussels Convention be rendered

inadmissible or unfounded by reason of the fact that, while appeal proceedings (Article 36 of the Brussels Convention) are pending, the debtor has left the State in which the proceedings were instituted and his new place of residence is unknown?'

The first question

12 By its first question, the national court seeks essentially to ascertain whether an enforceable acknowledgment of indebtedness which has been drawn up without the involvement of a public authority constitutes an authentic instrument within the meaning of Article 50 of the Brussels Convention.

13 Unibank submits that the answer to that question should be in the affirmative. Conversely, Mr Christensen, the German and United Kingdom Governments and the Commission contend that the adjective `authentic' means that the procedures for enforcement provided for by the Brussels Convention apply not to every instrument but only to those whose authenticity has been established by a competent public authority.

14 It must be borne in mind at the outset that Article 50 of the Brussels Convention treats a `document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State' in the same way, with regard to its enforceability in the other Contracting States, as judgments within the meaning of Article 25 of that Convention, in that it declares the provisions on enforcement contained in Article 31 et seq. thereof also to be applicable to such documents. The purpose of those provisions is to achieve one of the fundamental objectives of the Brussels Convention, which is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure (see Case 148/84 Deutsche Genossenschaftsbank [1985] ECR 1981, paragraph 16, and Case C-414/92 Solo Kleinmotoren [1994] ECR I-2237, paragraph 20).

15 Since the instruments covered by Article 50 of the Brussels Convention are enforced under exactly the same conditions as judgments, the authentic nature of such instruments must be established beyond dispute so that the court in the State in which enforcement is sought is in a position to rely on their authenticity. Since instruments drawn up between private parties are not inherently authentic, the involvement of a public authority or any other authority empowered for that purpose by the State of origin is needed in order to endow them with the character of authentic instruments.

16 That interpretation of Article 50 of the Brussels Convention is supported by the Jenard-Möller Report on the Lugano Convention (OJ 1990 C 189, p. 57, hereinafter `the Jenard-Möller Report').

17 Paragraph 72 of the Jenard-Möller Report states that the representatives of the Member States of the European Free Trade Area (EFTA) requested that the conditions which had to be fulfilled by authentic instruments in order to be regarded as authentic within the meaning of Article 50 of the Lugano Convention should be specified. In that connection the report mentions three conditions, namely: `the authenticity of the instrument should have been established by a public authority; this authenticity should relate to the content of the instrument and not only, for example, the signature; the instrument has to be enforceable in itself in the State in which it originates'.

18 According to the same report, the involvement of a public authority is therefore essential for an instrument to be capable of being classified as an authentic instrument within the meaning of Article 50 of the Lugano Convention.

19 It is true that Article 50 of the Brussels Convention and Article 50 of the Lugano Convention were not identically worded at the material time in the present case and that the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) does not indicate the criteria to be fulfilled by authentic instruments but merely reproduces the conditions laid down by Article 50 of the latter Convention.

20 However, the only difference in the wording of the two Conventions on that point was that the Brussels Convention used the expression `have an order for its enforcement issued' whereas the Lugano Convention used the expression `declared enforceable'. Moreover, it is clear from paragraph 29 of the De Almeida Cruz, Desantes Real and Jenard Report on the Third Accession Convention (OJ 1990 C 189, p. 35) that the latter Convention, by adopting for Article 50 of the Brussels Convention the same wording as that of Article 50 of the Lugano Convention, sought to bring the wording of the two Conventions into line with each other on that point, the two expressions cited above being considered virtually equivalent.

21 It follows from all the foregoing that the answer to the first question must be that an acknowledgment of indebtedness enforceable under the law of the State of origin whose authenticity has not been established by a public authority or other authority empowered for that purpose by that State does not constitute an authentic instrument within the meaning of Article 50 of the Brussels Convention.

The second question

22 In view of the answer given to the first question, it is unnecessary to answer the second.

Costs

23 The costs incurred by German and United Kingdom 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 proceedings 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 questions referred to it by the Bundesgerichtshof by order of 26 June 1997, hereby rules:

An acknowledgment of indebtedness enforceable under the law of the State of origin whose authenticity has not been established by a public authority or other authority empowered for that purpose by that State does not constitute an authentic instrument within the meaning of Article 50 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 and by the Convention of 25 October 1982 on the accession of the Hellenic Republic.

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CONCERNS Interprets 41968A0927(01)-A50

SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

AUTLANG German

OBSERV Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR
A9 Bundesgerichtshof, Vorlagebeschluß vom 26/06/1997 (IX ZB 11/97)
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PROCEDU Reference for a preliminary ruling

ADVGEN La Pergola

JUDGRAP Edward

DATES of document: 17/06/1999
of application: 18/07/1997

Judgment of the Court
of 16 March 1999
Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA.
Reference for a preliminary ruling: Corte suprema di cassazione - Italy.
Brussels Convention - Article 17 - Agreement conferring jurisdiction - Form according with usages in international trade or commerce.
Case C-159/97.

1 Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Conditions as to form - Written form - Clause included in the general conditions on the reverse of the contract - Need for an express reference to those conditions in the contract

(Convention of 27 September 1968, Art. 17)

2 Convention on Jurisdiction and the Enforcement of Judgments - Protocol on the interpretation of the Convention by the Court of Justice - Preliminary rulings - Jurisdiction of the Court of Justice - Limits

(Convention of 27 September 1968; Protocol of 3 June 1971)

3 Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Conditions as to form - Agreement made in a form according with usages in international trade or commerce - Concept - Criteria of assessment - Consent of the parties - Proof of the usage and of the parties' awareness of it

(Convention of 27 September 1968, Art. 17, as amended by the Convention on Accession of 1978)

4 Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Conditions as to form - Scheme of the Convention - Exhaustive nature - Application of other conditions concerning the choice of court by the parties - Excluded

(Convention of 27 September 1968, Art. 17)

1 Whilst the mere fact that a clause conferring jurisdiction is printed on the reverse of a contract drawn up on the commercial paper of one of the parties does not of itself satisfy the requirements as to written form laid down in Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, it is otherwise where the text of the contract signed by both parties itself contains an express reference to general conditions which include a clause conferring jurisdiction.

2 Under the division of responsibilities in the preliminary ruling procedure laid down by 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, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.

3 The third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention of 27 September 1968 is to be interpreted as follows:

- The contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware.

- The existence of such a usage, which must be determined in relation to the branch of trade or

commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type. It is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States. In addition, in establishing the existence of a usage, although any publicity which might be given in associations or specialised bodies to the standard forms on which a jurisdiction clause appears may help to prove that a practice is generally and regularly followed, such publicity cannot be a requirement. Furthermore, a course of conduct satisfying the conditions indicative of a usage does not cease to be a usage because it is challenged before the courts, whatever the extent of the challenges, provided that it still continues to be generally and regularly followed in the trade with which the type of contract in question is concerned.

- The specific requirements covered by the expression `form which accords' must be assessed solely in the light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions might lay down.

- Awareness of the usage must be assessed with respect to the original parties to the agreement conferring jurisdiction, their nationality being irrelevant in this regard. Awareness of the usage will be established when, regardless of any specific form of publicity, in the branch of trade or commerce in which the parties operate a particular course of conduct is generally and regularly followed in the conclusion of a particular type of contract, so that it may be regarded as an established usage.

4 The choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down in Article 17 of the Convention of 27 September 1968. Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.

In Case C-159/97,

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 Corte Suprema di Cassazione, Italy, for a preliminary ruling in the proceedings pending before that court between

Trasporti Castelletti Spedizioni Internazionali SpA

and

Hugo Trumpy SpA

on the interpretation of Article 17 of the Convention of 27 September 1968, cited above (OJ 1972 L 299, p. 32), 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 at p. 77),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn and P. Jann (Rapporteur) (Presidents of Chambers), G.F. Mancini, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevon, M. Wathelet and R. Schintgen, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Trasporti Castelletti Spedizioni Internazionali SpA, by Franco di Leo, of the Genoa Bar,

- Hugo Trumpy SpA, by Kristian Kielland, of the Genoa Bar, and Alessandro Sperati, of the Rome Bar,

- the Italian Government, by Professor Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato,

- the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by Lawrence Collins QC,

- the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, and Enrico Altieri, a national civil servant seconded to its Legal Service, acting as Agents,$

having regard to the Report for the Hearing,

after hearing the oral observations of Trasporti Castelletti Spedizioni Internazionali SpA, represented by Franco di Leo; of Hugo Trumpy SpA, represented by Maurizio Dardani, of the Genoa Bar; of the Italian Government, represented by Giacomo Aiello, Avvocato dello Stato; of the United Kingdom Government, represented by Lawrence Collins; and of the Commission, represented by Eugenio de March, Legal Adviser, acting as Agent, at the hearing on 26 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 22 September 1998,

gives the following

Judgment

Costs

53 The costs incurred by the Italian and United Kingdom 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,

in answer to the questions referred to it by the Corte Suprema di Cassazione by order of 24 October 1996, hereby rules:

The third case mentioned in the second sentence of the first paragraph of Article 17 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 to be interpreted as follows:

1. The contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware.

2. The existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

It is not necessary for such a course of conduct to be established in specific countries or, in

particular, in all the Contracting States.

A specific form of publicity cannot be required in all cases.

The fact that a course of conduct amounting to a usage is challenged before the courts is not sufficient to cause the conduct no longer to constitute a usage.

3. The specific requirements covered by the expression `form which accords' must be assessed solely in the light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions might lay down.

4. Awareness of the usage must be assessed with respect to the original parties to the agreement conferring jurisdiction, their nationality being irrelevant in this regard. Awareness of the usage will be established when, regardless of any specific form of publicity, in the branch of trade or commerce in which the parties operate a particular course of conduct is generally and regularly followed in the conclusion of a particular type of contract, so that it may be regarded as an established usage.

5. The choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down in Article 17 of the Convention of 27 September 1968. Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.

(1) - The terminology of the English text was changed by the Convention of 26 May 1989 from `practices' to `usages'. The majority of the other language texts use the same terminology (usage, uso, Handelsbrauch...). In the translation of the present judgment, the term `usages' has been adopted [although it did not appear in the text of the convention under consideration].

1 By order of 24 October 1996, received at the Court on 25 April 1997, the Corte Suprema di Cassazione (Supreme Court of Cassation) 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 fourteen questions on the interpretation of Article 17 of the Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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 at p. 77; hereinafter `the Convention').

2 The questions have been raised in proceedings for compensation for damage allegedly caused during the unloading of goods carried under a number of bills of lading from Argentina to Italy, between Trasporti Castelletti Spedizioni Internazionali SpA (`Castelletti'), having its registered office in Milan, Italy, to which the goods were delivered, and Hugo Trumpy SpA (`Trumpy'), having its registered office in Genoa, Italy, in its capacity as agent for the vessel and for the carrier Lauritzen Reefers A/S (`Lauritzen'), whose registered office is in Copenhagen.

The Convention

3 The first and second sentences of the first paragraph of Article 17 of the Convention provide:

`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 in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices (1) in that trade or commerce of which the parties are or ought to have been aware.'

4 That version was amended, after the events which are the subject of the main proceedings, 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). The first paragraph of Article 17 now provides:

`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

(b) in a form which accords with practices which the parties have established between themselves, or

(c) in international trade or commerce, in a form which accords with a usage 1 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.'

The main proceedings

5 The goods at issue in the main proceedings were, according to 22 bills of lading issued in Buenos Aires on 14 March 1987, placed by various Argentine shippers on board a vessel operated by Lauritzen, bound for Savona, Italy, where they were to be delivered to Castelletti. As a result of problems which arose during the unloading of the goods, Castelletti brought an action against Trumpy before the Tribunale di Genova (Genoa District Court) seeking an order for payment of compensation.

6 Trumpy, relying on clause 37 of the bills of lading, which confers jurisdiction on the High Court of Justice, London, argued that the Genoa court had no jurisdiction.

7 Clause 37, which is drawn up in English as are all the bills of lading in which it is inserted in small, but legible, characters, is the last to appear on the reverse of the printed document. It is worded as follows: `The contract evidenced by this Bill of Lading shall be governed by English Law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English Law to the exclusion of the Courts of any other country'.

8 On the face of the bills of lading there is, inter alia, a box to be filled in with particulars of the cargo, and a reference, in characters more obvious than those used for the other clauses, to the conditions set out on the reverse side. Below that reference are added the date and place of issue of the bill of lading and the signature of the carrier's local agent. The signature of the original shipper appears below the particulars of the cargo and above the reference to the reverse side.

9 By judgment of 14 December 1989, the Tribunale di Genova upheld the objection, taking the view that, having regard to the bill of lading produced before it, the clause conferring jurisdiction, although contained in a form which had not been signed by the shipper, was valid in the light of the usages of international trade. By decision of 7 December 1994, the Corte d'Appello (Court of Appeal), Genoa, upheld that judgment, but on different grounds. After examining all the bills of lading, it found that the shipper's signature on their face implied Castelletti's acceptance of all the clauses, including those on the reverse.

10 Castelletti therefore appealed on a point of law, claiming that the signature of the original shipper could not have entailed acceptance by it of all the clauses, but only, as is clear from its location, those relating to the particulars of the cargo.

11 The Corte Suprema di Cassazione found that this plea was admissible and that the signature of the original shipper could not be deemed to imply consent to all the clauses of the bill of lading.

Since the court had thus ruled out the possibility that an agreement conferring jurisdiction had been made in writing or even evidenced in writing, it considered that the resolution of the dispute depended upon the interpretation of Article 17 of the Convention, in that it provides that an agreement conferring jurisdiction can be made, `in international trade or commerce, in a form which accords with practices (usages) in that trade or commerce of which the parties are or ought to have been aware.'

12 In those circumstances, the Corte Suprema di Cassazione decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

`1. The first question to be put to the Court of Justice is as follows:

In the case-law of the Court of Justice relating to the original wording of Article 17, reference has been made to the need to ascertain and protect the actual will of the parties with regard to the jurisdiction clause by means of the requirements laid down by that provision in respect of the validity of such clauses; that is also the case where the clause is adjudged valid, when the bill of lading containing the clause comes within the framework of a continuing business relationship between the parties, and it is thereby established that the relationship is governed by the general terms and conditions (drawn up by one of the parties, namely the carrier) containing that clause (see Case 71/83 Tilly Russ v Nova [1984] ECR 2417, which cites earlier judgments underscoring the need for the consent of the parties to be clearly and precisely demonstrated).

However, in the light of the insertion into the new wording of the provision of the reference to usage, which is prescriptive (and thus unconnected to the will of the parties, at least so far as specifically concerns a particular contract), the question arises whether the requirement of (actual) knowledge, or of lack of awareness arising out of negligent and inexcusable ignorance, is sufficient in view of the consistent incorporation (in all agreements similar to that in issue) of the jurisdiction clause. The question arises, in other words, whether it is any longer necessary to ascertain the will of the parties, despite the fact that Article 17 uses the word "concluded" [in the Italian version], which implies an expression of will and thus "commercial" usage (customary clauses).

2. The second question concerns the meaning of the expression "form which accords". The first aspect concerns the way in which the clause appears, that is whether it must necessarily be in writing signed by the party who has drawn it up and who has therefore expressed the intention of relying upon it - for example - by signing the bill of lading referring specifically to a clause which in turn refers to an agreement conferring exclusive jurisdiction, even in the absence of the signature of the other party (the shipper).

The second aspect consists in establishing whether it is necessary for the jurisdiction clause to stand out prominently on its own within the contract as a whole, or whether it is sufficient (and therefore of no consequence as regards the validity of the clause) for it to be inserted amongst numerous other clauses drawn up in order to regulate the contract of carriage in every respect.

The third aspect relates to the language in which the clause is drawn up, that is to say, whether it must be in some way related to the nationality of the parties to the contract or whether it is sufficient for it to be a language regularly used in international trade or commerce.

3. The third question is concerned with whether the designated court must, as well as being a court of a Contracting State, be in some way related to the nationality and/or the residence of the parties to the contract or to the place of performance and/or conclusion of the contract, or whether the first condition is sufficient without there being any other link with the substance of the relationship.

4. The fourth question concerns the process by which usage comes into being; that is, whether consistent incorporation of the clause in bills of lading issued by trade associations or a significant number

of maritime transport undertakings is sufficient or whether it must be demonstrated that since users of such transport (whether traders or otherwise) have not made any observations or expressed reservations regarding consistent incorporation of the clause, they have tacitly acquiesced to the conduct of the other party, so that there may no longer be considered to be a dispute between them.

5. The fifth question concerns the form in which such consistent practice is publicised: must the form of bill of lading in which the jurisdiction clause appears be lodged at a particular office (trade association, chamber of commerce, port authorities, and so on) for consultation or made public in some other way?

6. The sixth question concerns the validity of the clause, even where, by virtue of the substantive rules applicable in the chosen court, it takes the form of a clause exempting the carrier from, or limiting, his liability.

7. The seventh question is concerned with whether the court (other than the chosen court) which has been called upon to assess the validity of the clause may examine the reasons for it, that is to say, the intention of the carrier in the choice of court made, as distinct from the court which would have had jurisdiction according to the usual criteria laid down in the Brussels Convention or by the lex fori.

8. The eighth question consists in ascertaining whether the fact that many shippers and/or endorsees of bills of lading have challenged the validity of the clause by bringing an action before a court other than that designated by the clause itself is indicative of the fact that usage regarding the insertion of the clause in forms has not become well established.

9. The ninth question consists in ascertaining whether the usage must exist in all the countries of the European Community or whether the expression "international trade or commerce" is intended to mean that it is sufficient for the usage to be practised in those countries which, in the context of international trade or commerce, have traditionally played a prominent role.

10. The tenth question consists in ascertaining whether the usage in question may derogate from mandatory statutory provisions of individual States, such as, in Italy, Article 1341 of the Civil Code which, with regard to the general contractual terms and conditions drawn up by one of the parties, provides that, in order for the usage to be valid, the other party must be or ought to have been aware of it and provides that clauses laying down particular limitations to or derogating from the jurisdiction of the courts must be specifically approved in writing.

11. The eleventh question concerns the circumstances in which insertion of the clause in question in a standard form, not signed by the party not involved in drawing it up, may be considered to be grossly unfair or even abusive.

12. The twelfth question involves ascertaining whether the party concerned was or ought to have been aware of the usage, other than with regard to the condition set forth in paragraph 5, above, as regards the bill of lading itself, which contained numerous clauses appearing on the reverse (paragraph 2, above).

13. The thirteenth question involves identifying the person who is or ought to have been aware of the usage; whether it must be the original shipper, even if he is a national of a non-Contracting State (such as, in the present case, Argentina), or whether it is sufficient for it to be the endorsee of the bill, who is a national of a Contracting State (in the present case, Italy).

14. The fourteenth question is concerned with whether the phrase "ought to have been aware" refers to a criterion of good faith and honesty when a particular contract was drawn up or to a criterion of ordinary care on the part of individuals who must be fully informed of current practices in international trade, for the purposes of paragraph 9, above.'

The questions submitted for a preliminary ruling

13 In Case 24/76 Estasis Salotti v RÜWA [1976] ECR 1831, paragraph 9, the Court of Justice held that, whilst the mere fact that a clause conferring jurisdiction is printed on the reverse of a contract drawn up on the commercial paper of one of the parties does not of itself satisfy the requirements of Article 17, it is otherwise where the text of the contract signed by both parties itself contains an express reference to general conditions which include a clause conferring jurisdiction.

14 Further, under the division of responsibilities in the preliminary ruling procedure laid down by the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention, it is for the national court alone to define the subject-matter of the questions which it proposes to refer to the Court. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Cases C-220/95 Van den Boogaard v Laumen [1997] ECR I-1147, paragraph 16, and C-295/95 Farrell v Long [1997] ECR I-1683, paragraph 11).

15 It is apparent from the wording of the questions submitted that the national court seeks clarification of four factors affecting the validity of a jurisdiction clause which is drawn up in a form which accords with established practices (usages) - the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention - namely:

- the consent of the parties to the clause (first question);

- the notion of usage in international trade or commerce (ninth, fourth, fifth and eighth questions);

- the notion of form which accords with established usages (second, eleventh and tenth questions);

- the parties' awareness of the usage (thirteenth, fourteenth and twelfth questions).

16 It is also clear from its questions that the national court is unsure whether there are any restrictions as to the choice of court under Article 17 of the Convention (third, seventh and sixth questions).

The first question: parties' consent to the jurisdiction clause

17 By its first question, the national court is asking essentially whether Article 17 of the Convention, as amended by the Accession Convention of 9 October 1978, in so far as it refers to the notion of `practices' (usages) whilst using the term `concluded' [in the Italian version], necessarily requires that the consent of the parties to the jurisdiction clause be established.

18 In its original version, Article 17 made the validity of a jurisdiction clause subject to the existence of an agreement in writing or an oral agreement evidenced in writing. It was in order to take account of the specific practices and requirements of international trade that the Accession Convention of 9 October 1978 added to the second sentence of the first paragraph of Article 17 a third case providing that, in international trade or commerce, a jurisdiction clause may be validly concluded in a form which accords with usages in that trade or commerce of which the parties are, or ought to have been, aware (Case C-106/95 MSG v Gravières Rhénanes [1997] ECR I-911, paragraph 16).

19 At paragraph 17 of MSG, the Court held that, in spite of the flexibility introduced into Article 17, the provision's aim was still to ensure that there was real consent on the part of the persons concerned so as to protect the weaker party to the contract by avoiding jurisdiction clauses, incorporated in a contract by one party, going unnoticed.

20 The Court went on to state, however, that the amendment made to Article 17 makes it possible

to presume that such consent exists where commercial usages of which the parties are or ought to have been aware exist in this regard in the relevant branch of international trade or commerce (MSG, paragraphs 19 and 20).

21 The answer to the first question must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention is to be interpreted as meaning that the contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware.

The ninth, fourth, fifth and eighth questions: usage in international trade or commerce

22 By these questions, the national court seeks to ascertain the countries in which a usage must be found to exist, the process by which it comes into being, the forms in which it must be publicised, and the consequences to be drawn, as to the existence of a usage in this area, from actions challenging the validity of jurisdiction clauses inserted in bills of lading.

23 At paragraph 21 of MSG, the Court stated that it is for the national court to determine, first, whether the contract in question is one forming part of international trade or commerce and, second, whether there is a usage in the branch of international trade or commerce in which the parties operate.

24 As to the first point, it is common ground that, in the main proceedings, the contract is one forming part of international trade or commerce.

25 As to the second point, the Court explained in MSG, at paragraph 23, that whether a usage exists is not to be determined by reference to the law of one of the Contracting Parties or in relation to international trade or commerce in general, but in relation to the branch of trade or commerce in which the parties to the contract operate.

26 It went on to hold in the same paragraph that there is a usage in the branch of trade or commerce in question where in particular a certain course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

27 It follows that it is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States. The fact that a practice is generally and regularly observed by operators in the countries which play a prominent role in the branch of international trade or commerce in question can be evidence which helps to prove that a usage exists. The determining factor remains, however, whether the course of conduct in question is generally and regularly followed by operators in the branch of international trade in which the parties to the contract operate.

28 Since Article 17 of the Convention does not contain any reference to forms of publicity, it must be held, as the Advocate General considered at point 152 of his Opinion, that, although any publicity which might be given in associations or specialised bodies to the standard forms on which a jurisdiction clause appears may help to prove that a practice is generally and regularly followed, such publicity cannot be a requirement for establishing the existence of a usage.

29 A course of conduct satisfying the conditions indicative of a usage does not cease to be a usage because it is challenged before the courts, whatever the extent of the challenges, provided that it still continues to be generally and regularly followed in the trade with which the type of contract in question is concerned. Therefore, the fact that numerous shippers and/or endorsees of bills of lading have challenged the validity of a jurisdiction clause by bringing actions before courts other than those designated would not cause the incorporation of that clause in those documents to cease to constitute a usage, as long as it is established that it amounts to a usage which is generally and regularly followed.

30 The answer to the ninth, fourth, fifth and eighth questions must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention is to be interpreted as follows:

The existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

It is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States.

A specific form of publicity cannot be required in all cases.

The fact that a course of conduct amounting to a usage is challenged before the courts is not sufficient to cause the conduct no longer to constitute a usage.

The second, eleventh and tenth questions: `form which accords with practices'

31 By its second question, the national court seeks to ascertain what is specifically required for there to be a `form which accords' within the meaning of Article 17 of the Convention. It asks more precisely whether the jurisdiction clause must be contained in a written document, bearing the signature of the party stipulating it, with the signature itself being accompanied by a reference to the clause, whether that clause must stand out prominently from the other clauses and whether the language in which it is drawn up must be related to the nationality of the parties.

32 By its eleventh question, the national court seeks to ascertain the circumstances in which insertion of the clause in question in a standard form, which has not been signed by the party not involved in drawing it up, may be considered to be grossly unfair or even abusive.

33 By its tenth question, the national court asks whether it is acceptable, in the context of Article 17 of the Convention, to rely on a usage which would derogate from mandatory statutory provisions adopted by certain Contracting States as regards the form of jurisdiction clauses.

34 As the Court held in Case 150/80 Elefanten Schuh v Jacqmain [1981] ECR 1671, paragraph 25, Article 17 is intended to lay down itself the conditions as to form which jurisdiction clauses must meet, so as to ensure legal certainty and to ensure that the parties have given their consent.

35 It follows that the validity of a jurisdiction clause may be subject to compliance with a particular condition as to form only if that condition is linked to the requirements of Article 17.

36 It is therefore for the national court to refer to the commercial usages in the branch of international trade or commerce concerned in order to determine whether, in the case before it, the physical appearance of the jurisdiction clause, including the language in which it is drawn up, and its insertion in a standard form, which has not been signed by the party not involved in drawing it up, are consistent with the forms according with those usages.

37 In Elefanten Schuh, at paragraph 26, the Court stated that Contracting States are not at liberty to lay down formal requirements other than those laid down in the Convention.

38 Therefore, the usages to which Article 17 refers cannot be nullified by national statutory provisions which require compliance with additional conditions as to form.

39 The answer to the second, eleventh and tenth questions must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention is to be interpreted as meaning that the specific requirements covered by the expression `form which accords' must be assessed solely in the light of the commercial usages of the branch of international trade

or commerce concerned, without taking into account any particular requirements which national provisions might lay down.

The thirteenth, fourteenth and twelfth questions: the parties' awareness of the usage

40 By these questions, the national court seeks to ascertain, first, which party must be aware of the usage and whether his nationality is relevant in this regard, next, what degree of awareness that party must have of the usage and, finally, whether any publicity must be given to the standard forms containing jurisdiction clauses and, if so, in what form.

41 As to the first point, the Court of Justice held in Tilly Russ, at paragraph 24, that, in so far as a jurisdiction clause incorporated in a bill of lading is valid under Article 17 of the Convention as between the shipper and the carrier, it can be pleaded against the third party holding the bill of lading so long as, under the relevant national law, the holder of the bill of lading succeeds to the shipper's rights and obligations.

42 Since the validity of the clause under Article 17 must be assessed by reference to the relationship between the original parties, it follows that it is those parties whose awareness of the usage must be assessed, the parties' nationality being irrelevant for the purposes of that investigation.

43 As to the second point, it is clear from paragraph 24 of MSG that actual or presumed awareness of a usage on the part of the parties to a contract can be made out, in particular, by showing either that the parties had previously had commercial or trade relations between themselves or with other parties operating in the sector in question, or that, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, so that it may be regarded as being an established usage.

44 As to the third point, given the Convention's silence on the means by which awareness of a usage may be proved, it must be held that, although any publicity which might be given in associations or specialised bodies to the standard forms containing jurisdiction clauses would make it easier to prove awareness, it cannot be essential for this purpose.

45 The answer to the thirteenth, fourteenth and twelfth questions must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 of the Convention is to be interpreted as meaning that awareness of the usage must be assessed with respect to the original parties to the agreement conferring jurisdiction, their nationality being irrelevant in this regard. Awareness of the usage will be established when, regardless of any specific form of publicity, in the branch of trade or commerce in which the parties operate a particular course of conduct is generally and regularly followed in the conclusion of a particular type of contract, so that it may be regarded as an established usage.

The third, seventh and sixth questions: choice of court

46 By these questions, the national court seeks to ascertain whether there are, under Article 17 of the Convention, any limitations as to the choice of court. It asks whether it is necessary for the parties to choose a court having some link to the case, whether the court seised may review the validity of the clause as well as the intention of the party which inserted it, and whether the fact that the substantive provisions applicable before the chosen court tend to reduce that party's liability may affect the validity of the jurisdiction clause.

47 In that regard, it should be recalled that the Convention does not affect rules of substantive law (Case 25/79 Sanicentral v Collin [1979] ECR 3423, paragraph 5), but has the aim of establishing uniform rules of international jurisdiction (Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, paragraph 25).

48 As the Court has repeatedly stated, it is in keeping with the spirit of certainty, which constitutes

one of the aims of the Convention, that the national court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case (Cases 34/82 Peters v ZNAV [1983] ECR 987, paragraph 17; C-288/92 Custom Made Commercial v Stawa Metallbau [1994] ECR I-2913, paragraph 20; and Benincasa, paragraph 27). In Benincasa, at paragraphs 28 and 29, the Court explained that the aim of securing legal certainty by making it possible reliably to foresee which court will have jurisdiction has been interpreted, in connection with Article 17 of the Convention, by fixing strict conditions as to form, since the purpose of that provision is to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus between the parties.

49 It follows that the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down by Article 17.

50 It is for those reasons that the Court has repeatedly held that Article 17 of the Convention dispenses with any objective connection between the relationship in dispute and the court designated (Case 56/79 Zelger v Salinitri [1980] ECR 89, paragraph 4; MSG, paragraph 34; and Benincasa, paragraph 28).

51 For the same reasons, in a situation such as that in the main proceedings, any further review of the validity of the clause and of the intention of the party which inserted it must be excluded and substantive rules of liability applicable in the chosen court must not affect the validity of the jurisdiction clause.

52 The answer to the third, seventh and sixth questions must therefore be that the third case mentioned in the second sentence of the first paragraph of Article 17 is to be interpreted as meaning that the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down in Article 17 of the Convention. Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Jann

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Judgment of the Court (Third Chamber)
of 27 October 1998
Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002. Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Interpretation of Articles 5(1) and (3) and 6 - Claim for compensation by the consignee or insurer of the goods on the basis of the bill of lading against a defendant who did not issue the bill of lading but is regarded by the plaintiff as the actual maritime carrier. Case C-51/97.

1 Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction in `matters relating to a contract' and `matters relating to tort, delict or quasi delict' - Goods damaged on completion of a voyage by sea then by land - Action for compensation by the consignee against the actual maritime carrier who did not issue the bill of lading - Action concerning a matter relating to tort, delict or quasi delict - Place where the harmful event occurred - Determination - Place where the damage arose - Place of delivery of the goods by the maritime carrier

(Convention of 27 September 1968, Art. 5, points 1 and 3)

2 Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - More than one defendant - Jurisdiction of the courts for the place where any one of the co-defendants is domiciled - Condition - Co-defendant domiciled in a Contracting State

(Convention of 27 September 1968, Art. 6, point 1)

1 An action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considers to be the actual maritime carrier, does not fall within the scope of matters relating to a contract within the meaning of Article 5, point 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, since the bill of lading in question does not disclose any contractual relationship freely entered into between the consignee and the defendant.

Such an action is, however, a matter relating to tort, delict or quasi-delict within the meaning of Article 5, point 3, of that Convention, since that concept covers all actions which seek to establish the liability of a defendant and are not related to matters of contract within the meaning of Article 5, point 1. As regards determining the `place where the harmful event occurred' within the meaning of Article 5, point 3, the place where the consignee, on completion of a transport operation by sea and then by land, merely discovered the existence of the damage to the goods delivered to him cannot serve to determine that place. Whilst it is true that the abovementioned concept may cover both the place where the damage occurred and the place of the event giving rise to it, the place where the damage arose can, in the circumstances described, only be the place where the maritime carrier was to deliver the goods.

2 Article 6, point 1, of the Convention of 27 September 1968 must be interpreted as meaning that a defendant domiciled in a Contracting State cannot, on the basis of that provision, be sued in another Contracting State before a court seised of an action against a co-defendant not domiciled in a Contracting State on the ground that the dispute is indivisible rather than merely displaying a connection. The objective of legal certainty pursued by the Convention would not be attained if the fact that a court in a Contracting State had accepted jurisdiction as regards one of the defendants not domiciled in a Contracting State made it possible to bring another defendant, domiciled

in a Contracting State, before that same court in cases other than those envisaged by the Convention, thereby depriving him of the benefit of the protective rules laid down by it.

In Case C-51/97,

REFERENCE to the Court by the Cour de Cassation (France), 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, for a preliminary ruling in the proceedings pending before that court between

Réunion Européenne SA and Others

and

Spliethoff's Bevrachtingskantoor BV, and the Master of the vessel Alblasgracht V002,

on the interpretation of Articles 5(1) and (3) and 6 of the said Convention of 27 September 1968 (OJ 1975 L 204, p. 28), 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) and 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),

THE COURT

(Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida (Rapporteur) and C. Gulmann, Judges,

Advocate General: G. Cosmas,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Spliethoff's Bevrachtingskantoor BV and the Master of the Alblasgracht V002, by D. Le Prado, of the Paris Bar,

- the French Government, by K. Rispal-Bellanger, Head of Sub-directorate in the Legal Directorate, Ministry of Foreign Affairs, and J.-M. Belorgey, Chargé de Mission in the same Directorate, acting as Agents,

- the German Government, by P. Gass, Ministerialdirigent in the Federal Justice Ministry, acting as Agent,

- the Commission of the European Communities, by J.L. Iglesias, Legal Adviser, acting as Agent, assisted by H. Lehman, of the Paris Bar,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 5 February 1998,

gives the following

Judgment

Costs

53 The costs incurred by the French and German Governments and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Third Chamber)

in answer to the questions referred to it by the Cour de Cassation by judment of 28 January 1997, hereby rules:

1. An action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, falls within the scope not of matters relating to a contract within the meaning of 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, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, but of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that Convention.

2. The place where the consignee of the goods, on completion of a transport operation by sea and then by land, merely discovered the existence of the damage to the goods delivered to him cannot serve to determine the `place where the harmful event occurred' within the meaning of Article 5(3) of the Convention of 28 September 1968, as interpreted by the Court.

3. Article 6(1) of the Convention of 27 September 1968 must be interpreted as meaning that a defendant domiciled in a Contracting State cannot be sued in another Contracting State before a court seised of an action against a co-defendant not domiciled in a Contracting State on the ground that the dispute is indivisible rather than merely displaying a connection.

1 By judgment of 28 January 1997, received at the Court on 7 February 1997, the Cour de Cassation (Court of Cassation) 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 four questions on the interpretation of Articles 5(1) and (3) and 6 of that convention (OJ 1975 L 204, p. 28), 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) and 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).

2 Those questions arose in proceedings brought by nine insurance companies and, as lead insurer, the company Réunion Européenne (hereinafter `the insurers'), which have been subrogated to the rights of the company Brambi Fruits (hereinafter `Brambi'), whose registered office is in Rungis (France), against Spliethoff's Bevrachtingskantoor BV, whose registered office is in Amsterdam (Netherlands), and the Master of the vessel Alblasgracht V002, residing in the Netherlands, following the discovery of damage to a cargo of 5 199 cartons of pears delivered to Brambi, in the carriage of which the defendants were involved.

The Convention

3 The first paragraph of Article 2 of the Convention provides:

`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.'

4 The first paragraph of Article 3 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.'

5 According to Article 5 of the 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...

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

...'

6 Article 6(1) of the Convention adds that where such a person is one of a number of defendants, he may also be sued in the courts for the place where any one of them is domiciled.

7 Finally, Article 22 provides:

`Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.'

The main proceedings

8 The goods at issue in the main proceedings were carried by sea, in eight refrigerated containers, from Melbourne (Australia) to Rotterdam (Netherlands) aboard the vessel Alblasgracht V002 under a bearer bill of lading issued on 8 May 1992 in Sydney, Australia, by Refrigerated Container Carriers PTY Ltd (hereinafter `RCC'), whose registered office is in Sydney, then by road under an international consignment note, to Rungis in France, where Brambi discovered the damage. The fruit had ripened prematurely owing to a breakdown in the cooling system.

9 The insurers paid compensation for the damage suffered by Brambi. Having been subrogated to that company's rights as a result of that payment, they brought proceedings to recoup their loss against RCC on whose headed paper the bill of lading had been issued for the sea voyage, against Spliethoff's Bevrachtingskantoor BV, which actually carried the goods by sea despite not being mentioned on the bill of lading, and, finally, against the Master of the vessel Alblasgracht V002, as representative of the owners and charterers of that vessel, before the Tribunal de Commerce (Commercial Court), Créteil, in whose jurisdiction Rungis is situated.

10 By judgment of 17 May 1994 the Tribunal de Commerce, Créteil, declared that it had jurisdiction as regards RCC, on the basis that the goods were to be delivered to Brambi in Rungis. However, it declined jurisdiction under Article 5(1) of the Convention as regards Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002, taking the view that the operation did not constitute a through transport operation from Melbourne to Rungis since an international consignment note had been drawn up for the carriage of the goods from Rotterdam to Rungis. The Tribunal de Commerce, Créteil, therefore considered that it should decline jurisdiction in the proceedings brought by the insurers against Spliethoff's Bevrachtingskantoor BV and the Master of the vessel

Alblasgracht V002 in favour of the courts of Rotterdam, Rotterdam being the place of performance of the obligation within the meaning of Article 5(1) of the Convention, or those of Amsterdam or of Sydney pursuant to Article 6(1) of the Convention, according to which a person who is one of a number of defendants may be sued before the courts for the place where any one of them is domiciled.

11 The Cour d'Appel (Court of Appeal), Paris, confirmed, by judgment of 16 November 1994, that the Tribunal de Commerce, Créteil, lacked international jurisdiction as regards Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002, whereupon the insurers appealed to the Cour de Cassation, claiming that it had not been established that Brambi had concluded an agreement with those defendants and that the Cour d'Appel could not therefore apply Article 5(1) of the Convention to them. According to the insurers, the Cour d'Appel should have applied Article 5(3) of the Convention concerning jurisdiction in matters relating to tort, delict or quasi-delict.

12 In the alternative, the insurers claimed that the dispute was indivisible since RCC, as well as both Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002, had been involved in the same transport operation. The Tribunal de Commerce, Créteil, having accepted jurisdiction for the proceedings against RCC, should have done so for the proceedings against the other two defendants.

13 Considering that the decision to be given depended on an interpretation of the Convention, the Cour de Cassation stayed proceedings pending a ruling from the Court of Justice on the following questions:

1. Is an action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, based on the contract of transport and does it, for that or any other reason, fall within the scope of matters relating to contract within the meaning of Article 5(1) of the Convention?

2. If the foregoing question is answered in the negative, is the matter one relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention or is it appropriate to have recourse to the principle laid down in Article 2 of the Convention that the courts of the State in whose territory the defendant is domiciled have jurisdiction?

3. In the event that the matter is to be regarded as one relating to tort, delict or quasi-delict, may the place where the consignee, after completion of the maritime transport operation and then the final overland transport operation, merely discovered that the goods delivered to him were damaged, constitute - and if so under what conditions - the place of occurrence of the damage which, according to the judgment of the Court of Justice of 30 November 1976 in Case 21/76 Bier v Mines de Potasse d'Alsace [1976] ECR 1735, may be the place "where the harmful event occurred" within the meaning of Article 5(3) of the Convention?

4. May a defendant domiciled in the territory of a Contracting State be brought, in another Contracting State, before the court hearing an action against a co-defendant not domiciled in the territory of any Contracting State, on the ground that the dispute is indivisible, rather than merely displaying a connection?

The first and second questions

14 According to Spliethoff's Bevrachtingskantoor BV and the Master of the Alblasgracht V002, the dispute is a matter relating to a contract within the meaning of Article 5(1) of the Convention since the action against them is based on the bill of lading, the document containing the transport

contract.

15 It must be pointed out that, according to settled case-law (Case 34/82 Peters v ZNAV [1983] ECR 987, paragraphs 9 and 10, Case 9/87 Arcado v Haviland [1988] ECR 1539, paragraphs 10 and 11, and Case C-26/91 Handte v Traitements Mécano-Chimiques des Surfaces [1992] ECR I-3967, paragraph 10), the phrase `matter relating to a contract' in Article 5(1) of the Convention is to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention, in order to ensure that it is applied uniformly in all the Contracting States; that phrase cannot therefore be taken to refer to how the legal relationship in question before the national court is classified by the relevant national law.

16 It is also settled case-law that, under the system of the Convention, the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is only by way of derogation from that principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (see, in particular, Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, paragraph 13).

17 It follows, as the Court held in paragraph 15 of Handte, cited above, that the phrase `matters relating to contract', as used in Article 5(1) of the Convention, is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards the other.

18 In this case, it is clear from the findings of the national courts at first instance and on appeal that the bearer bill of lading issued by RCC covers the carriage of the goods by sea to Rotterdam, the port of discharge and delivery, that it specifies Brambi as the person to whom the arrival of the goods must be notified and that it indicates that the goods are to be carried aboard the Alblasgracht V002.

19 It must therefore be held that that bill of lading discloses no contractual relationship freely entered into between Brambi on the one hand and, on the other, Spliethoff's Bevrachtingskantoor BV and the Master of the Alblasgracht V002, who, according to the insurers, were the actual maritime carriers of the goods.

20 In those circumstances, the action brought against the latter by the insurers cannot be a matter relating to a contract within the meaning of Article 5(1) of the Convention.

21 It is next necessary to determine whether such an action is concerned with a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention.

22 In its judgment in Case 189/87 Kalfelis v Schröder [1988] ECR 5565, paragraph 18, the Court defined the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention 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).

23 That is the position in the main proceedings. Where insurers who have been subrogated to the rights of the consignee of goods which, on completion of a sea voyage followed by overland transport, are found to be damaged claim compensation for the loss, relying on the bill of lading for the sea voyage, from the persons whom they regard as actually having carried the goods by sea, the purpose of their action is to establish the carriers' liability and does not, as is clear from paragraphs 18 to 20 of this judgment, fall within the scope of `matters relating to a contract' within the meaning of Article 5(1) of the Convention.

24 In those circumstances, it must be held that such an action is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention and that, therefore, the general principle that the courts of the State in which the defendant is domiciled are to have jurisdiction, laid down in the first paragraph of Article 2 of the Convention, is inapplicable.

25 The jurisdiction in matters relating to tort, delict or quasi-delict of the courts for the place where the harmful event occurred is one of the `special jurisdictions' listed in Articles 5 and 6 of the Convention, which constitute exceptions to the general principle laid down in the first paragraph of Article 2.

26 The answer to the first two questions must therefore be that an action by which the consignee of goods found to be damaged on completion of a transport operation by sea and then by land, or by which his insurer who has been subrogated to his rights after compensating him, seeks redress for the damage suffered, relying on the bill of lading covering the maritime transport, not against the person who issued that document on his headed paper but against the person whom the plaintiff considered to be the actual maritime carrier, falls within the scope not of matters relating to a contract within the meaning of Article 5(1) of the Convention but of matters relating to tort, delict or quasi-delict within the meaning of Article 5 (3) of the Convention.

The third question

27 It must borne in mind at the outset that, as the Court has held on several occasions (see the judgments in Case 21/76 Bier v Mines de Potasse d'Alsace, cited above, paragraph 11, Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraph 17, Case C-68/93 Shevill and Others v Presse Alliance [1995] ECR I-415, paragraph 19, and Case C-364/93 Marinari v Lloyds Bank and Another [1995] ECR I-2719, paragraph 10), the rule of special jurisdiction in Article 5(3) of the Convention, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

28 It must next be observed that in the judgments cited above in Mines de Potasse d'Alsace, paragraphs 24 and 25, and Shevill and Others, paragraph 20, the Court held that, where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression `place where the harmful event occurred' in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.

29 In Marinari, cited above, paragraph 13, the Court made it clear that the choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it, since otherwise the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction would be negated, with the result that, in cases other than those expressly provided for, jurisdiction would be attributed to the courts of the plaintiff's domicile, a solution which the Convention does not favour since, in the second paragraph of Article 3, it excludes application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a Contracting State.

30 The Court went on to infer, in paragraph 14 of that judgment, that whilst it has thus been recognised that the term `place where the harmful event occurred' within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse

consequences can be felt of an event which has already caused damage actually arising elsewhere.

31 For the same reasons, in Dumez France and Tracoba, cited above, the Court held that the rule on jurisdiction laid down in Article 5(3) of the Convention cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets.

32 It follows that a consignee of goods who, on completion of a transport operation by sea and then by land, finds that the goods delivered to him are damaged may bring proceedings against the person whom he regards as the actual maritime carrier either before the courts for the place where the damage occurred or the courts for the place of the event giving rise to it.

33 As the Advocate General emphasises in points 54 to 56 of his Opinion, in an international transport operation of the kind at issue in the main proceedings the place where the event giving rise to the damage occurred may be difficult or indeed impossible to determine. In such circumstances, it will be for the consignee of the damaged goods to bring the actual maritime carrier before the courts for the place where the damage occurred. It must be pointed out in that regard that, in an international transport operation of the kind at issue in the main proceedings, the place where the damage occurred cannot be either the place of final delivery, which, as the Commission rightly pointed out, can be changed in mid-voyage, or the place where the damage was ascertained.

34 To allow the consignee to bring the actual maritime carrier before the courts for the place of final delivery or before those for the place where the damage was ascertained would in most cases mean attributing jurisdiction to the courts for the place of the plaintiff's domicile, whereas the authors of the Convention demonstrated their opposition to such attribution of jurisdiction otherwise than in the cases for which it expressly provides (see, to that effect, Dumez France and Tracoba, cited above, paragraphs 16 and 19, and Case C-89/91 Shearson Lehman Hutton v TVB [1993] ECR I-139, paragraph 17). Furthermore, such an interpretation of the Convention would make the determination of the competent court depend on uncertain factors, which would be incompatible with the objective of the Convention which is to provide for a clear and certain attribution of jurisdiction (see, to that effect, Marinari, paragraph 19, and Handte, paragraph 19, both cited above).

35 In those circumstances, the place where the damage arose in the case of an international transport operation of the kind at issue in the main proceedings can only be the place where the actual maritime carrier was to deliver the goods.

36 That place meets the requirements of foreseeability and certainty imposed by the Convention and displays a particularly close connecting factor with the dispute in the main proceedings, so that the attribution of jurisdiction to the courts for that place is justified by reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

37 The answer to be given to the third question must therefore be that the place where the consignee of the goods, on completion of a transport operation by sea and then by land, merely discovered the existence of the damage to the goods delivered to him cannot serve to determine the `place where the harmful event occurred' within the meaning of Article 5(3) of the Convention, as interpreted by the Court.

The fourth question

38 It must be noted at the outset that the Convention does not use the term `indivisible' in relation to disputes but only the term `related', in Article 22.

39 As the Court made clear in Case 150/80 Elefanten Schuh v Jacqmain [1981] ECR 1671, paragraph 19, Article 22 of the Convention is intended to establish how related actions which have been brought

before courts of different Contracting States are to be dealt with. It does not confer jurisdiction; in particular, it does not accord jurisdiction to a court of a Contracting State to try an action which is related to another action of which that court is seised pursuant to the rules of the Convention.

40 In that judgment the Court held that Article 22 of the Convention applies only where related actions are brought before courts of two or more Contracting States.

41 It is clear from the documents before the Court in this case that separate actions have not been brought before the courts of different Contracting States, so that, in any event, the conditions for the application of Article 22 are not met.

42 It must next be borne in mind that, under Article 3 of the Convention, 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 Title II.

43 Those rules include, in Article 6(1) of the Convention, the rule that a person may also be sued, `where he is one of a number of defendants, in the courts for the place where any one of them is domiciled'.

44 As is clear from the very wording of Article 6(1), it applies only if the proceedings in question are brought before the courts for the place where one of the defendants is domiciled.

45 That is not the case here.

46 It must be observed that the objective of legal certainty pursued by the Convention would not be attained if the fact that a court in a Contracting State had accepted jurisdiction as regards one of the defendants not domiciled in a Contracting State made it possible to bring another defendant, domiciled in a Contracting State, before that same court in cases other than those envisaged by the Convention, thereby depriving him of the benefit of the protective rules laid down by it.

47 In any event, the exception provided for in Article 6(1) of the Convention, derogating from the principle that the courts of the State in which the defendant is domiciled are to have jurisdiction, must be construed in such a way that there is no possibility of the very existence of that principle being called in question, in particular by allowing a plaintiff to make a claim against a number of defendants with the sole purpose of ousting the jurisdiction of the courts of the State where one of those defendants is domiciled (Kalfelis, cited above, paragraphs 8 and 9).

48 Accordingly, after pointing out that the purpose of Article 6(1) of the Convention, and of Article 22, is to ensure that judgments which are incompatible with each other are not given in the Contracting States, the Court held in Kalfelis that, 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.

49 In that connection, the Court also held in Kalfelis that a court which has jurisdiction under Article 5(3) of the Convention 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.

50 It follows that two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected.

51 Finally, as the Court held in paragraph 20 of Kalfelis, 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.

52 The answer to the fourth question must therefore be that Article 6(1) of the Convention must be interpreted as meaning that a defendant domiciled in a Contracting State cannot be sued in another Contracting State before a court seised of an action against a co-defendant not domiciled in a Contracting State on the ground that the dispute is indivisible rather than merely displaying a connection.

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JUDGRAP Moitinho de Almeida

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Judgment of the Court (Fifth Chamber)
of 19 May 1998
Drouot assurances SA v Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne. Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Interpretation of Article 21 - Lis alibi pendens - Definition of "same parties" - Insurance company and its insured. Case C-351/96.

Convention on Jurisdiction and the Enforcement of Judgments - Lis alibi pendens - Proceedings between the `same parties' - Definition - Whether insurer and its insured are to be treated as the same party - Condition - Litigation concerning the obligation of the owner of the cargo of a vessel to contribute to the general average following the foundering of the vessel

(Convention of 27 September 1968, Art. 21)

An insurer and its insured must be considered to be one and the same party for the purposes of the application of Article 21 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, where there is such a degree of identity between their interests that a judgment delivered against one of them would have the force of res judicata as against the other. On the other hand, application of the said article 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.

Thus, 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.

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 Economique (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. Sevon, 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 Economique (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 Economique (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 subject-matter. 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 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 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 of the hull of a vessel which has foundered against the owner and the 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.

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CONCERNS	Interprets 41968A0927(01) -A21
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
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NATCOUR	*P1* Cour de cassation (France), Chambre commerciale, financière et économique, arrêt du 22/06/1999 (K 94-16.830 1283 P) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1999 IV no 135 ; - La Semaine juridique - entreprise et affaires 1999 p.1464 (résumé) ; - Recueil Dalloz Sirey 1999 IR. p.190-191 (résumé) ; - Revue critique de droit international privé 1999 p.777-779 ; - Revue de jurisprudence de droit des affaires 1999 p.931-932 ; - Europe 2000 Février Comm. no 59 p.22 (résumé) ; - Le droit maritime français 2000 p.20-22 ; - Recueil Le Dalloz 2000 Jur. p.212 ; - International Litigation Procedure 2000 p.421-425 ; - X: Revue de jurisprudence de droit des affaires 1999 p.932 ; - Hübner, Christian ; Latron, Pierre: Le droit maritime français 2000 p.22-25 ; - Ammar, Daniel:

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PROCEDU Reference for a preliminary ruling

ADVGEN Fennelly

JUDGRAP Edward

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Judgment of the Court
of 27 April 1999
Hans-Hermann Mietz v Intership Yachting Sneek BV. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Brussels Convention - Concept of provisional measures - Construction and delivery of a motor yacht. Case C-99/96.

1 Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction over consumer contracts - `Sale of goods on instalment credit terms' - Contract for the manufacture of goods for a price payable in several instalments before the goods are transferred to the purchaser - Excluded - Contract for the supply of services or goods

(Convention of 27 September 1968, Art. 13, first para., points 1 and 3, as amended by the Accession Convention of 1978)

2 Convention on Jurisdiction and the Enforcement of Judgments - Enforcement - `Provisional measure' ordering interim payment - Excluded - Conditions

(Convention of 27 September 1968, Art. 24, Title III)

3 Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Interim proceedings designed to obtain provisional or protective measures - Appearance by the defendant - Effects

(Convention of 27 September 1968, Arts 18 and 24)

1 In the area of consumer contracts, Article 13, first paragraph, point 1, of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be construed as not applying to a contract between two parties having the following characteristics, that is to say, a contract:

- relating to the manufacture by the first contracting party of goods corresponding to a standard model, to which certain alterations have been made;

- by which the first contracting party has undertaken to transfer the property in those goods to the second contracting party, who has undertaken, by way of consideration, to pay the price in several instalments; and

- in which provision is made for the final instalment to be paid before possession of the goods is transferred definitively to the second contracting party.

That provision is intended to protect the purchaser only where the vendor has granted him credit, that is to say, where the vendor has transferred to the purchaser possession of the goods in question before the purchaser has paid the full price. A contract having the characteristics mentioned above is, however, to be classified as a contract for the supply of services or of goods within the meaning of Article 13, first paragraph, point 3, of the Convention.

2 A judgment cannot be the subject of an enforcement order under Title III of the Convention of 27 September 1968 in a case where

- it was delivered at the end of proceedings which were not, by their very nature, proceedings as to substance, but summary proceedings for the granting of interim measures;

- the defendant was not domiciled in the Contracting State of the court of origin and it does not appear from the judgment that, for other reasons, that court had jurisdiction under the Convention as to the substance of the matter;

- it does not contain any statement of reasons designed to establish the jurisdiction of the court of origin as to the substance of the matter

and

- it is limited to ordering the payment of a contractual consideration, without, on the one hand, repayment to the defendant of the sum awarded being guaranteed if the plaintiff is unsuccessful as regards the substance of his claim or, on the other, the measure sought relating only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

In such a case, the court to which application for enforcement is made must conclude that the measure ordered is not a provisional measure within the meaning of Article 24 of the Convention.

3 The fact that the defendant appears before the court dealing with interim measures in the context of fast procedures intended to grant provisional or protective measures in case of urgency and which do not prejudice the examination of the substance cannot, by itself, suffice to confer on that court, by virtue of Article 18 of the Convention of 27 September 1968, unlimited jurisdiction to order any provisional or protective measure which the court might consider appropriate if it had jurisdiction under the Convention as to the substance of the matter.

In Case C-99/96,

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 Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Hans-Hermann Mietz

and

Intership Yachting Sneek BV

on the interpretation of Article 13, first paragraph, points 1 and 3, Article 24, Article 28, second paragraph, and Article 34, second paragraph, of the above 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 text - p. 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward (Rapporteur), H. Ragnemalm, L. Sevon and M. Wathelet, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

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

- the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, and David Lloyd Jones, Barrister,

- the Commission of the European Communities, by Ulrich Wölker, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom Government, represented by David Lloyd Jones, and the Commission, represented by Marco Nuñez-Müller, of the Brussels Bar, at the hearing on 9 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 8 October 1997,

gives the following

Judgment

Costs

59 The costs incurred by the German and United Kingdom 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,

in answer to the questions referred to it by the Bundesgerichtshof by order of 29 February 1996, hereby rules:

1. Article 13, first paragraph, point 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, and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, must be construed as not applying to a contract between two parties having the following characteristics, that is to say, a contract:

- relating to the manufacture by the first contracting party of goods corresponding to a standard model, to which certain alterations have been made;

- by which the first contracting party has undertaken to transfer the property in those goods to the second contracting party, who has undertaken, by way of consideration, to pay the price in several instalments; and

- in which provision is made for the final instalment to be paid before possession of the goods is transferred definitively to the second contracting party.

It is in this regard irrelevant that the contracting parties have described their contract as a `contract of sale'. A contract having the characteristics mentioned above is however to be classified as a contract for the supply of services or of goods within the meaning of Article 13, first paragraph, point 3, of the Convention of 27 September 1968. It is for the national court, should the need arise, to determine whether the particular case before it involves a supply of services or a supply of goods.

2. A judgment ordering interim payment of contractual consideration, delivered at the end of a procedure such as that provided for under Articles 289 to 297 of the Netherlands Code of Civil Procedure by a court not having jurisdiction under the Convention of 27 September 1968 as to the substance of the matter is not a provisional measure capable of being granted under Article 24 of that Convention unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure ordered relates only to specific assets of the defendant located or to be located within the confines of

the territorial jurisdiction of the court to which application is made.

1 By order of 29 February 1996, received at the Court on 26 March 1996, the Bundesgerichtshof (Federal Court of Justice) 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 four questions on the interpretation of Article 13, first paragraph, points 1 and 3, Article 24, Article 28, second paragraph, and Article 34, second paragraph, of the above 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 text - p. 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (`the Convention').

2 Those questions have arisen in proceedings brought before a German court with a view to securing an order in Germany for the enforcement of a judgment delivered on 12 May 1993 (`the Netherlands judgment') by the President of the Arrondissementsrechtbank te Leeuwarden (Regional Court, Leeuwarden) (Netherlands) (`the court of origin') following adversarial interim proceedings (`kort geding') between Intership Yachting Sneek BV (`Intership Yachting'), a limited-liability company established in Sneek (Netherlands), and Mr Mietz, who is domiciled in Lüchow (Germany).

3 Under the system of the Convention, the general rule in regard to the jurisdiction of courts, set out in the first paragraph of Article 2, is that persons domiciled in a Contracting State must, whatever their nationality, be sued in the courts of that State.

4 The first paragraph of Article 3 of the Convention provides that 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 Title II, that is to say, the rules set out in Articles 5 to 18 of the Convention.

5 Articles 13 and 14 form part of Section 4, entitled `Jurisdiction over consumer contracts', of Title II of the Convention. The first paragraph of Article 13 provides as follows:

`In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of [Articles 4 and 5(5)], if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.'

6 The second paragraph of Article 14 of the Convention provides as follows:

`Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.'

7 In addition, Article 24, which constitutes Section 9 of Title II of the Convention and specifically governs provisional and protective measures, provides as follows:

`Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

8 The rules governing recognition and enforcement of judgments are found in Title III of the Convention. Article 28, which appears in Section 1 of Title III, entitled `Recognition', provides as follows:

`Moreover, a judgment shall not be recognised if it conflicts with the provisions of Sections 3, 4 or 5 of Title II, or in a case provided for in Article 59.

In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction.

Subject to the provisions of the first paragraph, the jurisdiction of the court of the State of origin may not be reviewed; the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction.'

9 Article 29, which also appears in Section 1 of Title III of the Convention, provides that:

`Under no circumstances may a foreign judgment be reviewed as to its substance.'

10 The second and third paragraphs of Article 34, which forms part of Section 2, entitled `Enforcement', of Title III of the Convention, are worded as follows:

`The application may be refused only for one of the reasons specified in Articles 27 and 28.

Under no circumstances may the foreign judgment be reviewed as to its substance.'

11 Mr Mietz and Intership Yachting concluded in writing in Sneek a `contract of sale' for the purchase of an Intership Type 1.150 G vessel, to which a number of alterations were to be made. As consideration, Mr Mietz was to pay DEM 250 000 in five instalments.

12 Mr Mietz having failed to meet in full his obligation to pay the price, Intership Yachting obtained the Netherlands judgment, by which Mr Mietz was ordered, inter alia, to pay to Intership Yachting the sum of DEM 143 750, plus interest. That judgment was declared to be provisionally enforceable.

13 On 29 October 1993 the Landgericht (Regional Court) Lüneburg (Germany), on the application of Intership Yachting, declared the Netherlands judgment to be enforceable and issued an order for its enforcement.

14 Mr Mietz appealed against that decision authorising enforcement to the competent Oberlandesgericht (Higher Regional Court). He argued that Intership Yachting and himself had agreed on all of the details of the order for the vessel in question, which was intended for his own personal use, at the Boat Show in Düsseldorf (Germany) and that, when they met again in Sneek one week later, they had merely signed the contract and he had made the agreed advance payment of DEM 40 000. From this he concluded that, under the second paragraph of Article 14 of the Convention, the courts of the Contracting State in which the debtor was domiciled, that is to say Germany, had exclusive jurisdiction in the matter.

15 The Oberlandesgericht dismissed that appeal and Mr Mietz appealed on a point of law (`Revision') against that decision to the Bundesgerichtshof.

16 The Bundesgerichtshof takes the view that recognition and enforcement of the Netherlands judgment could be refused, pursuant to the first paragraph of Article 28 of the Convention, only if Mr Mietz were able to rely on the rules governing jurisdiction over consumer contracts set out in

Articles 13 and 14 of the Convention.

17 The Bundesgerichtshof notes in this regard the different definitions which the Member States have given to the concept of the sale of goods on instalment credit terms (Kauf beweglicher Sachen auf Teilzahlung) and to the concept of the supply of goods (Lieferung beweglicher Sachen), terms which are set out in points 1 and 3 respectively of the first paragraph of Article 13 of the Convention.

18 The Bundesgerichtshof also notes that the Netherlands judgment contains no information as to where the acts preparatory to the conclusion of the contract were performed, so that it finds it impossible on that basis to determine whether the court of origin did or did not infringe Article 13, first paragraph, point 3, of the Convention, which reserves to the courts of the Member State in which the consumer resides jurisdiction over disputes concerning contracts for the supply of services or goods in the case where certain preparatory acts have been performed in that State. During the appeal proceedings, Mr Mietz had argued that the creditor had advertised with a view to this sale during a specialist show organised in Germany and that the contract had been concluded orally during that show. The Bundesgerichtshof, however, is unsure whether it can take into account this new argument by Mr Mietz inasmuch as the second paragraph of Article 28 of the Convention prohibits review as to substance.

19 If the Court should take the view that Mr Mietz could indeed rely on the rules governing jurisdiction over consumer contracts, the Bundesgerichtshof questions whether the court of origin would not have been entitled to derogate from those rules by virtue of Article 24 of the Convention. Articles 13 and 14 would not then constitute an obstacle to recognition of the Netherlands judgment.

20 The Bundesgerichtshof accordingly decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

`1. Is there a sale of goods on instalment credit terms within the meaning of point 1 of the first paragraph of Article 13 of the Brussels Convention in the case where, in a document described by the parties as a "contract of sale", one of the parties undertakes to manufacture a specific type of motor yacht with nine specified alterations and to transfer it to the other party, and the latter is required to pay DEM 250 000 for it in five instalments?

If the first question is answered in the negative:

2. Is the contract described in the first question a contract for the supply of goods within the meaning of point 3 of the first paragraph of Article 13 of the Brussels Convention?

3. Under the second paragraph of Article 34 of the Brussels Convention, in conjunction with the second paragraph of Article 28 thereof, must account also be taken of new facts which, according to the debtor, establish that the court of the State of origin breached the provisions of Section 4 of Title II of that Convention?

If either the first or the second and third questions are answered in the affirmative:

4. Does the possibility provided for in Articles 289 to 297 of the Netherlands Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure) for obtaining a judgment ordering payment of contractual consideration through application for an immediate interim order by way of an abbreviated procedure ("kort geding") constitute a provisional measure within the meaning of Article 24 of the Brussels Convention?'

21 It is appropriate first of all to reply to the first and second questions, which should be examined together, then to the fourth question, and finally to the third question.

The first and second questions

22 In order to determine the scope of the first and second questions, it should be borne in mind

that the dispute in the main proceedings concerns a contract concluded between two parties, which those parties described as a `contract of sale', involving the construction of a yacht conforming to a standard model type but featuring a number of alterations. The first contracting party undertook to manufacture the yacht and to transfer the property in it to the second contracting party, who, by way of consideration, undertook to pay the price for it in five instalments. It appears from the order for reference that the final instalment was to be paid at the time of the trial voyage, that is to say, before possession of the yacht passed definitively to the second contracting party.

23 In view of certain observations concerning the possible treatment of a registered vessel as immovable property, it follows from the order for reference that, without prejudice to the question whether the contract in issue is to be treated as a contract for the supply of services or for the supply of goods, the yacht in question must, in any event, be classified as goods within the meaning of the Convention.

24 In that context, the crux of the Bundesgerichtshof's first question is whether the concept of the sale of goods on instalment credit terms within the meaning of Article 13, first paragraph, point 1, of the Convention must be understood as extending to a contract:

- relating to the manufacture by the first contracting party of goods corresponding to a standard model, to which certain alterations have been made;

- by which the first contracting party has undertaken to transfer the property in those goods to the second contracting party, who has undertaken, by way of consideration, to pay the price in several instalments; and

- in which provision is made for the final instalment to be paid before possession of the goods is transferred definitively to the second contracting party.

If the answer is in the negative, the Bundesgerichtshof asks, by its second question, whether such a contract must be treated as a contract for the supply of goods within the meaning of Article 13, first paragraph, point 3, of the Convention.

25 It must be stressed that the Court has not been asked to address the question whether a person in the position of Mr Mietz satisfies the other conditions set out in Article 13 of the Convention in order to be treated as a consumer within the meaning of that provision.

26 According to settled case-law, the concepts used in Articles 13 and 14 of the Convention must be interpreted independently, by reference principally to the system and objectives of the Convention (see, in particular, Case 150/77 Bertrand v Ott [1978] ECR 1431, paragraphs 14, 15, 16 and 19, Case C-89/91 Shearson Lehman Hutton v TVB [1993] ECR I-139, paragraph 13, and Case C-269/95 Benincasa v Dentalkit [1997] ECR I-3767, paragraph 12).

27 Furthermore, the rules of jurisdiction which derogate from the general principle on jurisdiction, such as the rules featuring in Articles 13 and 14, cannot give rise to an interpretation going beyond the cases envisaged by the Convention (see Bertrand, paragraph 17, Shearson Lehman Hutton, paragraphs 14, 15 and 16, and Benincasa, paragraphs 13 and 14, all cited above).

28 The Court held, in paragraph 20 of its judgment in Bertrand, that the sale of goods on instalment credit terms is to be understood as a transaction in which the price is discharged by way of several payments or which is linked to a financing contract.

29 A contract such as that described in paragraph 22 of the present judgment is indeed a transaction in which the agreed price is discharged by way of several payments, so that such a contract could be described as a contract of sale, since transfer of possession and property takes place only after the agreed price has been paid in full.

30 Such a contract cannot, however, be described as a `sale... on instalment credit terms' within the meaning of Article 13, first paragraph, point 1, of the Convention.

31 It follows from the wording of the Convention, and in particular from the expression `instalment credit terms' in the English version, that Article 13, first paragraph, point 1, of the Convention is intended to protect the purchaser only where the vendor has granted him credit, that is to say, where the vendor has transferred to the purchaser possession of the goods in question before the purchaser has paid the full price. In such a case, on the one hand, the purchaser may, when the contract is concluded, be misled as to the real amount which he owes, and, on the other, he will bear the risk of loss of those goods while remaining obliged to pay any outstanding instalments. Such considerations do not, however, apply where the price must be paid in full before transfer of possession takes place. Where the full price must be paid before transfer of possession, the special protection referred to in the first paragraph of Article 13 of the Convention cannot be extended to the purchaser solely on the ground that he has been allowed to pay the price in several instalments.

32 As regards the second question, it must be stressed that the Bundesgerichtshof is asking the Court only whether a contract such as that in the main proceedings is to be treated as a contract for the supply of goods within the meaning of Article 13, first paragraph, point 3, of the Convention. There can be no doubt that such a contract should be classified as a contract for the supply either of services or of goods. It is unnecessary, for the purposes of the present judgment, to decide whether, in this particular case, there was a supply of services or of goods.

33 The answer to the first and second questions must therefore be that Article 13, first paragraph, point 1, of the Convention must be construed as not applying to a contract between two parties having the following characteristics, that is to say, a contract:

- relating to the manufacture by the first contracting party of goods corresponding to a standard model, to which certain alterations have been made;

- by which the first contracting party has undertaken to transfer the property in those goods to the second contracting party, who has undertaken, by way of consideration, to pay the price in several instalments; and

- in which provision is made for the final instalment to be paid before possession of the goods is transferred definitively to the second contracting party.

It is in this regard irrelevant that the contracting parties have described their contract as a `contract of sale'. A contract having the characteristics mentioned above is however to be classified as a contract for the supply of services or of goods within the meaning of Article 13, first paragraph, point 3, of the Convention. It is for the national court, should the need arise, to determine whether the particular case before it involves a supply of services or a supply of goods.

The fourth question

34 It should be noted at the outset that Articles 289 to 297 of the Netherlands Code of Civil Procedure (`the Netherlands Code') deal with a form of procedure known as `kort geding', which allows the President of the Arrondissementsrechtbank to grant enforceable measures `in all cases which, having regard to the interests of the parties, require an immediate measure on grounds of urgency' (Article 289(1)).

35 Under Article 292 of the Netherlands Code, `interim decisions are without prejudice to the main proceedings'. Kort geding may be instituted without the need to bring substantive proceedings before the court having jurisdiction. The President of the Arrondissementsrechtbank may, however, refer the parties back to the ordinary proceedings (Article 291).

36 In order to exercise his jurisdiction in respect of kort geding, the President of the Arrondissementsrechtbank is required to comply with the jurisdiction rules provided for under Netherlands law.

37 Under Article 289 of the Netherlands Code, kort geding may be instituted at very short notice and, in accordance with Article 295, an appeal must be lodged within two weeks, on pain of being declared inadmissible.

38 Under those circumstances, it must be held that kort geding is a procedure of the type envisaged in Article 24 of the Convention, under which a court is authorised, by the law of its State, to order provisional or protective measures even if, under the Convention, it does not have jurisdiction as to the substance of the matter.

39 The Bundesgerichtshof's fourth question must therefore be construed as seeking to ascertain whether a judgment ordering payment of contractual consideration, delivered at the end of a procedure such as kort geding, is a provisional measure which may be granted by virtue of the jurisdiction provided for under Article 24 of the Convention.

40 It is important to stress that it is not necessary for the court hearing an application for provisional or protective measures to have recourse to Article 24 of the Convention where it has, in any event, jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention (see, to that effect, Case C-391/95 Van Uden v Deco-Line [1998] ECR I-7091, paragraph 19).

41 In this connection, the Court held at paragraph 22 of its judgment in Van Uden that the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the Convention also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions.

42 In contrast, in the case of a judgment delivered solely by virtue of the jurisdiction provided for under Article 24 of the Convention and ordering interim payment of a contractual consideration, the Court ruled in Van Uden that such a judgment does not constitute a provisional measure within the meaning of Article 24 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure ordered relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

43 The answer to the fourth question must therefore be that a judgment ordering interim payment of contractual consideration, delivered at the end of a procedure such as that provided for under Articles 289 to 297 of the Netherlands Code by a court not having jurisdiction under the Convention as to the substance of the matter is not a provisional measure capable of being granted under Article 24 of the Convention unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure ordered relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

The third question

44 By this question, the Bundesgerichtshof is asking in substance whether the court to which application for enforcement is made may, in the context of the procedure for ordering enforcement set out in Title III of the Convention, take account of new facts relied on by one party for the purpose of establishing that a contract such as that described in paragraph 22 of the present judgment satisfies the conditions listed in Article 13, first paragraph, point 3, heads (a) and (b), of the Convention.

45 It should, however, be noted that, even if Mr Mietz were allowed to prove that he ought to have been treated as a consumer within the meaning of Article 13 of the Convention, the court of

origin could still have had jurisdiction to order provisional measures.

46 Article 24 of the Convention expressly provides that a court has jurisdiction under its national law to grant an application for such measures, even if does not have jurisdiction as to the substance of the matter. That jurisdiction must be exercised within the limits set out in Article 24 of the Convention with regard, in particular, to the granting of measures ordering interim payment, limits which do not apply where the court has jurisdiction as to the substance of the matter (see, to that effect, Van Uden, paragraph 19).

47 However, it is important to ensure that enforcement, in the State where it is sought, of provisional or protective measures allegedly founded on the jurisdiction laid down in Article 24 of the Convention, but which go beyond the limits of that jurisdiction, does not result in circumvention of the rules on jurisdiction as to the substance set out in Articles 2 and 5 to 18 of the Convention (see, to that effect, Van Uden, paragraph 46).

48 Next, it should be noted that although, in the main proceedings, the court of origin ordered only one measure - namely interim payment - it may happen, in other situations, that the court of origin orders several measures, some of which are to be classified as provisional or protective measures within the meaning of Article 24 of the Convention, while others go beyond the limits provided for in that provision.

49 The question which arises for the court to which application for enforcement is made therefore relates not to the jurisdiction, as such, of the court of origin, but rather to the extent to which it is possible to seek enforcement of a judgment delivered in the exercise of the jurisdiction recognised by Article 24. That jurisdiction constitutes, within the context of the Convention, a special regime (see, in that regard, Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, paragraph 15, and Van Uden, paragraph 42).

50 Finally, it must be stressed that this is not a case where the court of origin has expressly based its jurisdiction to order interim payment by reference to its jurisdiction under the Convention to deal with the substance of the matter, nor a case where such jurisdiction is evident from the actual terms of its judgment, as would in particular be the case if the judgment showed that the defendant was domiciled in the Contracting State of the court of origin and none of the types of exclusive jurisdiction set out in Article 16 of the Convention was applicable.

51 In such circumstances, only the provisions of Article 27 and, if appropriate, the first paragraph of Article 28 of the Convention would be capable of preventing recognition and enforcement of the judgment of the court of origin.

52 Contrary, however, to the submissions of the United Kingdom Government and the Commission, the fact that the defendant appears before the court dealing with interim measures in the context of fast procedures intended to grant provisional or protective measures in case of urgency and which do not prejudice the examination of the substance cannot, by itself, suffice to confer on that court, by virtue of Article 18 of the Convention, unlimited jurisdiction to order any provisional or protective measure which the court might consider appropriate if it had jurisdiction under the Convention as to the substance of the matter.

53 Unlike the circumstances outlined above, the Netherlands judgment, for the enforcement of which an order is sought in the main proceedings, has the following characteristics:

- it was delivered at the end of proceedings which were not, by their very nature, proceedings as to substance, but summary proceedings for the granting of interim measures;

- the defendant was not domiciled in the Contracting State of the court of origin and it does not appear from the Netherlands judgment that, for other reasons, that court had jurisdiction under

the Convention as to the substance of the matter;

- it does not contain any statement of reasons designed to establish the jurisdiction of the court of origin as to the substance of the matter

and

- it is limited to ordering the payment of a contractual consideration, without, on the one hand, repayment to the defendant of the sum awarded being guaranteed if the plaintiff is unsuccessful as regards the substance of his claim or, on the other, the measure sought relating only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

54 It follows from the reply to the fourth question that, if the court of origin had expressly indicated in its judgment that it had based its jurisdiction on its national law in conjunction with Article 24 of the Convention, the court to which application for enforcement was made would have had to conclude that the measure ordered - namely unconditional interim payment - was not a provisional or protective measure within the meaning of that article and was therefore not capable of being the subject of an enforcement order under Title III of the Convention.

55 So, where the court of origin is silent as to the basis of its jurisdiction, the need to ensure that the Convention rules are not circumvented (see, in this respect, paragraph 47 of this judgment) requires that its judgment be construed as meaning that that court founded its jurisdiction to order provisional measures on its national law governing interim measures and not on any jurisdiction as to substance derived from the Convention.

56 It follows that, in a case having the characteristics set out in paragraph 53 of the present judgment, the court to which application for enforcement was made should conclude that the measure ordered is not a provisional measure within the meaning of Article 24 and for that reason cannot be the subject of an enforcement order under Title III of the Convention.

57 It is consequently unnecessary for that court to examine whether, and under what circumstances, it might take account of new facts for the purpose of possible application of the second paragraph of Article 28 of the Convention.

58 It follows that the Court need not reply to the third question.

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CONCERNS

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SUB

Brussels Convention of 27 September 1968 ; Jurisdiction

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Edward

DATES of document: 27/04/1999
of application: 26/03/1996

Judgment of the Court
of 17 November 1998
Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another.
Reference for a preliminary ruling: Hoge Raad - Netherlands.
Brussels Convention - Arbitration clause - Interim payment - Meaning of 'provisional measures'.
Case C-391/95.

1 Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction in matters relating to a contract - Scope - Jurisdiction to order provisional or protective measures - Included - Substance of the dispute subject to arbitration - Jurisdiction founded solely on Article 24

(Convention of 27 September 1968, Arts 5, point 1, and 24)

2 Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction to order provisional or protective measures - Grant of measures - Conditions - Measure ordering an interim payment - `Provisional measure' within the meaning of Article 24 - Conditions

(Convention of 27 September 1968, Art. 24)

3 On a proper construction of Article 5, point 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, and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, the court which has jurisdiction by virtue of that provision also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions. However, where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, it is only under Article 24 of the Convention that a court may be empowered to order such measures, since it cannot do so as the court having jurisdiction on the substance of the dispute. In that connection, where the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, that Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

4 The granting of provisional or protective measures on the basis of Article 24 of the Convention of 27 September 1968 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought. A measure ordering interim payment of a contractual consideration does not constitute a provisional measure within the meaning of that article unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

In Case C-391/95,

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 Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Van Uden Maritime BV, trading as Van Uden Africa Line,

and

Kommanditgesellschaft in Firma Deco-Line and Another

on the interpretation of Article 1, second paragraph, point 4, Article 3, Article 5, point 1, and Article 24 of the Convention of 27 September 1968, cited above (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), and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet, G. Hirsch, P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm (Rapporteur), L. Sevon and M. Wathelet, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Van Uden Maritime BV, trading as Van Uden Africa Line, by L. Ebbekink, of the Hague Bar,

- Kommanditgesellschaft in Firma Deco-Line and Another, by J.L. de Wijkerslooth, of the Hague Bar,

- the German Government, by J. Pirrung, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

- the United Kingdom Government, by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by V.V. Veeder QC, and

- the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, the United Kingdom Government and the Commission at the hearing on 22 April 1997,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1997,

gives the following

Judgment

Costs

49 The costs incurred by the German and United Kingdom 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 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 questions referred to it by the Hoge Raad der Nederlanden by judgment of 8 December 1995, hereby rules:

1. On a proper construction of Article 5, point 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, and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, the court which has jurisdiction by virtue of that provision also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions.

2. Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, no provisional or protective measures may be ordered on the basis of Article 5, point 1, of the Convention of 27 September 1968.

3. Where the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention of 27 September 1968, that Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

4. On a proper construction, the granting of provisional or protective measures on the basis of Article 24 of the Convention of 27 September 1968 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.

5. Interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 of the Convention of 27 September 1968 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

1 By judgment of 8 December 1995, received at the Court on 14 December 1995, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) 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 eight questions on the interpretation of Article 1, second paragraph, point 4, Article 3, Article 5, point 1, and Article 24 of the Convention of 27 September 1968, cited above (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), and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) (hereinafter `the Convention').

2 Those questions were raised in the context of a dispute between Van Uden Maritime BV (`Van Uden'), established at Rotterdam, the Netherlands, and Kommanditgesellschaft in Firma Deco-Line and Another (`Deco-Line'), of Hamburg, Germany, concerning an application for interim relief (in kort geding proceedings) relating to the payment of debts arising under a contract containing an arbitration clause.

3 Under the first paragraph of Article 1, the Convention is to apply in civil and commercial matters. The second paragraph provides, however, under point 4, that it is not to apply to arbitration.

4 Under Article 2 of the Convention, the general rule of jurisdiction is that persons domiciled in a Contracting State are, whatever their nationality, to be sued in the courts of that State.

5 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 the Convention. The second paragraph of Article 3 lists the rules of exorbitant jurisdiction which are not to be applicable against persons domiciled in another Contracting State, including Articles 126(3) and 127 of the Netherlands Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering, hereinafter `the Code of Civil Procedure').

6 Under Article 5, point 1, of the Convention, a person domiciled in a Contracting State may, in matters relating to a contract, be sued, in another Contracting State, in the courts for the place of performance of the obligation in question.

7 Article 24 of the Convention, which deals specifically with provisional and protective measures, provides:

`Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter.'

8 In March 1993 Van Uden and Deco-Line concluded a `slot/space charter agreement', under which Van Uden undertook to make available to Deco-Line cargo space on board vessels operated by Van Uden, either on its own account or in association with other shipping lines, on a liner service between northern or western parts of Europe and west Africa. In return, Deco-Line was to pay charter hire in accordance with the rates agreed between the parties.

9 Van Uden instituted arbitration proceedings in the Netherlands pursuant to the agreement, on the ground that Deco-Line had failed to pay certain invoices submitted to it by Van Uden.

10 Van Uden also applied to the President of the Rechtbank (District Court), Rotterdam, for interim relief on the grounds that Deco-Line was not displaying the necessary diligence in the appointment of arbitrators and that non-payment of its invoices was disturbing its cash flow. In its application, it sought an order against Deco-Line for payment of DM 837 919.13 to cover four debts due under the agreement.

11 In those proceedings, Deco-Line objected, first, that the Netherlands court had no jurisdiction to entertain the claims. Being established in Germany, it could be sued only before the German courts.

12 The President of the Rechtbank dismissed that objection on the ground that an order sought as interim relief must be regarded as a provisional measure within the meaning of Article 24 of the Convention.

13 Referring to Article 126(3) of the Code of Civil Procedure, he decided that, as court of the plaintiff's domicile, he had jurisdiction to entertain an application made by a plaintiff residing in the Netherlands against a defendant with no known domicile or recognised place of residence there. He further concluded that the case had the requisite minimum connection with Netherlands law, for two reasons: (i) Deco-Line was engaged in international trade and would thus become a creditor in the Netherlands, so that any judgment against it could be enforced there, and (ii) such a judgment could also be enforced in Germany.

14 Finally, the President of the Rechtbank took the view that his jurisdiction was in no way affected by the fact that the parties had agreed to have their dispute determined by arbitration in the Netherlands since, under Article 1022(2) of the Code of Civil Procedure, an arbitration clause cannot preclude a party's right to seek interim relief.

15 By provisionally enforceable judgment of 21 June 1994, the President of the Rechtbank, Rotterdam, therefore ordered Deco-Line to pay Van Uden the sum of DM 377 625.35, together with interest at the statutory rate.

16 On appeal by Deco-Line, the Gerechtshof te s'-Gravenhage (Regional Court of Appeal, The Hague) quashed that order. In its view, the fact that the case had to have a sufficient connection with Netherlands law meant, in the context of the Convention, that it must be possible for the interim order applied for to be enforced in the Netherlands. The mere fact that Deco-Line could acquire assets there in the future was, it considered, insufficient for that purpose.

17 A further appeal against that decision was brought before the Hoge Raad der Nederlanden, which stayed proceedings and requested a preliminary ruling by the Court on the following questions:

`(1) Where an obligation to pay a sum or sums due under a contract must be performed in a Contracting State - so that, under Article 5, point 1, of the Brussels Convention, the creditor is entitled to sue his defaulting debtor in the courts of that State with a view to obtaining performance, even though the debtor is domiciled in another Contracting State - do the courts of the first-mentioned State (for that same reason) have jurisdiction also to hear and determine a claim brought by the creditor against his debtor in interim [kort geding] proceedings for an order requiring the debtor, by provisionally enforceable judgment, to pay a sum which, in the view of the court hearing the interim application, is very probably due to the creditor, or do additional conditions apply in relation to the jurisdiction of the court hearing the interim application, for example the condition that the relief sought from that court must take effect (or be capable of taking effect) in the Contracting State concerned?

(2) Does it make any difference to the answer to Question 1 whether the contract between the parties contains an arbitration clause and, if so, what the place of arbitration is according to that clause?

(3) If the answer to Question 1 is that, in order for the court hearing the interim application to have jurisdiction, the relief sought from it must also take effect (or be capable of taking effect) in the Contracting State concerned, does that mean that the order applied for must be capable of enforcement in that State, and is it then necessary for this condition to be fulfilled when the interim application is made, or is it sufficient that it can be reasonably expected to be fulfilled in the future?

(4) Does the possibility, provided for in Article 289 et seq. of the Netherlands Code of Civil Procedure, of applying on grounds of pressing urgency to the President of the Arrondissementsrechtbank for a provisionally enforceable judgment constitute a "provisional" or "protective" measure within the meaning of Article 24 of the Brussels Convention?

(5) Does it make any difference to the answer to Question 4 whether substantive proceedings on the main issue are, or may become, pending and, if so, is it material that arbitration proceedings had started in the same case?

(6) Does it make any difference to the answer to Question 4 that the interim relief sought is an order requiring performance of an obligation of payment, as referred to in Question 1?

(7) If Question 4 must be answered in the affirmative, and "the courts of another Contracting State have jurisdiction as to the substance of the matter", must Article 24, and in particular the reference therein to "such provisional... measures as may be available under the law of [a Contracting] State", be interpreted as meaning that the court hearing the application for interim measures has (for that same reason) jurisdiction if it has jurisdiction under provisions of its national law, even where those provisions are referred to in the second paragraph of Article 3 of the Brussels Convention, or is its jurisdiction in the latter case conditional on the fulfilment of additional conditions, for example that the interim relief sought from that court must take effect, or be capable of taking effect, in the Contracting State concerned?

(8) If the answer to Question 7 must be that, in order for the court hearing the application for interim relief to have jurisdiction, it is also required that the relief sought from it must take effect (or be capable of taking effect) in the Contracting State concerned, does that mean that the order applied for must be capable of enforcement in that State, and is it then necessary for this condition to be fulfilled when the application for interim relief is made, or is it sufficient that it can reasonably be expected to be fulfilled in the future?'

18 The questions raised relate to the jurisdiction, under the Convention, of a court hearing applications for interim relief. The national court wishes to know both whether such jurisdiction could be established on the basis of Article 5, point 1, of the Convention (Questions 1 to 3) and whether it could be established on the basis of Article 24 (Questions 4 to 8). In both cases, the national court's questions relate to

- first, the relevance of the fact that the dispute in question is subject, under the terms of the contract, to arbitration,

- next, whether the jurisdiction of the court hearing the application for interim relief is subject to the condition that the measure sought must take effect or be capable of taking effect in the State of that court, in particular that it must be enforceable there, and whether it is necessary that such a condition should be met at the time when the application is made, and

- finally, the relevance of the fact that the case relates to a claim for interim payment of a contractual consideration.

19 The first point to be made, as regards the jurisdiction of a court hearing an application for interim relief, is that it is accepted that a court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention also has jurisdiction to order any provisional or protective measures which may prove necessary.

20 In addition, Article 24, in Section 9 of the Convention, adds a rule of jurisdiction falling outside the system set out in Articles 2 and 5 to 18, whereby a court may order provisional or protective measures even if it does not have jurisdiction as to the substance of the case. Under that provision, the measures available are those provided for by the law of the State of the court to which application is made.

21 Article 5, point 1, of the Convention provides that in matters relating to a contract a defendant may be sued, in a Contracting State other than that in which he is domiciled, in the courts for the place of performance of the obligation in question.

22 Thus, the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the Convention also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions, such as that mentioned in the national court's third question.

23 However, in the present case, the contract signed between Van Uden and Deco-Line contains an arbitration clause.

24 Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention. Consequently, a party to such a contract is not in a position to make an application for provisional or protective measures to a court that would have jurisdiction under the Convention as to the substance of the case.

25 In such a case, it is only under Article 24 that a court may be empowered under the Convention to order provisional or protective measures.

26 In that connection, Deco-Line and the German and United Kingdom Governments agreed that, since the parties have agreed to submit their dispute to arbitration, interim proceedings also fall outside the scope of the Convention. The German Government argues in particular that measures sought in interim proceedings, when they are intrinsically bound up with the subject-matter of an arbitration procedure, fall outside the scope of the Convention. In the United Kingdom Government's view, the measures sought in the present case may be regarded as ancillary to the arbitration procedure and are thus excluded from the scope of the Convention.

27 Van Uden and the Commission, however, contend that the existence of an arbitration clause does not have the effect of excluding an application for interim measures from the scope of the Convention. The Commission points out that the subject-matter of the dispute is decisive and that the issue underlying the interim proceedings concerns the performance of a contractual obligation - a matter which falls within the scope of the Convention.

28 It must first be borne in mind here that Article 24 of the Convention applies even if a court of another Contracting State has jurisdiction as to the substance of the case, provided that the subject-matter of the dispute falls within the scope ratione materiae of the Convention, which covers civil and commercial matters.

29 Thus the mere fact that proceedings have been, or may be, commenced on the substance of the case before a court of a Contracting State does not deprive a court of another Contracting State of its jurisdiction under Article 24 of the Convention.

30 However, Article 24 cannot be relied on to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded from it (Case 143/78 De Cavel v De Cavel [1979] ECR 1055, paragraph 9).

31 Under Article 1, second paragraph, point 4, of the Convention, arbitration is excluded from its scope. By that provision, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts (Case C-190/89 Rich v Società Italiana Impianti [1991] ECR I-3855, paragraph 18).

32 The experts' report drawn up on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention (OJ 1979 C 59, p. 71, at pp. 92-93) specifies that the Convention does not apply to judgments determining whether an arbitration agreement is valid or not or, because it is invalid, ordering the parties not to continue the arbitration proceedings, or to proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. Also excluded from the scope of the Convention are proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time-limit for making awards.

33 However, it must be noted in that regard that provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect (see Case C-261/90 Reichert and Kockler v Dresdner Bank [1992] ECR I-2149, paragraph 32).

34 It must therefore be concluded that where, as in the case in the main proceedings, the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

35 Next, as regards the conditions set out in the Convention for the grant of an application under Article 24, Van Uden submits that no further condition need be fulfilled for the court hearing such an application to have jurisdiction provided that it has jurisdiction under provisions of its national law even where those provisions are among those listed in the second paragraph of Article 3 of the Convention. Deco-Line, however, maintains that the imposition of stricter conditions is clearly justified and that, in any event, the fact that Article 24 refers to national rules on jurisdiction implies that the court in question is free to hold that its jurisdiction is subject to such conditions.

36 In the German Government's view, Article 24 does not authorise a court acting on the basis of one of the rules of jurisdiction listed in the second paragraph of Article 3 of the Convention to order provisional measures unless the rule of jurisdiction in question is subject to the urgency of the decision or based upon that reasoning and unless the provisional measure, at the time when it is ordered, has a sufficient connecting link with the State of that court. The latter condition is satisfied when the provisional measure can be enforced in that State.

37 In that regard, it must be remembered that the expression `provisional, including protective, measures' within the meaning of Article 24 of the Convention is to be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case (Reichert and Kockler, cited above, paragraph 34).

38 The granting of this type of measure requires particular care on the part of the court in question and detailed knowledge of the actual circumstances in which the measures sought are to take effect. Depending on each case and commercial practices in particular, the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered (Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, paragraph 15).

39 In that regard, the Court held at paragraph 16 of Denilauler that the courts of the place - or, in any event, of the Contracting State - where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised.

40 It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.

41 It further follows that a court ordering measures on the basis of Article 24 must take into consideration the need to impose conditions or stipulations such as to guarantee their provisional or protective character.

42 With regard more particularly to the fact that the national court has in this instance based its jurisdiction on one of the national provisions listed in the second paragraph of Article 3 of the Convention, it must be borne in mind that, in accordance with the first paragraph of that article, 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 Title II, that is to say Articles 5 to 18, of the Convention. Consequently, the prohibition in Article 3 of reliance on rules of exorbitant jurisdiction does not apply to the special regime provided for by Article 24.

43 Finally, with regard to the question whether an interim order requiring payment of a contractual consideration may be classified as a provisional measure within the meaning of Article 24 of the Convention, Deco-Line and the Government of the United Kingdom argue that it cannot. The German Government considers that the main proceedings appear to fall outside the definition of provisional or protective measures.

44 Van Uden and the Commission do not share that view. In the Commission's view, provisional measures must be taken to mean those whose validity lapses when the main issue is determined or on the expiry of a specified period. They may comprise positive measures, that is to say an order to perform some act such as the handing-over of property or the payment of a sum of money.

45 Here, it must be noted that it is not possible to rule out in advance, in a general and abstract manner, that interim payment of a contractual consideration, even in an amount corresponding to that sought as principal relief, may be necessary in order to ensure the practical effect of the decision on the substance of the case and may, in certain cases, appear justified with regard to the interests involved (see, in the context of Community law, Case C-393/96 P(R) Antonissen v Council and Commission [1997] ECR I-441, paragraph 37).

46 However, an order for interim payment of a sum of money is, by its very nature, such that it may preempt the decision on the substance of the case. If, moreover, the plaintiff were entitled to secure interim payment of a contractual consideration before the courts of the place where he is himself domiciled, where those courts have no jurisdiction over the substance of the case under Articles 2 to 18 of the Convention, and thereafter to have the order in question recognised and enforced in the defendant's State, the rules of jurisdiction laid down by the Convention could be circumvented.

47 Consequently, interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

48 In the light of the foregoing considerations, the answer to the first and second questions must be that

- on a proper construction of Article 5, point 1, of the Convention, the court which has jurisdiction by virtue of that provision also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions, and

- where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, no provisional or protective measures may be ordered on the basis of Article 5, point 1, of the Convention.

The answer to the fifth question must be that

- where the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

Finally, the answer to the fourth, sixth, seventh and eighth questions must be that

- on a proper construction, the granting of provisional or protective measures on the basis of Article 24 of the Convention is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State

of the court before which those measures are sought, and

- interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 24 of the Convention unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

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SUB Brussels Convention of 27 September 1968 ; Jurisdiction

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Ragnemalm

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Judgment of the Court (Sixth Chamber) of 9 January 1997

Petrus Wilhelmus Rutten v Cross Medical Ltd. Reference for a preliminary ruling: Hoge Raad - Netherlands. Brussels Convention - Article 5(1) - Courts for the place of performance of the contractual obligation - Contract of employment - Place where the employee habitually carries out his work - Work performed in more than one country. Case C-383/95.

Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Court for the place of performance of the contractual obligation - Contract of employment - Place where the employee habitually carries out his work - Meaning - Work carried out in more than one Contracting State

(Brussels Convention of 27 September 1968, Art. 5(1), as amended by the 1989 Accession Convention)

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 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as meaning that where, in the performance of a contract of employment, an employee carries out his work in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organizes his activities for his employer and to which he returns after each business trip abroad.

In Case C-383/95,

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 Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Petrus Wilhelmus Rutten

and

Cross Medical Ltd,

on the interpretation of Article 5(1) of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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) and 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),

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, J.L. Murray, C.N. Kakouris, H. Ragnemalm and R. Schintgen (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Mr Rutten, by P. Garretsen, of the Hague Bar,

- the German Government, by J. Pirrung, Ministerialrat, Federal Ministry of Justice, acting as Agent,

- the Commission of the European Communities, by P. van Nuffel, of its Legal Service, acting as Agent,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 October 1996,

gives the following

Judgment

1 By judgment of 1 December 1995, received at the Court on 7 December 1995, the Hoge Raad der Nederlanden (Netherlands Supreme Court) 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 (OJ 1972 L 299, p. 32), 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) and 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), hereinafter `the Convention', three questions on the interpretation of Article 5(1) of the Convention.

2 The questions were raised in proceedings between Mr Rutten, a Netherlands national residing in Hengelo, Netherlands, and Cross Medical Ltd, a company incorporated under English law whose registered office is in London, following termination of his contract of employment by his employer.

3 It appears from the documents in the main proceedings that Mr Rutten was engaged on 1 August 1989 by Cross Medical BV, a company incorporated under Netherlands law whose registered office is in the Netherlands and which is a subsidiary of Cross Medical Ltd.

4 On 31 May 1990 the contract of employment between the parties was terminated on account of the poor financial situation of Cross Medical BV and, with effect from 1 June 1990, Mr Rutten was employed by Cross Medical Ltd.

5 It is common ground that Mr Rutten carried out his duties on behalf of his two successive employers not only in the Netherlands, but also - for approximately one third of his working hours - in the United Kingdom, Belgium, Germany and the United States of America. He carried out his work from an office established in his home at Hengelo to which he returned after each business trip. Cross Medical Ltd paid his salary to him in pounds sterling.

6 Following his dismissal by Cross Medical Ltd on 1 October 1991, Mr Rutten brought an action against that company on 19 June 1992 before the Kantonrechter (Cantonal Court) Amsterdam claiming payment of arrears of salary and interest.

7 That court declared that it had jurisdiction to try the case, whereupon Cross Medical Ltd appealed against that judgment to the Rechtbank (District Court), Amsterdam, which set aside the judgment of the Kantonrechter.

8 Mr Rutten then appealed in cassation to the Hoge Raad der Nederlanden.

9 Since it was uncertain as to the interpretation of Article 5(1) of the Convention, the Hoge Raad submitted the following three questions to the Court of Justice for a preliminary ruling:

`1. Where, in the performance of an employment contract, an employee carries out his work in more

than one country, what are the criteria according to which he should be regarded as habitually carrying out his work in one of those countries, within the meaning of Article 5(1) of the Brussels Convention?

2. Is the fact that he spends most of his working time in one of those countries, or the fact that he spends more of his working time in another country or countries, decisive or significant in that regard?

3. Is the fact that the employee resides in one of those countries and maintains there an office where he prepares or administers his work outside that country, and to which he returns after every trip which he makes in connection with his work, significant in that regard?'

10 The three questions, which should be considered together, essentially seek a ruling on the interpretation of `place... where the employee habitually carries out his work' within the meaning of Article 5(1), second sentence, of the Convention, where a contract of employment is performed in more than one Contracting State.

11 In order to answer those questions, it should first be observed that, as an exception to the general rule laid down in the first paragraph of Article 2 of the Convention, namely that the courts of the Contracting State in which the defendant has his domicile have jurisdiction, Article 5(1) of the Convention provides that:

`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; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated.'

12 It is settled law (see, in particular, Case C-125/92 Mulox IBC v Hendrick Geels [1993] ECR I-4075, paragraph 10) that, in principle, the Court of Justice will interpret the terms of the Brussels Convention autonomously so as to ensure that it is fully effective, having regard to the objectives of Article 220 of the EEC Treaty, for the implementation of which it was adopted.

13 That autonomous interpretation alone is capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the Court before which he may be sued (Mulox IBC, paragraph 11).

14 Moreover, in Mulox IBC the Court has already interpreted Article 5(1) of the Brussels Convention, in the version prior to its amendment by the Convention of 26 May 1989, cited above (hereinafter `the San Sebastian Convention').

15 In Mulox IBC the Court held that Article 5(1) had to be interpreted as meaning that in relation to contracts of employment the place of performance of the relevant obligation, for the purposes of that provision, refers to the place where the employee actually performs the work covered by the contract with his employer and that where the employee performs his work in more than one Contracting State, that place refers to the place where or from which the employee principally discharges his obligations towards his employer (paragraphs 20 and 26).

16 As justification for that interpretation, the Court stated, first (paragraph 17), that the rule on special jurisdiction in Article 5(1) of the Brussels Convention was justified by the existence of a particularly close relationship between a dispute and the court which could most conveniently

be called on to take cognizance of the matter (Case 133/81 Ivenel v Schwab [1982] ECR 1891 and Case C-266/85 Shenavai v Kreischer [1987] ECR 239), and that the courts for the place in which the employee is to carry out the agreed work were best suited to resolving the disputes to which the contract of employment could give rise (Shenavai and Case 32/88 Six Constructions v Humbert [1989] ECR 341).

17 It considered, secondly (Mulox IBC, paragraphs 18 and 19), that, in regard to contracts of employment, interpretation of Article 5(1) of the Brussels Convention had to take account of the concern to afford proper protection to the employee as the party to the contract who was the weaker from the social point of view (Ivenel and Six Constructions) and that such protection was best assured if disputes relating to a contract of employment fell within the jurisdiction of the courts of the place where the employee discharged his obligations towards his employer, since that was the place where it was least expensive for the employee to commence, or defend himself in, court proceedings.

18 The Court stated, thirdly (Mulox IBC, paragraphs 21 and 23), that where the work was performed in more than one Contracting State, it was important to avoid any multiplication of courts having jurisdiction 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 (see also, to that effect, the judgment in Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraph 18) and that, consequently, Article 5(1) of the Brussels Convention could not be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee performed part of his work.

19 That case-law is also relevant for the purposes of interpreting Article 5(1) of the Convention as amended by the San Sebastian Convention, which is the version applicable in the main proceedings.

20 As the Court observed in Case C-288/92 Custom Made Commercial v Stava Metallbau [1994] ECR I-2913, paragraph 25, it had already interpreted the Convention as establishing the rule of special jurisdiction relating to contracts of employment, which the San Sebastian Convention inserted in Article 5(1) of the Brussels Convention. In that regard, it is clear from the report by Almeida Cruz, Desantes Real and Jenard on the San Sebastian Convention (OJ 1990 C 189, pp. 35, 44 and 45) that the new version of Article 5(1) of the Convention takes into account not only the wording of Article 5(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9), which was itself based on the interpretation which the Court adopted in Ivenel and Shenavai, but also of the need to afford proper protection to the employee, as stated by the Court in Six Constructions.

21 Consequently, not only did the amendment by the San Sebastian Convention to the wording of Article 5(1) of the Brussels Convention leave the rationale and purpose of that provision unaffected, but, moreover, the new wording of that provision following the entry into force of the San Sebastian Convention was intended in fact to support the interpretation given by the Court to that article in regard to contracts of employment.

22 It follows that in order to determine the meaning of the words `place ... where the employee habitually carries out his work' for the purposes of Article 5(1) of the Convention, as amended by the San Sebastian Convention, in a case where, as in the main proceedings, the employee carries out his work in more than one Contracting State, the Court's previous case-law must be taken into account when determining the place with which the dispute has the most significant link, while taking due account of the concern to afford proper protection to the employee as the weaker party to the contract.

23 Having regard to the requirements set out in the previous paragraph, where a contract of employment

is performed in several Contracting States, Article 5(1) of the Convention, as amended by the San Sebastian Convention, must be understood to refer to the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer.

24 That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend himself in such proceedings. The courts for that place are also best placed and, therefore, the most appropriate to resolve the dispute relating to the contract of employment.

25 When identifying that place in the particular case, which is a matter for the national court in the light of the facts before it, the fact that the employee carried out almost two-thirds of his work in one Contracting State - the remainder of his work being performed in several other States - and that he has an office in that Contracting State where he organized his work for his employer and to which he returned after each business trip abroad, as was the case in the main proceedings, is relevant.

26 In a situation such as that at issue in the main proceedings, that is the place where the employee established the effective centre of his activities under the contract of employment concluded with his employer. That place must, therefore, be deemed, for the purposes of the application of Article 5(1) of the Convention, as amended by the San Sebastian Convention, to be the place where the employee habitually carries out his work.

27 Accordingly, Article 5(1) of the Convention, as amended by the San Sebastian Convention, must be interpreted as meaning that where, in the performance of a contract of employment an employee carries out his work in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organizes his work for his employer and to which he returns after each business trip abroad.

Costs

28 The costs incurred by the German Government and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by judgment of 1 December 1995, hereby rules:

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 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, must be interpreted as meaning that where, in the performance of a contract of employment, an employee carries out his work in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time in one of the Contracting States in which he has an office where he organizes his activities

for his employer and to which he returns after each business trip abroad.

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NATCOUR	*A7* Kantongerecht Amsterdam, vonnis van 22/06/1993 (8329/92) ; - Nederlands Internationaal Privaatrecht 1996 no 106 ; *A8* Arrondissementsrechtbank Amsterdam, vonnis van 22/06/1994 (H 93.2686) ; - Nederlands Internationaal Privaatrecht 1996 no 106 ; *A9* Hoge Raad, 1e kamer, arrest van 01/12/1995 (15.842 (C 94/262)) ; - Rechtspraak van de week 1995 no 258 ; - Nederlands juristenblad 1996 Bijl. p.6 ; - Nederlands Internationaal Privaatrecht 1996 no 106 ; - Sociaal maandblad arbeid 1996 p.129 (résumé) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1997 no 716 ; - Nederlands internationaal privaatrecht 1998 p. 169 (résumé) ; - International

Litigation Procedure 1996 p.596-601 ; *P1* Hoge Raad, 1e kamer, arrest van 13/02/1998 (15.842 (C 94/262)) ; - Nederlands internationaal privaatrecht 1998 no 213 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1998 no 546 ; - Rechtspraak van de week 1998 p.346 (résumé) ; - Sociaal maandblad arbeid 1998 p.226 (résumé) ; - Sociaal maandblad arbeid 1998 p.496 (résumé) ; *P2* Gerechtshof Amsterdam, arrest van 18/03/1999 ; - Nederlands internationaal privaatrecht 2001 no 286 (résumé) ; *P3* Gerechtshof Amsterdam, arrest van 30/12/1999 (825/98) ; - Nederlands internationaal privaatrecht 2001 no 286

NOTES X: Revue de jurisprudence sociale 1997 p.146-147 ; Mankowski, Peter: Entscheidungen zum Wirtschaftsrecht 1997 p.221-222 ; Klauer, Stefan: Der Begriff des Arbeitnehmergerichtsstands bei wechselnden Arbeitsorten, St. Galler Europarechtsbriefe 1997 p.99-101 ; Silvestri, Caterina: Brevi note sul "forum contractus" in materia di lavoro, Il Foro italiano 1997 IV Col.57-60 ; X: Revue de jurisprudence de droit des affaires 1997 p.384 ; Antonmattei, Paul-Henri: La Semaine juridique - édition entreprise 1997 II 659 ; Vlas, P.: EEG Bevoegdheids- en Executieverdrag, TVVS ondernemingsrecht en rechtspersonen 1997 p.194 ; Bischoff, Jean-Marc: Journal du droit international 1997 p.635-637 ; Checa Martínez, Miguel: El foro del lugar de cumplimiento de la obligacion contractual en el Convenio de Bruselas: avances en el contrato de trabajo plurilocalizado, La ley - Union Europea 1997 no 4256 p.4-6 ; Adobati, Enrica ; Gratani, Adabella: Individuazione del foro competente quando il lavoratore presta la propria attività in più paesi, Diritto comunitario e degli scambi internazionali 1997 p.133-134 ; Idot, Laurence: Europe 1997 Mars Comm. no 93 p.24 ; Gaudemet-Tallon, Hélène: Revue critique de droit international privé 1997 p.341-346 ; Pertegas Sender, Marta: The Columbia Journal of European Law 1997 p.292-298 ; De Boer, Th.M.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1997 no 717 ; Stratinaki-Xenaki, A.: Koinodikion 1997 p.335-338 ; Volken, Paul: Schweizerische Zeitschrift für internationales und europäisches Recht 1998 p.105-107 ; X: Giurisprudenza italiana 1998 p.1549-1550 ; Vlas, P.: The EEC Convention on jurisdiction and judgments, Netherlands International Law Review 1999 p.94-95 ; Kalamidas, Eftychios-Dimitrios: I ektelesi tis symvasis ergasias se perissotera krati-meli tis E.E., Epitheorisis Ergatikou Dikaiou 1999 p.481-485 + p.528 ; Tagaras, Haris: Cahiers de droit européen 1999 p.178-183 ; Mankowski, Peter: Der gewöhnliche Arbeitsort im Internationalen Privat- und Prozeßrecht, Praxis des internationalen Privat- und Verfahrensrechts 1999 p.332-342

PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Schintgen

DATES of document: 09/01/1997
of application: 07/12/1995

Judgment of the Court (Sixth Chamber)
of 20 March 1997
Jackie Farrell v James Long. Reference for a preliminary ruling: Circuit Court, County of Dublin - Ireland. Brussels Convention - Article 5(2) - Definition of 'maintenance creditor'. Case C-295/95.

1 Convention on Jurisdiction and the Enforcement of Judgments - Protocol on the interpretation of the Convention by the Court of Justice - Preliminary rulings - Jurisdiction of the Court - Limits

(Convention of 27 September 1968; Protocol of 3 June 1971)

2 Convention on Jurisdiction and the Enforcement of Judgments - Rules on jurisdiction - Autonomous interpretation - Special jurisdiction - Jurisdiction in matters relating to maintenance - Maintenance creditor - Definition

(Convention of 27 September 1968, Art. 5(2))

3 In the light of the division of responsibilities in the preliminary ruling procedure laid down by 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, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court.

4 The terms of the Convention must, in principle, be interpreted autonomously. Such autonomous interpretation is alone capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible multiplication of the bases of jurisdiction in relation to one and the same legal relationship, and reinforcement of the legal protection available to persons established in the Community by allowing both the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued.

Those considerations also apply to the term `maintenance creditor' in the first limb of Article 5(2) of the Convention, which must be interpreted as covering any person applying for maintenance, including a person bringing a maintenance action for the first time, without any distinction being drawn between those already recognized and those not yet recognized as entitled to maintenance.

In Case C-295/95,

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 Circuit Court, County of Dublin, for a preliminary ruling in the proceedings pending before that court between

Jackie Farrell

and

James Long

on the interpretation of Article 5(2) of the abovementioned 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 - in the amended version - p. 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, C.N. Kakouris (Rapporteur), G. Hirsch, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: P. Léger,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Ms Farrell, by Inge Clissmann, Senior Counsel, and Felix McEnroy, Barrister, instructed by David Bergin, Solicitor, of Messrs O'Connor & Bergin,

- Mr Long, by Ann Kelly, Barrister, instructed by Lavery Kirby & Co., Solicitors,

- the Irish Government, by Michael A. Buckley, Chief State Solicitor, acting as Agent,

- the German Government, by Jörg Pirrung, Ministerialrat in the Federal Justice Ministry, acting as Agent,

- the United Kingdom Government, by Stephen Braviner, of the Treasury Solicitor's Department, acting as Agent,

- the Commission of the European Communities, by José Luis Iglesias Buhigues, Legal Adviser, and Barry Doherty, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Farrell, represented by David Bergin, Inge Clissmann and Felix McEnroy; of Mr Long, represented by Sean Moylan, Senior Counsel, and Ann Kelly; of the Irish Government, represented by Nuala Butler and Mary Cooke, Barristers; and of the Commission, represented by José Luis Iglesias Buhigues and Barry Doherty, at the hearing on 21 November 1996,

after hearing the Opinion of the Advocate General at the sitting on 12 December 1996,

gives the following

Judgment

1 By order of 15 May 1995, received at the Court on 15 September 1995, the Circuit Court, County of Dublin, 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 (OJ 1978 L 304, p. 36, hereinafter `the Convention'), 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 - in the amended version - p. 77) and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1), a question on the interpretation of Article 5(2) of the Convention.

2 That question was raised in proceedings between Ms Farrell, residing in Dalkey, Ireland, and Mr Long, who is habitually resident in Bruges, Belgium.

3 It appears from the documents in the main proceedings that Ms Farrell is the mother of a child born on 3 July 1988 whose father is, she claims, Mr Long. She brought an action against Mr Long before the District Court, applying for a maintenance order in favour of that child.

4 Mr Long denies that he is the father of the child and contests the jurisdiction of the Irish courts to entertain Ms Farrell's application.

5 Ms Farrell maintains that the Irish courts have jurisdiction under Article 5(2) of the Convention. That provision, which derogates from the rule in the first paragraph of Article 2 conferring jurisdiction on the courts of the Contracting State in which the defendant is domiciled, is in the following terms:

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

(...)

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties'.

6 Mr Long, on the other hand, maintains that that provision cannot apply. He contends that Ms Farrell is not a maintenance creditor within the meaning of Article 5(2) of the Convention because she has not obtained any maintenance order recognizing her as such.

7 At first instance, the District Court dismissed the application on the ground of lack of jurisdiction. Ms Farrell appealed against that judgment to the Circuit Court, which has referred the following question to the Court for a preliminary ruling:

`Do the provisions of Article 5(2) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on the 27th day of September 1968, require as a condition precedent to the institution of maintenance proceedings in the Irish courts by an applicant who is domiciled in Ireland against a respondent who is domiciled in Belgium that the applicant has previously obtained an order for maintenance against the respondent?'

8 By that question, the national court seeks in essence to ascertain whether the first limb of Article 5(2) of the Convention must be interpreted as meaning that the term `maintenance creditor' covers any person applying for maintenance, including a person bringing a maintenance action for the first time, or only persons whose entitlement to maintenance has already been recognized by a previous judicial decision.

9 The national court's question is prompted by the fact that the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988, which introduced the Brussels Convention into Irish law, contains, in section 1, the following definition:

- `"maintenance creditor" means, in relation to a maintenance order, the person entitled to the payments for which the order provides.'

Admissibility of the question referred

10 The respondent in the main proceedings denies that the question referred is pertinent, on the ground that the maintenance obligation at issue in the dispute before the national court is ancillary to the issue of paternity, which is a matter of status, and that the applicable provision is therefore not the first limb of Article 5(2), in which the term `maintenance creditor' appears, but the second limb.

11 In the light of the division of responsibilities in the preliminary ruling procedure laid down by the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention, it is for the national court alone to define the questions which it proposes to refer to the Court. According to settled law, it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine

in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-127/92 Enderby [1993] ECR I-5535, paragraph 10).

The question referred

12 For the purpose of answering the question referred, it must be noted that, according to settled law (see, in particular, Case C-125/92 Mulox IBC v Geels [1993] ECR I-4075, paragraph 10, and Case C-383/95 Rutten v Cross Medical [1997] ECR I-0000, paragraph 12), the Court will, in principle, interpret the terms of the Convention autonomously so as to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty, for the implementation of which it was adopted.

13 Such autonomous interpretation is alone capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued (Mulox IBC, paragraph 11, and Rutten, paragraph 13).

14 Those considerations must also apply to the interpretation of the term `maintenance creditor' in the first limb of Article 5(2) of the Convention, since there is nothing to suggest that its meaning is intended under that provision to be determined in accordance with the lex fori.

15 As to the meaning of that term, two arguments in particular have been advanced before the Court. According to the first of those arguments, put forward by the respondent in the main proceedings, the term covers only persons whose entitlement to maintenance has already been recognized by a previous judicial decision. Consequently, an initial action brought by a maintenance applicant, seeking a finding that maintenance is payable in principle, does not fall within that provision.

16 According to the second argument, advanced by the appellant in the main proceedings, by the Irish, German and United Kingdom Governments and by the Commission, the term must be construed as referring to any person applying for maintenance, including a person bringing a maintenance action for the first time.

17 It is necessary in that regard to determine the objective of Article 5(2) of the Convention.

18 Article 5 introduces a series of derogations from the rule laid down in the first paragraph of Article 2, which confers jurisdiction on the courts of the Contracting State where the defendant is domiciled. Each of the derogations from that rule provided for by Article 5 pursues a specific objective.

19 In particular, the derogation provided for in Article 5(2) is intended to offer the maintenance applicant, who is regarded as the weaker party in such proceedings, an alternative basis of jurisdiction. In adopting that approach, the drafters of the Convention considered that that specific objective had to prevail over the objective of the rule contained in the first paragraph of Article 2, which is to protect the defendant as the party who, being the person sued, is generally in a weaker position.

20 It is common ground that that was the intention of the authors of the Convention in cases where the entitlement to maintenance of a plaintiff in an action brought on the basis of Article 5(2) has already been recognized by a previous judicial decision and the new action seeks an order fixing the amount of the maintenance, if it has not been fixed by the previous decision, varying the amount already fixed, or requiring the maintenance to be paid where the defendant is in arrears or refuses to pay.

21 It is necessary, therefore to examine whether that was also the intention of the authors of the Convention in cases where a person brings a maintenance action on the basis of Article 5(2) without having previously obtained a judicial decision recognizing his or her entitlement to maintenance.

22 That question must be answered in the affirmative.

23 Article 5(2) refers to `the maintenance creditor' in general terms, without drawing any distinction between those already recognized and those not yet recognized as entitled to maintenance.

24 That finding is borne out by the report drawn up by the committee of experts who drafted the text of the Convention, known as the Jenard Report (OJ 1979 C 59, p. 1, in particular p. 25). As regards Article 5(2) of the Convention, that report states as follows:

`... the court for the place of domicile of the maintenance creditor is in the best position to know whether the creditor is in need and to determine the extent of such need.

However, in order to align the Convention with the Hague Convention, Article 5(2) also confers jurisdiction on the courts for the place of habitual residence of the maintenance creditor. This alternative is justified in relation to maintenance obligations since it enables in particular a wife deserted by her husband to sue him for payment of maintenance in the courts for the place where she herself is habitually resident, rather than the place of her legal domicile.

...

As regards maintenance payments, the Committee did not overlook the problems which might be raised by preliminary issues (for example, the question of affiliation). However, it considered that these were not properly problems of jurisdiction, and that any difficulties should be considered in the chapter on recognition and enforcement of judgments.'

25 It follows that Article 5(2) of the Convention is framed in such a way as to apply to all actions brought in maintenance matters, including the initial action brought by a person applying for maintenance, and that consideration of the question of paternity as a preliminary issue in such proceedings did not prompt the authors of the Convention to adopt any different solution.

26 Moreover, no decisive argument has been advanced against such an interpretation.

27 Having regard to the foregoing considerations, the first limb of Article 5(2) of the Convention must be interpreted as meaning that the term `maintenance creditor' covers any person applying for maintenance, including a person bringing a maintenance action for the first time.

Costs

28 The costs incurred by the Irish, German and United Kingdom Governments and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the question referred to it by the Circuit Court, County of Dublin, by order of 15 May 1995, hereby rules:

The first limb of Article 5(2) 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, must be interpreted as meaning that the term `maintenance creditor'

covers any person applying for maintenance, including a person bringing a maintenance action for the first time.

DOCNUM	61995J0295
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1997 Page I-01683
DOC	1997/03/20
LODGED	1995/09/15
JURCIT	41968A0927(01)-A05PT2 : N 1 - 27 41978A1009(01) : N 1 41982A1025(01) : N 1 41971A0603(02) : N 11 61992J0127-N10 : N 11 61992J0125-N10 : N 12 61995J0383-N12 : N 12 61995J0383-N13 : N 13 61992J0125-N11 : N 13 41968A0927(01)-A02L1 : N 18 19
CONCERNS	Interprets 41968A0927(01) -A05PT2
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	English
OBSERV	Ireland ; Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Ireland
NATCOUR	*A7* District Court, Dublin Metropolitan District, order of 11/02/94 (200/94) ; *A8* Circuit Court, County of Dublin, order of 13/12/94 (200/94) ; *A9* Circuit Court, County of Dublin, judgment of 15/12/94 (order of 15/05/95) (200/94) ; - International Litigation Procedure 1996 p.485-492

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Kakouris

DATES of document: 20/03/1997
of application: 15/09/1995

Judgment of the Court (Sixth Chamber)
of 3 July 1997
Francesco Benincasa v Dentalkit Srl. Reference for a preliminary ruling: Oberlandesgericht München - Germany. Brussels Convention - Concept of consumer - Agreement conferring jurisdiction. Case C-269/95.

1 Convention on jurisdiction and the enforcement of judgments - Jurisdiction in respect of contracts concluded by consumers - Concept of `consumer' - Plaintiff who has concluded a contract with a view to pursuing a trade or profession in the future - Excluded

(Convention of 27 September 1968, Arts 13, first para., and 14, first para., as amended by the Accession Convention of 1978)

2 Convention on jurisdiction and the enforcement of judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Scope of the exclusive jurisdiction of the court designated - Action to have the main agreement declared void - Included

(Convention of 27 September 1968, Art. 17, first para.)

3 In the context of the specific regime established by Article 13 et seq. of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. On the other hand, the specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character. It follows that the regime in question applies solely to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future, so that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time, but in the future may not be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention.

4 Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments and civil and commercial matters sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardized if one party to the contract could frustrate that rule simply by claiming that the whole of the contract which contained the clause was void on grounds derived from the applicable substantive law. It follows that the court of a Contracting State which is designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 also has exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void. Furthermore, it is for the national court to determine which disputes fall within the scope of the clause conferring jurisdiction invoked before it and, consequently, to determine whether that clause also covers any dispute relating to the validity of the contract containing it.

In Case C-269/95,

REFERENCE to the Court by the Oberlandesgericht München (Germany) 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, for a preliminary ruling in the proceedings pending before that court between

Francesco Benincasa

and

Dentalkit Srl

on the interpretation of the first paragraph of Article 13, the first paragraph of Article 14 and the first paragraph of Article 17 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; amended version of the Convention at p. 77),

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, J.L. Murray, C.N. Kakouris (Rapporteur), P.J.G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Benincasa, by Reinhard Böhner, Rechtsanwalt, Munich,

- Dentalkit Srl, by Alexander von Kuhlberg, Rechtsanwalt, Munich,

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

- the Commission of the European Communities, by Pieter van Nuffel, of its Legal Service, acting as Agent, and Hans-Jürgen Rabe, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Benincasa, represented by Reinhard Böhner, and the Commission, represented by Marco Nuñez-Müller, Rechtsanwalt, Hamburg, at the hearing on 22 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1997,

gives the following

Judgment

Costs

33 The costs incurred by the German Government and by the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Oberlandesgericht München by order of 5 May 1995, hereby rules:

1. The first paragraph of Article 13 and the first paragraph of Article 14 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, must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.

2. The courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention of 27 September 1968 also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

1 By order of 5 May 1995, received at the Court on 9 August 1995, the Oberlandesgericht (Higher Regional Court), Munich 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 (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 at p. 77; hereinafter `the Convention'), three questions on the interpretation of the first paragraph of Article 13, the first paragraph of Article 14 and the first paragraph of Article 17 of the Convention.

2 Those questions were raised in proceedings between Dentalkit Srl (`Dentalkit'), having its seat in Florence, and Mr Benincasa, an Italian national, relating to the validity of a franchising contract concluded between them.

3 According to the case-file relating to the main proceedings, in 1987 Dentalkit developed a chain of franchised shops in Italy specializing in the sale of dental hygiene products. In 1992 Mr Benincasa concluded a franchising contract with Dentalkit with a view to setting up and operating a shop in Munich. In that contract Dentalkit authorized Mr Benincasa to exploit the exclusive right to use the Dentalkit trade mark within a particular geographical area. Dentalkit further undertook to supply goods bearing that trade mark, to support him in various spheres, to carry out the requisite training and promotion and advertising activities and not to open any shop within the geographical area covered by the exclusive right.

4 For his part, Mr Benincasa undertook to equip business premises at his own cost, to stock exclusively Dentalkit's products, not to disclose any information or documents concerning Dentalkit and to pay it a sum of LIT 8 million as payment for the cost of technical and commercial assistance provided when opening the shop and 3% of his annual turnover. By reference to Articles 1341 and 1342 of the Italian Civil Code, the parties specifically approved a clause of the contract reading `The courts at Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract' by separately signing it.

5 Mr Benincasa set up his shop, paid the initial sum of LIT 8 million and made several purchases, for which, however, he never paid. In the meantime, he has ceased trading altogether.

6 Mr Benincasa brought proceedings in the Landgericht (Regional Court), Munich I, where he sought to have the franchising contract declared void on the ground that the contract as a whole was void under German law. He also claimed that the sales contracts concluded subsequently pursuant to the basic franchising contract were void.

7 Mr Benincasa argued that the Landgericht München I had jurisdiction as the court for the place of performance of the obligation in question within the meaning of Article 5(1) of the Convention.

He argued that the clause of the franchising contract conferring jurisdiction on the courts at Florence did not have the effect of derogating from Article 5(1) as regards his action to avoid the contract because that action sought to have the whole franchising agreement declared void and, therefore, also the jurisdiction clause. Mr Benincasa further argued that, since he had not yet started trading, he should be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention.

8 The relevant provisions of the Convention read as follows:

Article 13

`In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section, without prejudice to the provisions of point 5 of Articles 4 and 5, if it is:

1. a contract for the sale of goods on instalment credit terms,

...'

Article 14

`A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

...'

9 The Landgericht München I declined jurisdiction on the ground that the jurisdiction clause contained in the franchising contract was valid and that the contract was not a contract concluded by a consumer.

10 Mr Benincasa appealed against that decision to the Oberlandesgericht München, which stayed proceedings and referred the following questions to the Court for a preliminary ruling:

`(1) Is a plaintiff to be regarded as a consumer within the meaning of the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention even if his action relates to a contract which he concluded not for the purpose of a trade which he was already pursuing but a trade to be taken up only at a future date (here: a franchising agreement concluded for the purpose of setting up a business)?

(2) If Question 1 is to be answered in the affirmative: Does point 1 of the first paragraph of Article 13 of the Convention (contract for the sale of goods on instalment credit terms) cover a franchising agreement which obliges the plaintiff to buy from the other party to the agreement, over a period of several (three) years, the articles and goods required to equip and operate a business (without instalment credit terms having been agreed) and to pay an initial fee and, as from the second year of the business, a licence fee of 3% of turnover?

(3) Does the court of a Member State specified in an agreement conferring jurisdiction have exclusive jurisdiction pursuant to the first paragraph of Article 17 of the Convention even when the action is inter alia for a declaration of the invalidity of a franchising agreement containing the jurisdiction clause itself, which is worded "The courts at Florence shall have jurisdiction to entertain any

dispute relating to the interpretation, performance or other aspects of the present contract", that clause having been specifically approved within the meaning of Articles 1341 and 1342 of the Italian Civil Code?'

The first question

11 The point sought to be clarified by the national court's first question is whether the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may be regarded as a consumer.

12 In this connection, regard should be had to the principle laid down by the case-law (see, in particular, Case 150/77 Bertrand [1978] ECR 1431, paragraphs 14, 15, 16 and 19, and Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 13) according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This must apply in particular to the concept of `consumer' within the meaning of Article 13 et seq. of the Convention, in so far as it determines the rules governing jurisdiction.

13 It must next be observed that, as the Court has consistently held, under the system of the Convention the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is only by way of derogation from that principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (Shearson Lehman Hutton, paragraphs, 14, 15 and 16).

14 Such an interpretation must apply a fortiori with respect to a rule of jurisdiction, such as that contained in Article 14 of the Convention, which allows a consumer, within the meaning of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled. Apart from the cases expressly provided for, the Convention appears hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile (see Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraphs 16 and 19, and Shearson Lehman Hutton, paragraph 17).

15 As far as the concept of `consumer' is concerned, the first paragraph of Article 13 of the Convention defines a `consumer' as a person acting `for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities (Shearson Lehman Hutton, paragraphs 20 and 22).

16 It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.

17 Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity

is in the nature of a future activity does not divest it in any way of its trade or professional character.

18 Accordingly, it is consistent with the wording, the spirit and the aim of the provisions concerned to consider that the specific protective rules enshrined in them apply only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future.

19 The answer to the national court's first question must therefore be that the first paragraph of Article 13 and the first paragraph of Article 14 of the Convention must be interpreted as meaning that a plaintiff who has concluded a contract with a view to pursuing a trade or profession, not at the present time but in the future, may not be regarded as a consumer.

The second question

20 In view of the answer given to the first question, there is no need to answer the second.

The third question

21 The point sought to be clarified by the national court's third question is whether the courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

22 The national court also raises the question whether a jurisdiction clause validly concluded under the rules of the Convention and contained in the main contract must be considered on its own, independently of any allegation as to the validity of the remainder of the contract.

23 The first paragraph of Article 17 of the Convention provides as follows:

`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 in writing...'.

24 A distinction must first be drawn between a jurisdiction clause and the substantive provisions of the contract in which it is incorporated.

25 A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the lex causae determined by the private international law of the State of the court having jurisdiction.

26 Next, as the Court has consistently held, the objectives of the Convention include unification of the rules on jurisdiction of the Contracting States's courts, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued (Case 38/81 Effer v Kantner [1982] ECR 825, paragraph 6, and Case C-125/92 Mulox IBC [1993] ECR I-4075, paragraph 11).

27 It is also consonant with that aim of legal certainty that the court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case.

28 The aim of securing legal certainty by making it possible reliably to foresee which court will

have jurisdiction has been interpreted in connection with Article 17 of the Convention, which accords with the intentions of the parties to the contract and provides for exclusive jurisdiction by dispensing with any objective connection between the relationship in dispute and the court designated, by fixing strict conditions as to form (see, in this regard, Case C-106/95 MSG [1997] ECR I-0000, paragraph 34).

29 Article 17 of the Convention sets out to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardized if one party to the contract could frustrate that rule of the Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law.

30 That solution is consistent not only with the approach taken by the Court in Effer v Kanter, cited above, in which it ruled that the plaintiff may invoke the jurisdiction of the courts of the place of performance in accordance with Article 5(1) of the Convention even when the existence of the contract on which the claim is based is in dispute between the parties, but also with the judgment in Case 73/77 Sanders v Van der Putte [1977] ECR 2383, paragraph 15, in which the Court held, in connection with Article 16(1) of the Convention, that, in the matter of tenancies of immovable property, the courts of the State in which the immovable property is situated continue to have jurisdiction even where the dispute is concerned with the existence of the lease.

31 It must be added that, as the Court has held, it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope (Case C-214/89 Powell Duffryn [1992] ECR I-1745, paragraph 37). Consequently, in the instant case it is for the national court to determine whether the clause invoked before it, which refers to `any dispute' relating to the interpretation, performance or `other aspects' of the contract, also covers any dispute relating to the validity of the contract.

32 The answer to the national court's third question must therefore be that the courts of a Contracting State which have been designated in a jurisdiction clause validly concluded under the first paragraph of Article 17 of the Convention also have exclusive jurisdiction where the action seeks in particular a declaration that the contract containing that clause is void.

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FORM	Judgment
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41968A0927(01)-A14L1 : N 1 8 10 - 19
41968A0927(01)-A16PT1 : N 30
41968A0927(01)-A17L1 : N 1 10 21 - 32
61977J0150-N14 : N 12
61977J0150-N15 : N 12
61977J0150-N16 : N 12
61977J0150-N19 : N 12
61991J0089-N13 : N 12
61991J0089-N14 : N 13
61991J0089-N15 : N 13
61991J0089-N16 : N 13
61988J0220-N16 : N 14
61988J0220-N19 : N 14
61991J0089-N17 : N 14
61991J0089-N20 : N 15
61991J0089-N22 : N 15
61995C0269-N38 : N 16
61981J0038-N06 : N 26
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61995J0106-N34 : N 28
61981J0038 : N 30
61977J0073-N15 : N 30
61989J0214-N37 : N 31

CONCERNS Interprets 41968A0927(01) -A13L1
Interprets 41968A0927(01) -A14L1
Interprets 41968A0927(01) -A17L1

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

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NATIONA Federal Republic of Germany

NATCOUR *A9* Oberlandesgericht München, Vorlagebeschluß vom 05/05/1995 (8 U 5387/94) ; - Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts im Jahre 1995 no 144 ; - Jahrbuch für italienisches Recht 1996 Bd.9 p.215-216 (résumé) ; - International Litigation Procedure 1996 p.592-595

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PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Kakouris

DATES of document: 03/07/1997
of application: 09/08/1995

Judgment of the Court (Fifth Chamber)
of 27 February 1997
Antonius van den Boogaard v Paula Laumen. Reference for a preliminary ruling: Arrondissementsrechtbank Amsterdam - Netherlands. Brussels Convention - Interpretation of Article 1, second paragraph - Definition of rights in property arising out of a matrimonial relationship - Definition of matters relating to maintenance. Case C-220/95.

Convention on Jurisdiction and the Enforcement of Judgments - Scope - Civil and commercial matters - Matters relating to maintenance - Decisions rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property - Included - Conditions

(Convention of 27 September 1968, Art. 1, first para., and second para., point 1, and Art. 42)

If the reasoning of a decision rendered in divorce proceedings shows that the provision which it awards is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance and will therefore fall within the scope 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.

It follows that a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance and therefore as falling within the scope of the Convention if its purpose is to ensure the former spouse's maintenance. The fact that in its decision the court of origin disregarded a marriage contract is of no account in this regard.

In Case C-220/95,

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 Arrondissementsrechtbank te Amsterdam (District Court, Amsterdam) for a preliminary ruling in the proceedings pending before that court between

Antonius van den Boogaard

and

Paula Laumen

on the interpretation of the second paragraph of Article 1 of the aforementioned Convention of 27 September 1968, 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. 77) and by 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: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann, D.A.O. Edward, J.-P. Puissochet and P. Jann (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- the Austrian Government, by F. Cede, Ambassador at the Federal Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by B.J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Van den Boogaard, represented by M. Wigleven, of the Amsterdam Bar; of Miss Laumen, represented by R.Th.R.F. Carli, of the Hague Bar; and of the Commission, represented by B.J. Drijber, at the hearing on 24 October 1996,

after hearing the Opinion of the Advocate General at the sitting on 12 December 1996,

gives the following

Judgment

1 By judgment of 14 June 1995, received at the Court on 21 June 1995, the Arrondissementsrechtbank te Amsterdam 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, 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. 77) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1, hereinafter `the Brussels Convention') a question on the interpretation of the second paragraph of Article 1 of that Convention.

2 The question has been raised in proceedings between Antonius van den Boogaard and Paula Laumen concerning an application for enforcement, in the Netherlands, of a judgment given on 25 July 1990 by the High Court of Justice of England and Wales.

3 According to the order for reference, Mr Van den Boogaard and Miss Laumen were married in the Netherlands in 1957 under the regime of community of property. In 1980, they entered into a marriage contract, again in the Netherlands, which altered their matrimonial regime into one of separation of goods. In 1982, they moved to London. By judgment of 25 July 1990, the High Court dissolved the marriage and also dealt with an application made by Miss Laumen for full ancillary relief. Since the wife sought a `clean break' between herself and her husband, the English court awarded her a capital sum so that periodic payments of maintenance would be unnecessary. It also held that the Netherlands separation of goods agreement was of no relevance for the purposes of its decision in the case.

4 In its decision the High Court set the total amount which Miss Laumen should be awarded in order to provide for herself at £875 000. Part of that amount, £535 000, was covered by her own funds, by the sale of moveable property, by the transfer of a painting and, finally, by the transfer of immovable property. For the rest, the English court ordered Mr Van den Boogaard to pay Miss Laumen a lump sum of £340 000, to which was added £15 000 to meet the costs of earlier proceedings.

5 By application lodged on 14 April 1992 at the Arrondissementsrechtbank te Amsterdam, Miss Laumen

sought enforcement of the English judgment, relying on the Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (hereinafter `the Hague Convention').

6 On 21 May 1992 the President of the Arrondissementsrechtbank granted that application.

7 On 19 July 1993 Mr Van den Boogaard appealed against the grant of leave to enforce.

8 The Arrondissementsrechtbank te Amsterdam, which had jurisdiction to hear and determine that appeal, was uncertain whether the High Court's judgment of 25 July 1990 was to be classified as a `judgment given in matters relating to maintenance', in which case leave to enforce would be properly granted, or whether it was to be classified as a `judgment given in a matter relating to rights in property arising out of a matrimonial relationship', in which case the Hague Convention could provide no basis for enforcement.

9 The Amsterdam court considered that the High Court's judgment had such consequences for the parties' relations as regards property rights that it could not be regarded as a `decision in respect of maintenance obligations' within the meaning of Article 1 of the Hague Convention. It therefore considered that enforcement was not to be granted on the basis of that Convention. It then went on to consider whether the Brussels Convention could provide a basis for granting leave for enforcement.

10 Article 1 of the Brussels Convention provides:

`This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and successions;

...'

11 Article 5 of the Convention provides:

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

1. ...

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;

...'

12 The first paragraph of Article 57 of the Brussels Convention provides:

`This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.'

13 Article 23 of the Hague Convention is worded as follows:

`This Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining recognition or enforcement of a decision or settlement.'

14 Unsure about the interpretation to be given to the Brussels Convention, the Arrondissementsrechtbank te Amsterdam referred the following question to the Court for a preliminary ruling:

`Must the decision of the English judge, which in any case relates in part to a maintenance obligation, be regarded as a decision which relates (in part) to rights in property arising out of a matrimonial relationship within the meaning of indent 1 of the second paragraph of Article 1 of the Brussels Convention even though:

(a) the income requirement is capitalized;

(b) an order was made to transfer the house and the De Heem painting which, according to the decision, belong to the husband;

(c) in his decision, the English judge himself expressly stated that he did not regard the marriage settlement as binding;

(d) it cannot be made out from that decision to what extent the factor mentioned in (c) influenced the English judge's decision?'

15 By this question the national court is asking in substance whether a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse is excluded from the scope of the Brussels Convention by virtue of point 1 of the second paragraph of Article 1 thereof on the ground that it relates to rights in property arising out of a matrimonial relationship, or whether it may be covered by that Convention on the ground that it relates to maintenance. It also inquires whether the fact that the court of origin disregarded a marriage contract in arriving at his decision is relevant.

16 As a preliminary point, it must be observed that at the hearing it was asserted that Mr Van den Boogaard had lodged an appeal after the two-month period laid down in Article 36 of the Brussels Convention for appealing against decisions authorizing enforcement had expired. That fact does not affect in any way the Court's jurisdiction to give a preliminary ruling since, according to settled case-law, it is solely for national courts before which disputes are brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (see the judgment in Case C-127/92 Enderby [1993] ECR I-5535, paragraph 10).

17 It must also be observed that, for the reasons explained by the Advocate General in paragraphs 24 to 29 of his Opinion, the Hague Convention, by virtue of Article 23 thereof, does not preclude application of the Brussels Convention, notwithstanding Article 57 of the latter Convention.

18 It is common ground that the Brussels Convention does not define `rights in property arising out of a matrimonial relationship' or `maintenance'. These two terms must be distinguished, however, since only maintenance is covered by the Brussels Convention.

19 As is stated in the Schlosser Report, in no legal system of a Member State `do maintenance claims between spouses derive from rules governing "matrimonial regimes"' (Report on the Convention on the accession 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, OJ 1979 C 59, p. 71, paragraph 49).

20 As the Advocate General points out in paragraphs 54 to 62 of his Opinion, on divorce courts in England and Wales have a wide discretion to make financial provision. They may, in particular, order periodical payments or lump sum payments to be made and ownership in property belonging to one spouse to be transferred to the former spouse. Thus, they have the task of regulating, in a single decision, the matrimonial relationships and maintenance obligations arising from dissolution of a marriage.

21 Owing precisely to the fact that on divorce an English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance, the court from which leave to enforce is sought must distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance, having regard in each particular case to the specific aim of the decision rendered.

22 It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.

23 It makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a predetermined level of income.

24 In the present case, as the Advocate General points out in paragraph 59 of his Opinion, the court of origin was under an obligation to consider whether it had to impose a clean break between the spouses and to order payment of a lump sum instead of periodical payments. It is clear that the choice of method of payment made by the court of origin cannot alter the nature of the aim pursued by the decision.

25 Likewise, the fact that the decision of which enforcement is sought also orders ownership in certain property to be transferred between the former spouses cannot call in question the nature of that decision as an order for the provision of maintenance. The aim is still to make provision, by means of a capital sum, for the maintenance of one of the former spouses.

26 Finally, for the reasons explained by the Advocate General in paragraphs 69 to 72 of his Opinion, the English court's statement that it did not consider itself bound by the separation of goods agreement should be read in its context and in any event is not relevant for the purposes of defining the nature of the decision in question.

27 Consequently, the answer to be given must be that a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance and therefore as falling within the scope of the Brussels Convention if its purpose is to ensure the former spouse's maintenance. The fact that in its decision the court of origin disregarded a marriage contract is of no account in this regard.

Costs

28 The costs incurred by the Austrian Government and by the Commission of the European Communities, 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 Arrondissementsrechtbank te Amsterdam by judgment of 14 June 1995, hereby rules:

A decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance and therefore as falling within the scope 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 and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, if its purpose is to ensure the former spouse's maintenance. The fact that in its decision the court of origin disregarded a marriage contract is of no account in this regard.

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FORM	Judgment
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CONCERNS	Interprets 41968A0927(01) -
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
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NATIONA	Netherlands
NATCOUR	*A9* Arrondissementsrechtbank Amsterdam, vonnis van 14/06/1995 (H 93.2242) ; - International Litigation Procedure 1996 p.654-660 ; *P1* Arrondissementsrechtbank Amsterdam, vonnis van 16/06/1999 (H 93.2242) ; - Nederlands internationaal

privaatrecht 1999 no 283

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Jann

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of application: 21/06/1995

Judgment of the Court (Sixth Chamber) of 9 October 1997

Elsbeth Freifrau von Horn v Kevin Cinnamond. Reference for a preliminary ruling: House of Lords - United Kingdom. Brussels Convention - Article 21 - Lis pendens - San Sebastian Accession Convention - Article 29 - Transitional provisions. Case C-163/95.

Convention on Jurisdiction and the Enforcement of Judgments - Accession of new Contracting States - Spain - Portugal - Transitional provisions - Lis pendens - Proceedings involving the same cause of action and between the same parties in two different Contracting States - First proceedings brought before and second proceedings after the entry into force of the Accession Convention between the two States - Application of Article 21 of the Convention on Jurisdiction and the Enforcement of Judgments by the court second seised - Conditions

(Convention of 27 September 1968, Art. 21; 1989 Accession Convention, Art. 29)

Article 29(1) of the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that where proceedings involving the same cause of action and between the same parties are pending in two different Contracting States, the first proceedings having been brought before the date of entry into force of the Brussels Convention between those States and the second proceedings after that date, the court second seised must apply Article 21 of the latter Convention if the court first seised has assumed jurisdiction on the basis of a rule which accords with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the two States concerned when the proceedings were instituted; if the court first seised has not yet ruled on whether it has jurisdiction, the court second seised must apply that article provisionally.

On the other hand, the latter court must not apply Article 21 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters if the court first seised has assumed jurisdiction on the basis of a rule which does not accord with the provisions of Title II of that Convention or with the provisions of a convention which was in force between those two States when the proceedings were instituted.

In Case C-163/95,

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 House of Lords for a preliminary ruling in the proceedings pending before that court between

Elsbeth Freifrau von Horn

and

Kevin Cinnamond

on the interpretation of Article 21 of the said 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) and the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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 of Article 29 of the Convention of 26 May 1989,

THE COURT

(Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, G.F. Mancini (Rapporteur), P.J.G. Kapteyn, J.L. Murray and G. Hirsch, Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Freifrau von Horn, by Messrs Forsyte, Saunders and Kerman, Solicitors,

- Mr Cinnamond, by Nicholas Forwood QC and Peter Brunner, Barrister, instructed by David Henshall, Solicitor,

- the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and David Lloyd Jones, Barrister,

- the Commission of the European Communities, by Nicholas Khan, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Cinnamond, the United Kingdom Government and the Commission at the hearing on 24 April 1996,

after hearing the Opinion of the Advocate General at the sitting on 14 May 1996,

gives the following

Judgment

Costs

28 The costs incurred by the United Kingdom Government and by the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the House of Lords by order of 25 May 1995, hereby rules:

Article 29(1) of the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that where proceedings involving the same cause of action and between the same parties are pending in two different Contracting States, the first proceedings having been brought before the date of entry into force of the Brussels Convention between those States and the second proceedings after that date, the court second seised must apply Article 21 of the latter Convention if the court first seised has assumed jurisdiction on the basis of a rule which accords with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the two States concerned when the proceedings were instituted, and must do so provisionally if the court first seised has not yet ruled on whether it has jurisdiction. On the other hand, the court second seised must not apply Article 21 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters if the court first seised has

assumed jurisdiction on the basis of a rule which does not accord with the provisions of Title II of that Convention or with the provisions of a convention which was in force between those two States when the proceedings were instituted.

1 By order of 25 May 1995, received at the Court on 29 May 1995, the House of Lords 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 (OJ 1978 L 304, p. 36, hereinafter `the Brussels Convention') two questions on the interpretation of Article 21 of that Convention, 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 the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1, hereinafter `the San Sebastian Convention'), and of Article 29 of the San Sebastian Convention.

2 Those questions were raised in proceedings between Freifrau von Horn, domiciled in Portugal, and Mr Cinnamond, domiciled in the United Kingdom, concerning the payment of a sum of money which she claims from him as constituting payment for the sale to a Gibraltar company of shares in a property company.

3 On 27 August 1991 Mr Cinnamond brought proceedings against Freifrau von Horn in the Tribunal de Círculo (Circuit Court), Portimao, Portugal, for a declaration that he did not owe the sum of £600 000 or the equivalent in escudos. In those proceedings Freifrau von Horn counterclaimed for a declaration that Mr Cinnamond owed her £600 000 and an order for payment.

4 On 9 November 1992 Freifrau von Horn issued a writ in the High Court of Justice, served on Mr Cinnamond on 18 November 1992, for payment of £600 000 as the balance due for the shares or, in the alternative, for damages. On 27 November 1992 Mr Cinnamond issued a summons for a declaration that that court lacked jurisdiction. On 5 March 1993 the proceedings were stayed. On 21 April 1993 a judge of the High Court allowed Freifrau von Horn's appeal against the stay. Mr Cinnamond appealed against the judge's decision to the Court of Appeal, which dismissed his appeal by judgment of 25 February 1994. On 19 July 1994 the House of Lords granted Mr Cinnamond leave to appeal.

5 Since it considered that the dispute raised questions of the interpretation of the Brussels and San Sebastian Conventions, the House of Lords stayed proceedings and referred the following questions to the Court:

`In a case where:

(a) there are pending proceedings in two different Contracting States involving the same cause of action and between the same parties;

(b) the first such proceedings in time were initiated in Contracting State A before the Brussels Convention and/or any applicable accession convention came into force in that State;

(c) the second such proceedings are initiated in Contracting State B in accordance with Article 2 of the Brussels Convention after the Brussels Convention and/or any applicable accession convention has come into force in both State A and State B;

and having regard to Article 29(1) of the San Sebastian Convention and the corresponding articles in any other applicable accession convention and Article 21 of the Brussels Convention (as amended):

(1) Does the Brussels Convention (as amended) and/or any applicable accession convention lay down any, and if so what, rules as to whether the proceedings in State B may or must be stayed, or jurisdiction

declined, on the ground of pending proceedings in State A

and in particular

(2) Is the Court second seised required or permitted, for the purpose of deciding whether or not to decline jurisdiction in respect of, or to stay, the proceedings before it, to conduct any and, if so, what examination of the basis upon which the court first seised assumed jurisdiction?'

6 In answering those questions, which should be taken together, it must be noted that under Article 21 of the Brussels Convention, as amended by Article 8 of the San Sebastian Convention,

`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 stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

7 Article 29 of the San Sebastian Convention reads as follows:

`1. The 1968 Convention and the 1971 Protocol, as amended by the 1978 Convention, the 1982 Convention and this Convention, shall apply only to legal proceedings instituted and to authentic instruments formally drawn up or registered after the entry into force of this Convention in the State of origin and, where recognition or enforcement of a judgment or authentic instrument is sought, in the State addressed.

2. However, judgments given after the date of entry into force of this Convention between the State of origin and the State addressed in proceedings instituted before that date shall be recognized and enforced in accordance with the provisions of Title III of the 1968 Convention, as amended by the 1978 Convention, the 1982 Convention and this Convention, if jurisdiction was founded upon rules which accorded with the provisions of Title II of the 1968 Convention, as amended, or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.'

8 In accordance with Article 32(2) thereof, the San Sebastian Convention entered into force between Portugal and the United Kingdom on the first day of the third month following the deposit of the last instrument of ratification, namely 1 July 1992.

9 The rule which governs the temporal application of Article 21 of the Brussels Convention is therefore that laid down in Article 29(1) of the San Sebastian Convention. However, that provision does not allow it to be determined with certainty whether the lis pendens provisions of Article 21 of the Brussels Convention apply where the first proceedings were brought in a Contracting State before the date of entry into force of the San Sebastian Convention and the second proceedings were brought in another Contracting State after that date, or whether both sets of proceedings must have been brought after the entry into force of the San Sebastian Convention.

10 First, while Article 21 is included in Title II of the Brussels Convention among the provisions which determine jurisdiction of the court seised, it requires that court to stay the proceedings before it and, as the case may be, decline jurisdiction because of the existence of proceedings before a court of another Contracting State. In contrast to other procedural rules, it thus necessarily implies the taking into account of other proceedings, which may have been brought before or after the entry into force of the Convention.

11 While Article 29(1) of the San Sebastian Convention states that the Brussels Convention is to apply to legal proceedings instituted after its entry into force, it does not specify whether,

in the case, referred to in Article 21 of the Brussels Convention, where several actions are pending before the courts of different Contracting States, it is necessary that all the proceedings should have been instituted after the date of entry into force or whether it is enough that the proceedings pending before the court last seised were so instituted.

12 Most of the language versions of Article 21 of the Brussels Convention admittedly refer to the institution of the proceedings and thus appear to suggest that Article 29(1) of the San Sebastian Convention is to be interpreted as providing that Article 21 is to apply only if all the proceedings were commenced after the entry into force of the Convention. However, the German (`werden... anhängig gemacht') and Dutch (`aanhangig zijn') versions refer to the situation where the proceedings are pending, so that they permit the interpretation that by reason of Article 29(1) the rule in Article 21 applies where that situation is shown to exist before the court second seised after the entry into force of the San Sebastian Convention.

13 Second, the two interpretations mentioned in paragraph 9 above are both capable of leading to consequences which are unsatisfactory and contrary to the aims of the Brussels Convention as set out in its preamble, which are, in particular, to facilitate reciprocal recognition and enforcement of judgments of courts and tribunals and to strengthen the legal protection of persons established in the Community. With respect more particularly to Article 21, the Court has repeatedly observed that that provision, together with Article 22 on related actions, is contained in Section 8 of Title II of the Brussels Convention, a section which is 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 arise therefrom. Those rules are therefore designed to preclude, in so far as possible and from the outset, a situation such as that referred to in Article 27(3), namely the non-recognition of a judgment on account of its irreconcilability with a judgment given between the same parties in the State addressed (see Case 144/86 Gubisch Maschinenfabrik v Palumbo [1987] ECR 4861, paragraph 8, and Case C-351/89 Overseas Union Insurance and Others v New Hampshire Insurance [1991] ECR I-3317, paragraph 16).

14 The view that Article 21 applies where the second proceedings have been brought after the date of entry into force of the San Sebastian Convention, even if the first action was commenced before that date, could make it impossible for the parties to the proceedings to obtain a judgment enforceable in the Contracting State in which the second proceedings take place. The court second seised would have to stay the proceedings and, as the case may be, decline jurisdiction by reason of the existence of proceedings before a court of another Contracting State, even though recognition and enforcement of the judgment given in those proceedings might prove impossible in the State addressed. That would be the case in particular, under Article 29(2) of the San Sebastian Convention, if the jurisdiction of the court of the Contracting State of origin was founded on rules which did not accord with Title II of the Brussels Convention or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

15 The contrary view, namely that Article 21 applies only if the two sets of proceedings were instituted after the entry into force of the San Sebastian Convention, on the other hand, would lead to their continuing, in the two Contracting States, and possibly resulting in two different judgments being delivered. If those decisions were irreconcilable, neither of them could be recognized in the other State, in accordance with Article 27(3) of the Brussels Convention.

16 In those circumstances, it may be seen that it is essential to interpret Article 29(1) of the San Sebastian Convention in the light of the structure and aims of that Convention and the Brussels Convention.

17 That provision should therefore be construed in such a way as to make it possible for the legal

protection of persons established in the Community to be strengthened and recognition and enforcement of judicial decisions to be facilitated, in particular by reducing the danger of irreconcilable judgments being delivered, that being a ground for refusing recognition and enforcement under Article 27(3) and the second paragraph of Article 34 of the Brussels Convention (see Case C-220/88 Dumez France and Tracoba v Hessische Landesbank and Others [1990] ECR I-49, paragraph 18, and Overseas Union Insurance, paragraph 15).

18 In accordance with Article 29(2) of the San Sebastian Convention, judgments delivered in a Contracting State after the date of entry into force of that Convention in proceedings brought before that date must be recognized and enforced in accordance with Title III of the Brussels Convention if jurisdiction was founded on rules which accorded with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

19 In such a case, therefore, the court second seised should, in accordance with Article 21, stay the proceedings of its own motion until the jurisdiction of the court first seised is established and, where the jurisdiction of the court first seised is established, decline jurisdiction in favour of that court. The production of parallel, potentially conflicting judgments which might prevent recognition and enforcement will thereby be avoided.

20 If, on the other hand, the jurisdiction of the court first seised is founded on rules which do not accord with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the State of origin and the State addressed when the proceedings were instituted, its judgment could not be recognized in the Contracting State of the court second seised.

21 In such a case, the court second seised should disapply Article 21 and continue with the proceedings before it. In that way a judgment can be given in the Contracting State of the court second seised, in which the judgment of the court first seised cannot be recognized or enforced. Moreover, the judgment of the court second seised can be recognized and enforced in the Contracting State of the court first seised, provided always that it is not incompatible with a judgment given between the same parties in that State.

22 Further, if the court first seised has not yet ruled on whether it has jurisdiction, it is for the court second seised to apply Article 21 of the Brussels Convention provisionally and stay its proceedings. However, those proceedings may later be resumed if the court first seised declines jurisdiction or the rule on which it has founded its jurisdiction does not accord with the rules of Title II of the Brussels Convention or with a convention which was in force between the State of origin and the State addressed when the proceedings were instituted.

23 That interpretation does admittedly mean that a court of a Contracting State will review the jurisdiction of a court of another Contracting State outside the cases expressly listed in Article 28 and the second paragraph of Article 34 of the Brussels Convention, even though, as the Court held in Overseas Union Insurance, paragraph 24, apart from those limited exceptions, the Convention does not authorize such a review. However, an exception to that principle appears justified in the situation referred to by the national court.

24 First, by virtue of the transitional provision contained in Article 29(2) of the San Sebastian Convention, application of the rules of that convention which concern the recognition and enforcement of judgments specifically depends on the basis of the jurisdiction of the court first seised.

25 Second, the court second seised must restrict itself to determining whether the jurisdiction of the court first seised accords with the rules of the Brussels Convention, or a convention concluded between the two States concerned, which are common to both courts and may be interpreted with equal authority by the courts of both Contracting States (see Overseas Union Insurance, cited above,

paragraph 23). In the particular case where the jurisdiction of the court first seised derives, in accordance with Article 4 of the Brussels Convention, from the law of the State of that court, which would thus undeniably be better placed to rule on the question of its own jurisdiction, the court second seised should restrict itself to ascertaining whether the conditions for the application of that provision are satisfied, namely that the plaintiff is domiciled in a Contracting State and the defendant is not domiciled in such a State. In no case, therefore, may the court second seised assess the jurisdiction of the court first seised in the light of the law of the State of that court.

26 Lastly, it must be emphasized that the above rules apply only on a transitional basis to resolve the difficulties deriving from the entry into force of the Brussels Convention and only for so long as proceedings brought before that entry into force are still pending in a Contracting State. Consequently, the principle referred to in paragraph 23 above suffers no lasting injury.

27 The answer to the national court's questions must therefore be that Article 29(1) of the San Sebastian Convention must be interpreted as meaning that where proceedings involving the same cause of action and between the same parties are pending in two different Contracting States, the first proceedings having been brought before the date of entry into force of the Brussels Convention between those States and the second proceedings after that date, the court second seised must apply Article 21 of the Brussels Convention if the court first seised has assumed jurisdiction on the basis of a rule which accords with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the two States concerned when the proceedings were instituted, and must do so provisionally if the court first seised has not yet ruled on whether it has jurisdiction. On the other hand, the court second seised must not apply Article 21 of the Brussels Convention if the court first seised has assumed jurisdiction on the basis of a rule which does not accord with the provisions of Title II of that Convention or with the provisions of a convention which was in force between those two States when the proceedings were instituted.

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NOTES Klauer, Stefan: Rechtshängigkeit nach dem 3. Beitrittsübereinkommen zum EuGVÜ, St. Galler Europarechtsbriefe 1997 p.581-583 ; Alvarez Gonzalez, Santiago: Situaciones transitorias y litispendencia en el Convenio de Bruselas de 27 de septiembre de 1968. Localizacion sistematica del artículo 21 del Convenio, La ley 1997 no 4437 p.1-4 ; Gaudemet-Tallon, Hélène: Revue critique de droit international privé 1998 p.113-117 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes. Convention de Bruxelles du 27 septembre 1968, Journal du droit international 1998 p.575-579 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1998 p.595-599 ; Soulard, Christophe: Revue des affaires européennes 1998 p.283-287 ; Consolo, Claudio: Litispendenza "comunitaria", convenzione "parallela" di Lugano, interventi di terzi e sindacabilità in sede di regolamento di giurisdizione, Il Corriere giuridico 1998 p.1201-1209 ; Dede, E.: Koinodikion 1998 p.129-133 ; Lapiedra Alcamí, Rosa: Jurisprudencia española y comunitaria de Derecho Internacional Privado, Revista española de Derecho Internacional 1998 p.213-218 ; Rauscher, Thomas: Intertemporale Anwendung des Art. 21 EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 1999 p.80-82 ; Tagaras, Haris: Cahiers de droit européen 1999 p.231-235 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1999 no 793 ; Lupoi, Michele Angelo: "As time goes by": il regime di applicazione temporale della litispendenza comunitaria, Rivista trimestrale di diritto e procedura civile 1999 p.1415-1432

PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Mancini

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Judgment of the Court (Sixth Chamber)
of 20 February 1997
Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL.
Brussels Convention - Agreement on the place of performance of the obligation in question - Agreement conferring jurisdiction.
Demande de décision préjudicielle: Bundesgerichtshof - Allemagne.
Case C-106/95.

1 Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Conditions as to form - Agreement concluded in a form according with practices in international trade or commerce - Concept - Contract concluded orally - Clause included in a commercial letter of confirmation and in invoices paid - Unchallenged - Validity of the clause - Conditions

(Convention of 27 September 1968, Art. 17, as amended by the 1978 Accession Convention)

2 Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Court for the place of performance of the contractual obligation - Oral agreement between the parties on a place other than that of actual performance with the sole purpose of establishing that the courts of a particular place have jurisdiction - Inapplicability of Article 5(1) - Applicability of the conditions as to form for agreements conferring jurisdiction

(Convention of 27 September 1968, Arts 5(1) and 17)

3 The third hypothesis in the second sentence of the first paragraph of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as meaning that, under a contract concluded orally in international trade or commerce, an agreement conferring jurisdiction will be deemed to have been validly concluded under that provision by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to it by the other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, provided that such conduct is consistent with a practice in force in the field of international trade or commerce in which the parties in question operate and the latter are aware or ought to have been aware of the practice in question.

In this regard, a practice exists in a branch of international trade or commerce in particular where a particular course of conduct is generally followed by contracting parties operating in that branch when they conclude contracts of a particular type. The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.

4 The Convention must be interpreted as meaning that an oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) of the Convention, but by Article 17, and is valid only if the requirements set out therein are complied with. Whilst the parties are free to agree on a place of performance for contractual obligations which differs from that which would be determined under the law applicable to the contract, without having to comply with specific conditions as to form, they are nevertheless not entitled, having regard to the system established by the Convention, to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under

the contract could not be performed in accordance with the terms of the contract.

In Case C-106/95,

REFERENCE to the Court by the Bundesgerichtshof 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, for a preliminary ruling in the proceedings pending before that court between

Mainschiffahrts-Genossenschaft eG (MSG)

and

Les Gravières Rhénanes SARL

on the interpretation of Article 5(1) and the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the 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; amended version of the Convention at p. 77),

THE COURT

(Sixth Chamber),

composed of: J.L. Murray, President of the Fourth Chamber, acting for the President of the Sixth Chamber, C.N. Kakouris (Rapporteur), P.J.G. Kapteyn, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: G. Tesauro,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mainschiffahrts-Genossenschaft eG (MSG), by Thor von Waldstein, Rechtsanwalt, Mannheim,

- Les Gravières Rhénanes SARL, by Fink von Waldstein, Rechtsanwalt, Mannheim,

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

- the Commission of the European Communities, by Pieter van Nuffel, of its Legal Service, acting as Agent, assisted by Hans-Jürgen Rabe, Rechtsanwalt, Hamburg,

having regard to the Report for the Hearing,

after hearing the oral observations of Mainschiffahrts-Genossenschaft eG (MSG), represented by Thor von Waldstein; Les Gravières Rhénanes SARL, represented by Fink von Waldstein; the Greek Government, represented by Vasileios Kontolaimos, Assistant Legal Adviser in the State Legal Department, acting as Agent, and the Commission, represented by Hans-Jürgen Rabe, at the hearing on 4 July 1996,

after hearing the Opinion of the Advocate General at the sitting on 26 September 1996,

gives the following

Judgment

Costs

36 The costs incurred by the German and Greek Governments and the Commission of the European

Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 6 March 1995, hereby rules:

1. The third hypothesis in the second sentence of the first paragraph of Article 17 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, must be interpreted as meaning that, under a contract concluded orally in international trade or commerce, an agreement conferring jurisdiction will be deemed to have been validly concluded under that provision by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to it by the other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, provided that such conduct is consistent with a practice in force in the field of international trade or commerce in which the parties in question operate and the latter are aware or ought to have been aware of the practice in question. It is for the national court to determine whether such a practice exists and whether the parties to the contract were aware of it. A practice exists in a branch of international trade or commerce in particular where a particular course of conduct is generally followed by contracting parties operating in that branch when they conclude contracts of a particular type. The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.

2. The Convention of 27 September 1968 must be interpreted as meaning that an oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) of the Convention, but by Article 17, and is valid only if the requirements set out therein are complied with.

1 By order of 6 March 1995, received at the Court on 31 March 1995, the Bundesgerichtshof (Federal Court of Justice) 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 (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 at p. 77; hereinafter `the Convention'), two questions on the interpretation of Article 5(1) and the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the Convention.

2 The questions arose in proceedings between Mainschiffahrts-Genossenschaft eG (MSG) (`MSG'), an inland-waterway transport cooperative based at Würzburg (Germany), and Les Gravières Rhénanes SARL (`Gravières Rhénanes'), whose registered office is in France, concerning compensation for damage caused to an inland-waterway vessel which MSG owned and had chartered to Gravières Rhénanes

by a time charter concluded orally between the parties.

3 According to the case-file, that vessel operated a shuttle service on the Rhine between 1 June 1989 and 10 February 1991, chiefly carrying shipments of gravel. With some exceptions, the places of loading were all located in France, whilst the cargo was invariably unloaded in France. According to MSG, the handling equipment used by Gravières Rhénanes to unload the cargo damaged its vessel. The main proceedings are for the sum of DM 197 284, namely the difference between the amount paid by Gravières Rhénanes' insurers and the amount claimed by MSG.

4 MSG brought an action before the Schiffahrtsgericht (Maritime Court) Würzburg, taking the view that the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the Convention entitled it to do so on the ground that the parties had validly designated Würzburg, MSG's principal place of business, as the place of performance and the Würzburg courts as having jurisdiction.

5 The first and second sentences of the first paragraph of Article 17 of the Convention provide as follows:

`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 in writing or evidenced in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.'

6 It appears from the order for reference that, when the contractual negotiations had been completed, MSG sent Gravières Rhénanes a commercial letter of confirmation containing the following pre-printed statement:

`The place of performance is Würzburg and the courts for that place have exclusive jurisdiction.'

Moreover, MSG's invoices also mentioned that forum directly and by reference to the conditions of the bill of lading. Gravières Rhénanes did not challenge the commercial letter of confirmation and paid all invoices without objection. The Schiffahrtsgericht Würzburg declared the action admissible.

7 On an appeal brought by Gravières Rhénanes, the Oberlandesgericht (Higher Regional Court) Nürnberg rejected the application as inadmissible on the ground that there was no international jurisdiction. MSG appealed on a point of law to the Bundesgerichtshof.

8 The Bundesgerichtshof found, in the first place, that the jurisdiction of the French courts was borne out by the general rule set forth in the first paragraph of Article 2 of the Convention (place of the defendant's domicile), by Article 5(3) (place where the harmful event occurred) and likewise by Article 5(1) (place of performance of the obligation in question). The contractual obligations arising under the contract of carriage had to be performed in France and MSG was under an obligation to present the vessel at Gravières Rhénanes' principal place of business, which was in France. In the Bundesgerichtshof's view, this case affords two possible approaches by which the jurisdiction of the French courts might be ousted in favour of the international jurisdiction of the German courts.

9 In the first place, Würzburg might be regarded as the place of performance within the meaning of Article 5(1) of the Convention, on the ground that it was identified as such by the parties' oral agreement. The Bundesgerichtshof observes that in this case the agreement was `abstract'. It characterizes an agreement on the place of performance as abstract where it does not set out to designate the place where the person liable has to perform his obligations, but only to determine the courts having jurisdiction, without complying with the requirements as to form set out in Article

17 of the Convention. The only aim of such an agreement, therefore, is to disguise an agreement conferring jurisdiction. In this case, the contractual obligations had to be performed in any event in France, where in all cases the place of unloading was located.

10 Whilst stressing that, under the applicable German law, the agreement at issue on the place of performance was validly concluded, the Bundesgerichtshof has doubts about whether such `abstract' agreements are valid under the Convention in so far as they involve a risk of abuse, that is to say, circumvention of the rules as to form set out in Article 17 of the Convention.

11 Secondly, in the event that an `abstract' agreement on the place of performance is regarded as invalid, the Bundesgerichtshof considers that the German courts might have jurisdiction in this case by virtue of the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the Convention.

12 In those circumstances, the Bundesgerichtshof stayed proceedings and referred the following questions to the Court for a preliminary ruling:

`1. Is an oral agreement on the place of performance (Brussels Convention, Article 5) to be recognized even if it is not intended to fix the place at which the person liable has to perform the obligations incumbent on him, but is intended solely to establish - informally - that the courts for a particular place are to have jurisdiction (a so-called "abstract" agreement on the place of performance)?

2. In the event that the Court of Justice should answer Question 1 in the negative:

(a) Can an agreement conferring jurisdiction in international trade or commerce in accordance with the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the 1978 version of the Brussels Convention also be concluded by one party's not contradicting a commercial letter of confirmation containing a pre-printed reference to the courts of the consignors' place of business having sole jurisdiction or must there have been in every case prior consensus with regard to the content of the letter of confirmation?

(b) Is it sufficient in order for there to be an agreement conferring jurisdiction within the meaning of the aforesaid provision if the invoices sent by one party all contain a reference to the courts of the carrier's place of business having sole jurisdiction and to the conditions of the bill of lading used by the carrier which also stipulate the courts of the same place as having jurisdiction, and the other party invariably paid the invoices without objecting, or is prior consensus also required in this respect?'

The second question

13 By its second question, which, being concerned with exclusive jurisdiction, may conveniently be considered first, the national court essentially asks whether, under a contract concluded orally, an agreement conferring jurisdiction may be deemed to have been concluded in international trade or commerce in the form required by the third hypothesis mentioned in the second sentence of the first paragraph of Article 17 of the Convention simply by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to him by the other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, or whether there should in any event be prior consensus on the part of the persons concerned, only written confirmation of the agreement being unnecessary.

14 It should be observed in this regard that, according to the Court's case-law, the requirements laid down by Article 17 of the Convention must be strictly interpreted in so far as that article excludes both jurisdiction as determined by the general principle of the defendant's courts laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 (see, to this

effect, Case 24/76 Estasis Salotti [1976] ECR 1831, paragraph 7, and Case 25/76 Segoura [1976] ECR 1851, paragraph 6).

15 The Court has further held with regard to the initial version of Article 17 that, by making the validity of a jurisdiction clause subject to the existence of an `agreement' between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated, and that the purpose of the requirements as to form imposed by Article 17 is to ensure that consensus between the parties is in fact established (Estasis Salotti, paragraph 7, and Segoura, paragraph 6).

16 However, in order to take account of the specific practices and requirements of international trade, the aforementioned Accession Convention of 9 October 1978 added to the second sentence of the first paragraph of Article 17 of the Convention a third hypothesis providing that, in international trade or commerce, a jurisdiction clause may be validly concluded in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware.

17 Yet that relaxation incorporated in Article 17 by the 1978 Accession Convention does not mean that there is not necessarily any need for consensus between the parties on a jurisdiction clause, since it is still one of the aims of that provision to ensure that there is real consent on the part of the persons concerned. The weaker party to the contract should be protected by avoiding jurisdiction clauses incorporated in a contract by one party alone going unnoticed.

18 To take the view, however, that the relaxation thus introduced relates solely to the requirements as to form laid down by Article 17 by merely eliminating the need for a written form of consent would be tantamount to disregarding the requirements of non-formalism, simplicity and speed in international trade or commerce and to depriving that provision of a major part of its effectiveness.

19 Thus, in the light of the amendment made to Article 17 by the 1978 Accession Convention, consensus on the part of the contracting parties as to a jurisdiction clause is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard of which the parties are or ought to have been aware.

20 It must therefore be considered that the fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice.

21 Whilst it is for the national court to determine whether the contract in question comes under the head of international trade or commerce and to find whether there was a practice in the branch of international trade or commere in which the parties are operating and whether they were aware or are presumed to have been aware of that practice, the Court should nevertheless indicate the objective evidence which is needed in order to make such a determination.

22 It should first be considered that a contract concluded between two companies established in different Contracting States in a field such as navigation on the Rhine comes under the head of international trade or commerce.

23 Next, whether a practice exists must not be determined by reference to the law of one of the Contracting Parties. Furthermore, whether such a practice exists should not be determined in relation to international trade or commerce in general, but to the branch of trade or commerce in which the

parties to the contract are operating. There is a practice in the branch of trade or commerce in question in particular where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

24 Lastly, actual or presumptive awareness of such practice on the part of the parties to a contract is made out where, in particular, they had previously had commercial or trade relations between themselves or with other parties operating in the sector in question or where, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, with the result that it may be regarded as being a consolidated practice.

25 The answer to the second question must therefore be that the third hypothesis in the second sentence of the first paragraph of Article 17 of the Convention, as amended by the Accession Convention of 9 October 1978, must be interpreted as meaning that, under a contract concluded orally in international trade or commerce, an agreement conferring jurisdiction will be deemed to have been validly concluded under that provision by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to it by the other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, provided that such conduct is consistent with a practice in force in the field of international trade or commerce in which the parties in question operate and the latter are aware or ought to have been aware of the practice in question. It is for the national court to determine whether such a practice exists and whether the parties to the contract were aware of it. A practice exists in a branch of international trade or commerce in particular where a particular course of conduct is generally followed by contracting parties operating in that branch when they conclude contracts of a particular type. The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.

The first question

26 The first question has to be answered in case the national court concludes that there is in this case no practice in the branch of trade or commerce in question of which the parties were or ought to have been aware and that, as a result, a jurisdiction clause was not validly concluded.

27 By this question, the national court essentially asks whether an oral agreement on the place of performance, which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is valid under Article 5(1) of the Convention.

28 Article 5(1) of the Convention provides as follows:

`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 the performance of the obligation in question.'

29 According to the case-law of the Court, jurisdiction derogating from the general rule that the defendant's courts should have jurisdiction was introduced by Article 5(1) in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may be called upon to take cognizance of the matter, with a view to the effective organization of the proceedings (Case 12/76 Tessili v Dunlop [1976] ECR 1473, paragraph 13).

30 Moreover, the Court has also held that the place of performance of a contractual obligation

may also be fixed by agreement between the parties and that, if the parties to the contract are permitted by the applicable law, subject to the conditions imposed thereby, to specify the place of performance without satisfying any special condition of form, an agreement on the place of performance of the obligation is sufficient to found jurisdiction in that place within the meaning of Article 5(1) of the Convention (Case 56/79 Zelger v Salinitri [1980] ECR 89, paragraph 5).

31 It should be noted, however, that whilst the parties are free to agree on a place of performance for contractual obligations which differs from that which would be determined under the law applicable to the contract, without having to comply with specific conditions as to form, they are nevertheless not entitled, having regard to the system established by the Convention, to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract.

32 This approach is based, in the first place, on the terms of Article 5(1) of the Convention, which confers jurisdiction on the courts for the place `of performance' of the contractual obligation on which the claim is based. Consequently, that provision has in mind the place of actual performance of the obligation as the jurisdictional criterion by reason of its direct connection with the courts on which it confers jurisdiction.

33 Secondly, it should be considered that to specify a place of performance which has no actual connection with the real subject-matter of the contract becomes fictitious and has as its sole purpose the determination of the place of the courts having jurisdiction. Such agreements conferring jurisdiction are governed by Article 17 of the Convention and are therefore subject to specific requirements as to form.

34 Thus, where there is such an agreement, there is not only no direct connection between the dispute and the courts called upon to determine it, but there is also circumvention of Article 17, which, whilst providing for exclusive jurisdiction by dispensing with any objective connection between the relationship in dispute and the court designated (Zelger v Salinitri, paragraph 4), requires, for that very reason, compliance with the strict requirements as to form which it sets out.

35 The answer to the national court's first question must therefore be that the Convention must be interpreted as meaning that an oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) of the Convention, but by Article 17, and is valid only if the requirements set out therein are complied with.

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SUB Brussels Convention of 27 September 1968 ; Jurisdiction

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OBSERV Federal Republic of Germany ; Greece ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR
A7 Amtsgericht Würzburg, Urteil vom 20/11/92 (14 C 3592/91)
A8 Schiffahrtsobergericht Nürnberg, Urteil vom 27/01/94 (8 U 3905/92)
A9 Bundesgerichtshof, Vorlagebeschluß vom 06/03/95 (II ZR 37/94)
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PROCEDU	Reference for a preliminary ruling
ADVGEN	Tesauro
JUDGRAP	Kakouris
DATES	of document: 20/02/1997 of application: 31/03/1995

Judgment of the Court (Fifth Chamber) of 10 October 1996

Bernardus Hendrikman and Maria Feyen v Magenta Druck & Verlag GmbH. Reference for a preliminary ruling: Hoge Raad - Netherlands. Brussels Convention - Interpretation of Article 27(2) - Recognition of a judgment- Definition of a defendant in default of appearance. Case C-78/95.

Convention on jurisdiction and the enforcement of judgments ° Recognition and enforcement ° Grounds for refusal ° Defendant who is not properly served with or notified of the document instituting proceedings in sufficient time and who fails to appear ° Definition of "in default of appearance" ° Defendant unaware of proceedings initiated against him and represented by a lawyer without his authority ° Included ° Remedy available in the State in which judgment was given, allowing it to be contested on the ground of lack of representation ° Not material

(Convention of 27 September 1968, Art. 27(2))

Where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seised on his behalf but without his authority, such a person is quite powerless to defend himself and must be regarded as a defendant in default of appearance, within the meaning of Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, even if the proceedings before the court first seised became, in point of form, proceedings inter partes. That conclusion is not affected by the fact that the defendant may apply to have the judgment in question annulled on the ground of lack of representation, since the proper time for a defendant to have an opportunity to defend himself is the time at which proceedings are commenced.

Article 27(2) of the Convention therefore applies to judgments given against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance because someone purporting to represent the defendant appeared before the court first seised.

In Case C-78/95,

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 Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Bernardus Hendrikman

and

Maria Feyen

and

Magenta Druck & Verlag GmbH,

on the interpretation of Article 27(1) and (2) and Article 29 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 relating to 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, for the amended text, p. 77),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, C. Gulmann, D.A.O. Edward,

P. Jann (Rapporteur), and M. Wathelet, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° B. Hendrikman and M. Feyen, by W. Heemskerk, of The Hague Bar;

° the Government of the Hellenic Republic, by V. Kondolaimos, Assistant Legal Adviser to the State Legal Service, and S. Chala, specialist assistant in the Special Legal Service for the European Communities in the Ministry of Foreign Affairs, acting as Agents; and

° the Commission of the European Communities, by P. van Nuffel, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, represented by J. Pirrung, Ministerialrat at the Federal Ministry of Justice, acting as Agent, the Government of the Hellenic Republic, represented by V. Kondolaimos and S. Chala, and the Commission, represented by P. van Nuffel, at the hearing on 23 May 1996,

after hearing the Opinion of the Advocate General at the sitting on 4 July 1996,

gives the following

Judgment

1 By judgment of 10 March 1995, which was received at the Court on 16 March 1995, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling 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 three questions on the interpretation of Article 27(1) and (2) and Article 29 of that Convention (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 relating to 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, for the amended text, p. 77; hereinafter "the Convention").

2 Those questions arose in proceedings between Bernardus Hendrikman and Maria Feyen (hereinafter "Mr and Mrs Hendrikman"), residing at The Hague, and Magenta Druck & Verlag GmbH (hereinafter "Magenta"), a German company whose seat is in Krefeld, Germany. Those proceedings concern the enforcement in the Netherlands of a judgment delivered on 2 April 1991 by the Landgericht (Regional Court), Krefeld, and of an order on taxation of costs made on 12 July 1991 by the Amtsgericht (Local Court) Nettetal (Germany) against Mr and Mrs Hendrikman. That judgment and that order were both served on Mr and Mrs Hendrikman on 17 September 1991.

3 By order of 14 January 1992, the acting President of the Arrondissementsrechtbank (District Court), The Hague, gave leave for the enforcement of the German judgment and order in the Netherlands. In their appeal against that order for leave, Mr and Mrs Hendrikman relied on Article 27(1) and (2) of the Convention, contending that they had never received the documents instituting the proceedings and had not been validly represented before the German courts.

4 Article 27 of the Convention provides that:

"A judgment shall not be recognized:

1. if such recognition is contrary to public policy in the State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

..."

5 According to Mr and Mrs Hendrikman, the proceedings leading to the German judgment and order had been instituted by Magenta in Germany without their knowledge. They concerned an unpaid invoice for stationery which had been ordered on behalf of Mr and Mrs Hendrikman by two persons who had no authority to do so. The same two persons also instructed lawyers in the name of Mr and Mrs Hendrikman, but again without their authority, to represent the couple in the proceedings.

6 By judgment of 2 February 1994, the Arrondissementsrechtbank, The Hague, dismissed the appeal as unfounded. It held that Article 29 of the Convention, which provides that "under no circumstances may a foreign judgment be reviewed as to its substance", precluded it from judging whether the German courts were entitled to assume that the conduct of the proceedings by the lawyers in question amounted to valid representation.

7 The Arrondissementsrechtbank also took the view that Article 27(1) could only apply where, under the law of the country in which the judgment was given, no remedy was available to a party who was unaware of the proceedings initiated against him and who was not validly represented, or where that party could not in practice exercise that remedy. In the present case, Paragraphs 579(4) and 586 of the Zivilprozessordnung (German Code of Civil Procedure) would have allowed Mr and Mrs Hendrikman to apply for annulment of the German judgment and order on the ground of lack of representation within one month of service. However, they did not avail themselves of that remedy.

8 Lastly, according to the Arrondissementsrechtbank, Mr and Mrs Hendrikman could not rely on Article 27(2) of the Convention because their case did not concern a judgment delivered against a defendant in default of appearance.

9 Mr and Mrs Hendrikman appealed in cassation to the Hoge Raad der Nederlanden against the Arrondissementsrechtbank' s decision.

10 The Hoge Raad decided to stay proceedings and request a preliminary ruling from this Court on the following questions:

> "(1) Must Article 29 of the Brussels Convention be interpreted as meaning that the court of the State in which recognition is sought must refrain from making any inquiry into the question whether the defendant to the proceedings conducted in the State in which judgment was given was validly represented, even if the court of the State in which judgment was given made no ruling in that regard?

(2)(a) Must Article 27(1) of the Brussels Convention be interpreted as precluding recognition of a judgment given in another Contracting State where the defendant in the relevant proceedings was not validly represented and had no knowledge of the proceedings, even if he later had cognizance of the judgment which was given and availed himself in that regard of none of the legal remedies afforded by the procedural law of the State in which judgment was given?

(2)(b) Is it relevant in that connection that the time within which the legal remedy must be exercised is one month from the day on which the defendant has cognizance of the judgment which has been given?

(3) Must Article 27(2) of the Brussels Convention be interpreted as meaning that that provision is also applicable in a case in which, although the defendant was not declared to be in default

of appearance, the document instituting the proceedings or an equivalent document was not duly served on, or notified to, him in sufficient time and the defendant was not validly represented in the proceedings?"

11 Since the court making the reference has not described the facts found in any great detail, the answers given by this Court will be apposite only in so far as the description of the circumstances on which the appellants in the main case rely corresponds to the facts.

12 The third question should be addressed first.

The third question

13 By this question, the national court is essentially asking whether Article 27(2) of the Convention applies to judgments delivered against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance, because someone purporting to represent the defendant appeared before the court first seised.

14 Under Article 27(2), a court from which recognition is sought may decline to recognize a judgment only if certain conditions are satisfied: the document instituting proceedings was not duly served on, or notified to, the defendant in sufficient time and he failed to appear in the proceedings conducted before the court first seised. The national court inquires only about the second condition.

15 According to settled case-law, the purpose of Article 27(2) of the Convention is to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised (see Case 166/80 Klomps v Michel [1981] ECR 1593, paragraph 9, and Case C-172/91 Sonntag v Waidmann [1993] ECR I-1963, paragraph 38).

16 The German Government submits that the rights of the defence are observed even if a lawyer who is not authorized to act appears for the defendants because the court must rely on what is stated by that lawyer until such time as he is shown to have no authority.

17 That argument cannot be accepted.

18 Where proceedings are initiated against a person without his knowledge and a lawyer appears before the court first seised on his behalf but without his authority, such a person is quite powerless to defend himself. That person must therefore be regarded as a defendant in default of appearance, within the meaning of Article 27(2), even if the proceedings before the court first seised became, in point of form, proceedings inter partes. It is for the court from whom recognition is sought to ascertain whether those exceptional circumstances exist.

19 That conclusion is not affected by the fact that, under Paragraphs 579(4) and 586 of the German Code of Civil Procedure, Mr and Mrs Hendrikman were entitled to apply, within one month of service of the judgment and order, for their annulment on the ground of lack of representation.

20 The proper time for a defendant to have an opportunity to defend himself is the time at which proceedings are commenced. The possibility of having recourse, at a later stage, to a legal remedy against a judgment given in default of appearance, which has already become enforceable, cannot constitute an equally effective alternative to defending proceedings before judgment is given (see Case C-123/91 Minalmet v Brandeis [1992] ECR I-5661, paragraph 19).

21 The answer to the third question must therefore be that Article 27(2) of the Convention applies to judgments given against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance because someone purporting to

represent the defendant appeared before the court first seised.

The first and second questions

22 In view of the reply given to the third question, there is no need to answer the first question.

23 As regards the second question, it should be noted that the public-policy clause in Article 27(1) of the Convention "ought to operate only in exceptional cases" (see the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1979 C 59, p. 1, at p. 44). Recourse to it is in any event precluded when the issue must be resolved on the basis of a specific provision such as Article 27(2) (see, in connection with Article 27(3), Case 145/86 Hoffmann v Krieg [1988] ECR 645, paragraph 21).

24 In view of the foregoing considerations, there is no need to reply to the second question.

Costs

25 The costs incurred by the German Government, the Government of the Hellenic Republic and the Commission of the European Communities, 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 proceedings 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 questions referred to it by the Hoge Raad der Nederlanden, by judgment of 10 March 1995, hereby rules:

Article 27(2) 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 relating to the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, applies to judgments given against a defendant who was not duly served with, or notified of, the document instituting proceedings in sufficient time and who was not validly represented during those proceedings, albeit the judgments given were not given in default of appearance because someone purporting to represent the defendant appeared before the court first seised.

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41968A0927(01)-A29 : N 1 10
41978A1009(01) : N 1
61980J0166-N09 : N 15
61991J0172-N38 : N 15
61991J0123-N19 : N 20
61986J0145-N21 : N 23

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Interprets 41978A1009(01) -

SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

AUTLANG Dutch

OBSERV Federal Republic of Germany ; Greece ; Commission ; Member States ; Institutions

NATIONA Netherlands

NATCOUR *A9* Hoge Raad, 1e kamer, arrest van 10/03/1995 (15.634) ; - Euridica 1995 no 4 p.29 (résumé) ; - Nederlands Internationaal Privaatrecht 1995 no 406 ; - Nederlands juristenblad 1995 Bijl. p.168-169 ; - Rechtspraak van de week 1995 no 69 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1999 no 791 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1995 p.283 (résumé) ; - Gaceta Jurídica de la C.E. 1995 no 103 p.42-43 (résumé) ; - Buys, I.L.: Erkenning van in andere verdragsstaat gewezen uitspraak, Nederlands tijdschrift voor Europees recht 1995 p.139-140 ; - Buys, I.L.: Erkenning van in andere verdragsstaat gewezen uitspraak, Nederlands tijdschrift voor Europees recht 1995 p.139-140

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Jann

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Judgment of the Court (Fifth Chamber) of 14 March 1996

Roger van der Linden v Berufsgenossenschaft der Feinmechanik und Elektrotechnik. Reference for a preliminary ruling: Hof van Cassatie - Belgium. Brussels Convention - Interpretation of Article 47(1) - Documents to be produced by a party applying for enforcement - Obligation to produce proof of service of the judgment delivered - Possibility of producing proof of service after the application has been made. Case C-275/94.

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Convention on Jurisdiction and the Enforcement of Judgments ° Recognition and enforcement ° Procedure ° Application for an enforcement order ° Documents to be produced ° Service of the judgment for which an enforcement order is sought ° Production after the application has been lodged ° Whether permissible ° Conditions

(Brussels Convention of 27 September 1968, Art. 47(1))

Article 47(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 to be interpreted as meaning that, where the domestic procedural rules of the State in which application is made so permit, proof of service of the judgment delivered in the State of origin may be produced after the application has been made, in particular during the course of appeal proceedings subsequently brought by the party against whom enforcement is sought, provided that that party is given a reasonable period of time in which to satisfy the judgment voluntarily and that the party seeking enforcement bears all costs unnecessarily incurred.

In Case C-275/94,

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 Hof van Cassatie van Belgïe for a preliminary ruling in the proceedings pending before that court between

Roger Van der Linden

and

Berufsgenossenschaft der Feinmechanik und Elektrotechnik

on the interpretation of Article 47(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 17), 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 ° in its amended form ° p. 77),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.-P. Puissochet, J.C. Moitinho de Almeida (Rapporteur), C. Gulmann and P. Jann, Judges,

Advocate General: N. Fennelly,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

° Mr Van der Linden, by H. Geinger, of the Brussels Bar,

° the Berufsgenossenschaft der Feinmechanik und Elektrotechnik, by F. Fazzi-De Clercq, of the Ghent Bar,

° the German Government, by B. Lohr, Ministerialdirigent in the Federal Justice Ministry, acting as Agent,

° the Austrian Government, by F. Cede, Ambassador in the Federal Ministry of Foreign Affairs, acting as Agent,

° the Commission of the European Communities, by P. van Nuffel, of its Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 30 January 1996,

gives the following

Judgment

1 By order of 30 September 1994, received at the Court on 11 October 1994, the Hof van Cassatie van Belgïe (Belgian Court of Cassation) 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, two questions on the interpretation of Article 47(1) of that convention (OJ 1978 L 304, p. 17), 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 ° in its amended form ° p. 77, hereinafter "the Convention").

2 Those questions were raised in proceedings between Mr Van der Linden, a Belgian national, at the material time engaged in the resale of motor vehicles at Blankenberge (Belgium), and the Berufsgenossenschaft der Feinmechanik und Elektrotechnik, a German insurance company (hereinafter "the insurer"). Those proceedings concern the enforcement in Belgium of two judgments given in default on 25 May and 1 September 1976 by the Landgericht (Regional Court) Bonn, ordering Mr Van der Linden to pay the insurer, first, the sum of DM 45 428.25 together with interest at the rate of 4% from 12 March 1976 and, second, the sum of DM 2 190.75 together with interest at the rate of 4% from 20 August 1976.

3 The first of those sums represents the medical expenses incurred as a result of injuries caused to Mr Rudolf Lempges, a policy-holder with the insurer, in a collision which occurred in Germany on 5 February 1973 between his vehicle and that of Mr Van der Linden, which was being driven by a third person. The second sum represents the legal costs incurred in those proceedings.

4 On 2 February 1982, upon application by the insurer, those judgments were rendered enforceable in Belgium by decision of the Rechtbank van Eerste Aanleg (Court of First Instance), Bruges (hereinafter "the Rechtbank").

5 Mr Van der Linden lodged an appeal against that decision. He complained, in particular, that the Rechtbank had allowed the application for enforcement despite the fact that, contrary to the requirements of Article 47(1) of the Convention, no document had been produced to show that the default judgments had been served and were enforceable.

6 By judgment of 30 June 1993 the Rechtbank declared Mr Van der Linden' s appeal admissible but unfounded. It found that, although Mr Van der Linden had probably been entitled to plead that no proof of service of the default judgments of 25 May and 1 September 1976 had been produced when the ex parte application was made, the insurer had proceeded on 6 January 1987 (that is to say,

during the course of the appeal proceedings) to re-serve the judgments in accordance with the rules of Belgian domestic law. According to the Rechtbank, Article 47(1) of the Convention had thus been complied with, so that the judgment challenged should be upheld, even though it had been given on the basis of incomplete documentation.

7 Mr Van der Linden appealed against that decision to the Hof van Cassatie van Belgïe. He contended that, as a matter of law, the Rechtbank could not decide that the insurer could still regularize the procedure by effecting service during the course of the appeal proceedings, since it follows from Articles 46(1) and 47(1) of the Convention that a copy of the judgment and the record of service must be lodged at the same time as the application for enforcement of the judgment, and that service of the judgment must be effected before the application for enforcement is lodged.

8 The Hof van Cassatie van Belgïe decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> "1. Must Article 47(1) of the Convention of 27 September 1968 between the Member States of the European Economic Community on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters be interpreted as meaning that the court before which enforcement is sought may order the enforcement of a judgment given in another State only if, either together with the application or before a decision is given on the application, the document referred to in Article 47(1) and in particular proof of service are also produced?

2. If the answer to Question 1 is in the negative must that article be interpreted as meaning that, notwithstanding provisions of national law, the requirement to produce the document is not satisfied where the decision is served only after the application was made and the document evidencing service was drawn up and produced only after a decision was given by the court before which enforcement is sought on the application and the party against whom enforcement is sought has lodged an appeal?"

9 By those questions, the national court is essentially asking whether Article 47(1) of the Convention is to be interpreted as meaning that proof of service of the judgment of which enforcement is sought can be produced after the application has been lodged, in particular during the course of appeal proceedings subsequently brought by the party against whom that application is made.

10 The third paragraph of Article 33 of the Convention reads: "The documents referred to in Articles 46 and 47 shall be attached to the application", whereas Article 47(1) provides: "A party applying for enforcement shall also produce:

(1) documents which establish that, according to the law of the State of origin, the judgment is enforceable and has been served...".

11 Article 48 of the Convention further provides: "If the documents specified in point 2 of Articles 46 and 47 are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production."

12 Mr Van der Linden and the Austrian Government maintain that those provisions clearly show that proof of service of the judgment must be produced, at the latest, when the application is lodged. According to Mr Van der Linden, such an interpretation is confirmed by Article 48, since that article makes no provision for the setting of a time-limit, the acceptance of equivalent documents or the exemption of the applicant from his obligation to produce the documents specified in Article 47(1), whereas it expressly provides for that possibility in the case of the documents referred to in Articles 46(2) and 47(2).

13 That view cannot be accepted.

14 Although, according to the third paragraph of Article 33, the documents referred to in Articles

46 and 47 must be attached to the application, that does not mean that the domestic procedural rules, to which the first paragraph of Article 33 refers as regards determination of the time when the application is to be made and of the form which it is to take, may not provide for the procedure to be regularized by production of proof of service after the application has been lodged, provided that the objective pursued by the Convention in the third paragraph of Article 33 and Article 47(1) is respected.

15 In that regard, the experts' report on the Convention (OJ 1979 C 59, p. 1, at p. 55) states that the purpose of serving the judgment on the defendant is to inform him of the judgment given against him and to give him the opportunity to satisfy it voluntarily before enforcement can be applied for.

16 Domestic rules of procedure allowing the court to which application is made to take into consideration, in ex parte proceedings, proof that the judgment has been served are not incompatible with such an objective, provided that the party against whom enforcement is sought, who is not represented at this stage of proceedings, is given a reasonable period of time in which to satisfy the judgment voluntarily and that the party seeking enforcement bears all costs unnecessarily incurred.

17 Contrary to the arguments advanced by Mr Van der Linden, that interpretation of the Convention is not invalidated by Article 48 of the Convention. Whilst it is true that that article, which allows the court to specify a time for the production of certain documents, does not relate to proof of service as provided for in Article 47(1), it also provides that the court may accept equivalent documents. However, that last possibility is excluded as regards proof of service of the judgment of which enforcement is sought. As the Advocate General observes in point 18 of his Opinion, Article 48 is merely a special provision whose scope is limited to the sphere which it governs, and which cannot therefore attach any other limitations to the general principle that domestic procedural rules which respect the essential requirements of the Convention will normally be applicable.

18 It should be added that this reasoning also applies in relation to the possibility of regularizing the application by producing proof of service in the course of appeal proceedings subsequently brought by the party against whom execution was sought. At that stage, the enforcement procedure is inter partes, thereby affording an additional safeguard for the party against whom enforcement is sought.

19 In those circumstances, the reply to the national court must be that Article 47(1) of the Convention is to be interpreted as meaning that, where the domestic procedural rules so permit, proof of service of the judgment may be produced after the application has been made, in particular during the course of appeal proceedings subsequently brought by the party against whom enforcement is sought, provided that that party is given a reasonable period of time in which to satisfy the judgment voluntarily and that the party seeking enforcement bears all costs unnecessarily incurred.

Costs

20 The costs incurred by the German and Austrian Governments and the Commission of the European Communities, 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 proceedings 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 questions referred to it by the Hof van Cassatie van Belgïe by order of 30 September 1994, hereby rules:

Article 47(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 to be interpreted as meaning that, where the domestic procedural rules so permit, proof of service of the judgment may be produced after the application has been made, in particular during the course of appeal proceedings subsequently brought by the party against whom enforcement is sought, provided that that party is given a reasonable period of time in which to satisfy the judgment voluntarily and that the party seeking enforcement bears all costs unnecessarily incurred.

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FORM	Judgment
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JURCIT	41968A0927(01)-A47PT1 : N 1 - 19 41968A0927(01)-A33L3 : N 10 14 41968A0927(01)-A48 : N 11 17 41968A0927(01)-A33L1 : N 14 61994C0275-N18 : N 17
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SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	Dutch
OBSERV	Austria ; Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Belgium
NATCOUR	*A9* Hof van cassatie (Belgie), 1e kamer, arrest van 30/09/1994 (C.94.0058.N) ; - Larcier - Cassation 1994 no 1133 (résumé) ; - Pasicrisie belge 1994 I p.783-787 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1995 p.56 (résumé)
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PROCEDU Reference for a preliminary ruling

ADVGEN Fennelly

JUDGRAP Moitinho de Almeida

DATES of document: 14/03/1996
of application: 11/10/1994

Judgment of the Court (Third Chamber)
of 13 July 1995
Hengst Import BV v Anna Maria Campese.
Reference for a preliminary ruling: Arrondissementsrechtbank Zwolle - Netherlands.
Brussels Convention - Article 27 (2) - Concept of document instituting the proceedings or equivalent document.
Case C-474/93.

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Convention on Jurisdiction and the Enforcement of Judgments ° Recognition and enforcement ° Grounds for refusal ° Failure duly and timeously to serve the document instituting the proceedings on the absent defendant ° Concept of document instituting the proceedings or equivalent document ° Document enabling the defendant to assert his rights before an enforceable judgment is given ° Order for payment under Italian law served jointly with the plaintiff' s application ° Included

(Convention of 27 September 1968, Art. 27(2))

The term "document instituting the proceedings or equivalent document" within the meaning of Article 27(2) 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, means the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin. The decreto ingiuntivo within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application instituting the proceedings, must therefore be regarded as "the document which instituted proceedings or... an equivalent document" within the meaning of that provision, since their joint service starts time running for the defendant to oppose the order and since the plaintiff cannot obtain an enforceable order before the expiry of that time-limit.

In Case C-474/93,

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 Arrondissementsrechtbank te Zwolle (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Hengst Import BV

and

Anna Maria Campese

on the interpretation of Article 27(2) of the abovementioned 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 text ° p. 77),

THE COURT (Third Chamber),

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

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

° Hengst Import BV, by H.F. Hoogeveen, of the Zwolle Bar,

° Mrs Campese, by A.A. Renken, of the Zwolle Bar,

° the Italian Government, by Professor U. Leanza, Head of the Department for Legal Affairs of the Ministry of Foreign Affairs, assisted by O. Fiumara, Avvocato dello Stato, acting as Agent,

° the Commission of the European Communities, by P. van Nuffel, of the Legal Service, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 4 May 1995,

gives the following

Judgment

1 By order of 15 December 1993, received at the Court on 20 December 1993, the Arrondissementsrechtbank te Zwolle (Zwolle District Court) 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 preliminary question on the interpretation of Article 27(2) 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 and ° amended text ° p. 77; hereinafter "the Convention").

2 That question was raised in proceedings between Mrs Campese, domiciled in Italy, and Hengst Import BV ("Hengst"), whose registered office is in the Netherlands, concerning partly unpaid bills relating to shoe deliveries in 1987 and 1988.

3 Using the procedimento d' ingiunzione, a summary procedure for recovery of debts, Mrs Campese applied to the President of the Tribunale di Trani (Trani District Court, Italy) on 28 March 1989 for a decreto ingiuntivo (order for payment) requiring Hengst to pay her the sum of LIT 11 214 875 with statutory interest and costs.

4 The procedimento d' ingiunzione is a summary procedure which allows a creditor by ex parte application to obtain an enforceable court order against the debtor.

5 The creditor applies to the court, with all supporting written evidence, for an order against the debtor for payment of the sum claimed or delivery of the goods within a period of ° generally ° 20 days (Article 641 of the Italian Code of Civil Procedure, hereinafter "CPC"). The second paragraph of Article 643 provides that copies of the order and the application are to be served on the defendant. The third paragraph of Article 643 provides that that joint service marks the start of the proceedings. After service, the defendant may oppose the order until the end of the period set under Article 641 of the CPC for voluntary compliance.

6 In principle, the order is not enforceable without more: authorization of the court, given on the application of the plaintiff after expiry of the period for opposing the order, is necessary to make it enforceable. On application by the creditor, however, the order may be made enforceable on an interim basis where the debt is based on a bill of exchange, a banker' s draft, a cheque, a certificate of stock-market liquidation (in cases where a stockbroker has become insolvent) or an instrument made before a notary or other authorized public officer (Article 642(1) of the CPC). The court may also make the order enforceable on an interim basis if delay would give rise to a risk of serious harm (Article 642(2) of the CPC).

7 If the debtor opposes the order within the prescribed period, the ordinary inter partes civil procedure is followed (Article 645 of the CPC). Otherwise the court declares the order enforceable on application by the creditor. It must however first order fresh service where it is probable that the debtor was not aware of the order (Article 647 of the CPC).

8 In this case, the President of the Tribunale di Trani made an order for payment on 1 April 1989. On 23 May 1989, that order, together with the application, was served on Hengst in the Netherlands by the Office of the Public Prosecutor at the Arrondissementsrechtbank te Zwolle in accordance with the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters.

9 On 31 July 1989, noting that the decreto ingiuntivo had been duly served on the defendant and that the period of 20 days had expired without Hengst' s opposing it, the President of the Tribunale di Trani declared the order enforceable. That decision was recorded on 27 September 1989 in the form of a declaration by the clerk of the Tribunale di Trani, inscribed on the decreto ingiuntivo.

10 By order of 20 November 1990, the President of the Arrondissementsrechtbank te Zwolle authorized enforcement of the decreto ingiuntivo in accordance with Article 31 of the Brussels Convention, which provides: "A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there." On 6 December 1990, Mrs Campese served that order on Hengst.

11 Hengst opposed the order before the Arrondissementsrechtbank te Zwolle on the basis of Article 27(2) of the Convention which provides that a judgment is not to be recognized where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence. According to Hengst, service of the copy of the order together with that of the application cannot be considered to be a document which instituted the proceedings or an equivalent document within the meaning of that provision. The order for payment made by the Tribunale di Trani cannot therefore be recognized and enforced on the basis of the Convention.

12 Unsure of the interpretation to be given to the Convention, the Arrondissementsrechtbank referred the following question to the Court for a preliminary ruling:

> "Must a decreto ingiuntivo within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application instituting the proceedings or on its own, be regarded as 'the document which instituted the proceedings or... an equivalent document' within the meaning of Article 27(2) or Article 46(2) or the second paragraph of Article 20 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters?"

13 It must be noted first that only Article 27(2) of the Convention is to be interpreted, since Articles 20 and 46(2) of the Convention, also referred to in the question, are irrelevant to the main proceedings. Article 20 is addressed to the courts of the State in which the judgment was given and not to those of the State in which enforcement is sought. With regard to Article 46, the main proceedings do not appear to be concerned with the question whether, as required by that provision in the case of judgments in default, Mrs Campese, in the course of the procedure for recognition and enforcement, produced a document proving that the document which instituted the proceedings had been duly served in the original action.

14 It should also be noted that the order at issue is undoubtedly a judgment capable of recognition and enforcement under Title III of the Convention since there could have been an inter partes hearing in the State where it was made before recognition and enforcement were sought in the Netherlands (see Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, paragraph 13).

15 By virtue of Article 645 of the CPC, Hengst could have opposed the order before the Tribunale di Trani within 20 days of service of the decreto ingiuntivo, which would have converted the matter into ordinary contentious proceedings.

16 In order to construe the term "document which instituted the proceedings or... equivalent document" used in Article 27(2) of the Convention, it must first be noted that the provisions of the Convention as a whole, both in Title II on jurisdiction and in Title III on recognition and enforcement, manifest an intention to ensure that, within the scope of the objectives of the Convention, proceedings culminating in judicial decisions are conducted in such a way that the rights of the defence are observed (Denilauler, paragraph 13).

17 That requirement is particularly crucial where the defendant fails to respond. Article 27(2) is specifically intended to ensure that a judgment given in default can be recognized or enforced under the Convention only if the defendant had the opportunity to put his defence before the court which gave the judgment (Case 166/80 Klomps v Michel [1981] ECR 1593, paragraph 9, and Case C-123/91 Minalmet v Brandeis [1992] ECR I-5661, paragraph 18). To that end, the provision requires that the document which instituted the proceedings or an equivalent document be duly and timeously served on the defendant.

18 It is clear from Minalmet, paragraphs 19 and 20, that in order to enable the defendant to arrange for his defence, service of the document which instituted the proceedings or an equivalent document within the meaning of Article 27(2) of the Convention must be effected before an enforceable judgment is given in the State of origin.

19 It follows that the term "document which instituted the proceedings or... equivalent document" within the meaning of Article 27(2) of the Convention means the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin.

20 Since their joint service starts time running for the defendant to oppose the order and since the plaintiff cannot obtain an enforceable order before the expiry of the time-limit, the decreto ingiuntivo and the plaintiff' s application constitute a document which instituted the proceedings or an equivalent document within the meaning of Article 27(2) of the Convention.

21 It must be stressed that in this case the document which instituted the proceedings is constituted by the combination of the order to pay and the application. The decreto ingiuntivo is just a form which to be comprehensible must be read with the application. Conversely, service of the application alone would not enable the defendant to decide whether to defend the action since, without the decreto ingiuntivo, he would not know whether the court had granted or refused the application. Moreover, the requirement for joint service of the decreto ingiuntivo and the application is confirmed by Article 643 of the CPC, according to which it marks the start of the proceedings.

22 In its written observations to the Court, the Commission puts forward an argument against the recognition and enforcement of the judgment of the Tribunale di Trani which was not raised before the national courts. According to the final paragraph of Article 633 of the CPC, "the order may not be made if service on the defendant pursuant to Article 643 must be effected outside Italy or the territories under Italian sovereignty." Noting that in this case service was effected in the Netherlands, the Commission submits that the order cannot be a document which instituted the proceedings within the meaning of Article 27(2) of the Convention. Hence, the Netherlands court could refuse to recognize the order of the Tribunale di Trani on the ground of lack of proper service of the document which instituted the proceedings.

23 That argument cannot be upheld.

24 First, the sole aim of Article 27(2) is to ensure that a document which instituted the proceedings or an equivalent document was duly served on the defendant in sufficient time to enable him to arrange for his defence. It does not entitle the court of the State in which recognition is sought to refuse recognition and enforcement of a judgment because of a possible breach of provisions of the law of the State in which it was given other than those governing proper service.

25 Secondly, disregard by the court in which the judgment was given of the final paragraph of Article 633 of the CPC is neither one of the grounds for refusing recognition laid down elsewhere in Article 27 nor one of the situations exhaustively listed in Article 28 of the Convention, in which the court of the State in which recognition is sought is authorized to review the jurisdiction of the court of the State in which the judgment was given.

26 The reply to the national court should accordingly be that the decreto ingiuntivo within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application instituting the proceedings, must be regarded as "the document which instituted proceedings or... an equivalent document" within the meaning of Article 27(2) of the Convention.

Costs

27 The costs incurred by the Italian Government and the Commission of the European Communities, 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 (Third Chamber),

in answer to the question referred to it by the Arrondissementsrechtbank te Zwolle by judgment of 15 December 1993, hereby rules:

The decreto ingiuntivo within the meaning of Book IV of the Italian Code of Civil Procedure (Articles 633 to 656), together with the application instituting the proceedings, must be regarded as "the document which instituted proceedings or... an equivalent document" within the meaning of Article 27(2) 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.

DOCNUM 61993J0474

AUTHOR COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

FORM JUDGMENT

TREATY European Economic Community

TYPDOC 6 ; CJUS ; CASES ; 1993 ; J ; JUDGMENT

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SUB BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ; ENFORCEMENT OF JUDGMENTS

AUTLANG DUTCH

OBSERV Italy ; Commission

NATIONA NETHERLANDS

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JUDGRAP Moitinho de Almeida

DATES OF DOCUMENT.....: 13/07/1995
OF APPLICATION....: 20/12/1993

Judgment of the Court of 6 April 1995 Lloyd's Register of Shipping v Société Campenon Bernard. Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Article 5 (5) - Dispute arising out of the operations of a branch. Case C-439/93.

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Convention on Jurisdiction and the Enforcement of Judgments ° Special jurisdiction ° Dispute arising out of the operations of a branch, agency or other establishment ° Definition of "operations" ° Undertakings entered into by an ancillary establishment in the name of its parent body ° Undertakings to be performed abroad ° Included

(Convention of 27 September 1968, Art. 5(5))

The expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) of the Convention 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, does not presuppose that the undertakings giving rise to the dispute, entered into by a branch in the name of its parent body, are to be performed in the Contracting State in which the branch is established.

In Case C-439/93,

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 French Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

Lloyd' s Register of Shipping

and

Société Campenon Bernard

on the interpretation of Article 5(5) of the Convention of 27 September 1968, 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 ° the amended version ° p. 77),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn, C. Gulmann (Presidents of Chambers), C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward and J.-P. Puissochet, Judges,

Advocate General: M.B. Elmer,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Lloyd' s Register of Shipping, by Didier Le Prado and Luc Grellet, of the Paris Bar,

° Société Campenon Bernard, by André Moquet and Arnaud Lyon-Caen, of the Paris Bar,

° the French Government, by Catherine de Salins, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs and Nicolas Eybalin, Foreign Affairs Secretary of that Directorate, acting as Agents,

° the Greek Government, by Michail Apessos, Assistant Legal Adviser, and Vassileia Pelekou, Legal Agent, acting as Agents,

° the United Kingdom, by Lucinda Hudson, of the Treasury Solicitor' s Department, acting as Agent, assisted by S. Lee, Barrister,

° the Commission of the European Communities, by Marie-José Jonczy, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations made on behalf of Lloyd' s Register of Shipping, Société Campenon Bernard, represented by Elie Kleiman, of the Paris Bar, the Greek Government and the Commission of the European Communities at the hearing on 10 January 1995,

after hearing the Opinion of the Advocate General at the sitting on 21 February 1995,

gives the following

Judgment

1 By judgment of 26 October 1993, received at the Court on 10 November 1993, the French Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling 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 a question concerning the interpretation of Article 5(5) of that Convention, 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 ° the amended version ° p. 77, hereinafter the "Convention").

2 The question arose in proceedings, which concerned the proper performance of a contract to test concrete reinforcing steel, between Campenon Bernard, a company governed by French law and established in Clichy (France), and Lloyd' s Register of Shipping, an English registered charity, established in London.

3 At the end of November 1985, Campenon Bernard contacted the French branch of Lloyd' s Register in order to arrange for the testing of concrete reinforcing steel which it was to use in the construction of a motorway in Kuwait. The object was to check that the concrete reinforcing steel complied with a United States technical standard which had been added to the tender specifications by the Kuwait Ministry of Public Works and, if so, to have a certificate of compliance issued.

4 Following negotiations, in a letter of 3 December 1985 Campenon Bernard placed the order with the French branch of Lloyd' s Register. That letter specified that inspection would take place in Spain and would be carried out by the Spanish branch of Lloyd' s Register. It also stated that payment would be effected in pesetas. On 9 December 1985 the French branch communicated its acceptance.

5 Although the Spanish branch of Lloyd' s Register issued certificates of compliance, the Kuwait Ministry of Public Works refused to accept the concrete reinforcing steel on the ground that it did not comply with the United States technical standard.

6 On 2 February 1988 Campenon Bernard paid the invoice issued by the Spanish branch of Lloyd' s Register, having been pressed to do so by the French branch, but without prejudice to its rights. Alleging that Lloyd' s Register had wrongly stated that the steel complied with the United States technical standard, it then brought a claim for damages in the Tribunal de Commerce (Commercial Court), Paris, through the intermediary of the French branch.

7 Lloyd' s Register pleaded that the French courts lacked jurisdiction.

8 The plea was rejected at first instance on the basis of domestic law. It was only on appeal that the plea was examined in the light of Article 5(1) and (5) of the Convention, pursuant to which:

"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;

...

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated."

9 In its judgment of 5 June 1991 the Cour d' Appel (Court of Appeal), Paris, held that the case concerned the operations of the French branch of Lloyd' s Register within the meaning of Article 5(5) of the Convention and that consequently it had jurisdiction. It pointed out that Campenon Bernard had had dealings solely with the French branch, since it had negotiated and concluded the contract and subsequently demanded payment. It was not significant that the undertakings entered into had been performed in Spain. According to the Cour d' Appel, Article 5(5) of the Convention did not require that the undertakings entered into were to be performed in the Contracting State where the place of business was established. To allow such a restriction would render Article 5(5) redundant in relation to Article 5(1), which already gave jurisdiction to the courts for the place of performance of the obligation in question.

10 Lloyd' s Register applied for review inter alia on the ground that Article 5(5) had been infringed. In its view, a dispute arises out of the operations of a branch, agency or other establishment within the meaning of that provision only in so far as the undertakings entered into by that place of business are to be performed in the Contracting State where it is established.

11 In the circumstances, by judgment of 26 October 1993 the Cour de Cassation asked the Court whether,

"in the light of the first paragraph of Article 5 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the expression 'dispute arising out of the operations of a branch...' in Article 5(5) of the Convention necessarily presupposes that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State where the branch is established."

12 Lloyd' s Register contends that in its judgment in Case 33/78 Somafer v Saar Ferngas [1978] ECR 2183, at paragraph 13, the Court held that the rule set out in Article 5(5) applies to actions relating to undertakings which have been entered into by that establishment in the name of the parent body, provided that they are to be performed in the Contracting State of the ancillary establishment.

13 According to Lloyd' s Register, such a requirement as to place is in accordance with the interests of the proper administration of justice which underlie the provision. It is aimed at enabling an action that has its origin in the actual activities of a branch to be heard by the courts for the place in which it is situated on practical and evidential grounds.

14 Moreover, it states, since an ancillary establishment may not confine itself to transmitting orders to its parent body but must also take part in their performance, and in that connection the range of activity of an ancillary establishment is naturally confined to the territory of the Contracting State in which it has been set up, jurisdiction under Article 5(5) is justified only where the undertakings in question entered into by the ancillary establishment in the name of its parent body are to be performed on the territory of the Contracting State in which it is situated.

15 That argument cannot be accepted.

16 First, the actual wording of Article 5(5) of the Convention in no way requires that the undertakings negotiated by a branch should be performed in the Contracting State in which it is established in order for them to form part of its operations.

17 Secondly, the interpretation put forward by the appellant in the main proceedings would render Article 5(5) almost wholly redundant. Since Article 5(1) already allows the plaintiff to bring an action in contract in the courts for the place of performance of the obligation in question, Article 5(5) would duplicate that provision if it applied solely to undertakings entered into by a branch which were to be performed in the Contracting State in which the branch was established. At the very most it would create a second head of special jurisdiction where, within the Contracting State of the branch, the place of performance of the obligation in question was situated in a judicial area other than that of the branch.

18 Thirdly, it should be noted that an ancillary establishment is a place of business which has the appearance of permanency such as the extension of a parent body, has a management and is equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, whose seat is in another Contracting State, do not have to deal directly with such parent body (see Somafer, cited above, at paragraph 12).

19 A branch, agency or other ancillary establishment within the meaning of Article 5(5) is therefore an entity capable of being the principal, or even exclusive, interlocutor for third parties in the negotiation of contracts.

20 There does not necessarily have to be a close link between the entity with which a customer conducts negotiations and places an order and the place where the order will be performed. Accordingly, undertakings may form part of the operations of an ancillary establishment within the meaning of Article 5(5) of the Convention even though they are to be performed outside the Contracting State where it is situated, possibly by another ancillary establishment.

21 That interpretation is, moreover, in conformity with the objective of the special rules of jurisdiction. As the Jenard Report (OJ 1979 C 59, at p. 22) makes clear, those rules allow the plaintiff to sue the defendant in courts other than those of his domicile because there is a specially close connecting factor between the dispute and the court with jurisdiction to resolve it.

22 In the light of the foregoing considerations, the answer to the question referred by the Cour de Cassation must be that the expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) of the Convention does not presuppose that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State in which the branch is established.

Costs

23 The costs incurred by the French and Greek Governments, the United Kingdom and the Commission of the European Communities, 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,

in answer to the questions referred to it by the Cour de Cassation of the French Republic by judgment of 26 October 1993, hereby rules:

The expression "dispute arising out of the operations of a branch, agency or other establishment" in Article 5(5) 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, does not presuppose that the undertakings in question entered into by the branch in the name of its parent body are to be performed in the Contracting State in which the branch is established.

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JURCIT	41978A1009(01) : N 1 41968A0927(01)-A05PT5 : N 1 8 - 22 41968A0927(01)-A05PT1 : N 8 9 11 17 61978J0033-N13 : N 12 61978J0033-N12 : N 18
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SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
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NATCOUR	*A9* Cour de cassation (France), Chambre commerciale, financière et économique, arrêt du 26/10/1993 (1611 91-17.851) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1993 IV no 358 ; - La Semaine juridique - édition générale 1993 IV p.334 (résumé) ; - Recueil Dalloz Sirey 1993 IR. p.248 (résumé) ; - Journal du droit international 1994 p.426-428 ; - Revue critique de droit international privé 1994 p.802 (résumé) ; - Revue de jurisprudence de droit des affaires 1994 p.292 ; - Cahiers de droit européen 1996 p.203 (résumé) ; - International Litigation Procedure 1994

p.199-201 ; - X: Rapport de la Cour de Cassation 1993 p.421-422 ; - X: Revue de jurisprudence de droit des affaires 1994 p.292 ; - Sturlese, Bruno: Journal du droit international 1994 p.428-431 ; - X: Rapport de la Cour de Cassation 1993 p.421-422 ; - X: Revue de jurisprudence de droit des affaires 1994 p.292 ; - Sturlese, Bruno: Journal du droit international 1994 p.428-431

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PROCEDU Reference for a preliminary ruling

ADVGEN Elmer

JUDGRAP Schockweiler

DATES of document: 06/04/1995
of application: 10/11/1993

Judgment of the Court (Sixth Chamber) of 11 August 1995

Société d'Informatique Service Réalisation Organisation v Ampersand Software BV. Reference for a preliminary ruling: Court of Appeal, Civil Division (England) - United Kingdom. Brussels Convention - Articles 36, 37 and 38 - Enforcement - Judgment given on an appeal against authorization of enforcement - Appeal on a point of law - Stay of proceedings. Case C-432/93.

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Convention on Jurisdiction and the Enforcement of Judgments ° Enforcement ° Appeals ° Appeal in cassation or similar form of appeal on a point of law ° Decisions against which appeals can be brought ° Decision on a stay of proceedings by a court seised of an appeal against authorization of enforcement ° Excluded ° Jurisdiction of the court seised of an appeal on a point of law to decide on such a stay of proceedings ° None

(Brussels Convention of 27 September 1968, Arts 37(2) and 38, first para.)

Article 37(2) and the first paragraph of Article 38 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, are to be interpreted as meaning that a decision by which a court of a Contracting State, seised of an appeal against authorization to enforce an enforceable judgment of a court in another Contracting State, refuses a stay or lifts a stay previously ordered does not constitute a "judgment given on the appeal" within the meaning of the said Article 37(2) and therefore cannot be contested by an appeal in cassation or similar form of appeal limited to the examination of points of law only. Moreover, the court seised of such an appeal on a point of law under Article 37(2) of the Convention does not have jurisdiction to impose or reimpose such a stay.

In Case C-432/93,

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 Court of Appeal (Civil Division), London, for a preliminary ruling in the proceedings pending before that court between

Société d' Informatique Service Réalisation Organisation (SISRO)

and

Ampersand Software BV,

on the interpretation of Article 37(2) and the first paragraph of Article 38 of the said 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 ° as amended ° p. 77),

THE COURT (Sixth Chamber),

composed of: F.A. Schockweiler (Rapporteur), President of the Chamber, G.F. Mancini, C.N. Kakouris, J.L. Murray and G. Hirsch, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

° Société d' Informatique Service Réalisation Organisation (SISRO), by J. Marks, Barrister, instructed by Gregory, Rowcliffe & Milners, Solicitors,

° Ampersand Software BV, by Paris & Co., Solicitors,

° the United Kingdom, first by J.D. Colahan and then by S. Braviner, of the Treasury Solicitor' s Department, acting as Agents, assisted by A. Briggs, Barrister,

° the German Government, by J. Pirrung, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

° the Commission of the European Communities, by N. Khan, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Société d' Informatique Service Réalisation Organisation, Ampersand Software BV, represented by S. Oliver-Jones, Barrister, the United Kingdom, represented by L. Nicoll, of the Treasury Solicitor' s Department, acting as Agent, and A. Briggs, and the Commission at the hearing on 6 April 1995,

after hearing the Opinion of the Advocate General at the sitting on 8 June 1995,

gives the following

Judgment

Costs

44 The costs incurred by the German Government, the United Kingdom and the Commission of the European Communities, 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 (Sixth Chamber),

in answer to the questions referred to it by the Court of Appeal by order of 14 July 1993, hereby rules:

Article 37(2) and the first paragraph of Article 38 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, are to be interpreted as meaning that a decision by which a court of a Contracting State, seised of an appeal against authorization to enforce an enforceable judgment of a court in another Contracting State, refuses a stay or lifts a stay previously ordered cannot be contested by an appeal in cassation or similar form of appeal limited to the examination of points of law only. Moreover, the court seised of such an appeal on a point of law under Article 37(2) of the Convention does not have jurisdiction to impose or reimpose such a stay.

1 By order of 14 July 1993, received at the Court Registry on 3 November 1993, the Court of Appeal 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 (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 ° as amended ° p. 77) (hereinafter

"the Convention"), three questions on the interpretation of Article 37(2) and the first paragraph of Article 38 of the Convention.

2 Those questions arose in proceedings between Société d' Informatique Service Réalisation Organisation ("SISRO"), governed by French law and established in France, and Ampersand Software BV ("Ampersand"), a company incorporated under Netherlands law and established in the Netherlands.

3 It appears from the case-file that on 8 April 1987 SISRO obtained from the Tribunal de Grande Instance, Paris, a provisionally enforceable judgment against Ampersand for damages for infringement of its copyright in a computer program.

4 Ampersand appealed against that judgment to the Cour d' Appel, Paris, on the ground that the French courts did not have jurisdiction to hear the case and that the judgment of 8 April 1987 had been given on the basis of an expert' s report which was fraudulent. The appeal is still pending, the Cour d' Appel having stayed the proceedings pending the outcome of the criminal proceedings for forgery brought following complaints lodged by several defendants in the first instance proceedings, other than Ampersand, against the expert appointed by the Tribunal de Grande Instance.

5 Ampersand twice applied to the Paris Cour d' Appel for a stay of enforcement of the judgment of 8 April 1987. The applications were dismissed, the first on procedural grounds and the second on the merits.

6 On 15 December 1987 SISRO obtained in England, where Ampersand has assets, an order for registration of the judgment in order to enforce it in England, in accordance with Article 31 of the Convention.

7 On 8 April 1988 Ampersand appealed to the High Court of Justice against that order, arguing that it was contrary to public policy for a foreign judgment obtained by fraud to be enforced in England. Although the period of two months laid down in the second paragraph of Article 36 of the Convention for lodging such an appeal had expired, the High Court declared it admissible under national procedural rules.

8 By order of 9 October 1989, the High Court, pursuant to the first paragraph of Article 38 of the Convention, stayed Ampersand' s appeal against the English order for registration pending the determination of the appeal brought in France.

9 SISRO then appealed to the Court of Appeal against that order. In view of the second decision of the Paris Cour d' Appel refusing a stay of enforcement of the French judgment of 8 April 1987, the Court of Appeal authorized SISRO to request the High Court to lift the stay it had ordered on 9 October 1989.

10 On 23 January 1992 the High Court lifted the stay on the ground that the application for a stay of enforcement of the judgment of 8 April 1987 had been dismissed on the merits in France. It also dismissed Ampersand' s appeal against the order for registration of that judgment in England, on the ground that Ampersand had remedies available in France to establish that it had been obtained by fraud and that its enforcement in England was therefore not contrary to public policy.

11 Ampersand thereupon appealed to the Court of Appeal against those two decisions.

12 The Court of Appeal held that the High Court' s decision to dismiss the appeal against the order for registration of the French judgment in England could not be criticized, since no ground under Articles 27 and 28 of the Convention for refusing registration under Article 34 could be relied on.

13 In so far as concerned the lifting of the stay of proceedings, on the other hand, the Court of Appeal examined the question of its jurisdiction and considered whether, and to what extent, the court of the State in which enforcement is sought must, when assessing whether a stay of proceedings

is appropriate, take into account the outcome in the State of origin of an application for a stay of enforcement of the judgment in question and the reasons for the decision thereon.

14 The Court of Appeal was unsure how the Convention should be interpreted in that respect and referred the following three questions to the Court for a preliminary ruling:

> "1. Is an appellant in the United Kingdom who has lodged an appeal under Article 36 of the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters entitled to seek the relief provided by Article 38, if he is unable to advance successfully one of the reasons specified in Articles 27 and 28 for refusal of an application for registration for enforcement of a judgment given in another Contracting State, and, if so, what are the 'proceedings' in respect of which a stay may be ordered?

2. Is the fact that there has been a refusal of a stay on the enforcement of a judgment in the State where the judgment was given

(i) relevant to and/or

(ii) decisive of

the way in which the power to stay registration proceedings provided for by Article 38 of the Convention should be exercised?

3. If one of the courts referred to in the first paragraph of Article 37 of the Convention

(a) refuses to grant a stay, or

(b) removes a stay imposed

under Article 36 of the Convention, does the court to which an appeal on a point of law is made under the second paragraph of Article 37 have the power to impose or reimpose such a stay?"

15 It must be observed to begin with that since the appeal against the registration order was lodged after the period of two months laid down in the second paragraph of Article 36 of the Convention had expired (see paragraph 7 above), the Court is answering the questions referred to it without prejudice to the issue whether the court with which the appeal was lodged could nevertheless declare it admissible pursuant to national procedural rules.

16 It should also be noted that Articles 36, 37 and 38 of the Convention, referred to in the national court' s questions, form part of Section 2 of Title III of the Convention, which deals with the enforcement of judgments which are enforceable in the Contracting State in which they have been given.

17 Under Article 31 of the Convention, such judgments are to be enforced in another Contracting State after having been declared enforceable there or, in the United Kingdom, registered for enforcement, on application by any interested party, by the court with jurisdiction specified in Article 32 of the Convention and in accordance with the rules in Article 33 et seq. of the Convention. In England and Wales, the application is made to the High Court, except in the case of a maintenance judgment.

18 Article 34 of the Convention provides that the party against whom enforcement is sought cannot submit observations at this stage. Moreover, the application for enforcement can be refused only for one of the reasons set out in Articles 27 and 28 of the Convention; under no circumstances may the foreign judgment be reviewed as to its substance.

19 If enforcement has been authorized, the party against whom enforcement is sought may, under Article 36 of the Convention, appeal against that decision within one month of service thereof. The period is two months if the party is domiciled in a Contracting State other than that in which

the decision authorizing enforcement was given. No extension of time may be granted on account of distance.

20 Under Article 37(1) of the Convention, in England and Wales, the appeal is to be lodged, in accordance with the rules governing procedure in contentious matters, with the High Court, except in the case of a maintenance judgment. Article 39 provides that during the time allowed for an appeal and until any appeal is determined, the only measures which may be taken are protective measures against the property of the person against whom enforcement is sought.

21 Under Article 37(2) of the Convention, the judgment given on the appeal may be contested only by an appeal in cassation or similar form of appeal. In the case of the United Kingdom, Article 37(2) specifies that the judgment can be contested only "by a single further appeal on a point of law". Pursuant to the Civil Jurisdiction and Judgments Act 1982, whose object is to bring the Convention into force in the United Kingdom, the court with jurisdiction for England is the Court of Appeal.

22 Under Article 38 of the Convention,

> "The court with which the appeal under Article 37(1) is lodged may, on the application of the appellant, stay the proceedings if an ordinary appeal has been lodged against the judgment in the State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.
>
> ...
>
> The court may also make enforcement conditional on the provision of such security as it shall determine."

23 As regards the particular circumstances in which the present reference was made, it should be noted that an "appeal on a point of law" has been lodged with the Court of Appeal, in accordance with Article 37(2) of the Convention, against the High Court' s decision on the appeal brought under Article 36 of the Convention against the registration for enforcement in England of an enforceable judgment given in another Contracting State.

24 In that appeal the Court of Appeal is asked by the party against whom enforcement is sought in England to rule both on the lawfulness of the High Court' s dismissal of the appeal against the order for registration and on whether the High Court was right to lift the stay of proceedings previously ordered.

25 The Court of Appeal' s uncertainty as to the interpretation of the Convention extends, however, only to the stay of proceedings referred to in the first paragraph of Article 38. It thus asks the Court of Justice whether the court with which an appeal in cassation or similar appeal on a point of law is lodged under Article 37(2) has power to impose or reimpose a stay under the first paragraph of Article 38 (Question 3). If so, it requests the Court to specify the extent and conditions of exercise of the power to grant or refuse such a stay (Questions 1 and 2).

26 In those circumstances, Question 3 should be examined first.

Question 3

27 By this question the national court seeks essentially to know whether Article 37(2) and the first paragraph of Article 38 of the Convention are to be interpreted as meaning, firstly, that a decision by which a court of a Contracting State, seised of an appeal against authorization to enforce an enforceable judgment given in another Contracting State, refuses a stay or lifts a stay previously ordered can be contested by an appeal in cassation or similar form of appeal limited to the examination of points of law only and, secondly, that the court seised of such an appeal on a point of law under Article 37(2) of the Convention has jurisdiction to impose or reimpose

such a stay of proceedings.

28 In answering that question, it must first be noted that the experts' reports written when the Convention was drawn up and when it was amended emphasized the need for Article 37(2) of the Convention to be interpreted strictly: "An excessive number of avenues of appeal might be used by the losing party purely as delaying tactics, and this would constitute an obstacle to the free movement of judgments which is the object of the Convention" (Jenard Report, OJ 1979 C 59, p. 52). The Convention "limit[s] the number of appeals, in the interests of rapid enforcement, to a single appeal which may involve a full review of the facts and a second one limited to points of law" (Schlosser Report, OJ 1979 C 59, p. 133). "Only the court seised of the appeal [the first appeal under Articles 36 and 37(1) of the Convention] has the power to stay the proceedings" (Jenard Report, p. 52).

29 Moreover, the Court has on several occasions favoured a restrictive interpretation of the phrase "judgment given on the appeal" in Article 37(2) of the Convention.

30 In Case 258/83 Brennero v Wendel [1984] ECR 3971, paragraph 15, it held that under the general scheme of the Convention and in the light of one of its principal objectives, namely to simplify procedures in the State in which enforcement is sought, that provision cannot be extended so as to enable an appeal in cassation to be lodged against a judgment other than that given on the appeal, such as a preliminary or interlocutory order requiring preliminary inquiries to be made.

31 Similarly, in Case C-183/90 van Dalfsen v van Loon [1991] ECR I-4743, paragraph 21, the Court held that since the object of the Convention is to facilitate the free movement of judgments by establishing a simple and rapid procedure in the Contracting State in which the enforcement of a foreign judgment is sought, the expression "judgment given on the appeal" in Article 37(2) of the Convention is to be understood as denoting only judgments deciding on the substance of the appeal lodged against an order for the enforcement of a judgment given in another Contracting State, to the exclusion of judgments given under Article 38.

32 The Court accordingly held in that judgment that a decision taken under Article 38 of the Convention by which the court seised of an appeal against an order for the enforcement of a judgment given in another Contracting State has refused to stay the proceedings does not constitute a "judgment given on the appeal" within the meaning of Article 37(2) of the Convention, and may not, therefore, be contested by an appeal in cassation or similar form of appeal.

33 That interpretation applies to any decision on a stay of proceedings taken by the court with which an appeal has been lodged against the authorization of enforcement or registration for enforcement of a judgment given in another Contracting State, including a decision to lift a stay previously ordered.

34 Both the wording of the Convention and its general scheme show that it distinguishes between the "court with which the appeal... is lodged" within the meaning of the first paragraph of Article 38 and the court in which "the judgment given on the appeal" is contested within the meaning of Article 37(2), the former term relating to Articles 36 and 37(1) to the exclusion of Article 37(2).

35 Furthermore, since the effect of procedural issues is to delay the enforcement in one Contracting State of a judgment given in another Contracting State, they represent a derogation from the Convention' s object of establishing a simple and rapid machinery for the enforcement of judgments which are enforceable in the State of origin, and hence the rules relating to them must be interpreted strictly.

36 For the same reasons, the court referred to in Article 37(2) of the Convention does not have jurisdiction to decide on a stay of proceedings under Article 38.

37 The United Kingdom observes, however, that that court must have jurisdiction to decide on the stay provided for in the Convention, if it possesses that power under its own procedural rules.

It bases this argument on the specific features of its own legal system. In most of the original Contracting States, if a court hearing an appeal in cassation quashes the decision of an inferior court, it simply remits the case to another court for a decision on the substance; the latter court may then stay the proceedings under Article 38 of the Convention. In the United Kingdom, on the other hand, the superior court cannot remit the case, but always decides on the substance. It must therefore, in the United Kingdom' s view, itself be able to decide on the stay.

38 That argument cannot be accepted.

39 As the Advocate General has explained in point 37 of his Opinion, it follows from the case-law (see Joined Cases 9/77 and 10/77 Bavaria Fluggesellschaft and Germanair v Eurocontrol [1977] ECR 1517, paragraph 4, and Case 148/84 Deutsche Genossenschaftsbank v Brasserie du Pêcheur [1985] ECR 1981, paragraph 17), firstly, that the Convention established an enforcement procedure which constitutes an autonomous and complete system independent of the legal systems of the Contracting States and, secondly, that the principle of legal certainty in the Community legal system and the objectives of the Convention in accordance with Article 220 of the EEC Treaty, which is at its origin, require a uniform application in all Contracting States of the Convention rules and the relevant case-law of the Court.

40 Moreover, the adjustments required for the accession of the United Kingdom to the Convention because of the particular features of that State' s legal system were effected by the Convention of 9 October 1978.

41 In those circumstances, a court in the United Kingdom with which an appeal on a point of law has been lodged, within the meaning of Article 37(2) of the Convention, cannot have more extensive powers under Article 38 of the Convention than any other court of a Contracting State which, as a court of cassation, restricts its review to points of law without reappraising the facts of the case. Uniform application of the Convention in all the Contracting States precludes parties against whom enforcement is sought in some States from enjoying greater procedural possibilities than in other Contracting States for delaying the enforcement of an enforceable judgment given in the Contracting State of origin.

42 In view of all the foregoing, the reply to Question 3 should be that Article 37(2) and the first paragraph of Article 38 of the Convention must be interpreted as meaning that a decision by which a court of a Contracting State, seised of an appeal against authorization to enforce an enforceable judgment of a court in another Contracting State, refuses a stay or lifts a stay previously ordered cannot be contested by an appeal in cassation or similar form of appeal limited to points of law only. Moreover, the court seised of such an appeal on a point of law under Article 37(2) of the Convention does not have jurisdiction to impose or reimpose such a stay.

Questions 1 and 2

43 In view of the answer to Question 3, there is no need to rule on Questions 1 and 2 submitted by the national court.

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FORM	Judgment

TREATY European Economic Community

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41968A0927(01)-A39 : N 20
61983J0258-N15 : N 30
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SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

AUTLANG English

OBSERV Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA United Kingdom

NATCOUR *A9* Court of Appeal (England), Civil Division, order of 14/07/1993 and judgment of 15/07/1993 ; - Commonwealth Law Bulletin 1994 p.458-459 ; - International Litigation Procedure 1994 p.55-64

NOTES Idot, Laurence: Europe 1995 Octobre Comm. no 371 p.18 ; X: Giustizia civile 1996 I p.304-305 ; Hartley, Trevor: Article 38: Power to Grant Stays in Enforcement Proceedings, European Law Review 1996 p.169-171 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1995), Schweizerische Zeitschrift für internationales und europäisches Recht 1996 p.157 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1996 p.610-613 ; Gaudemet-Tallon,

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PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Schockweiler

DATES of document: 11/08/1995
of application: 03/11/1993

**Judgment of the Court
of 19 September 1995
Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company. Reference for a preliminary ruling: Corte suprema di Cassazione - Italy. Brussels Convention - Article 5 (3) - Place where the harmful event occurred. Case C-364/93.**

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Convention on jurisdiction and the enforcement of judgments ° Special jurisdiction ° Jurisdiction in "matters relating to tort, delict or quasi-delict" ° Place where the harmful event occurred ° Plaintiff' s option ° Place where the damage occurred and the place of the event giving rise to it ° Scope ° Place where financial damage was suffered in consequence of initial damage arising and suffered by a victim in another Contracting State ° Excluded

(Brussels Convention of 27 September 1968, Article 5(3))

The term "place where the harmful event occurred" in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage folowing upon initial damage arising and suffered by him in another Contracting State. Although that term may cover both the place where the damage occurred and the place of the event giving rise to it, it cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.

In Case C-364/93,

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 Corte Suprema di Cassazione for a preliminary ruling in the proceedings pending before that court between

Antonio Marinari

and

Lloyds Bank plc

and

Zubaidi Trading Company

on the interpretation of Article 5(3) of the 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, of Ireland, and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and ° amended text ° p. 77) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler, P.J.G. Kapteyn and P. Jann (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida (Rapporteur), J.-P. Puissochet, G. Hirsch, H. Ragnemalm and L. Sevon, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

° Antonio Marinari, the plaintiff in the main proceedings, by Francesco Vassalli, Antonio Piras and Maurizio Bonistalli, of the Pisa Bar, Francesco Olivieri, of the Florence Bar, and Laurent Mosar, of the Luxembourg Bar,

° Lloyds Bank plc, the defendant in the main proceedings, by Cosimo Rucellai and Enrico Adriano Raffaelli, of the Milan Bar,

° Zubaidi Trading Company, party joined in the main proceedings, by Professor Sergio Spadari, of the Rome Bar,

° the German Government, by Professor Christof Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

° the United Kingdom, by S. Lucinda Hudson, of the Treasury Solicitor' s Department, acing as Agent, and T.A.G. Beazley, Barrister,

° the Commission of the European Communities, by Pieter Van Nuffel, of its Legal Service, acting as Agent, and Alberto dal Ferro, of the Vicenza Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff, the defendant and the intervener in the main proceedings and the Commission of the European Communities at the hearing on 15 June 1994 and, following the order of 25 January 1995 reopening the oral procedure, at the hearing on 3 May 1995,

after hearing the Opinion of Advocate General Darmon at the sitting on 21 December 1994 and the Opinion of Advocate General Léger at the sitting on 18 May 1995,

gives the following

Judgment

1 By order of 21 January 1993, received at the Court on 26 July 1993, the Corte Suprema di Cassazione (Supreme Court of Cassation) 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 (OJ 1978 L 304, p. 36), as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, of Ireland, and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and ° amended text ° p. 77) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1, hereinafter "the Convention") a question on the interpretation of Article 5(3) of the Convention.

2 That question was raised in the course of proceedings between Mr Marinari, who is domiciled in Italy, and Lloyds Bank, whose registered office is in London.

3 In April 1987, Mr Marinari lodged with a Manchester branch of Lloyds Bank a bundle of promissory notes with a face value of US (752) 500 000, issued by the Negros Oriental province of the Republic of the Philippines in favour of Zubaidi Trading Company of Beirut. The bank staff, after opening the envelope, refused to return the promissory notes and advised the police of their existence, stating them to be of dubious origin, which led to Mr Marinari' s arrest and sequestration of the promissory notes.

4 Having been released by the English authorities, Mr Marinari sued Lloyds Bank in the Tribunale di Pisa, seeking compensation for the damage caused by the conduct of its staff. The documents forwarded by the national court show that Mr Marinari is claiming not only payment of the face value of the promissory notes but also compensation for the damage he claims to have suffered as a result of his arrest, breach of several contracts and damage to his reputation. Lloyds Bank objected

that the Italian court lacked jurisdiction on the ground that the damage constituting the basis of jurisdiction ratione loci had occurred in England. Mr Marinari, supported by Zubaidi Trading Company, applied to the Corte Suprema di Cassazione for a prior ruling on the question of jurisdiction.

5 In its order for reference, the Corte Suprema di Cassazione raises the issue of the jurisdiction of the Italian courts in relation to Article 5(3) of the Convention, as interpreted by the Court of Justice.

6 It observes that, in Case 21/76 Bier v Mines de Potasse d' Alsace [1976] ECR 1735, the Court considered that the term "place where the harmful event occurred" was to be understood as intended to cover both the place where the damage occurred and the place of the event giving rise to it, and that Mr Marinari contends that the expression "damage occurred" relates not only to the physical result but also to damage in the legal sense, such as a decrease in a person' s assets.

7 It also notes that in Case C-220/88 Dumez France and Tracoba v Hessische Landesbank [1990] ECR I-49, the Court held that account should not be taken, for the purpose of determining jurisdiction under Article 5(3) of the Convention, of indirect financial damage. The national court, in those circumstances, questions whether that also applies where the harmful effects alleged by the plaintiff are direct, not indirect.

8 In those circumstances, it decided to stay the proceedings pending a preliminary ruling on the following question:

> "In applying the jurisdiction rule laid down in Article 5(3) of the Brussels Convention of 27 September 1968, as interpreted in the judgment of the Court of Justice of the European Communities of 30 November 1976 in Case 21/76 Handelskwekerij G.J. Bier BV v Mines de Potasse d' Alsace SA [1976] ECR 1735, is the expression 'place where the harmful event occurred' to be taken to mean only the place in which physical harm was caused to persons or things, or also the place in which the damage to the plaintiff' s assets occurred?"

9 By way of derogation from the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the State where the defendant is domiciled are to have jurisdiction, Article 5 provides:

> "A person domiciled in a Contracting State may, in another Contracting State, be sued:
>
> ...
>
> 3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;
>
> ... ."

10 As the Court has held on several occasions (in Mines de Potasse d' Alsace, cited above, paragraph 11, Dumez France and Tracoba, cited above, paragraph 17, and Case C-68/93 Shevill and Others v Presse Alliance [1995] ECR I-415, paragraph 19), that rule of special jurisdiction, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant' s domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

11 In Mines de Potasse d' Alsace (paragraphs 24 and 25) and Shevill (paragraph 20), the Court held that where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred" in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving

rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.

12 In those two judgments, the Court considered that the place of the event giving rise to the damage no less than the place where the damage occurred could constitute a significant connecting factor from the point of view of jurisdiction. It added that to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness.

13 The choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it. Such extension would negate the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction. It would lead, in cases other than those expressly provided for, to recognition of the jurisdiction of the courts of the plaintiff' s domicile, a solution which the Convention does not favour since, in the second paragraph of Article 3, it excludes application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a Contracting State.

14 Whilst it has thus been recognized that the term "place where the harmful event occurred" within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.

15 Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.

16 The German Government submits, however, that, in interpreting Article 5(3) of the Convention, the Court should take account of the applicable national law on non-contractual civil liability. Thus, where, under that law, an actual adverse effect on goods or rights is a precondition for liability (as, for instance, under paragraph 823(1) of the Buergerliches Gesetzbuch ° the German Civil Code), the "place where the harmful event occurred" means both the place of that adverse effect and the place of the event giving rise to it. On the other hand, it considers that where national law does not make redress conditional upon an actual adverse effect upon property or a right (as, for instance, under Article 1382 of the French Civil Code and Article 2043 of the Italian Civil Code), the victim may choose between the place of the event giving rise to the damage and the place where he suffered financial damage.

17 The German Government also considers that that interpretation would not be such as to lead to a multiplication of courts enjoying jurisdiction. Nor would it lead systematically to the result that the court for the place where the financial damage was suffered would be the same as the court of the plaintiff' s domicile. Moreover, it would not enable the victim, by moving his assets, to determine the competent court, since account would be taken of the location of his assets when the obligation of reparation arose. Finally, that interpretation has the advantage of not according preference to the laws of certain States at the expense of others.

18 It must, however, be noted that the Convention did not intend to link the rules on territorial jurisdiction with national provisions concerning the conditions under which non-contractual civil liability is incurred. Those conditions do not necessarily have any bearing on the solutions adopted by the Member States regarding the territorial jurisdiction of their courts, such jurisdiction being founded on other considerations.

19 There is no basis for interpreting Article 5(3) of the Convention by reference to the applicable rules on non-contractual civil liability, as proposed by the German Government. That interpretation is also incompatible with the objective of the Convention, which is to provide for a clear and certain attribution of jurisdiction (see Case 241/83 Roesler v Rottwinkel [1985] ECR 99, paragraph 23, and Case C-26/91 Handte v Traitments Mécano-Chimiques des Surfaces [1992] ECR II-3967, paragraph 19). The delimitation of jurisdiction would then depend on uncertain factors such as the place where the victim' s assets suffered subsequent damage and the applicable rules on civil liability.

20 Finally, as regards the argument as to the relevance of the location of the assets when the obligation to redress the damage arose, the proposed interpretation might confer jurisdiction on a court which had no connection at all with the subject-matter of the dispute, whereas it is that connection which justifies the special jurisdiction provided for in Article 5(3) of the Convention. Indeed, the expenses and losses of profit incurred as a result of the initial harmful event might be incurred elsewhere so that, as far as the efficiency of proof is concerned, that court would be entirely inappropriate.

21 The answer to the national court' s question should therefore be that the term "place where the harmful event occurred" in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.

Costs

22 The costs incurred by the United Kingdom, the German Government and the Commission of the European Communities, 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,

in answer to the question referred to it by the Italian Corte Suprema di Cassazione by order of 21 January 1993, hereby rules:

The term "place where the harmful event occurred" in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.

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JURCIT	41978A1009(01) : N 1 41982A1025(01) : N 1 41968A0927(01)-A05PT3 : N 1 - 21 61976J0021 : N 6 8 61988J0220 : N 7 41968A0927(01)-A02L1 : N 9 12 13 61976J0021-N11 : N 10 61988J0220-N17 : N 10 61993J0068-N19 : N 10 61976J0021-N24 : N 11 61976J0021-N25 : N 11 61993J0068-N20 : N 11 61983J0241-N23 : N 19 61991J0026-N19 : N 19
CONCERNS	Interprets 41968A0927(01) -A05PT3
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Italian
OBSERV	United Kingdom ; Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Italy
NATCOUR	*A9* Corte di Cassazione, ordinanza del 21/01/1993 05/07/1993 (562 - RG 3142/92 3991/92 5434/92) ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1993 p.375-376 (résumé) ; *P1* Corte di Cassazione, Sezioni unite civili, sentenza del 20/06/1996 04/11/1996 (9533/96 - RG 3142/92 3991/92 5434/92) ; - Il massimario del Foro italiano 1996 Col.842 (résumé) ; - Giurisprudenza italiana 1997 I Sez.I Col.736-740 ; - Giustizia civile 1997 I p.3145-3146 ; - Rivista di diritto internazionale privato e processuale 1997 p.722-726 ; - Bulleting of Legal Developments 1997 p.206-207 (résumé) ; - X: Giurisprudenza italiana 1997 I Sez.I Col.737-738 ; - Mazzarini, Lucia: Giustizia civile 1997 I p.3146-3159
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PROCEDU Reference for a preliminary ruling

ADVGEN Darmon Léger

JUDGRAP Moitinho de Almeida

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**Judgment of the Court
of 28 March 1995
Kleinwort Benson Ltd v City of Glasgow District Council. Reference for a preliminary ruling: Court of Appeal (England) - United Kingdom. Brussels Convention - National legislation modelled on it - Interpretation - Questions submitted for a preliminary ruling - Lack of jurisdiction of the Court. Case C-346/93.**

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Convention on jurisdiction and the enforcement of judgments ° Interpretation by the Court ° Interpretation sought in regard to legal proceedings to be determined by the application of national legislation merely modelled on the Convention and not requiring the national court to apply the interpretation given by the Court ° Lack of jurisdiction of the Court

(Convention of 27 September 1968; Protocol of 3 June 1971)

The function of the Court, as envisaged by 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, is that of a court whose judgments are binding on the national court. That function would be altered if the replies given by the Court to the courts of the Contracting States were permitted to be purely advisory and without binding effect.

However, that would be the case if the Court were to declare that it had jurisdiction to provide interpretation of the Convention requested of it by a national court before which proceedings are pending and to which not the Convention but national legislation is applicable, where that legislation takes the Convention as a model, by reproducing certain of its provisions but without incorporating them as such into the domestic legal order, and expressly providing for the possibility of adopting modifications in order to produce divergence in relation to Convention provisions as interpreted by the Courts, and where that legislation merely requires national courts in applying the Convention provisions to have regard to the Court' s interpretation of the corresponding provisions of the Convention without giving binding effect to that interpretation.

For that reason the Court does not have jurisdiction to give a preliminary ruling on a question arising in such a context.

In Case C-346/93,

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 Court of Appeal for a preliminary ruling in the proceedings pending before that court between

Kleinwort Benson Ltd

and

City of Glasgow District Council,

on the interpretation of Article 5(1) and (3) of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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 ° text of Convention as amended ° p. 77),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn and C. Gulmann, Presidents of Chambers, G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida,

J.L. Murray, D.A.O. Edward, J.-P. Puissochet and G. Hirsch, Judges,

Advocate General: G. Tesauro,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Kleinwort Benson Ltd, by T. Beazley, Barrister, instructed by R. Baggallay and K. Anderson, Solicitors,

° City of Glasgow District Council, by M. Burton QC and J. Tecks, Barrister, instructed by Lewis Silkin, Solicitors,

° the United Kingdom, by J.D. Colahan of the Treasury Solicitor' s Department, acting as Agent, assisted by D. Lloyd Jones, Barrister,

° the German Government, by C. Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

° the Spanish Government, by A.J. Navarro Gonzalez, Director General of Community legal and institutional coordination at the Ministry of Foreign Affairs, and by G. Calvo Díaz, State Advocate, of the State Legal Service for matters before the Court of Justice, acting as Agents,

° the French Government, by C. de Salins, Deputy Director of the Directorate of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent,

° the Commission of the European Communities, by N. Khan and X. Lewis, both of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Kleinwort Benson Ltd, represented by T. Beazley, the City of Glasgow District Council, represented by M. Burton and J. Tecks, the United Kingdom, represented by S. Braviner, of the Treasury Solicitor' s Department, acting as Agent, assisted by D. Lloyd Jones, the Spanish Government, represented by G. Calvo Díaz, and of the Commission, represented by N. Khan and X. Lewis, at the hearing on 22 November 1994,

after hearing the Opinion of the Advocate General at the sitting on 31 January 1995,

gives the following

Judgment

1 By decision of 18 May 1993 received at the Court on 6 July 1993, the Court of Appeal 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) and (3) of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), 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 ° text of the Convention as amended ° p. 77, hereinafter "the Convention").

2 That question was raised in the course of proceedings between Kleinwort Benson Ltd (hereinafter "Kleinwort Benson"), a bank established in England, and the City of Glasgow District Council (hereinafter "the District Council") concerning the determination of the court with jurisdiction to hear an action for restitution of sums of money paid in performance of contracts declared void.

3 It is apparent from the documents before the Court that as from 7 September 1982 Kleinwort Benson

and the District Council entered into seven interest-rate swap contracts under which Kleinwort Benson, between 9 March 1983 and 10 September 1987, made payments to the District Council totalling 807 230.31.

4 On 24 January 1991 the House of Lords held in a test case that it was ultra vires local authorities such as the District Council to enter into contracts of that kind and that the contracts entered into were consequently void ab initio owing to the lack of capacity of one of the parties.

5 On 6 September 1991 Kleinwort Benson brought an action against the District Council founded on unjust enrichment before the Commercial Court of the Queen' s Bench Division of the Court of Justice for restitution of sums of money paid in performance of contracts entered into between the parties.

6 The District Council challenged the jurisdiction of the English courts to determine Kleinwort Benson' s claim arguing that the action for restitution had to be brought before the courts of the place of the defendant' s domicile in Scotland.

7 On the other hand, Kleinwort Benson argued before the High Court that the District Council was being sued either "in matters relating to a contract" or "in matters relating to tort, delict or quasi-delict", and that the English courts therefore had jurisdiction under either Article 5(1) or Article 5(3) of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act").

8 The principal purpose of the 1982 Act is to render the Convention applicable in the United Kingdom, but it also provides for the allocation of civil jurisdiction as between the separate jurisdictions within the United Kingdom (England and Wales, Scotland, Northern Ireland).

9 To that end Schedule 4 to the 1982 Act contains certain provisions modelled on the Convention. Thus, Article 2 enshrines the principle that the courts of the defendant' s domicile are to have jurisdiction. Article 5(1) and (3) respectively confer special jurisdiction in matters relating to a contract on the courts for the place of performance of the obligation in question and, in matters relating to tort, delict or quasi-delict, on the courts for the place where the harmful event occurred or in the case of a threatened wrong is likely to occur.

10 Section 16(3)(a) provides that, in determining any question as to the meaning or effect of any provision contained in Schedule 4, "regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title."

11 Section 47(1) and (3) makes provision for amendments in particular of Schedule 4 "in view of any principle laid down by the European Court in connection with Title II of the 1968 Convention or of any decision of that court as to the meaning or effect of any provision of that Title", including "modifications designed to produce divergence between any provision of Schedule 4... and a corresponding provision of Title II of the 1968 Convention."

12 On 27 February 1992 the High Court ruled that it did not have jurisdiction to determine the action. On 26 March 1992 Kleinwort Benson appealed against that decision to the Court of Appeal.

13 Considering that the resolution of the dispute required a decision on the scope of Article 5(1) and (3) of Schedule 4 to the 1982 Act and on the interrelationship between those two provisions, whose wording was substantially the same as that of Article 5(1) and (3) of the Convention, and on whose interpretation the Court of Justice had not yet ruled, the Court of Appeal on 18 May 1993 decided to stay the proceedings and refer the following question to the Court for a preliminary ruling under Article 3 of the Protocol of 3 June 1971:

> "Where proceedings are brought against a defendant for restitution in respect of a sum of money paid to that defendant by the plaintiff under a contract which is a nullity because one of the

parties did not have capacity to enter into it,

(a) is the defendant being sued 'in matters relating to a contract' within the meaning of Article 5(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed in Brussels on 27 September 1968 (as amended)? or

(b) is the defendant being sued 'in matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of the Convention?"

Jurisdiction of the Court

14 It is common ground that the purpose of the interpretation which the Court is asked to give of the Convention provisions at issue is to enable the national court to decide on the application not of the Convention but of the national law of the contracting state to which that court belongs.

15 Under those circumstances the question arises as to the jurisdiction of the Court to give a preliminary ruling on the question submitted by the Court of Appeal.

16 Far from containing a direct and unconditional renvoi to provisions of Community law so as to incorporate them into the domestic legal order, the 1982 Act takes the Convention as a model only, and does not wholly reproduce the terms thereof.

17 Though certain provisions of the 1982 Act are taken almost word for word from the Convention, others depart from the wording of the corresponding Convention provision. That is true in particular of Article 5(3).

18 Moreover, express provision is made in the 1982 Act for the authorities of the contracting state in question to adopt modifications "designed to produce divergence" between any provision of Schedule 4 and a corresponding provision of the Convention, as interpreted by the Court.

19 Accordingly, the provisions of the Convention which the Court is asked to interpret cannot be regarded as having been rendered applicable as such, in cases outwith the scope of the Convention, by the law of the contracting state concerned.

20 The 1982 Act does not require the courts of the contracting state to decide disputes before them by applying absolutely and unconditionally the interpretation of the Convention provided to them by the Court.

21 Indeed, in terms of the 1982 Act, when national courts apply provisions modelled on those of the Convention, they are required only to have regard to the Court' s case-law concerning the interpretation of the corresponding provisions of the Convention. In contrast, when the Convention applies to the dispute, Section 3(1) of the 1982 Act provides that "any question as to the meaning or effect of any provision of the Convention shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court."

22 In a case such as that in the main proceedings, where the Convention is not applicable, the court of the contracting state in question is therefore free to decide whether the interpretation given by the Court is equally valid for the purposes of the application of the national law based on the Convention.

23 Accordingly, if the Court were to declare that it had jurisdiction to give a ruling in regard to this question, its interpretation of the provisions of the Convention would not be binding on the national court which would be bound by the interpretation of the Court only if the Convention were applicable to the dispute.

24 It cannot be accepted that the replies given by the Court to the courts of the contracting states

are to be purely advisory and without binding effect. That would be to alter the function of the Court, as envisaged in the Protocol of 3 June 1971, cited above, namely that of a court whose judgments are binding (see Opinion 1/91 [1991] ECR I-6079, paragraph 61).

25 In the light of all the foregoing considerations the Court does not have jurisdiction to give a preliminary ruling on the question submitted by the Court of Appeal.

Costs

26 The costs incurred by the United Kingdom, the German, Spanish and French Governments and by the Commission of the European Communities, which 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,

in answer to the question submitted to it by the Court of Appeal, by decision of 18 May 1993, hereby rules:

The Court does not have jurisdiction to give a preliminary ruling on the question submitted by the Court of Appeal.

DOCNUM	61993J0346
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1995 Page I-00615
DOC	1995/03/28
LODGED	1993/07/06
JURCIT	41978A1009(01) : N 1 41968A0927(01)-A05PT1 : N 1 13 41968A0927(01)-A05PT3 : N 1 13 41971A0603(02) : N 24 61991V0001-N61 : N 24
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	English
OBSERV	United Kingdom ; Federal Republic of Germany ; Spain ; France ; Commission ; Member States ; Institutions

NATIONA United Kingdom

NATCOUR *P2* House of Lords, judgment of 30/10/1997 ; - Bulletin of Legal Developments 1997 p.255 (résumé) ; - Current Law - Monthly Digest 1997 Part 12 no 86 (résumé) ; - New Law Journal 1997 p.1617-1618 (résumé) ; - The All England Law Reports 1997 Vol.4 p.641-676 ; - The Weekly Law Reports 1997 Vol.3 p.923-958 ; - International Litigation Procedure 1998 p.350-390 ; - The Law Reports ; Appeal Cases 1999 Vol.3 p.153-196 ; - The Times 31/10/97 (résumé) ; - Briggs, Adrian: British Yearbook of International Law 1997 p.331-339 ; - Peel, Ed: Jurisdiction Over Restitutionary Claims, Lloyd's Maritime and Commercial Law Quarterly 1998 p.22-27 ; - Pitel, Stephen G.A.: Jurisdiction Over Restitutionary Claims, The Cambridge Law Journal 1998 p.19-22 ; - Maher, G.: Jurisdiction and void contracts, The Juridical Review 1998 p.131-133 ; - Salerno, Francesco: Sull'interpretazione uniforme della norma sul foro contrattuale della Convenzione di Bruxelles, Rivista di diritto internazionale 1998 p.181-186 ; - McGrath, Paul A.: Kleinwort Benson v. Glasgow City Council: A simple point of jurisdiction, Civil Justice Quarterly 1999 p.41-57

NOTES Rigaux, Anne ; Simon, Denys: Europe 1995 Mai Comm. no 192 p.16-17 ; X: Giustizia civile 1995 I p.1409-1410 ; De Guillenchmidt, Michel ; Bonichot, Jean-Claude: Jurisprudence de la Cour de justice et du Tribunal de première instance des Communautés européennes, Les petites affiches 1995 no 107 p.4-5 ; Collins, Lawrence: The Brussels Convention within the United Kingdom, The Law Quarterly Review 1995 p.541-544 ; Bishop, Eva Maria: Kleinwort Benson: A good Example of Judicial Self-restraint?, European Law Review 1995 p.495-501 ; Chavrier, Henri ; Honorat, Edmond ; Pouzoulet, Philippe: Le contentieux communautaire, L'actualité juridique ; droit administratif 1995 p.708-711 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1995 p.1159-1163 ; Klesta Dosi, Laurence: Corte di giustizia delle Comunità europee (1o ottobre 1994 - 30 aprile 1995), La nuova giurisprudenza civile commentata 1995 II p.395-397 ; Gaja, Giorgio: L'interpretazione di norme interne riproduttive della Convenzione di Bruxelles da parte della Corte di giustizia, Rivista di diritto internazionale 1995 p.757-758 ; Peel, Edwin: Non-admissibility and Restitution in the European Court of Justice, Lloyd's Maritime and Commercial Law Quarterly 1996 p.8-14 ; Betlem, Gerrit: Common Market Law Review 1996 p.137-147 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1995), Schweizerische Zeitschrift für internationales und europäisches Recht 1996 p.125-126 ; Holl, Volker H.: Kehrtwende in der Rechtsprechung des EuGH zur Auslegungszuständigkeit im Vorabentscheidungsverfahren?, Praxis des internationalen Privat- und Verfahrensrechts 1996 p.174-177 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1996 p.550-556 ; Mari, Luigi: Delimitazione della giurisdizione italiana mediante rinvio alla convenzione di Bruxelles del 1968 e competenza pregiudiziale della Corte di giustizia, Il Foro italiano 1996 IV Col.365-380

PROCEDU Reference for a preliminary ruling - inadmissible

ADVGEN Tesauro

JUDGRAP Schockweiler

DATES of document: 28/03/1995
of application: 06/07/1993

Judgment of the Court of 13 July 1995

Danværn Production A/S v Schuhfabriken Otterbeck GmbH & Co. Reference for a preliminary ruling: Vestre Landsret - Denmark. Brussels Convention - Special jurisdiction - Article 6 (3) - Counterclaim - Set-off. Case C-341/93.

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Convention on Jurisdiction and the Enforcement of Judgments ° Special jurisdiction ° Counterclaim ° Definition ° Claim by the defendant in the main proceedings seeking the pronouncement of a separate judgment or decree ° Defence seeking to set off a claim by the defendant against a claim by the plaintiff ° Excluded

(Convention of 27 September 1968, Art. 6(3))

Article 6(3) 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, is intended to establish the conditions under which a court has jurisdiction to hear a claim which would involve a separate judgment or decree. It therefore applies only to claims by defendants which seek the pronouncement of such a judgment or decree. It does not apply to the situation where a defendant raises, as a pure defence, a claim which he allegedly has against the plaintiff. The defences which may be raised and the conditions under which they may be raised are governed by national law.

In Case C-341/93,

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 Vestre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Danvaern Production A/S

and

Schuhfabriken Otterbeck GmbH & Co.,

on the interpretation of Articles 6(3) and 22 of the said 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 ° as amended ° p. 77) and the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1 and ° as amended ° OJ 1983 C 97, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler, C. Gulmann and P. Jann (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch and L. Sevon, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

° the German Government, by Christof Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

° the United Kingdom, by John D. Colahan, of the Treasury Solicitor' s Department, acting as Agent,

° the Commission of the European Communities, by Anders Christian Jessen and Pieter van Nuffel, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 May 1995,

gives the following

Judgment

1 By decision of 30 June 1993, received at the Court Registry on 5 July 1993, the Vestre Landsret (Western Regional Court), Denmark, 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 (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 ° as amended ° p. 77) and the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1 and ° as amended ° OJ 1983 C 97, p. 1) (hereinafter "the Convention"), two questions on the interpretation of Articles 6(3) and 22 of the Convention.

2 Those questions were raised in proceedings between Schuhfabriken Otterbeck GmbH & Co. ("Otterbeck"), the plaintiff in the main proceedings, established in Germany, and Danvaern Production A/S ("Danvaern"), the defendant in the main proceedings, established in Denmark.

3 Under an agency contract of 10 August 1979, Otterbeck appointed Danvaern as its exclusive agent in Denmark for sales of its range of safety shoes.

4 By letter of 22 March 1990, Otterbeck terminated the agency contract with immediate effect, on the ground that Danvaern had acted in gross bad faith by dismissing a certain employee.

5 On 11 September 1990 Otterbeck brought proceedings against Danvaern in the Byret (District Court), Broenderslev, seeking payment of DKR 223 173.39 with interest, in respect of safety shoes delivered in January and February 1990.

6 Before the Byret, Danvaern admitted that it owed the amount claimed, but, asserting that it had its own claims against Otterbeck, including a claim for loss and damage resulting from the wrongful termination of the agency contract, submitted that Otterbeck' s claim should be dismissed and that a separate judgment should be entered against Otterbeck ordering it to pay DKR 737 018.34.

7 By judgment of 26 March 1991 the Byret dismissed Danvaern' s claim as inadmissible, both in so far as it sought a separate judgment and in so far as it pleaded a set-off as a defence, on the basis that there was not the necessary degree of connection between Otterbeck' s and Danvaern' s claims as required by Article 6(3) of the Convention, which provides:

"A person domiciled in a Contracting State may also be sued:

...

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending."

8 Danvaern appealed against that judgment to the Vestre Landsret, where it abandoned its application for a separate judgment and sought only to set off the sum of DKR 223 173.39 with interest, which was equivalent to the amount of Otterbeck' s original claim.

9 The Vestre Landsret considered that the proceedings raised a question of interpretation of the Convention.

10 It therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

"1. Does Article 6(3) cover counterclaims for set-offs?

2. Is the expression in Article 6(3) '... arising from the same contract or facts on which the original claim was based...' to be treated as more restrictive than the expression 'actions [which] are ... related' in the third paragraph of Article 22 of the Convention?"

Question 1

11 By its first question the national court asks whether Article 6(3) of the Convention applies to the situation where a defendant, who is being sued in a court which has jurisdiction over him, pleads in reply a claim which he allegedly has against the plaintiff.

12 The national laws of the Contracting States generally distinguish between two situations. One is where the defendant pleads, as a defence, the existence of a claim he allegedly has against the plaintiff, which would have the effect of wholly or partially extinguishing the plaintiff' s claim. The other is where the defendant, by a separate claim made in the context of the same proceedings, seeks a judgment or decree ordering the plaintiff to pay him a debt. In the latter case, the separate claim can be made for an amount exceeding that claimed by the plaintiff, and it can be proceeded with even if the plaintiff' s claim is dismissed.

13 Procedurally, a defence is an integral part of the action initiated by the plaintiff and therefore does not involve the plaintiff being "sued" in the court in which his action is pending, within the meaning of Article 6(3) of the Convention. The defences which may be raised and the conditions under which they may be raised are determined by national law.

14 Article 6(3) of the Convention is not intended to deal with that situation.

15 By contrast, a claim by the defendant for a separate judgment or decree against the plaintiff presupposes that the court in which the plaintiff has brought proceedings also has jurisdiction to hear such an application.

16 Article 6(3) is specifically intended to establish the conditions under which a court has jurisdiction to hear a claim which would involve a separate judgment or decree.

17 While the Danish version of Article 6(3) uses the word "modfordringer", a general term which can cover both situations referred to in paragraph 12 above, the legal terminology of other Contracting States expressly recognizes the distinction between those two situations. French law distinguishes between "demande reconventionelle" and "moyens de défense au fond", English law between "counterclaim" and "set-off as a defence", German law between "Widerklage" and "Prozessaufrechnung", and Italian law between "domanda riconvenzionale" and "eccezione di compensazione". The relevant language versions of Article 6(3) expressly adopt the terms "demande reconventionelle", "counterclaim", "Widerklage" and "domanda riconvenzionale".

18 The answer to the national court' s first question must therefore be that Article 6(3) of the Convention applies only to claims by defendants which seek the pronouncement of a separate judgment or decree. It does not apply to the situation where a defendant raises, as a pure defence, a claim which he allegedly has against the plaintiff. The defences which may be raised and the conditions under which they may be raised are governed by national law.

Question 2

19 The decision making the reference indicates that Question 2 need only be answered if Article 6(3) of the Convention applies to the situation where a defendant raises as a defence a claim which he allegedly has against the plaintiff. In the light of the answer to Question 1, there is therefore no need to answer Question 2.

Costs

20 The costs incurred by the German Government, the United Kingdom and the Commission of the European Communities, 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,

in answer to the questions referred to it by the Vestre Landsret by decision of 30 June 1993, hereby rules:

Article 6(3) 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 and by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, applies only to claims by defendants which seek the pronouncement of a separate judgment or decree. It does not apply to the situation where a defendant raises, as a pure defence, a claim which he allegedly has against the plaintiff. The defences which may be raised and the conditions under which they may be raised are governed by national law.

DOCNUM	61993J0341
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1995 Page I-02053
DOC	1995/07/13
LODGED	1993/07/05
JURCIT	41978A1009(01) : N 1 41982A1025(01) : N 1 41968A0927(01)-A06PT3 : N 1 7 10 - 19 41968A0927(01)-A22 : N 1 10
CONCERNS	Interprets 41968A0927(01) -A06PT3

SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Danish
OBSERV	Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Denmark
NATCOUR	*A9* Vestre Landsret, beslutning af 30/06/1993 (B 654/1991)
NOTES	Geimer, Reinhold: Europäische Zeitschrift für Wirtschaftsrecht 1995 p.640-641 ; Buys, I.L.: Bevoegde rechter bij vordering in reconventie, Nederlands tijdschrift voor Europees recht 1995 p.176-177 ; Blaise, Jean-Bernard ; Robin-Delaine, Catherine: Jurisprudence de la Cour de justice et du Tribunal de première instance (juillet-octobre 1995), Revue des affaires européennes 1995 no 4 p.94 ; Gaudemet-Tallon, Hélène: Revue critique de droit international privé 1996 p.146-152 ; Hartley, Trevor: Article 6(3): Counterclaims, European Law Review 1996 p.166-168 ; X: Giustizia civile 1996 I p.640-641 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1995), Schweizerische Zeitschrift für internationales und europäisches Recht 1996 p.144-145 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1996 p.606-608 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1996 p.559-562 ; Bacher, Gabriela: Zuständigkeit nach EuGVÜ bei Prozeßaufrechnung, Neue juristische Wochenschrift 1996 p.2140-2141 ; Klesta Dosi, Laurence: Corte di giustizia delle Comunità europee (1o maggio 1995 - 31 ottobre 1995), La nuova giurisprudenza civile commentata 1996 II p.175-176 ; Mankowski, Peter: Zeitschrift für Zivilprozeß 1996 p.376-394 ; Tassoni, G.: Rivista italiana di diritto pubblico comunitario 1996 p.1055 (PM) ; Michinel Alvarez, Miguel Angel: Revista española de Derecho Internacional 1996 p.317-320 ; Philip, Allan: Set-Offs and Counterclaims Under the Brussels Judgments Convention, Praxis des internationalen Privat- und Verfahrensrechts 1997 p.97-98 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1994-1995 et 1995-1996, Cahiers de droit européen 1997 p.196-198 ; Merlin, Elena: Riconvenzione e compensazione al vaglio della Corte di giustizia (una nozione comunitaria di "eccezione"?), Rivista di diritto processuale 1999 p.48-108
PROCEDU	Reference for a preliminary ruling
ADVGEN	Léger
JUDGRAP	Edward
DATES	of document: 13/07/1995 of application: 05/07/1993

Judgment of the Court (Fifth Chamber)
of 15 September 1994
Wolfgang Brenner and Peter Noller v Dean Witter Reynolds Inc. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Brussels Convention - Articles 13 and 14 - Jurisdiction over consumer contracts - Contract with a party not domiciled in a Contracting State. Case C-318/93.

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Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction over consumer contracts - Contract with a party not domiciled or having a branch, agency or other establishment in a Contracting State, out of whose operation the dispute arises - Jurisdiction under the Convention of the courts of the State in which the consumer is domiciled - Excluded

(Convention of 27 September 1968, Arts 13 and 14 as amended by the 1978 Accession Convention)

The courts of the State in which the consumer is domiciled have jurisdiction in proceedings under the second alternative in the first paragraph of Article 14 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, if the other party to the contract is domiciled in a Contracting State or is deemed under the second paragraph of Article 13 of that Convention to be so domiciled.

The latter provision, which applies where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment there and the dispute arises out of its operation, is, with respect to consumer contracts, the only exception to the rule in Article 4 that the jurisdiction of courts in proceedings where the defendant is not domiciled in a Contracting State is governed not by the Convention but by the law of the Contracting State of the court in which the proceedings are brought.

In Case C-318/93,

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 (OJ 1972 L 299, p. 32) by the Bundesgerichtshof for a preliminary ruling in the proceedings pending before that court between

Wolfgang Brenner and Peter Noller

and

Dean Witter Reynolds Inc.

on the interpretation of Articles 13 and 14 of the Convention of 27 September 1968, cited above, 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),

THE COURT

(Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, R. Joliet, G.C. Rodríguez Iglesias (Rapporteur), F. Grévisse and M. Zuleeg, Judges,

Advocate General: M. Darmon,

Registrar: L. Hewlett, administrator,

after considering the written observations submitted on behalf of:

- Mr Brenner and Mr Noller, by C. Klaas, Rechtsanwalt, Karlsruhe,

- the German Government, by C. Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

- the Commission of the European Communities, by P. Van Nuffel, of its Legal Service, acting as Agent, assisted by A. Boehlke, Rechtsanwalt, Frankfurt and Brussels,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Brenner, Mr Noller and the Commission at the hearing on 28 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 8 June 1994,

gives the following

Judgment

1 By order of 25 May 1993, received at the Court on 16 June 1993, the Bundesgerichtshof (Federal Court of Justice) 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 (OJ 1972 L 299, p. 32), 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) (hereinafter `the Brussels Convention'), on a number of questions on the interpretation of Articles 13 and 14 of that Convention.

2 Those questions were raised in separate proceedings between Mr Brenner, a self-employed master joiner, and Mr Noller, employed as a textile technician, both domiciled in the Federal Republic of Germany (`the plaintiffs'), and Dean Witter Reynolds Inc., a firm of brokers based in New York (`the defendant').

3 According to the order for reference, the plaintiffs, not acting within the scope of their profession or occupation, commissioned the defendant with the implementation of commodity futures transactions, on a commission basis.

4 The plaintiffs provided large sums of money, which apart from a small residual amount were entirely consumed by losses as a result of speculations.

5 The defendant advertises in Germany via Dean Witter Reynolds GmbH, a German company based in Frankfurt. However, it is common ground between the parties that contacts between them were mediated exclusively by Metzler Wirtschafts- und Boersenberatungsgesellschaft mbH (`MWB'), a company based in Frankfurt which advises on economic and stock market affairs, and is independent of the defendant.

6 The plaintiffs claimed damages on the grounds of breach by the defendant of its contractual and precontractual obligations, tortious conduct characterized by unjustified charges in connection with a large number of partly unreasonable transactions (`churning'), and unjust enrichment.

7 The Landgericht (Regional Court), in which the plaintiffs brought proceedings, held that it had no jurisdiction in respect of the defendant. Its decisions were upheld on appeal. Mr Brenner and Mr Noller thereupon each appealed on a point of law to the Bundesgerichtshof.

8 The Bundesgerichtshof considers that, on the basis of the findings made by the judges of fact, only Articles 13 and 14 of the Brussels Convention might establish the international jurisdiction of the German courts.

9 Under Article 13 of the Brussels Convention:

`In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section without prejudice to the provisions of Articles 4 and 5(5), if it is:

1. a contract for the sale of goods on instalment credit terms; or

2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.'

10 The first paragraph of Article 14 then states that:

`A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.'

11 The Bundesgerichtshof observes that in the present case the other party to the contract is not domiciled in a Contracting State and no branch, agency or other establishment within the meaning of the second paragraph of Article 13 of the Brussels Convention acted as an intermediary in the conclusion or performance of the contract. It wonders whether in those circumstances the consumer is precluded only from bringing proceedings against the other party to the contract in the courts of the State in which that party is domiciled, or whether the consumer is also precluded from bringing proceedings in the courts of the Contracting State in which he is himself domiciled. The Bundesgerichtshof considers that the first paragraph of Article 4 of the Brussels Convention might support the latter interpretation, since it makes the applicability of the Convention subject to the defendant being domiciled in a Contracting State.

12 In those circumstances the Bundesgerichtshof stayed the proceedings pending a preliminary ruling by the Court on the following questions:

`1 Is it a condition for the recognition of the international jurisdiction of the State in which the consumer is domiciled under the second alternative in the first paragraph of Article 14 of the Brussels Convention that the other party to the contract is domiciled in a Contracting State to the Brussels Convention or is deemed under the second paragraph of Article 13 of the Brussels Convention to be so domiciled?

2 Does subparagraph 3 of the first paragraph of Article 13 of the Brussels Convention cover contracts on a commission basis for the purpose of carrying out commodity futures transactions?

3 Is subparagraph 3(a) of the first paragraph of Article 13 of the Brussels Convention applicable whenever the party with whom the consumer enters into a contract has advertised in the State in which the consumer is domiciled prior to conclusion of the contract, or does that provision require

there to be a connection between the advertisement and the conclusion of the contract?

4 (a) Does the term "proceedings concerning a contract" in the first paragraph of Article 13 of the Brussels Convention cover, in addition to the pursuit of claims for damages for breach of contractual obligations, also the pursuit of claims based on breach of precontractual obligations (culpa in contrahendo) and unjust enrichment in connection with reversal of contractual performance?

(b) In the case of proceedings in which damages are claimed for the breach of contractual and precontractual obligations, claims are put forward on the basis of unjust enrichment and damages are sought for tortious acts, does the first paragraph of Article 13 of the Brussels Convention create, by virtue of the factual connection, ancillary jurisdiction which extends also to the non-contractual claim?'

13 The Bundesgerichtshof notes that Questions 2, 3 and 4 are asked only in case the answer to Question 1 is that the first paragraph of Article 14 of the Convention is applicable in a case such as the present one.

14 It must be noted to begin with that Articles 13 and 14 form part of the section on `jurisdiction over consumer contracts'.

15 In addition, the first subparagraph of Article 13 expressly states that that section, as a whole, applies `without prejudice to the provisions of [Article] 4'.

16 According to the first paragraph of Article 4, `if the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State'. Article 16 lays down rules for exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the validity of the constitution, the nullity or the dissolution of companies or other legal persons, the validity of entries in public registers, the registration or validity of patents, trademarks, designs or other similar rights, and in proceedings concerned with the enforcement of judgments.

17 It follows that, subject to those cases of exclusive jurisdiction, the jurisdiction of courts in proceedings where the defendant is not domiciled in a Contracting State is governed not by the Brussels Convention but by the law of the Contracting State of the court in which proceedings are brought.

18 With respect to consumer contracts, the only exception to the rule in Article 4 is introduced by the second paragraph of Article 13, which applies where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment there and the dispute arises out of its operations.

19 It is sufficient to note that, according to the order for reference, no branch, agency or other establishment within the meaning of the second paragraph of Article 13 acted as an intermediary in the conclusion or performance of the contracts between Mr Brenner and Mr Noller and the defendant, and that that exception thus does not apply to the present case.

20 Accordingly, the answer to Question 1 must be that the courts of the State in which the consumer is domiciled have jurisdiction in proceedings under the second alternative in the first paragraph of Article 14 of the Brussels Convention if the other party to the contract is domiciled in a Contracting State or is deemed under the second paragraph of Article 13 of that Convention to be so domiciled.

21 In view of the answer to Question 1, there is no need to answer the other questions.

Costs

22 The costs incurred by the German Government and by the Commission of the European Communities, 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 questions referred to it by the Bundesgerichtshof, by order of 25 May 1993, hereby rules:

The courts of the State in which the consumer is domiciled have jurisdiction in proceedings under the second alternative in the first paragraph of Article 14 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, if the other party to the contract is domiciled in a Contracting State or is deemed under the second paragraph of Article 13 of that Convention to be so domiciled.

DOCNUM	61993J0318
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1994 Page I-04275
DOC	1994/09/15
LODGED	1993/06/16
JURCIT	41978A1009(01) : N 1 41968A0927(01)-A13 : N 1 8 9 14 41968A0927(01)-A14 : N 1 8 14 41968A0927(01)-A14L1 : N 10 12 13 20 41968A0927(01)-A13L2 : N 11 12 18 19 20 41968A0927(01)-A04L1 : N 11 16 18 41968A0927(01)-A13L1PT3LA : N 12 41968A0927(01)-A13L1 : N 15 41968A0927(01)-A16 : N 16
CONCERNS	Interprets 41968A0927(01) -A13L2 Interprets 41968A0927(01) -A14L1

SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Bundesgerichtshof, Vorlagebeschluß vom 25/05/1993 (XI ZR 45/91 ; XI ZR 59/91) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1993 no 142 ; - Europäische Zeitschrift für Wirtschaftsrecht 1993 p.518-519 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1993 p.265-266 ; - Neue juristische Wochenschrift 1993 p.2640 (résumé) ; - Recht der internationalen Wirtschaft 1993 p.671-672 ; - Wertpapier-Mitteilungen 1993 p.1215-1216 ; - Zeitschrift für Wirtschaftsrecht 1993 p.993-994 ; - Nassall, Wendt: Verbraucherschutz durch europäisches Verfahrensrecht, Wertpapier-Mitteilungen 1993 p.1950-1955 ; - Geimer, Reinhold: Kompetenzrechtlicher Verbraucherschutz, Europäische Zeitschrift für Wirtschaftsrecht 1993 p.564-567 ; - Nassall, Wendt: Verbraucherschutz durch europäisches Verfahrensrecht, Wertpapier-Mitteilungen 1993 p.1950-1955 ; - Geimer, Reinhold: Kompetenzrechtlicher Verbraucherschutz, Europäische Zeitschrift für Wirtschaftsrecht 1993 p.564-567
NOTES	Foglia, Raffaele ; Saggio, Antonio: Competenza per le controversie relative ai contratti conclusi dai consumatori, Il Corriere giuridico 1994 p.1521-1522 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1995 p.81 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1995 p.577-579 ; Bischoff, Jean-Marc: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1995 p.476-477 ; Rauscher, Thomas: Prozessaler Verbraucherschutz im EuGVÜ?, Praxis des internationalen Privat- und Verfahrensrechts 1995 p.289-294 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1993/94), Schweizerische Zeitschrift für internationales und europäisches Recht 1995 p.309-310 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions Relating to the Judgments Convention, The Scots Law Times 1995 p.a12 ; Libchaber, Remy: Revue critique de droit international privé 1995 p.758-769 ; Arenas García, Rafael: Revista española de Derecho Internacional 1995 p.380-383 ; De Groote, Bertel: De bijzondere rechtsmachtregeling inzake door consumenten gesloten overeenkomsten: schets van het territoriaal toepassingsgebied van afdeling 4 titel II EEX-Verdrag, Consumentenrecht 1996 p.180-191 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1994-1995 et 1995-1996, Cahiers de droit européen 1997 p.147-151
PROCEDU	Reference for a preliminary ruling
ADVGEN	Darmon
JUDGRAP	Rodriguez Iglesias
DATES	of document: 15/09/1994 of application: 16/06/1993

Judgment of the Court (Fifth Chamber) of 9 June 1994

Norbert Lieber v Willi S. Göbel and Siegrid Göbel. Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany. Brussels Convention - Jurisdiction in proceedings which have as their object rights in rem in, or tenancies of, immovable property - Claim for compensation for use. Case C-292/93.

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Convention on Jurisdiction and the Enforcement of Judgments ° Exclusive jurisdiction ° Proceedings which have as their object "rights in rem in immovable property or tenancies of immovable property" ° Definition ° Claim for compensation for the use of real property following the annulment of a transfer of ownership ° Excluded ° Calculation of compensation according to the principles of the law on tenancies ° No effect

(Convention of 27 September 1968, Art. 16(1))

A claim for compensation for use of a dwelling after the annulment of a transfer of ownership is not included in the matters governed by Article 16(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland.

Article 16 must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, in their being brought before a court which is not that of any of them. The fact that the compensation payable is to be calculated according to the principles governing tenancies does not justify the application of Article 16(1) to a situation where no tenancy is involved, since where there is no relationship of landlord and tenant, which is governed by special legislative provisions, some of a mandatory nature, of the State where the immovable property which is the subject of the lease is situated, the reasons, relating to the complex nature of that relationship and the interest of the State in which the property is situated in ensuring that those provisions are complied with, which justify the exclusive jurisdiction conferred by that provision on the courts of that State in cases concerning tenancies do not apply.

In Case C-292/93,

REFERENCE to the Court pursuant to Article 1 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 Oberlandesgericht (Higher Regional Court), Frankfurt am Main, Germany, for a preliminary ruling in the proceedings pending before that court between

Norbert Lieber

and

Willi S. Goebel,

Siegrid Goebel

on the interpretation of Article 16(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32), 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),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, D.A.O. Edward (Rapporteur), R. Joliet, G.C. Rodríguez Iglesias and F. Grévisse, Judges,

Advocate General: M. Darmon,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Norbert Lieber, by Thilo Krause-Palfner, Rechtsanwalt, Frankfurt am Main,

- Willi S. Goebel and Siegrid Goebel, by Reinhard Patzina, Rechtsanwalt, Frankfurt am Main,

- the German Government, by Christof Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

- the French Government, by Catherine de Salins, Foreign Affairs Adviser in the Directorate of Legal Affairs, Ministry of Foreign Affairs, and Fabien Moury, Assistant Secretary of Foreign Affairs in that Directorate, acting as Agents,

- the Commission of the European Communities, by Pieter van Nuffel, of its Legal Service, assisted by Hans-Juergen Rabe, Rechtsanwalt, Hamburg and Brussels, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 22 March 1994,

gives the following

Judgment

1 By order of 10 June 1992, received at the Court on 19 May 1993, the Oberlandesgericht (Higher Regional Court), Frankfurt am Main, 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 16(1) of that Convention (OJ 1972 L 299, p. 32), 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) (hereinafter "the Brussels Convention").

2 That question was raised in proceedings between Mr Lieber and Mr and Mrs Goebel.

3 It can be seen from the case file that Mr and Mrs Goebel, who are domiciled in Germany, are the owners of an apartment in Cannes (France).

4 In 1978 Mr Lieber, who is also domiciled in Germany, brought proceedings against Mr and Mrs Goebel in the Landgericht (Regional Court), Frankfurt am Main. Following those proceedings, the parties reached a friendly settlement under which ownership of the apartment was to be transferred to Mr Lieber. In execution of that settlement, Mr and Mrs Goebel allowed Mr Lieber into possession of the apartment. He used it until 1987.

5 In that year the 1978 settlement on the transfer of ownership of the apartment was declared void ex tunc for reasons of German law. Mr Lieber then brought proceedings in the Landgericht Frankfurt am Main. Mr and Mrs Goebel counterclaimed for an order that Mr Lieber should pay them compensation for the nine years during which he had used the apartment in Cannes.

6 After obtaining a report from a French expert on the value of the use of the apartment, the Landgericht

Frankfurt am Main upheld the counterclaim to the amount of DM 200 791.78.

7 Mr Lieber appealed to the Oberlandesgericht Frankfurt am Main against that decision, arguing that under Article 16(1) of the Brussels Convention a court of the Contracting State where the immovable property was situated, in other words a French court, not a German court, had jurisdiction on the counterclaim.

8 The Oberlandesgericht Frankfurt am Main considered that the case raised a question of interpretation of the Brussels Convention. It therefore stayed the proceedings and referred the following question to the Court for a preliminary ruling:

> "Do the matters governed by Article 16(1) of the Brussels Convention also cover questions of compensation for use of a dwelling after a failed property transfer?"

9 Article 16(1) of the Brussels Convention provides that:

> "The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> 1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;
>
> ..."

10 It must be noted to begin with that, as the German Government correctly pointed out, a settlement such as that in issue here, the object of which was to transfer ownership of immovable property, does not constitute a tenancy of immovable property within the meaning of Article 16(1) of the Brussels Convention. That term applies to agreements for the letting of immovable property (see the judgment in Case 241/83 Roesler v Rottwinkel [1985] ECR 99, paragraphs 24 and 25). It follows that compensation for the use of property following the annulment of a transfer of ownership of that property cannot be regarded as a right relating to a tenancy of immovable property and fall within Article 16(1) of the Brussels Convention on that basis.

11 The Court must therefore consider whether the compensation in question is a right in rem in immovable property within the meaning of that provision.

12 The Court has consistently held (see inter alia the judgment in Case C-115/88 Reichert and Kockler [1990] ECR I-27, paragraph 9) that Article 16 must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of any of them.

13 It follows from that judgment and from the judgment in Case C-294/92 Webb, 17 May 1994, not yet published in the ECR, paragraph 14, that in order for Article 16(1) to apply, it is not sufficient that the action concerns a right in rem in immovable property or that the action is connected with immovable property. The action must be based on a right in rem and not, apart from the exception for tenancies of immovable property, on a right in personam.

14 The difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect against the whole world, whereas the latter can only be claimed against the debtor (see the Schlosser Report, OJ 1979 C 59, p. 71, paragraph 166).

15 It is evident that a claim for compensation for the use of immovable property can be raised only against the debtor and thus constitutes a right in personam, at any rate where the debtor does not dispute that the person bringing the claim is the owner of the immovable property in question.

16 Mr Lieber points out, however, that in the Roesler judgment, cited above, the Court held that the raison d' être of the exclusive jurisdiction conferred by Article 16(1) of the Brussels Convention

was the fact that tenancies are closely bound up with the law of immovable property and with the provisions, generally of a mandatory character, governing its use, such as legislation controlling the level of rents and protecting the rights of tenants, including tenant-farmers. In Mr Lieber' s opinion, that is why the Court held that the recovery of rent payable by the tenant pursuant to a lease fell within Article 16(1).

17 Mr Lieber considers that those considerations also apply to a claim for compensation for use of property, such as that in issue in the main proceedings, in particular because the compensation sought must be calculated according to principles analogous to those governing tenancies. The calculation cannot be done without recourse to an expert based in France, given that local knowledge is a precondition for drawing up an expert report.

18 That argument cannot be accepted.

19 Firstly, unlike the present case, the judgment in Roesler, cited above, concerned a letting agreement, which was therefore covered by the term "tenancies of immovable property".

20 Secondly, the mere fact that in a case such as the present one the compensation payable is to be calculated according to the principles governing tenancies does not justify the application of Article 16(1) to a situation where no tenancy is involved. The relationship of landlord and tenant comprises a series of rights and obligations in addition to that relating to rent. That relationship is governed by special legislative provisions, some of a mandatory nature, of the State where the immovable property which is the subject of the lease is situated, for example, provisions determining who is responsible for maintaining the property and paying land taxes, provisions governing the duties of the occupier of the property as against the neighbours, and provisions controlling or restricting the landlord' s right to retake possession of the property on expiry of the lease. It is the complex nature of that relationship and the interest of the State in which the property is situated in ensuring that those provisions are complied with which justify the exclusive jurisdiction conferred on that State in cases concerning tenancies. Those reasons do not apply where there is no relationship of landlord and tenant.

21 Thirdly, while it may be easier for the court of the Contracting State in which the immovable property is situated to ascertain the level of rents within its area with a view to determining the amount of compensation payable, it is equally possible for a court in another Member State to consult a local expert in order to obtain the necessary information, as indeed the Landgericht Frankfurt am Main did at first instance in the main proceedings.

22 The answer to the question referred by the national court must therefore be that a claim for compensation for use of a dwelling after the annulment of a transfer of ownership is not included in the matters governed by Article 16(1) of the Brussels Convention.

Costs

23 The costs incurred by the French and German Governments and the Commission of the European Communities, 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 Oberlandesgericht Frankfurt am Main by order of 10 June 1992, hereby rules:

A claim for compensation for use of a dwelling after the annulment of a transfer of ownership is not included in the matters governed by Article 16(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.

DOCNUM	61993J0292
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1994 Page I-02535
DOC	1994/06/09
LODGED	1993/05/19
JURCIT	41968A0927(01)-A16PT1 : N 1 7 - 22 41978A1009(01) : N 1 61983J0241 : N 10 16 19 61988J0115 : N 12 61992J0294 : N 13
CONCERNS	Interprets 41968A0927(01) -A16PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; France ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Oberlandesgericht Frankfurt/Main, Vorlagebeschluß vom 10/06/1992 (19 U 253/89) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1992 no 191 ; - Europäische Zeitschrift für Wirtschaftsrecht 1993 p.776
NOTES	X: Revue de jurisprudence de droit des affaires 1994 p.958 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments, Netherlands International Law Review 1994 p.351-355 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1995 p.272-276 ; Ulmer, Michael J.: Neue Tendenzen bei der

Auslegung des Art. 16 Nr. 1 EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 1995 p.72-75 ; Béraudo, Jean-Paul: Revue critique de droit international privé 1995 p.130-138 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1992-1993 et 1993-1994, Cahiers de droit européen 1995 p.216-217 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1995 p.110-112 ; Bischoff, Jean-Marc: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1995 p.477-483 ; Kohl, Alphonse: La notion de "baux d'immeubles" et de "droits réels immobiliers" dans l'article 16.1 de la Convention de Bruxelles de 1968, Revue de jurisprudence de Liège, Mons et Bruxelles 1995 p.1177-1180 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1993/94), Schweizerische Zeitschrift für internationales und europäisches Recht 1995 p.316-319 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions Relating to the Judgments Convention, The Scots Law Times 1995 p.a11

PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Edward

DATES of document: 09/06/1994
of application: 19/05/1993

Judgment of the Court of 7 March 1995

Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA. Reference for a preliminary ruling: House of Lords - United Kingdom. Brussels Convention - Article 5 (3) - Place where the harmful event occurred - Libel by a newspaper article. Case C-68/93.

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1. Convention on jurisdiction and the enforcement of judgments ° Special jurisdiction ° Jurisdiction "in matters relating to tort, delict or quasi-delict" ° Place where the harmful event occurred ° Cross-border defamation by the press ° Plaintiff' s right to choose ° Court of the place where the publisher is established ° Jurisdiction in respect of all the harm ° Courts of the places where the publication was distributed in each Contracting State where the reputation of the person harmed is injured ° Jurisdiction limited to the harm caused in the State of the court seised

(Brussels Convention of 27 September 1968, Art. 5(3))

2. Convention on jurisdiction and the enforcement of judgments ° Special jurisdiction ° Jurisdiction "in matters relating to tort, delict or quasi-delict" ° Defamation ° Assessment of the harmful character of the event in question and the evidence required of the alleged harm ° Application of the conflict of laws rules of the forum ° Limits

(Brussels Convention of 27 September 1968, Art. 5(3))

1. On a proper construction of the expression "place where the harmful event occurred" in Article 5(3) 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 and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

2. The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the plaintiff in an action in tort, delict or quasi-delict are not governed by the Convention but are determined in accordance with the substantive law designated by the national conflict of laws rules of the court seised on the basis of the Convention, provided that the effectiveness of the Convention is not thereby impaired. The fact that under the national law applicable to the main proceedings damage is presumed in libel actions, so that the plaintiff does not have to adduce evidence of the existence and extent of that damage, does not therefore preclude the application of Article 5(3) of the Convention.

In Case C-68/93,

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 House of Lords for a preliminary ruling in the proceedings pending before that court between

Fiona Shevill,

Ixora Trading Inc.,

Chequepoint SARL,

Chequepoint International Ltd

and

Presse Alliance SA

on the interpretation of Article 5(3) of the abovementioned Convention of 27 September 1968 (Journal Officiel 1972, L 299, p. 32) 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) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn and C. Gulmann (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, J.L. Murray, D.A.O. Edward,

J.-P. Puissochet and G. Hirsch, Judges,

Advocate General: M. Darmon, and subsequently P. Léger,

Registrar: Lynn Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, by H.M. Boggis-Rolfe, Barrister, instructed by P. Carter-Ruck & Partners, Solicitors,

° Presse Alliance SA, by M. Tugendhat QC, instructed by D.J. Freeman & Co., Solicitors,

° the United Kingdom, by J.D. Colahan, of the Treasury Solicitor' s Department, acting as Agent, and A. Briggs, Barrister,

° the Spanish Government, by A.J. Navarro Gonzalez, Director General for Community Legal and Institutional Coordination at the Ministry of Foreign Affairs, and M. Bravo-Ferrer Delgado, State Attorney, acting as Agents,

° the French Government, by H. Renie, Deputy Principal Secretary of Foreign Affairs at the Ministry of Foreign Affairs, acting as Agent,

° the Commission of the European Communities, by N. Khan, of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

the Sixth Chamber of the Court having heard the oral observations of Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, represented by H.M. Boggis-Rolfe, Presse Alliance SA, represented by M. Tugendhat QC, the United Kingdom, represented by S. Braviner, of the Treasury Solicitor' s Department, acting as Agent, and A. Briggs, Barrister, the German Government, represented by J. Pirrung, Ministerialrat at the Federal Ministry of Justice, acting as Agent, the Spanish Government, represented by M. Bravo-Ferrer Delgado, and the Commission, represented by N. Khan, at the hearing on 21 April 1994,

the Sixth Chamber having heard the Opinion of Advocate General Darmon at the sitting on 14 July 1994,

the Sixth Chamber of 5 October 1994 having decided to refer the case back to the Court,

having regard to the order of 10 October 1994 reopening the oral procedure,

after hearing the oral observations of Miss Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Limited, represented by H.M. Boggis-Rolfe, Presse Alliance SA, represented by M. Tugendhat QC, the United Kingdom, represented by S. Braviner and A. Briggs, the German Government, represented by M Klippstein, Richter, acting as Agent, the Spanish Government, represented by M. Bravo-Ferrer Delgado, and the Commission, represented by N. Khan, at the hearing on 22 November 1994,

after hearing the Opinion of Advocate General Léger at the sitting on 10 January 1995,

gives the following

Judgment

Costs

42 The costs incurred by the United Kingdom, the German, Spanish and French Governments and the Commission of the European Communities, 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,

in answer to the questions referred to it by the House of Lords, by order of 1 March 1993, hereby rules:

1. On a proper construction of the expression "place where the harmful event occurred" in Article 5(3) 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 and by the Convention of 25 October 1982 on the accession of the Hellenic Republic, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

2. The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention is not thereby impaired.

1 By order of 1 March 1993, received at the Court on 15 March 1993, the House of Lords 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 (Journal Officiel 1972, L 299, p. 32), 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) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), hereinafter "the Convention", seven questions on the interpretation of Article

5(3) of the Convention.

2 Those questions were raised in proceedings brought by Miss Fiona Shevill, a United Kingdom national residing in North Yorkshire, England, Chequepoint SARL, Ixora Trading Inc. and Chequepoint International Limited against Presse Alliance SA, a company incorporated under French law whose registered office is in Paris, and seek to establish which courts have jurisdiction to hear an action for damages for harm caused by the publication of a defamatory newspaper article.

3 According to the documents before the Court, on 23 September 1989 Presse Alliance SA, which publishes the newspaper France-Soir, published an article about an operation which drug squad officers of the French police had carried out at one of the bureaux de change operated in Paris by Chequepoint SARL. That article, based on information provided by the agency France Presse, mentioned the company "Chequepoint" and "a young woman by the name of Fiona Shevill-Avril".

4 Chequepoint SARL, a company incorporated under French law whose registered office is in Paris, has operated bureaux de change in France since 1988. It is not alleged to carry on business in England or Wales.

5 Fiona Shevill was temporarily employed for three months in the summer of 1989 by Chequepoint SARL in Paris. She returned to England on 26 September 1989.

6 Ixora Trading Inc., which is not a company incorporated under the law of England and Wales, has since 1974 operated bureaux de change in England under the name "Chequepoint".

7 Chequepoint International Ltd, a holding company incorporated under Belgian law whose registered office is in Brussels, controls Chequepoint SARL and Ixora Trading Inc.

8 Miss Shevill, Chequepoint SARL, Ixora Trading Inc. and Chequepoint International Ltd considered that the abovementioned article was defamatory in that it suggested that they were part of a drug-trafficking network for which they had laundered money. On 17 October 1989 they issued a writ in the High Court of England and Wales claiming damages for libel from Presse Alliance SA in respect of the copies of France-Soir distributed in France and the other European countries including those sold in England and Wales. The plaintiffs subsequently amended their pleadings, deleting all references to the copies sold outside England and Wales. Since under English law there is a presumption of damage in libel cases, the plaintiffs did not have to adduce evidence of damage arising from the publication of the article in question.

9 It is common ground that France-Soir is mainly distributed in France and that the newspaper has a very small circulation in the United Kingdom, effected through independent distributors. It is estimated that more than 237 000 copies of the issue of France-Soir in question were sold in France and approximately 15 500 copies distributed in the other European countries, of which 230 were sold in England and Wales (5 in Yorkshire).

10 On 23 November 1989 France-Soir published an apology stating that it had not intended to allege that either the owners of Chequepoint bureaux de change or Miss Shevill had been involved in drug trafficking or money laundering.

11 On 7 December 1989 Presse Alliance SA issued a summons disputing the jurisdiction of the High Court of England and Wales on the ground that no harmful event within the meaning of Article 5(3) of the Convention had occurred in England.

12 That application to strike out was dismissed by order of 10 April 1990. The appeal brought against that decision was dismissed by order of 14 May 1990.

13 On 12 March 1991 the Court of Appeal dismissed the appeal brought by Presse Alliance SA against that decision and stayed the action brought by Chequepoint International Limited.

14 Presse Alliance SA appealed against that decision to the House of Lords pursuant to leave to appeal granted by the latter.

15 Presse Alliance SA argued essentially that under Article 2 of the Convention the French courts had jurisdiction in this dispute and that the English courts did not have jurisdiction under Article 5(3) of the Convention since the "place where the harmful event occurred" within the meaning of that provision was in France and no harmful event had occurred in England.

16 Considering that the proceedings raised problems of interpretation of the Convention, the House of Lords by order of 1 March 1993 decided to stay the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

"1. In a case of libel by a newspaper article, do the words 'the place where the harmful event occurred' in Article 5(3) of the Convention mean:

(a) the place where the newspaper was printed and put into circulation; or

(b) the place or places where the newspaper was read by particular individuals; or

(c) the place or places where the plaintiff has a significant reputation?

2. If and sofar as the answer to the first question is (b), is 'the harmful event' dependent upon there being a reader or readers who knew (or knew of) the plaintiff and understood those words to refer to him?

3. If and in so far as harm is suffered in more than one country (because copies of the newspaper were distributed in at least one Member State other than the Member State where it was printed and put into circulation), does a separate harmful event or harmful events take place in each Member State where the newspaper was distributed, in respect of which such Member State has separate jurisdiction under Article 5(3), and if so, how harmful must the event be, or what proportion of the total harm must it represent?

4. Does the phrase 'harmful event' include an event actionable under national law without proof of damage, where there is no evidence of actual damage or harm?

5. In deciding under Article 5(3) whether (or where) a 'harmful event' has occurred is the local court expected to answer the question otherwise than by reference to its own rules and, if so, by reference to which other rules or substantive law, procedure or evidence?

6. If, in a defamation case, the local court concludes that there has been an actionable publication (or communication) of material, as a result of which at least some damage to reputation would be presumed, is it relevant to the acceptance of jurisdiction that other Member States might come to a different conclusion in respect of similar material published within their respective jurisdictions?

7. In deciding whether it has jurisdiction under Article 5(3) of the Convention, what standard of proof should a court require of the plaintiff that the conditions of Article 5(3) are satisfied:

(a) generally; and

(b) in relation to matters which (if the court takes jurisdiction) will not be re-examined at the trial of the action?"

The first, second, third and sixth questions

17 The national court' s first, second, third and sixth questions, which should be considered together, essentially seek guidance from the Court as to the interpretation of the concept "the place where the harmful event occurred" used in Article 5(3) of the Convention, with a view to establishing which courts have jurisdiction to hear an action for damages for harm caused to the victim following

distribution of a defamatory newspaper article in several Contracting States.

18 In order to answer those questions, reference should first be made to Article 5(3) of the Convention, which, by way of derogation from the general principle in the first paragraph of Article 2 of the Convention that the courts of the Contracting State of the defendant' s domicile have jurisdiction, provides:

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

[...]

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

[...]"

19 It is settled case-law (see Case 21/76 Bier v Mines de Potasse d' Alsace [1976] ECR 1735, paragraph 11, and Case C-220/88 Dumez France and Tracoba v Hessische Landesbank (Helaba) and Others [1990] ECR I-49, paragraph 17) that that rule of special jurisdiction, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant' s domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

20 It must also be emphasized that in Mines de Potasse d' Alsace the Court held (at paragraphs 24 and 25) that, where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred" in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.

21 In that judgment, the Court stated (at paragraphs 15 and 17) that the place of the event giving rise to the damage no less than the place where the damage occurred could constitute a significant connecting factor from the point of view of jurisdiction, since each of them could, depending on the circumstances, be particularly helpful in relation to the evidence and the conduct of the proceedings.

22 The Court added (at paragraph 20) that to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness.

23 Those observations, made in relation to physical or pecuniary loss or damage, must equally apply, for the same reasons, in the case of loss or damage other than physical or pecuniary, in particular injury to the reputation and good name of a natural or legal person due to a defamatory publication.

24 In the case of a libel by a newspaper article distributed in several Contracting States, the place of the event giving rise to the damage, within the meaning of those judgments, can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation.

25 The court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for all the harm caused by the unlawful act.

26 However, that forum will generally coincide with the head of jurisdiction set out in the first

paragraph of Article 2 of the Convention.

27 As the Court held in Mines de Potasse d' Alsace, the plaintiff must consequently have the option to bring proceedings also in the place where the damage occurred, since otherwise Article 5(3) of the Convention would be rendered meaningless.

28 The place where the damage occurred is the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced its harmful effects upon the victim.

29 In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.

30 It follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim' s reputation.

31 In accordance with the requirement of the sound administration of justice, the basis of the rule of special jurisdiction in Article 5(3), the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess the libel committed in that State and to determine the extent of the corresponding damage.

32 Although there are admittedly disadvantages to having different courts ruling on various aspects of the same dispute, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant' s domicile or of the place where the publisher of the defamatory publication is established.

33 In light of the foregoing, the answer to the first, second, third and sixth questions referred by the House of Lords must be that, on a proper construction of the expression "place where the harmful event occurred" in Article 5(3) of the Convention, the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.

The fourth, fifth and seventh questions

34 The national court' s fourth, fifth and seventh questions, which should be considered together, essentially ask whether, in determining whether it has jurisdiction qua court of the place where the damage occurred pursuant to Article 5(3) of the Convention as interpreted by the Court, it is required to follow specific rules different from those laid down by its national law in relation to the criteria for assessing whether the event in question is harmful and in relation to the evidence required of the existence and extent of the harm alleged by the victim of the defamation.

35 In order to reply to those questions, it must first be noted that the object of the Convention is not to unify the rules of substantive law and of procedure of the different Contracting States, but to determine which court has jurisdiction in disputes relating to civil and commercial matters in relations between the Contracting States and to facilitate the enforcement of judgments (see Case C-365/88 Hagen v Zeehaghe [1990] ECR I-1845, paragraph 17).

36 Moreover, the Court has consistently held that, as regards procedural rules, reference must be made to the national rules applicable by the national court, provided that the application of

those rules does not impair the effectiveness of the Convention (paragraphs 19 and 20 of the same judgment).

37 In the area of non-contractual liability, the context in which the questions referred have arisen, the sole object of the Convention is to determine which court or courts have jurisdiction to hear the dispute by reference to the place or places where an event considered harmful occurred.

38 It does not, however, specify the circumstances in which the event giving rise to the harm may be considered to be harmful to the victim, or the evidence which the plaintiff must adduce before the court seised to enable it to rule on the merits of the case.

39 Those questions must therefore be settled solely by the national court seised, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the Convention is not thereby impaired.

40 The fact that under the national law applicable to the main proceedings damage is presumed in libel actions, so that the plaintiff does not have to adduce evidence of the existence and extent of that damage, does not therefore preclude the application of Article 5(3) of the Convention in determining which courts have territorial jurisdiction to hear the action for damages for harm caused by an international libel through the press.

41 The answer to the referring court must accordingly be that the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation are not governed by the Convention but by the substantive law determined by the national conflict of laws rules of the court seised, provided that the effectiveness of the Convention is not thereby impaired.

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PROCEDU Reference for a preliminary ruling

ADVGEN Darmon Léger

JUDGRAP Schockweiler

DATES of document: 07/03/1995
of application: 15/03/1993

Judgment of the Court (Sixth Chamber)
of 2 June 1994
Solo Kleinmotoren GmbH v Emilio Boch. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Brussels Convention - Article 27 (3) - Judgment given in a dispute between the same parties - Definition - Court settlement. Case C-414/92.

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1. Convention on Jurisdiction and the Enforcement of Judgments ° Recognition and enforcement ° Definition of "judgment" ° Scope ° Court settlement ° Excluded

(Convention of 27 September 1968, Art. 25)

2. Convention on Jurisdiction and the Enforcement of Judgments ° Recognition and enforcement ° Grounds for refusal ° Strict interpretation ° Judgment irreconcilable with a judgment given in the State in which recognition is sought ° Treatment of a court settlement reached in the State in which recognition is sought as a judgment given by a court of that State ° Excluded

(Convention of 27 September 1968, Art. 27(3))

1. The definition of a "judgment" given in Article 25 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters refers, for the purposes of the application of the various provisions of the Convention in which the term is used, solely to judicial decisions actually given by a court or tribunal of a Contracting State deciding on its own authority on the issues between the parties. That is not the case as far as a settlement is concerned, even if it was reached in a court of a Contracting State and brings legal proceedings to an end, because settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention.

2. Article 27 of the Convention must be interpreted strictly, inasmuch as it constitutes an obstacle to the achievement of one of its fundamental objectives, which is to facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure. Hence Article 27(3) of the Convention is to be interpreted as meaning that an enforceable settlement reached before a court of the State in which recognition is sought in order to settle legal proceedings which are in progress does not constitute a "judgment" within the meaning of that provision, "given in a dispute between the same parties in the State in which recognition is sought" which, under the Convention, may preclude recognition and enforcement of a judgment given in another Contracting State.

In Case C-414/92,

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 Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the proceedings pending before that court between

Solo Kleinmotoren GmbH

and

Emilio Boch

on the interpretation of Article 27(3) of the Convention of 27 September 1968, 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),

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, C.N. Kakouris, F.A. Schockweiler (Rapporteur), P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C. Gulmann,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Solo Kleinmotoren GmbH, by R.A. Schuetze, Rechtsanwalt, Stuttgart,

- Emilio Boch, by P. Mueller, Rechtsanwalt, Stuttgart, and A. Rizzi and F. Ferria Contin, of the Milan Bar,

- the German Government, by C. Boehmer, Ministerialrat at the Federal Ministry of Justice, acting as Agent,

- the Italian Government, by Professor L. Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs at the Ministry of Foreign Affairs, acting as Agent, assisted by O. Fiumara, Avvocato dello Stato,

- the Commission of the European Communities, by P. van Nuffel, of its Legal Service, acting as Agent, assisted by W.-D. Krause-Ablass, Rechtsanwalt, Duesseldorf,

having regard to the Report for the Hearing,

after hearing the oral observations of Solo Kleinmotoren GmbH, represented by R.A. Schuetze and T.R. Kloetzel, Rechtsanwaelte, Stuttgart, of Emilio Boch and of the Commission at the hearing on 10 February 1994,

after hearing the Opinion of the Advocate General at the sitting on 22 March 1994,

gives the following

Judgment

1 By order of 5 November 1992, received at the Court on 15 December 1992, the Bundesgerichtshof referred to the Court for a preliminary ruling 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 (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) (hereinafter the "Convention"), two questions on the interpretation of Article 27(3) of the Convention.

2 The questions arose in proceedings between Solo Kleinmotoren GmbH ("Solo Kleinmotoren"), a company established in the Federal Republic of Germany, and Emilio Boch, the owner of an agricultural machinery retail sales company established in Italy, concerning an application for an order for enforcement in Germany of a final judgment delivered by a civil court in Italy.

3 The file shows that until 1966 Mr Boch sold in Italy, under the trade name "Solo", agricultural machinery supplied to him by Solo Kleinmotoren. Subsequently, Solo Italiana SpA ("Solo Italiana") began to distribute in Italy the machinery manufactured by Solo Kleinmotoren, which consequently discontinued its supplies to Mr Boch' s company. Mr Boch then brought two actions.

4 First, he sued Solo Kleinmotoren in the Tribunale Civile (District Court), Milan (Italy), for breach of the supply contract. In 1975 the Corte d' Appello (Court of Appeal), Milan, ordered the defendant to pay an amount of over LIT 48 000 000, with interest. On Mr Boch' s application, an order for enforcement was issued in Germany in accordance with the provisions of the Convention.

Following an appeal brought by Solo Kleinmotoren against that enforcement order, the parties concluded a settlement on 24 February 1978 in the Oberlandesgericht (Higher Regional Court) Stuttgart (Federal Republic of Germany). It was worded as follows:

"1. On Monday 27 February 1978 (Solo Kleinmotoren) shall pay a sum of DM 160 000 (to Mr Boch) by handing over a banker' s cheque to M. X.

2. (Solo Kleinmotoren) shall collect the goods described in the 'packing list' at its own expense from the carrier Y by 31 March 1978 at the latest. Notification must be sent (to Mr Boch) one week before the goods are collected. (Mr Boch) guarantees that storage costs have been paid for the period until 31 March 1978 and that no other charge is payable on the goods. (Solo Kleinmotoren) waives the warranty on the goods recovered.

3. All the parties' claims against one another arising from their business relationship are hereby resolved. All claims between (Mr Boch) and Inter Solo at Zug are also resolved.

(Mr Boch) undertakes not to assert the claims forming the subject-matter of the present legal dispute against Solo Italiana, Bologna.

4. (Solo Kleinmotoren) shall pay the legal costs, its own non-legal expenses and the costs of the legal agent (of Mr Boch) in the present proceedings; (Mr Boch) shall pay the other expenses himself."

5 Mr Boch commenced a second action against Solo Kleinmotoren and Solo Italiana before the Tribunale Civile, Bologna (Italy), for infringement of the trade name "Solo" and for unfair competition. In 1979 the Corte d' Appello, Bologna, held that Solo Kleinmotoren and Solo Italiana were jointly liable for misuse of the trade name "Solo" and acts of unfair competition prejudicial to Mr Boch and ordered the two defendant companies jointly to pay him damages, the quantum to be determined in separate proceedings. In the grounds of its judgment that court examined Solo Italiana' s objection that the settlement reached in the German court had disposed of Mr Boch' s claims, and held that the settlement could not be relied on in the proceedings before it because it had not been declared enforceable in Italy and because, according to its terms, the subject-matter of the dispute before the courts in Bologna was excluded from the settlement reached by the parties. That judgment of the Corte d' Appello, Bologna, subsequently became final.

6 In 1981 Mr Boch brought proceedings before the Tribunale Civile, Bologna for determination of the quantum of damages to be paid by Solo Kleinmotoren and Solo Italiana pursuant to the judgment of the Corte d' Appello, Bologna. On 18 February 1986 the Tribunale Civile ordered the two defendant companies to pay Mr Boch LIT 180 000 000 by way of damages. The Corte d' Appello, Bologna, dismissed the appeal brought by Solo Kleinmotoren against that judgment. Both courts rejected Solo Kleinmotoren' s argument that the settlement approved by the Stuttgart court resolved all the claims which the parties had against one another, and held that this question had been settled definitively by the judgment given in 1979 by the Corte d' Appello, Bologna.

7 Mr Boch then lodged an application in the Landgericht (Regional Court) Stuttgart to obtain enforcement in Germany of the judgment of the Tribunale Civile, Bologna, of 18 February 1986. The Landgericht granted the application. After the Oberlandesgericht Stuttgart had dismissed the appeal brought by Solo Kleinmotoren against the Landgericht' s decision, Solo Kleinmotoren appealed on a point of law to the Bundesgerichtshof and asked it to annul the Oberlandesgericht' s order and dismiss the application for an order for the enforcement of the Italian judgment.

8 Solo Kleinmotoren contended before the Bundesgerichtshof that Article 27(3) of the Convention precluded enforcement in Germany of the Italian judgment since it was incompatible with the settlement concluded by the parties on 24 February 1978 in the Oberlandesgericht Stuttgart. In support of that argument, Solo Kleinmotoren maintained that the settlement brought to an end all the parties'

reciprocal rights and obligations arising from their previous business relationship, including Mr Boch' s claims which had been upheld by the judgment delivered on 18 February 1986 by the Tribunale Civile, Bologna.

9 The Bundesgerichtshof, unsure whether a court settlement can be treated as a "judgment given in a dispute between the same parties in the State in which recognition is sought" for the purposes of Article 27(3) of the Convention and whether such a settlement therefore precludes, under the provisions of the Convention, recognition and enforcement of a judgment given in another Contracting State which is irreconcilable with that settlement, stayed the proceedings until the Court of Justice has given a preliminary ruling on the following questions:

> "Can a judgment within the meaning of Article 27(3) of the Brussels Convention, with which the judgment whose recognition is sought is irreconcilable, also be an enforceable settlement which is reached by the same parties before a court of the State in which recognition is sought in order to settle legal proceedings which are in progress?

If so, does that answer apply to all the terms of that settlement or only to those which are independently enforceable under Article 51 of the Brussels Convention and possibly only if the conditions for enforcement are met?"

The first question

10 In answering this question it must be borne in mind at the outset that in derogation from the principle laid down in the first paragraph of Article 26 of the Convention, according to which a judgment given in a Contracting State is to be recognized in the other Contracting States without any special procedure being required, Articles 27 and 28 of the Convention list exhaustively the grounds for refusing to recognize such a judgment.

11 Thus, according to Article 27 of the Convention,

> "A judgment shall not be recognized:
>
> ...
>
> (3) if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;
>
> ...".

12 The first paragraph of Article 31 of the Convention provides:

> "A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there."

13 The second paragraph of Article 34 of the Convention provides:

> "The application may be refused only for one of the reasons specified in Articles 27 and 28."

14 On the question whether a court settlement such as that at issue in the main proceedings constitutes a "judgment" within the meaning of Article 27(3), it is to be noted that Article 25 of the Convention, which appears under Title III - "Recognition and Enforcement" - provides:

> "For the purposes of this Convention, 'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."

15 The very wording of Article 25 shows that the definition of "judgment" given in that provision

refers, for the purposes of the application of the various provisions of the Convention in which the term is used, solely to judicial decisions actually given by a court or tribunal of a Contracting State.

16 As is explained in the Report of the Committee of Experts on the Convention (OJ 1979 C 59, at the foot of p. 42), Article 25 expressly treats the determination of costs by an officer of the court as a judgment since, under the German Code of Civil Procedure which makes provision for this, the registrar acts as an officer of the court which decided on the substance of the matter and, in the event of a challenge to the registrar' s decision, the court decides the issue.

17 It follows from the foregoing that in order to be a "judgment" for the purposes of the Convention the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties.

18 That condition is not fulfilled in the case of a settlement, even if it was reached in a court of a Contracting State and brings legal proceedings to an end. Settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention, as the Experts' Report explains (op. cit., p. 56)

19 Moreover, a different construction cannot be entertained where the application of Article 27(3) of the Convention is concerned.

20 As has already been stated in paragraph 15 of this judgment, the definition of "judgment" given in Article 25 applies to all the provisions of the Convention in which that term is used. Moreover, Article 27 constitutes an obstacle to the achievement of one of the fundamental objectives of the Convention, which is to facilitate, to the greatest extent possible, the free movement of judgments by providing for a simple and rapid enforcement procedure. Article 27 must therefore be interpreted strictly, which precludes treating a court settlement as a judgment given by a court or tribunal.

21 The Report of the Committee of Experts states elsewhere (op. cit., p. 45), with regard to the ground for refusing recognition set out in Article 27(3) of the Convention, that "the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments". Such a risk of disturbance only assumes the gravity required to justify, under the Convention, refusal of recognition and enforcement of a judgment given in another Contracting State, whose irreconcilability with a judgment given between the same parties in the State where recognition is sought is pleaded, if the latter decision is a judgment of a court which itself determines a matter at issue between the parties.

22 Furthermore, the case of court settlements is governed expressly by Article 51 of the Convention, which falls under Title IV, headed "Authentic Instruments and Court Settlements", and which lays down specific rules for their enforcement.

23 According to that provision;

> "A settlement which been approved by a court in the course of proceedings and is enforceable in the State in which it was concluded shall be enforceable in the State in which enforcement is sought under the same conditions as authentic instruments."

24 In derogation from the system of rules governing enforcement of judgments, the first paragraph of Article 50 of the Convention provides that enforcement of an authentic instrument in a Contracting State other than the State in which it was formally drawn up or registered and is enforceable may be refused only if enforcement of the instrument is contrary to public policy in the State in which enforcement is sought.

25 In view of all the preceding considerations, the reply to the first question submitted by the Bundesgerichtshof must be that Article 27(3) of the Convention is to be interpreted as meaning

that an enforceable settlement reached before a court of the State in which recognition is sought in order to settle legal proceedings which are in progress does not constitute a "judgment", within the meaning of that provision, "given in a dispute between the same parties in the State in which recognition is sought" which, under the Convention, may preclude recognition and enforcement of a judgment given in another Contracting State.

The second question

26 In view of the answer given to the first question, there is no need to answer the second question.

Costs

27 The costs incurred by the German and Italian Governments and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof by order of 5 November 1992, hereby rules:

Article 27(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as meaning that an enforceable settlement reached before a court of the State in which recognition is sought in order to settle legal proceedings which are in progress does not constitute a "judgment", within the meaning of that provision, "given in a dispute between the same parties in the State in which recognition is sought" which, under the Convention, may preclude recognition and enforcement of a judgment given in another Contracting State.

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41968A0927(01)-A28 : N 10
41968A0927(01)-A31L1 : N 12
41968A0927(01)-A34L2 : N 13
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CONCERNS Interprets 41968A0927(01) -A27PT3

SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

AUTLANG German

OBSERV Federal Republic of Germany ; Italy ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Bundesgerichtshof, Vorlagebeschluß vom 05/11/1992 (IX ZB 15/92) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1992 no 228 ; - Europäische Zeitschrift für Wirtschaftsrecht 1993 p.195-198 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1993 p.78 (résumé) ; - Neue Juristische Wochenschrift 1993 p.1616 (résumé) ; - Wertpapier-Mitteilungen 1993 p.574-577 ; - Jahrbuch für italienisches Recht 1995 Bd.8 p.258 (résumé)

NOTES Schlosser, Peter: Juristenzeitung 1994 p.1008-1009 ; Mankowski, Peter: Prozeßvergleiche im europäischen Rechtsverkehr, Europäisches Wirtschafts- & Steuerrecht - EWS 1994 p.379-384 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments, Netherlands International Law Review 1994 p.359-362 ; Fiumara, Oscar: Decisione giudiziaria e transazione giudiziaria nella Convenzione di Bruxelles del 27 settembre 1968, Rassegna dell'avvocatura dello Stato 1994 I Sez.II p.275-277 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1995 p.280-282 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1992-1993 et 1993-1994, Cahiers de droit européen 1995 p.209-213 ; Von Hoffmann, Bernd ; Hau, Wolfgang: Deutscher Prozeßvergleich kein Anerkennungshindernis nach Art. 27 Nr. 3 EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 1995 p.217-218 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1995 p.466-469 ; Kohl, Alphonse: Transaction judiciaire et décision dans la Convention de 1968, Revue de jurisprudence de Liège, Mons et Bruxelles 1995 p.1176-1177 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1993/94), Schweizerische Zeitschrift für internationales und europäisches Recht 1995 p.346-348 ; De Boer, Th.M.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1995 no 637 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions Relating to the Judgments Convention, The Scots Law Times 1995 p.a10 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1995 p.342-343 ; Palao Moreno, Guillermo: Revista española de Derecho Internacional 1995 p.227-229 ; Coscia, Giuseppe: Contrasto fra decisioni e atti equiparati, Il Foro italiano 1996 IV Col.463-469

PROCEDU	Reference for a preliminary ruling
ADVGEN	Gulmann
JUDGRAP	Schockweiler
DATES	of document: 02/06/1994 of application: 15/12/1992

Judgment of the Court
of 6 December 1994
The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj". Reference for a preliminary ruling: Court of Appeal (England) - United Kingdom. Brussels Convention - Lis pendens - Related actions - Relationship with the international convention relating to the arrest of seagoing ships. Case C-406/92.

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1. Convention on jurisdiction and the enforcement of judgments ° Relationship to other conventions ° Conventions on a specific matter ° Convention including rules of jurisdiction ° Exclusion of application of the Brussels Convention ° Limits ° Applicability of that convention to questions not governed by the specialized convention

(Convention of 27 September 1968, Art. 57)

2. Convention on jurisdiction and the enforcement of judgments ° Lis pendens ° Actions brought between the same parties ° Some but not all parties to the two sets of proceedings identical ° Obligation of the second court seised to decline jurisdiction ° Obligation limited solely to those parties who are also parties to the action previously commenced

(Convention of 27 September 1968, Art. 21)

3. Convention on jurisdiction and the enforcement of judgments ° Lis pendens ° Actions involving the same cause of action and the same object ° Concept ° Action for a finding of liability with a claim for payment by the defendant of damages for the loss suffered, and action by that party for a declaration that he is not liable for the same loss ° Inclusion ° Distinction in national law between actions in personam and in rem ° Irrelevance

(Convention of 27 September 1968, Art. 21)

4. Convention on jurisdiction and the enforcement of judgments ° Related actions ° Concept ° Independent interpretation ° Risk of conflicting decisions ° Actions brought against a shipowner by several groups of cargo owners seeking damages for loss which occurred during the shipment of the joint cargo and based on contracts which are separate but identical

(Convention of 27 September 1968, Art. 22)

1. On a proper construction, Article 57 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, means that, where a Contracting State is also a contracting party to another convention on a specific matter containing rules on jurisdiction, that specialized convention precludes the application of the provisions of the Brussels Convention only in cases governed by the specialized convention and not in those to which it does not apply. Where a specialized convention contains certain rules of jurisdiction but no provision as to lis pendens or related actions, Articles 21 and 22 of the Brussels Convention accordingly apply.

2. On a proper construction of Article 21 of the Convention, where it requires, as a condition of the obligation of the second court seised to decline jurisdiction, that the parties to the two actions be identical, that cannot depend on the procedural position of each of them in the two actions. Where some but not all of the parties to the second action are the same as the parties to the action commenced earlier in another Contracting State, that article requires the second court seised to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously commenced; it does not prevent the proceedings from continuing between the other parties.

3. For the purposes of Article 21 of the Convention, the "cause of action" comprises the facts and the rule of law relied on as the basis of the action and the "object of the action" means the end the action has in view. An action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object within the meaning of that article as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss. A subsequent action does not cease to have the same cause of action and the same object and to be between the same parties as a previous action where the latter, brought by the owner of a ship before a court of a Contracting State, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another Contracting State by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other Contracting State.

4. The concept of "related actions" defined in the third paragraph of Article 22 of the Convention, which must be given an independent interpretation, must be interpreted broadly and, without its being necessary to consider the concept of irreconcilable judgments in Article 27(3) of the Convention, must cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive. It is accordingly sufficient, in order to establish the necessary relationship between, on the one hand, an action brought in a Contracting State by one group of cargo owners against a shipowner seeking damages for harm caused to part of the cargo carried in bulk under separate but identical contracts, and, on the other, an action in damages brought in another Contracting State against the same shipowner by the owners of another part of the cargo shipped under the same conditions and under contracts which are separate from but identical to those between the first group and the shipowner, that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences.

In Case C-406/92,

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 Court of Appeal for a preliminary ruling in the proceedings pending before that court between

The owners of the cargo lately laden on board the ship "Tatry"

and

The owners of the ship "Maciej Rataj"

on the interpretation of Articles 21, 22 and 57 of the Brussels Convention of 27 September 1968, cited above, 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, R. Joliet, F.A. Schockweiler and P.J.G. Kapteyn (Presidents of Chambers), G.F. Mancini, C.N. Kakouris (Rapporteur) and J.L. Murray, Judges,

Advocate General: G. Tesauro,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° the owners of the cargo lately laden on board the ship Tatry, by Clyde & Co., Solicitors, and Alistair Schaff, Barrister,

° the owners of the ship Maciej Rataj, by Lawrence Graham, Solicitors, and Charles Priday, Barrister,

° the United Kingdom, by John D. Colahan, replacing Susan Cochrane, of the Treasury Solicitor' s Department, acting as Agent, and Lionel Persey, Barrister,

° the Commission of the European Communities, by Xavier Lewis and Pieter van Nuffel, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicants, represented by Alistair Schaff, of the defendants, represented by Stephen Tomlinson QC, of the United Kingdom, represented by Stephen Braviner of the Treasury Solicitor' s Department, acting as Agent, and by Lionel Persey, and of the Commission, represented by Xavier Lewis, at the hearing on 11 May 1994,

after hearing the Opinion of the Advocate General at the sitting on 13 July 1994,

gives the following

Judgment

Costs

58 The costs incurred by the United Kingdom Government and the Commission of the European Communities, 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 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 questions referred to it by the Court of Appeal by order of 5 June 1992, hereby rules:

1. On a proper construction, Article 57 of the Brussels 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, means that, where a Contracting State is also a contracting party to another convention on a specific matter containing rules on jurisdiction, that specialized convention precludes the application of the provisions of the Brussels Convention only in cases governed by the specialized convention and not in those to which it does not apply.

2. On a proper construction of Article 21 of the Convention, where two actions involve the same cause of action and some but not all of the parties to the second action are the same as the parties to the action commenced earlier in another Contracting State, the second court seised is required to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously commenced; it does not prevent the proceedings from continuing between the other parties.

3. On a proper construction of Article 21 of the Convention, an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss.

4. A subsequent action does not cease to have the same cause of action and the same object and to be between the same parties as a previous action where the latter, brought by the owner of a ship before a court of a Contracting State, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another Contracting State by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other Contracting State.

5. On a proper construction of Article 22 of the Convention, it is sufficient, in order to establish the necessary relationship between, on the one hand, an action brought in a Contracting State by one group of cargo owners against a shipowner seeking damages for harm caused to part of the cargo carried in bulk under separate but identical contracts, and, on the other, an action in damages brought in another Contracting State against the same shipowner by the owners of another part of the cargo shipped under

the same conditions and under contracts which are separate from but identical to those between the first group and the shipowner, that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences.

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 "the Convention" or "the Brussels Convention"), 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) (hereinafter "the Accession Convention"), several questions on the interpretation of Articles 21, 22 and 57 of the Convention.

1 Those questions were raised in two actions in which the facts and procedure before the national courts are summarized below.

2 In September 1988 a cargo of soya bean oil belonging to a number of owners (hereinafter "the cargo owners") was carried in bulk aboard the vessel Tatry, belonging to a Polish shipping company, Zegluga Polska Spolka Alceyjna ° referred to in the order for reference as "the shipowners". The voyage was from Brazil to Rotterdam for part of the cargo and to Hamburg for the rest. The cargo owners complained to the shipowners that in the course of the voyage the cargo was contaminated with diesel or other hydrocarbons.

3 There are three groups of cargo owners:

° "Group 1": owners of cargo carried to Rotterdam under separate bills of lading;

° "Group 2": this is not a "group", but simply the company Phillip Brothers Ltd (hereinafter "Phibro"), whose registered office is in the United Kingdom, which owned another part of the cargo also carried to Rotterdam under separate bills of lading;

° "Group 3": four owners of cargo carried to Hamburg under four separate bills of lading; the owners in the group were Phibro (in respect of parcels other than those covered by Group 2) and Bunge & Co. Ltd, whose registered office is likewise in the United Kingdom, Hobum Oele und Fette AG and Handelsgesellschaft Kurt Nitzer GmbH, both of whose registered offices are in Germany.

4 Various actions were commenced in courts in the Netherlands and the United Kingdom by the various cargo owners and the shipowners.

(a) Actions brought by the shipowners

5 On 18 November 1988, before any other proceedings had commenced, the shipowners brought an action before the Arrondissementsrechtbank (District Court), Rotterdam against Groups 1 and 3, with the exception of Phibro, seeking a declaration that they were not liable or not fully liable for the alleged contamination.

6 The cargo owners in Group 1 were sued in the Rotterdam District Court on the basis of Article 2 of the Convention, and those in Group 3 on the basis of Article 6(1).

7 In 1988, no action had been brought by the shipowners against Group 2 (Phibro). It was not until 18 September 1989 that the shipowners initiated separate proceedings in the Netherlands for a declaration that they were not liable for the contamination of the cargo delivered to Group 2 in Rotterdam. Those proceedings were brought against Phibro' s agents in Rotterdam, who had presented the bills of lading on behalf of Phibro.

8 On 26 October 1990 the shipowners initiated proceedings in the Netherlands seeking to limit their liability in respect of the entire cargo. Those proceedings were brought under the International Convention of 10 October 1957 relating to the limitation of the liability of owners of sea-going ships [International Transport Treaties, suppl. 1-10 (January 1986), p. I-76].

(b) Actions brought by the cargo owners

9 The following actions were brought by the cargo owners in Groups 2 and 3 against the owners of the vessel Tatry seeking damages for their alleged loss.

10 After an unsuccessful attempt to arrest the Tatry in Hamburg, Group 3 brought an action in rem (hereinafter "Folio 2006") before the High Court of Justice, Queens' s Bench Division, Admiralty Court, against the Tatry and another ship, the Maciej Rataj, whose owners are the same as the owners of the Tatry. The writ was served on 15 September 1989 in Liverpool on the Maciej Rataj, which was arrested. Subsequently, the shipowners acknowledged service of the writ and, by providing a guarantee, secured the vessel' s release from arrest. The action continued in accordance with English law. However, doubts exist under that law as to whether the proceedings continue in those circumstances only in personam or both in rem and in personam.

11 Group 2 (Phibro) also commenced an action in rem before the same court (hereinafter "Folio 2007") against the ship Maciej Rataj. The writ was served on 15 September 1989 in Liverpool on the Maciej Rataj, which was likewise arrested. The course of events in Folio 2007 was the same as in Folio 2006.

12 For the arrest of the Maciej Rataj, the Admiralty Court based its jurisdiction on sections 20 to 24 of the Supreme Court Act 1981, which implement the International Convention for the unification of certain rules relating to the arrest of sea-going ships, signed at Brussels on 10 May 1952 [International Transport Treaties, suppl. 14 (March 1990), p. I-64, hereinafter "the Arrest Convention"], to which the Netherlands is also a party.

13 Furthermore, as a precautionary measure in the event that the English courts declined jurisdiction, Groups 2 and 3 (with the exception of Phibro) brought actions in the Netherlands on 29 September and 3 October 1989 respectively.

14 Group 1 brought no action before the English courts. However, on 29 September 1989 it brought an action for damages in the Netherlands against the shipowners.

15 As regards Folio 2006, the shipowners moved the Admiralty Court to decline jurisdiction in favour of the Netherlands court pursuant to Article 21 of the Brussels Convention relating to lis pendens or, in the alternative, pursuant to Article 22 on related actions. As regards Folio 2007, since they accepted that the Admiralty Court was the first seised, they did not rely on Article 21 of the Convention but none the less requested that the Admiralty Court decline jurisdiction

on the basis of Article 22.

16 At first instance, the Admiralty Court decided that it was under no obligation to decline jurisdiction or stay proceedings in accordance with Article 21 of the Convention, since that provision was not applicable for the following reasons:

(a) in Folio 2006, on the ground that that action and the proceedings previously brought in the Netherlands did not have the same cause of action, since the English proceedings sought compensation for the cargo owners while the Netherlands proceedings sought neither to protect nor to enforce a right but sought a declaration that the cargo owners were not entitled to claim damages from the owners of the Tatry;

(b) in Folio 2007, on the ground that Group 2 was not a party to the proceedings commenced in the Netherlands.

17 The Admiralty Court accepted that Folio 2006 and Folio 2007 and the proceedings commenced in the Netherlands were related actions. It decided, however, that it was not appropriate to decline jurisdiction or stay proceedings in the two cases pending before it.

18 The shipowners appealed against that decision to the Court of Appeal.

19 The Court of Appeal, since it did not uphold the decision given at first instance and considered that the outcome of the proceedings depended on the interpretation of Articles 21, 22 and 57 of the Convention, decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

> "1. For the purposes of the application of Article 21 of the Brussels Convention 1968 (as amended), where proceedings are brought in a Contracting State which involve the same cause of action as prior proceedings brought in another Contracting State, must the courts of the Contracting State second seised decline jurisdiction

(a) only where there is a complete identity of parties between the two sets of proceedings; or

(b) only where all the parties to the proceedings in the courts of the Contracting State second seised are also parties to the proceedings in the courts of the Contracting State first seised; or

(c) whenever at least one of the plaintiffs and one of the defendants to the proceedings before the courts of the Contracting State second seised are also parties to the proceedings in the courts of the Contracting State first seised; or

(d) whenever the parties in the two sets of proceedings are substantially the same?

2. In relation to the carriage of goods by sea in circumstances where goods are discharged in an allegedly damaged condition, does a claim brought by the cargo owners in a Contracting State in respect of such alleged damage in an action which was commenced in rem against either the carrying vessel or a sister ship thereof pursuant to the United Kingdom' s admiralty jurisdiction involve the same parties and the same cause of action for the purposes of Article 21 of the Brussels Convention 1968 (as amended) as in personam proceedings previously brought in another Contracting State by the ship owner against the cargo owners in respect of such alleged damage if the shipowner acknowledges service and procures the release from arrest of the vessel upon provision of security and thereafter

(a) the admiralty action continues both in rem and in personam; or

(b) the admiralty action continues only in personam?

3. Where a Contracting State is party to the Brussels Arrest Convention 1952 and its merits jurisdiction has been invoked by the arrest of a vessel in accordance with the provisions of the Arrest Convention

by cargo owners in respect of a claim for loss arising out of the discharge of cargo in an allegedly damaged condition, then in so far as proceedings have previously been brought by the shipowner against the cargo owners in respect of such alleged damage in another Contracting State, are the courts of the Contracting State in which merits jurisdiction has been founded by arrest entitled to retain such jurisdiction by virtue of Article 57 of the Brussels Convention 1968 (as amended by Article 25(2) of the Accession Convention) if

(a) the two actions involve the same cause of action and same parties for the purposes of Article 21 of the Brussels Convention 1968 (as amended); or

(b) the two actions are 'related actions' for the purposes of Article 22 of the Brussels Convention 1968 (as amended) and it would otherwise be appropriate for the court second seised to decline jurisdiction or to stay its proceedings thereunder?

4. For the purposes of Article 22 of the Brussels Convention 1968 (as amended):

(a) Does the third paragraph of Article 22 provide an exclusive definition of 'related proceedings?'

(b) In order for the courts of a Contracting State to decline jurisdiction or to stay their proceedings under Article 22, is it necessary for there to be a risk that if the two sets of proceedings are heard and determined separately, this might lead to legal consequences which are mutually exclusive?

(c) If proceedings are brought in one Contracting State in respect of a claim by one group of cargo owners against a shipowner for damage to their portion of a bulk cargo carried under specified contracts of carriage and if separate proceedings are brought in another Contracting State against the same shipowner based on essentially similar issues of fact and law but by a different cargo owner for damage to its portion of the same bulk cargo carried under separate contracts of carriage on the same terms, do these proceedings, if heard and determined separately, involve the risk of giving rise to legal consequences which are mutually exclusive or are they otherwise related actions for the purposes of Article 22?

5. In relation to the carriage of goods by sea in circumstances where goods are discharged in an allegedly damaged condition, if

(i) the shipowner commences proceedings in a Contracting State which involve a claim for a declaration of non-liability to cargo interests in respect of such alleged damage; and

(ii) the cargo claimants subsequently commence the proceedings in another Contracting State in which they claim damages against the shipowner for negligence and/or breach of contract and/or duty in respect of such alleged damage to their cargo,

do the latter proceedings involve the same cause of action as the former proceedings for the purposes of Article 21 of the 1968 Brussels Convention (as amended) so that the courts of the latter Contracting State must decline jurisdiction pursuant to Article 21?"

20 In the light of the interrelationship between the various questions referred, it is appropriate first to consider the third question, which concerns the scope of the Brussels Convention and of the special conventions. The first, fifth and second questions, all three of which seek an interpretation of Article 21 of the Convention, concerned with lis pendens, will be considered thereafter. Finally, the fourth question, which seeks an interpretation of Article 22 of the Convention, concerned with related actions, will be considered.

The third question

21 The national court' s third question is essentially whether, on a proper construction, Article 57 of the Convention, as amended by the Accession Convention, means that, where a Contracting State is also a contracting party to another convention on a specific matter containing rules on

jurisdiction, that specialized convention always, subject to express exceptions, precludes the application of the Brussels Convention, or that the specialized convention precludes the application of the provisions of the Brussels Convention only in cases governed by it and not in those to which it does not apply.

22 Article 57 of the Convention, as amended by Article 25(1) of the Accession Convention, provides:

> "This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.
>
> This Convention shall not affect the application of provisions which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts."

23 Article 57 introduces an exception to the general rule that the Convention takes precedence over other conventions signed by the Contracting States on jurisdiction and the recognition and enforcement of judgments. The purpose of that exception is to ensure compliance with the rules on jurisdiction laid down by specialized conventions, since in enacting those rules account was taken of the specific features of the matters to which they relate.

24 That being its purpose, Article 57 must be understood as precluding the application of the provisions of the Brussels Convention solely in relation to questions governed by a specialized convention. A contrary interpretation would be incompatible with the objective of the Convention which, according to its preamble, is to strengthen in the Community the legal protection of persons therein established and to facilitate recognition of judgments in order to secure their enforcement. In those circumstances, when a specialized convention contains certain rules of jurisdiction but no provision as to lis pendens or related actions, Articles 21 and 22 of the Brussels Convention apply.

25 The cargo owners argue that the Arrest Convention contains provisions relating to lis pendens in Article 3(3), which provides: "A ship shall not be arrested... more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant".

26 The cargo owners' argument cannot be accepted. Where an arrest has already been made in the jurisdiction of a Contracting State, Article 3(3) of the Arrest Convention prohibits a second arrest by the same claimant in respect of the same claim in the jurisdiction, in particular, of another Contracting State. Such a prohibition has nothing to do with the concept of lis pendens within the meaning of Article 21 of the Brussels Convention. That provision is concerned with the situation where proceedings are brought before two courts both of which have jurisdiction and it governs only the question which of those two courts is to decline jurisdiction in the case.

27 The answer to the third question therefore is that, on a proper construction, Article 57 of the Convention, as amended by the Accession Convention, means that, where a Contracting State is also a contracting party to another convention on a specific matter containing rules on jurisdiction, that specialized convention precludes the application of the provisions of the Brussels Convention only in cases governed by the specialized convention and not in those to which it does not apply.

The first question

28 The national court' s first question is essentially whether, on a proper construction, Article 21 of the Convention is applicable in the case of two sets of proceedings involving the same cause of action where some but not all of the parties are the same, at least one of the plaintiffs and one of the defendants to the proceedings first commenced also being among the plaintiffs and defendants

in the second proceedings, or vice versa.

29 The question refers to the term "the same parties" mentioned in Article 21, which requires as a condition for its application that the two sets of proceedings be between the same parties. As the Court held in Case 144/86 Gubisch Maschinenfabrik v Palumbo [1987] ECR 4861, the terms used in Article 21 in order to determine whether a situation of lis pendens arises must be regarded as independent (paragraph 11 of the judgment).

30 Moreover, as the Advocate General noted in his Opinion (paragraph 14), it follows by implication from that judgment that the question whether the parties are the same cannot depend on the procedural position of each of them in the two actions, and that the plaintiff in the first action may be the defendant in the second.

31 The Court stressed in that judgment (paragraph 8) 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 and from the outset, 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.

32 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.

33 Consequently, where some of the parties are the same as the parties to an action which has already been started, Article 21 requires the second court seised to decline jurisdiction only to the extent to which the parties to the proceedings pending before it are also parties to the action previously started before the court of another Contracting State; it does not prevent the proceedings from continuing between the other parties.

34 Admittedly, that interpretation of Article 21 involves fragmenting the proceedings. However, Article 22 mitigates that disadvantage. That article allows the second court seised to stay proceedings or to decline jurisdiction on the ground that the actions are related, if the conditions there set out are satisfied.

35 Accordingly, the answer to the first question is that, on a proper construction of Article 21 of the Convention, where two actions involve the same cause of action and some but not all of the parties to the second action are the same as the parties to the action commenced earlier in another Contracting State, the second court seised is required to decline jurisdiction only to the extent to which the parties to the proceedings before it are also parties to the action previously commenced; it does not prevent the proceedings from continuing between the other parties.

The fifth question

36 The national court' s fifth question is essentially whether, on a proper construction of Article 21 of the Convention, an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss.

37 It should be noted at the outset that the English version of Article 21 does not expressly distinguish between the concepts of "object" and "cause" of action. That language version must however be construed in the same manner as the majority of the other language versions in which that distinction is made (see the judgment in Gubisch Maschinenfabrik v Palumbo, cited above,

paragraph 14).

38 For the purposes of Article 21 of the Convention, the "cause of action" comprises the facts and the rule of law relied on as the basis of the action.

39 Consequently, an action for a declaration of non-liability, such as that brought in the main proceedings in this case by the shipowners, and another action, such as that brought subsequently by the cargo owners on the basis of shipping contracts which are separate but in identical terms, concerning the same cargo transported in bulk and damaged in the same circumstances, have the same cause of action.

40 The "object of the action" for the purposes of Article 21 means the end the action has in view.

41 The question accordingly arises whether two actions have the same object when the first seeks a declaration that the plaintiff is not liable for damage as claimed by the defendants, while the second, commenced subsequently by those defendants, seeks on the contrary to have the plaintiff in the first action held liable for causing loss and ordered to pay damages.

42 As to liability, the second action has the same object as the first, since the issue of liability is central to both actions. The fact that the plaintiff' s pleadings are couched in negative terms in the first action whereas in the second action they are couched in positive terms by the defendant, who has become plaintiff, does not make the object of the dispute different.

43 As to damages, the pleas in the second action are the natural consequence of those relating to the finding of liability and thus do not alter the principal object of the action. Furthermore, the fact that a party seeks a declaration that he is not liable for loss implies that he disputes any obligation to pay damages.

44 In those circumstances, the answer to the fifth question is that, on a proper construction of Article 21 of the Convention, an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable for that loss.

The second question

45 The national court' s second question is whether a subsequent action has the same cause of action and the same object and is between the same parties as a previous action where the first action, brought by the owner of a ship before a court of a Contracting State, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another Contracting State by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other Contracting State.

46 In Article 21 of the Convention, the terms "same cause of action" and "between the same parties" have an independent meaning (see Gubisch Maschinenfabrik v Palumbo, cited above, paragraph 11). They must therefore be interpreted independently of the specific features of the law in force in each Contracting State. It follows that the distinction drawn by the law of a Contracting State between an action in personam and an action in rem is not material for the interpretation of Article 21.

47 Consequently, the answer to the second question is that a subsequent action does not cease to have the same cause of action and the same object and to be between the same parties as a previous action where the latter, brought by the owner of a ship before a court of a Contracting State, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo

before a court of another Contracting State by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other Contracting State.

The fourth question

48 The national court' s fourth question is essentially whether, on a proper construction of Article 22 of the Convention, it is sufficient, in order to establish the necessary relationship between, on the one hand, an action brought in a Contracting State by one group of cargo owners against a shipowner seeking damages for harm caused to part of the cargo carried in bulk under separate but identical contracts, and, on the other, an action in damages brought in another Contracting State against the same shipowner by the owners of another part of the cargo shipped under the same conditions and under contracts which are separate from but identical to those between the first group and the shipowner, that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences.

49 It is clear that that question arises only if the conditions for the application of Article 21 of the Convention are not satisfied.

50 The third paragraph of Article 22 provides that "actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

51 The purpose of that provision is to avoid the risk of conflicting judgments and thus to facilitate the proper administration of justice in the Community (see the Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1979 C 59, p. 1, and in particular at p. 41). Furthermore, since the expression "related actions" does not have the same meaning in all the Member States, the third paragraph of Article 22 sets out the elements of a definition (same report, p. 42). It follows that the concept of related actions there defined must be given an independent interpretation.

52 In order to achieve proper administration of justice, that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive.

53 The cargo owners and the Commission contend that the adjective "irreconcilable", which is used both in the third paragraph of Article 22 and in Article 27(3) of the Convention, must be used in the same sense in both provisions, meaning that the decisions must have mutually exclusive legal consequences, as was held in Case 145/86 Hoffmann v Krieg [1987] ECR 645 (paragraph 22). They point out that the Court there held that a foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable, within the meaning of Article 27(3) of the Convention, with a national judgment pronouncing the divorce of the spouses (paragraph 25).

54 That argument cannot be accepted. The objectives of the two provisions are different. Article 27(3) of the Convention enables a court, by way of derogation from the principles and objectives of the Convention, to refuse to recognize a foreign judgment. Consequently the term "irreconcilable... judgment" there referred to must be interpreted by reference to that objective. The objective of the third paragraph of Article 22 of the Convention, however, is, as the Advocate General noted in his Opinion (paragraph 28), to improve coordination of the exercise of judicial functions within the Community and to avoid conflicting and contradictory decisions, even where the separate enforcement of each of them is not precluded.

55 That interpretation is supported by the fact that the German and Italian versions of the Convention

use different terms in the third paragraph of Article 22 and in Article 27(3).

56 The conclusion is therefore inescapable that the term "irreconcilable" used in the third paragraph of Article 22 of the Convention has a different meaning from the same term used by Article 27(3) of the Convention.

57 Consequently the answer to the fourth question is that, on a proper construction of Article 22 of the Convention, it is sufficient, in order to establish the necessary relationship between, on the one hand, an action brought in a Contracting State by one group of cargo owners against a shipowner seeking damages for harm caused to part of the cargo carried in bulk under separate but identical contracts, and, on the other, an action in damages brought in another Contracting State against the same shipowner by the owners of another part of the cargo shipped under the same conditions and under contracts which are separate from but identical to those between the first group and the shipowner, that separate trial and judgment would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences.

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CONCERNS	Interprets 41968A0927(01) -A21 Interprets 41968A0927(01) -A22 Interprets 41968A0927(01) -A57
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NATCOUR	*A9* Court of Appeal (England), Civil Division, judgment and order of 05/06/1992 ; - Lloyd's Law Reports 1992 Vol.2 p.552-562 ; - Lloyd's Law Reports 1992 Vol.2 p.663-664 (résumé) ; - Current Law - Monthly Digest 1993 Part 3 no 64 (résumé) ; - International Litigation Procedure 1995 p.114-132 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1993 p.194 ; - Collins, Lawrence: Negative Declarations and the Brussels Convention, The Law Quarterly Review 1992 p.545-549 ; - Collins, Lawrence: Negative Declarations and the Brussels Convention, The Law Quarterly Review 1992 p.545-549
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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Kakouris

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Judgment of the Court (Sixth Chamber) of 10 February 1994

Mund & Fester v Hatrex Internationaal Transport. Reference for a preliminary ruling: Hanseatisches Oberlandesgericht Hamburg - Germany. Seizure order - Sufficient grounds: enforcement of a judgment in another Contracting State party to the Brussels Convention - Prohibition of discrimination. Case C-398/92.

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1. EEC Treaty - Fourth indent of Article 220 - Convention on Jurisdiction and Enforcement of Judgments - Connection of Treaty with both the Convention and the national provisions referred to by the Convention

(EEC Treaty, Art. 220; Convention of 27 September 1968)

2. Community law - Principles - Equal treatment - Discrimination on grounds of nationality - National provision authorizing seizure based on the presumption of foreseeable difficulties in the event of a judgment being enforced abroad - Presumption not justified where enforcement takes place in a Member State party to the Brussels Convention - Unlawful

(EEC Treaty, Arts 7 and 220; Convention of 27 September 1968)

1. By providing that the Member States shall, so far as is necessary, enter into negotiations with each other with a view to ensuring for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals, the purpose of the fourth indent of Article 220 of the Treaty is to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto and the elimination, as far as is possible, of diffculties concerning the recognition and enforcement of judgments in the territory of the Contracting States. It follows that the provisions of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, concluded on the basis of that article and within the framework defined by it, and also the national provisions to which the Convention refers, are linked to the EEC Treaty.

2. Article 7 of the Treaty, read in conjunction with Article 220 thereof and the Brussels Convention, precludes a national provision of civil procedure which, in the case of a judgment to be enforced within national territory, authorizes seizure only on the ground that it is probable that enforcement will otherwise be made impossible or substantially more difficult but, in the case of a judgment to be enforced in another Member State, authorizes seizure simply on the ground that enforcement is to take place abroad.

The distinction made by such a provision is not justified by objective circumstances, since all the Member States are Contracting Parties to the Brussels Convention and the conditions for enforcing judgments and the risks attached to the difficulties raised by enforcement are the same.

In Case C-398/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hanseatisches Oberlandesgericht (Higher Regional Court), Hamburg (Federal Republic of Germany), for a preliminary ruling in the proceedings pending before that court between

Mund & Fester

and

Hatrex Internationaal Transport,

on the interpretation of Article 7 of the EEC Treaty, read in conjunction with Article 220 of

the Treaty and the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32), as subsequently amended,

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, C.N. Kakouris (Rapporteur), F.A. Schockweiler, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: G. Tesauro,

Registrar: J.-G. Giraud,

after considering the written observations submitted on behalf of:

- Mund & Fester, by Juergen Kroeger of the Hamburg Bar,

- the German Government, by Ernst Roeder, Ministerialrat in the Federal Ministry of the Economy, and Alfred Dittrich, Regierungsdirektor in the Federal Ministry of Justice, acting as Agents,

- the Commission of the European Communities, by Bernd Langeheine and Pieter Van Nuffel, members of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1993,

gives the following

Judgment

1 By order of 16 November 1992, which was received at the Court on 23 December 1992, the Hanseatisches Oberlandesgericht (Higher Regional Court), Hamburg, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 7 of the EEC Treaty, read in conjunction with Article 220 of the Treaty and the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L 299, p. 32), as subsequently amended (hereinafter referred to as the "Brussels Convention").

2 That question was raised in the course of proceedings brought by Mund & Fester, a German company, against Hatrex Internationaal Transport (hereinafter referred to as "Hatrex"), an international carrier having its registered office in the Netherlands, for a seizure order against assets of Hatrex in Germany.

3 Hatrex transported hazelnuts from Carsamba (Turkey) to Hamburg which were damaged in transit by moisture arising from failure to make the lorry transporting them watertight.

4 Mund & Fester, which acquired rights by subrogation as the result of the transfer of the debt, claimed damages and, to ensure that the debt was recovered, lodged an application on 23 June 1992 at the Landesgericht (Regional Court), Hamburg, pursuant to Paragraph 917 of the Zivilprozessordnung (German Code of Civil Procedure, hereinafter referred to as "ZPO"), for a seizure order against the lorry belonging to Hatrex which was used to carry the hazelnuts and which was still in Germany.

5 Paragraph 917 of the ZPO provides as follows:

> "(1) An order for the seizure of assets shall be made when it is to be feared that enforcement of the judgment would otherwise be made impossible or substantially more difficult.
>
> (2) The fact that judgment is to be enforced abroad shall be considered sufficient grounds for a seizure order."

6 By order of the same day the Landesgericht Hamburg refused to authorize seizure It considered

that the grounds laid down in Paragraph 917(2) of the ZPO did not exist because the judgment in question was to be enforced in a Contracting State party to the Brussels Convention.

7 Mund & Fester appealed against the order of the Landesgericht Hamburg to the Hanseatisches Oberlandesgericht Hamburg, claiming inter alia that the interpretation of Paragraph 917(2) of the ZPO was not affected by the Brussels Convention.

8 Considering that judgment on the application for a seizure order depended on whether the grounds for seizure laid down in Paragraph 917(2) of the ZPO existed where a judgment was to be enforced in the Netherlands, the Hanseatisches Oberlandesgericht Hamburg decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> "Does the need to enforce a seizure order abroad (Paragraph 917(2) of the Zivilprozessordnung) also constitute grounds for seizure where such enforcement would take place in a State which has adhered to the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (the Brussels Convention)?"

9 By its question, the national court is essentially asking whether Article 7 of the EEC Treaty, read in conjunction with Article 220 of the Treaty and the Brussels Convention, precludes a national provision of civil procedure which, in the case of a judgment to be enforced within the national territory, authorizes seizure only on the ground that it is probable that enforcement will otherwise be made impossible or substantially more difficult, but, in the case of a judgment to be enforced in another Member State, authorizes seizure simply on the ground that enforcement is to take place abroad.

10 In order to answer that question, it must first be considered whether that provision falls within the ambit of the EEC Treaty.

11 The fourth indent of Article 220 of the EEC Treaty provides that the Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, although it is not intended to lay down a legal rule directly applicable as such but merely to mark out the framework of negotiations between the Member States (see judgment in Case 137/84 Mutsch [1985] ECR 2681, at paragraph 11). Its purpose is this: to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto and through the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States.

12 It is on the basis of that article and within the framework defined by it that the Member States concluded the Brussels Convention. Consequently, the provisions of that Convention relating to jurisdiction and to the simplification of formalities concerning the recognition and enforcement of judgments and also the national provisions to which the Convention refers are linked to the EEC Treaty.

13 In this case, it must be considered whether the national provision at issue in the main proceedings introduces discrimination on grounds of nationality prohibited by Article 7 of the Treaty.

14 The Court has consistently held that that provision prohibits any discrimination on grounds of nationality within the field of application of the Treaty. The article forbids not only overt forms of discrimination based on nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see judgment in Case 22/80 Boussac [1980] ECR 3427 at paragraph 9).

15 The national provision at issue in the main proceedings entails a covert form of discrimination.

16 While examination of Paragraph 917(2) of the ZPO reveals no overt discrimination based on

nationality, since it applies in all cases where a judgment is to be enforced abroad, even if the assets forming the subject of the seizure belong to a German national, it is nevertheless the case that, as the Commission correctly points out, the latter situation is rare, the great majority of enforcements abroad being against persons who are not of German nationality or against legal persons not established in the Federal Republic of Germany. It follows that the national provision in question leads in fact to the same result as discrimination based on nationality.

17 However, that finding is not sufficient to conclude that a provision such as that at issue in the main proceedings is incompatible with Article 7 of the Treaty. For that it would also be necessary that the provision in question should not be justified by objective circumstances.

18 In that connection, it must be borne in mind that a seizure order guarantees the creditor the opportunity of enforcing a subsequent judgment against the debtor effectively and within the prescribed time. According to Paragraph 917(1) of the ZPO, seizure is to be authorized where it is reasonable to fear, in the light of the circumstances of the case, that enforcement of the subsequent judgment would otherwise be made impossible or substantially more difficult. By virtue of Paragraph 917(2), such difficulties are presumed from the mere fact that enforcement is to take place in a State other than the Federal Republic of Germany.

19 While such a presumption is justified where the subsequent judgment is to be enforced in the territory of a non-member country, it is not justified where enforcement is to take place in the territory of the Member States of the Community. All those States are Contracting Parties to the Brussels Convention whose territories may be regarded as forming a single entity, as indicated in the Report on the Brussels Convention (Official Journal 1979 C 59, p. 1, particularly at p. 13).

20 Consequently, although the conditions for enforcing judgments and the risks attached to the difficulties raised by enforcement are the same in all the Member States, Paragraph 917(2) of the ZPO in essence considers those risks and difficulties to be sure and certain solely because enforcement will take place in the territory of a Member State other than Germany.

21 It follows that the national provision is not justified by objective circumstances.

22 In the light of the foregoing, the answer to the question submitted must be that Article 7 of the EEC Treaty, read in conjunction with Article 220 of the Treaty and the Brussels Convention, precludes a national provision of civil procedure which, in the case of a judgment to be enforced within the national territory, authorizes seizure only on the ground that it is probable that enforcement will otherwise be made impossible or substantially more difficult, but, in the case of a judgment to be enforced in another Member State, authorizes seizure simply on the ground that enforcement is to take place abroad.

Costs

23 The costs incurred by the German Government and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Hanseatisches Oberlandesgericht Hamburg by order of 16 November 1992, hereby rules:

Article 7 of the EEC Treaty, read in conjunction with Article 220 of the Treaty and the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, precludes a national provision of civil procedure which, in the case of a judgment to be enforced within national territory, authorizes seizure only on the ground that it is probable that enforcement will otherwise be made impossible or substantially more difficult, but, in the case of a judgment to be enforced in another Member State, authorizes seizure simply on the ground that enforcement is to take place abroad.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1994 Page I-00467 Swedish special edition Page I-00037 Finnish special edition Page I-00045
DOC	1994/02/10
LODGED	1992/11/23
JURCIT	11957E007 : N 1 9 13 17 22 11957E220 : N 1 9 22 41968A0927(01) : N 1 8 9 12 19 22 11957E220-T4 : N 11 61984J0137-N11 : N 11 61980J0022-N09 : N 14
CONCERNS	Interprets 11957E007 - Interprets 11957E220 - Interprets 41968A0927(01) -
SUB	Brussels Convention of 27 September 1968
AUTLANG	German
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Oberlandesgericht Hamburg, Vorlagebeschluß vom 16/11/1992 (6 W 53/92) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1992 no 241 ; - Europäische Zeitschrift für Wirtschaftsrecht

1993 p.264 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1993 p.78 (résumé) ; - Neue Juristische Wochenschrift 1993 p.2200 (résumé) ; - Praxis des internationalen Privat- und Verfahrensrechts 1993 p.398-399 ; - International Litigation Procedure 1993 p.593-596 ; - Ehricke, Ulrich: Auswirkungen des Gemeinschaftsrechts auf º 917 II ZPO, Praxis des internationalen Privat- und Verfahrensrechts 1993 p.380-382 ; - Ehricke, Ulrich: Auswirkungen des Gemeinschaftsrechts auf º 917 II ZPO, Praxis des internationalen Privat- und Verfahrensrechts 1993 p.380-382 ; *A9* Oberlandesgericht Hamburg, Vorlagebeschluß vom 16/11/1992 (6 W 53/92) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1992 no 241 ; - Europäische Zeitschrift für Wirtschaftsrecht 1993 p.264 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1993 p.78 (résumé) ; - Neue Juristische Wochenschrift 1993 p.2200 (résumé) ; - Praxis des internationalen Privat- und Verfahrensrechts 1993 p.398-399 ; - International Litigation Procedure 1993 p.593-596 ; - Ehricke, Ulrich: Auswirkungen des Gemeinschaftsrechts auf º 917 II ZPO, Praxis des internationalen Privat- und Verfahrensrechts 1993 p.380-382

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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Kakouris

DATES of document: 10/02/1994
of application: 23/11/1992

Judgment of the Court of 17 May 1994

George Lawrence Webb v Lawrence Desmond Webb. Reference for a preliminary ruling: Court of Appeal (England) - United Kingdom. Brussels Convention - Article 16 (1) - Action concerning the existence of a trust attaching to immovable property. Case C-294/92.

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Convention on Jurisdiction and the Enforcement of Judgments ° Exclusive jurisdiction ° Proceedings which have as their object rights in rem in immovable property ° Concept ° Proceedings relating to the existence of a trust attaching to immovable property ° Excluded

(Convention of 27 September 1968, Art. 16(1))

In order for Article 16(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters to apply, it is not sufficient that a right in rem in immovable property be involved in the action or that the action have a link with immovable property: the action must be based on a right in rem and not on a right in personam, save in the case of the exception concerning tenancies of immovable property.

It follows that an action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action in rem within the meaning of Article 16(1) of the Convention.

In Case C-294/92,

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 Court of Appeal, London, for a preliminary ruling in the proceedings pending before that court between

George Lawrence Webb

and

Lawrence Desmond Webb

on the interpretation of Article 16(1) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT,

composed of: O. Due, President, J.C. Moitinho de Almeida, M. Diez de Velasco and D.A.O. Edward (Presidents of Chambers), C.N. Kakouris, R. Joliet (Rapporteur) G.C. Rodríguez Iglesias, M. Zuleeg and P.J.G. Kapteyn, Judges,

Advocate General: M. Darmon,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- George Lawrence Webb, represented by Michael Briggs, Barrister, instructed by Bower, Cotton & Bower, Solicitors,

- Lawrence Desmond Webb, represented by Mark Blackett-Ord, Barrister, instructed by William Sturges & Co, Solicitors,

- the United Kingdom, represented by Sue Cochrane, of the Treasury Solicitor' s Department,

acting as Agent,

- the Commission of the European Communities, represented by Xavier Lewis and Pieter van Nuffel, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations made on behalf of George Lawrence Webb, represented by Michael Briggs and Philip Moser, Barrister, Lawrence Desmond Webb, the United Kingdom, represented by John D. Colahan, of the Treasury Solicitor' s Department, acting as Agent, and David Lloyd Jones, Barrister, and the Commission at the hearing on 16 November 1993,

after hearing the Opinion of the Advocate General at the sitting on 8 February 1994,

gives the following

Judgment

1 By order of 27 February 1992, received at the Court on 3 July 1992, the Court of Appeal, London, 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 "the Convention") a question on the interpretation of Article 16(1) of the Convention.

2 The question arose in proceedings between George Lawrence Webb ("the father") and his son, Lawrence Desmond Webb ("the son") relating to immovable property situated in France.

3 In 1971 the father concluded an agreement for the purchase of a flat in Antibes. He raised the necessary funds in England.

4 The Bank of England authorizations required by United Kingdom exchange control legislation were obtained on the footing that the property would be purchased in the name of the son. The necessary funds were then transferred from the father' s bank account in England to an account opened in Antibes by the son. In October 1971 the vendor conveyed legal ownership of the flat to the son.

5 Since then, both the father, with his wife, and the son have used the flat as a holiday home, with the father bearing the bulk of the outgoings.

6 On 26 March 1990 the father brought an action against the son before the High Court of Justice for a declaration that the son held the property as trustee and for an order that the son should execute such documents as should be required to vest legal ownership of the property in the father.

7 The son challenged the jurisdiction of the English courts. He contended that, since the action related to a right in rem in immovable property, the French courts had exclusive jurisdiction. On this point, he relied on Article 16(1) of the Convention, which provides that

"The following courts shall have exclusive jurisdiction, regardless of domicile:

(1)(a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated."

8 In its judgment of 23 May 1991 the High Court found that the father' s claim was based on a fiduciary relationship between himself and the son and, further, that the father was not seeking a declaration that he was the owner, an order for possession, or rectification of the land register but an order requiring the son to execute such documents as should be necessary to convey ownership in the flat. The High Court accordingly concluded that the claim did not relate to rights in rem in immovable property within the meaning of Article 16(1) of the Convention and dismissed the objection of lack of jurisdiction.

9 On the merits, the High Court found that the son held the flat under a resulting trust. In English law, where a person finances the purchase of property in the name of another, that person is presumed, in the absence of clear intention to bestow a gift, to have retained the beneficial interest in the property and the nominal owner is presumed to be a trustee. In order to rebut that presumption, the son, relying on the presumption of advancement, contended that the flat had been a gift to him. However, that argument did not convince the High Court which deduced from the fact that the flat was used by the father that he intended to keep the property for himself.

10 The son appealed on the ground that the High Court was wrong to hold Article 16(1) of the Convention inapplicable. The Court of Appeal, which was in doubt as to the interpretation to be given to that provision, requested the Court of Justice to give a preliminary ruling on the following question:

> "Whether on the true interpretation of Article 16(1) of the Brussels Convention the proceedings in the Chancery Division of the High Court of Justice, the short title and reference to the record of which is Webb v Webb 1990 W. No 2827, are proceedings in respect of which the courts of France have exclusive jurisdiction."

11 By its question the national court asks whether an action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff constitutes an action in rem within the meaning of Article 16(1) of the Convention.

12 The son and the Commission, who consider that the test for applying Article 16(1) is the plaintiff' s ultimate purpose and that by his action the father is ultimately seeking to secure ownership of the flat, contend that the main proceedings are covered by Article 16(1).

13 That argument cannot be accepted.

14 Article 16 confers exclusive jurisdiction in the matter of rights in rem in immovable property on the courts of the Contracting State in which the property is situated. In the light of the Court' s judgment in Case C-115/88 Reichert and Kockler [1990] ECR I-27, where the Court had to rule on the question whether the exclusive jurisdiction prescribed by that article applied in respect of an action by a creditor to have a disposition of immovable property declared ineffective as against him on the ground that it was made in fraud of his rights by his debtor, it follows that it is not sufficient, for Article 16(1) to apply, that a right in rem in immovable property be involved in the action or that the action have a link with immovable property: the action must be based on a right in rem and not on a right in personam, save in the case of the exception concerning tenancies of immovable property.

15 The aim of the proceedings before the national court is to obtain a declaration that the son holds the flat for the exclusive benefit of the father and that in that capacity he is under a duty to execute the documents necessary to convey ownership of the flat to the father. The father does not claim that he already enjoys rights directly relating to the property which are enforceable against the whole world, but seeks only to assert rights as against the son. Consequently, his action is not an action in rem within the meaning of Article 16(1) of the Convention but an action in personam.

16 Nor are considerations relating to the proper administration of justice underlying Article 16(1) of the Convention applicable in this case.

17 As the Court has held, the conferring of exclusive jurisdiction in the matter of rights in rem in immovable property on the courts of the State in which the property is situated is justified because actions concerning rights in rem in immovable property often involve disputes frequently necessitating checks, inquiries and expert assessments which must be carried out on the spot (see

the judgment in Case 73/77 Sanders v Van der Putte [1977] ECR 2383, at paragraph 13).

18 As the father and the United Kingdom rightly point out, the immovable nature of the property held in trust and its location are irrelevant to the issues to be determined in the main proceedings which would have been the same if the dispute had concerned a flat situated in the United Kingdom or a yacht.

19 The answer to be given to the question submitted to the Court must therefore be that an action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action in rem within the meaning of Article 16(1) of the Convention.

Costs

.20 The costs incurred by the United Kingdom and by the Commission of the European Communities, 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,

in answer to the question referred to it by the Court of Appeal, London, by order of 27 February 1992, hereby rules:

An action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action in rem within the meaning of Article 16(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1994 Page I-01717
DOC	1994/05/17
LODGED	1992/07/03
JURCIT	41968A0927(01)-A16PT1 : N 1 - 19 61988J0115 : N 14 61977J0073 : N 17

CONCERNS	Interprets 41968A0927(01) -A16PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	English
OBSERV	United Kingdom ; Commission ; Member States ; Institutions
NATIONA	United Kingdom
NATCOUR	*A9* Court of Appeal (England), Civil Division, Order of 27/02/1992 (1421/92 1990/W/2827) ; - Current Law - Monthly Digest 1992 Part 4 no 45 (résumé) ; - International Litigation Procedure 1992 p.374-378 ; - Financial Times 11/03/92 (résumé)
NOTES	Koppenol-Laforce, M.E.: De exclusieve bevoegdheid inzake geschillen ten aanzien van onroerende zaken (art. 16 sub 1 EEX) en een vordering inzake het bestaan van een trust, Juridisch up to date 1994 no 13 p.5-8 ; Idot, Laurence: Europe 1994 Juillet Comm. no 297 p.19 ; Hartley, Trevor: Rights in rem: trusts, European Law Review 1994 p.547-548 ; Briggs, Adrian: Trusts of Land and the Brussels Convention, The Law Quarterly Review 1994 p.526-531 ; Rogerson, Pippa: Equity, rights in rem and the Brussels Convention, The Cambridge Law Journal 1994 p.462-464 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments, Netherlands International Law Review 1994 p.347-351 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1995 p.272-276 ; Struycken, A.V.M.: Webb-Webb, modehuis Nolly en de hete fiduciaire brij, Weekblad voor privaatrecht, notariaat en registratie 1995 p.210-211 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1995 p.81-82 ; Béraudo, Jean-Paul: Revue critique de droit international privé 1995 p.130-138 ; Bouckaert, F.: Een appartement in Antibes, een "resulting" trust in Engeland en het EEX Verdrag, Weekblad voor privaatrecht, notariaat en registratie 1995 p.241-245 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1992-1993 et 1993-1994, Cahiers de droit européen 1995 p.202-204 ; Bischoff, Jean-Marc: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1995 p.477-483 ; Kaye, Peter: Creation of an English Resulting Trust of Immovables Held to Fall Outside Article 16(1) of the European Judgments Convention, Praxis des internationalen Privat- und Verfahrensrechts 1995 p.286-289 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1993/94), Schweizerische Zeitschrift für internationales und europäisches Recht 1995 p.316-319 ; Asín Cabrera, María Asuncion: Revista española de Derecho Internacional 1995 p.363-365 ; Contaldi, Gianluca: La Convenzione di Bruxelles e il trust: brevi note sull'interpretazione dell'art. 16.1 conv., Giustizia civile 1996 I p.1531-1540 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions Relating to the Judgments Convention, The Scots Law Times 1996 p.a2 ; Poddighe, Andrea: I trusts in Italia, Diritto e pratica tributaria 2001 I p.300-316
PROCEDU	Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Joliet

DATES of document: 17/05/1994
of application: 03/07/1992

Judgment of the Court
of 29 June 1994
Custom Made Commercial Ltd v Stawa Metallbau GmbH.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention - Place of performance of an obligation - Uniform law of sale.
Case C-288/92.

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Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ° Special jurisdiction ° Court of the place of performance of a contractual obligation ° Determination of the place of performance according to the substantive law, including, if appropriate, the uniform law on international sales, applicable according to the conflicts rules of the court seised

(Convention of 27 September 1968, Art. 5(1), as amended by the Accession Convention of 1978)

The place of performance of the obligation in question was chosen as the criterion of jurisdiction in Article 5(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought. That criterion makes it possible for a defendant to be sued in the courts for the place of performance of the obligation in question, even where the court thus designated is not that which has the closest connection with the dispute.

The court before which the matter is brought must determine in accordance with its own rules of conflicts of laws, including, if appropriate, a uniform law, what is the law applicable to the legal relationship in question and define, in accordance with that law, the place of performance of the contractual obligation in question. Article 5(1) of the Convention, as amended by the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

In Case C-288/92,

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 Bundesgerichtshof (Federal Court of Justice) (Germany) for a preliminary ruling in the proceedings pending before that court between

Custom Made Commercial Ltd

and

Stawa Metallbau GmbH

on the interpretation of Article 5(1) and the first paragraph of Article 17 of the 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 version ° p. 77),

THE COURT,

composed of: O. Due, President, J.C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C.N. Kakouris (Rapporteur), F.A. Schockweiler, F. Grévisse, M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: C.O. Lenz,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° the German Government, by Professor Christof Boehmer, Ministerialrat at the Federal Ministry of Justice, acting as Agent,

° the Italian Government, by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by O. Fiumara, Avvocato dello Stato,

° the Commission of the European Communities, by P. van Nuffel, of the Legal Service, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt, Duesseldorf,

having regard to the Report for the Hearing,

after hearing the oral observations of the Italian Government and the Commission of the European Communities at the hearing on 19 January 1994,

after hearing the Opinion of the Advocate General at the sitting on 8 March 1994,

gives the following

Judgment

1 By order of 26 March 1992, received at the Court on 30 June 1992, the Bundesgerichtshof 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 (OJ 1978 L 304, p. 36) ("the Convention"), 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), a number of questions on the interpretation of Article 5(1) and the first paragraph of Article 17 of the Convention.

2 Those questions arose in proceedings between Stawa Metallbau GmbH ("Stawa"), which has its seat in Bielefeld (Germany), and Custom Made Commercial Ltd ("Custom Made"), which has its seat in London, concerning the payment by the latter of merely part of the price agreed under a contract for the supply of windows and doors to be manufactured by Stawa.

3 According to the order for reference, Stawa gave a verbal undertaking in London on 6 May 1988, following negotiations conducted in English, to supply the goods to Custom Made. The goods were to be used for a building complex in London. The contract, the first to be concluded between the parties, stipulated that payment was to be in sterling.

4 Stawa confirmed the conclusion of the contract by a letter of 9 May 1988 written in English, to which it attached for the first time its general business conditions written in German. Paragraph 8 of those general conditions stated that in the event of a dispute between the parties the place of performance and jurisdiction was to be Bielefeld. Custom Made did not raise any objection to those general conditions.

5 When Custom Made paid only part of the stipulated price, Stawa brought proceedings for recovery

of the balance before the Landgericht (Regional Court) Bielefeld. On 13 December 1989 that court delivered a default judgment in which it ordered Custom Made to pay to Stawa the sum of 144 742.08 plus interest.

6 In its application to have that judgment set aside, Custom Made submitted, inter alia, that the German courts lacked international jurisdiction. On 9 May 1990 the Landgericht Bielefeld delivered an interlocutory judgment declaring Stawa' s claim to be admissible.

7 Custom Made appealed against that decision to the Oberlandesgericht (Higher Regional Court) Hamm, once again claiming that the German courts lacked international jurisdiction.

8 The Oberlandesgericht dismissed that appeal by judgment of 8 March 1991, in which it based the international jurisdiction of the German courts on Article 5(1) of the Convention, in conjunction with the first part of Article 59(1) of the Uniform Law on the International Sale of Goods annexed to the Hague Convention of 1 July 1964 (United Nations Treaty Series, 1972, Vol. 834, p. 107 et seq.), which provides that the buyer must pay the price to the seller at the seller' s place of business or, if he does not have a place of business, at his habitual residence.

9 Custom Made brought an appeal on a point of law before the Bundesgerichtshof against the judgment of the Oberlandesgericht.

10 The Bundesgerichtshof took the view that the dispute gave rise to problems of interpretation of the Convention and for that reason decided to stay the proceedings until the Court had delivered a preliminary ruling on the following questions:

"1. (a) Is the place of performance under Article 5(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to be determined pursuant to the substantive law applicable to the obligation in issue under the conflicts rules of the court hearing the case where the case concerns a claim for payment of the price brought by the supplier against the customer under a contract for manufacture and supply, according to the conflicts rules of the court hearing the case that contract is governed by uniform sales law and under that law the place of performance of the obligation to pay the price is the place of establishment of the plaintiff supplier?

(b) In the event that the Court of Justice replies in the negative to Question 1(a):

How is the place of performance under Article 5(1) of the Convention to be determined in such a case?

2. In the event that according to the answers to Questions 1(a) and (b) the German courts cannot derive jurisdiction from Article 5(1) of the Convention:

(a) Can a jurisdiction agreement validly be made under the third hypothesis in the second sentence of Article 17, first paragraph, of the Convention (in the 1978 version) where after the oral conclusion of a contract the supplier confirms the conclusion of the contract in writing and that written confirmation is accompanied for the first time by general business conditions containing a jurisdiction clause, the customer does not dispute the jurisdiction clause, there is no trade practice at the place where the customer is established to the effect that the absence of response to such a document is to be regarded as assent to the jurisdiction clause, the customer is not aware of any such trade practice and it is the first time that the parties have done business with each other?

(b) In the event that the Court of Justice replies in the affirmative to Question 2(a):

Is that also true where the general business conditions containing the jurisdiction clause are in a language which the customer does not understand and is not that in which the contract was negotiated

and concluded and where the written confirmation of the contract, written in the language in which the contract was negotiated and concluded, refers generally to the attached general business conditions but not specifically to the jurisdiction clause?

3. In the event that the Court of Justice replies in the affirmative to Questions 2(a) and (b):

In relation to a jurisdiction clause contained in general business conditions which meets the requirements laid down in Article 17 of the Convention for a valid jurisdiction agreement, does Article 17 preclude further examination, under the national substantive law which is applicable in accordance with the conflicts rules of the court hearing the case, of the question whether the jurisdiction clause is validly incorporated in the contract?"

Question 1(a)

11 In this question, as elucidated by the grounds of the order for reference, the national court asks whether Article 5(1) of the Convention is to be understood as meaning that, in the case of a claim for payment by a supplier against his customer under a contract for manufacture and supply, the place of performance of the obligation to pay must be determined pursuant to the substantive law applicable to the obligation in issue under the conflicts rules of the court seised, even if those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

12 Article 2 of the Convention sets out the general rule that the jurisdiction of a court is based on the place of the defendant' s domicile, although Article 5 also confers jurisdiction on other courts, the choice of which is a matter for the applicant. This freedom of choice was introduced in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may most conveniently be called upon to take cognizance of the matter (see Case 12/76 Tessili v Dunlop [1976] ECR 1473, paragraph 13). However, Article 5 does not establish that connecting factor itself as the criterion for the choice of the competent forum. It is not possible for an applicant to sue a defendant before any court having a connection with the dispute since Article 5 lists exhaustively the criteria for linking a dispute to a specific court.

13 Article 5(1) provides in particular that a defendant may, in matters relating to a contract, be sued in the courts "for the place of performance of the obligation in question". That place usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it and explains why that court has jurisdiction in contractual matters (see Case 266/85 Shenavai v Kreischer [1987] ECR 239, paragraph 18).

14 Although the connecting factor is the reason which led to the adoption of Article 5(1) of the Convention, the criterion employed in that provision is not the connection with the court seised but, rather, only the place of performance of the obligation which forms the basis of the legal proceedings.

15 The place of performance of the obligation was chosen as the criterion of jurisdiction because, being precise and clear, it fits into the general aim of the Convention, which is to establish rules guaranteeing certainty as to the allocation of jurisdiction among the various national courts before which proceedings in matters relating to a contract may be brought.

16 It has been submitted, certainly, that the criterion of the place of performance of the obligation which specifically forms the basis of the applicant' s action, a criterion expressly laid down in Article 5(1) of the Convention, may in certain cases have the effect of conferring jurisdiction on a court which has no connection with the dispute, and that, in such a case, the criterion explicitly laid down should be departed from on the ground that the result it yields would be contrary to the

aim of Article 5(1) of the Convention.

17 That last argument cannot be accepted, however.

18 The use of criteria other than that of the place of performance, where that confers jurisdiction on a court which has no connection with the case, might jeopardize the possibility of foreseeing which court will have jurisdiction and for that reason be incompatible with the aim of the Convention.

19 The effect of accepting as the sole criterion of jurisdiction the existence of a connecting factor between the facts at issue in a dispute and a particular court would be to oblige the court before which the dispute is brought to consider other factors, in particular the pleas relied on by the defendant, in order to determine whether such a connection exists and would thus render Article 5(1) nugatory.

20 Such an examination would also be contrary to the purposes and spirit of the Convention, which requires an interpretation of Article 5 enabling the national court to rule on its own jurisdiction without being compelled to consider the substance of the case (see Case 34/82 Peters v ZNAV [1983] ECR 987, paragraph 17).

21 It follows that under Article 5(1), in matters relating to a contract, a defendant may be sued in the courts for the place of performance of the obligation in question, even where the court thus designated is not that which has the closest connection with the dispute.

22 It is accordingly necessary to identify the "obligation" referred to in Article 5(1) of the Convention and to determine its "place of performance".

23 The Court has ruled that the obligation cannot be interpreted as referring to any obligation whatsoever arising under the contract in question, but is rather that which corresponds to the contractual right on which the plaintiff' s action is based (see Case 14/76 De Bloos v Bouyer [1976] ECR 1497, paragraphs 10 and 13).

24 Having allowed an exception in the case of contracts of employment presenting certain special features (see, in particular, Case 133/81 Ivenel v Schwab [1982] ECR 1891), in paragraph 20 of its judgment in Shenavai, cited above, the Court confirmed that the obligation referred to in Article 5(1) is the contractual obligation which forms the actual basis of the legal proceedings.

25 That interpretation was endorsed on the conclusion of the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1989 L 285, p. 1). On that occasion the rule in Article 5(1) of the Convention was maintained in the same terms and was supplemented by a single exception relating to contracts of employment which had already been recognized by way of interpretation in the Court' s case-law cited above.

26 With regard to the "place of performance", the Court has ruled that it is for the court before which the matter is brought to establish under the Convention whether the place of performance is situate within its territorial jurisdiction and that it must for that purpose determine in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question and define, in accordance with that law, the place of performance of the contractual obligation in question (see Tessili, cited above, paragraph 13, as referred to in paragraph 7 of Shenavai, cited above).

27 That interpretation must also be accepted in the case where the conflicts rules of the court seised refer to the application to contractual relations of a "uniform law" such as that in issue in the main proceedings.

28 That interpretation is not called in question by a provision such as Article 59(1) of the Uniform

Law, under which the place of performance of the obligation on the buyer to pay the price to the seller is the seller' s place of business or, if he does not have a place of business, his habitual residence, subject only to the proviso that the parties to the contract have not stipulated a different place for the performance of that obligation under Article 3 of that Law.

29 It follows that Article 5(1) of the Convention must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

30 In view of the reply to Question 1(a), it is not necessary to reply to the other questions asked by the national court.

Costs

31 The costs incurred by the German and Italian Governments and the Commission of the European Communities, 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,

in answer to a question referred to it by the Bundesgerichtshof, by order of 26 March 1992, hereby rules:

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, must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised, even where those rules refer to the application to the contract of provisions such as those of the Uniform Law on the International Sale of Goods, annexed to the Hague Convention of 1 July 1964.

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SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Federal Republic of Germany ; Italy ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR
A8 Oberlandesgericht Hamm, Urteil vom 08/03/1991 (26 U 88/90)
- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1992 no 181
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PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Kakouris

DATES of document: 29/06/1994
of application: 30/06/1992

Judgment of the Court (Sixth Chamber) of 20 January 1994

Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA. Reference for a preliminary ruling: House of Lords - United Kingdom. Brussels Convention - Interpretation of Articles 21, 22 and 23 - Recognition and enforcement of judgments given in non-contracting States. Case C-129/92.

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Convention on Jurisdiction and the Enforcement of Judgments - Scope - Proceedings for the recognition and enforcement in a Contracting State of judgments given in non-contracting States - Excluded - Need for a decision on a preliminary issue - Irrelevant

(Convention of 27 September 1968)

The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and, in particular, Articles 21, 22 and 23 thereof do not apply to proceedings, or to issues arising in proceedings, in Contracting States for the recognition and enforcement of judgments given in civil and commercial matters in non-contracting States.

First, it follows from Articles 26 and 31 of the Convention, which are to be read in conjunction with Article 25, that the procedures provided for in Title III of the Convention, which concerns recognition and enforcement, apply only to judgments given by the courts of Contracting States. Secondly, the rules on jurisdiction contained in Title II of the Convention do not establish the forum in which proceedings for the recognition and enforcement of judgments given in non-contracting States are to take place, having regard to the fact that Article 16(5), which provides that in proceedings concerned with the enforcement of judgments the courts of the Contracting State in which the judgment has been or is to be enforced are to have exclusive jurisdiction, is also to be read in conjunction with the definition of "judgment" contained in Article 25. No distinction can be drawn in that regard between an order for enforcement simpliciter and a judgment of a court of a Contracting State ruling on an issue arising in proceedings for the enforcement of a judgment given in a non-contracting State, since if the subject-matter of such a dispute is such that it falls outside the scope of the Convention, the existence of a preliminary issue on which the court has to give a ruling in order to decide the dispute cannot justify the application of the Convention, whatever the nature of that issue may be.

In Case C-129/92,

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 House of Lords for a preliminary ruling in the proceedings pending before that court between

Owens Bank Ltd

and

1. Fulvio Bracco

2. Bracco Industria Chimica SpA,

on the interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1972 L 299, p. 32), 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 (Official Journal 1978 L 304, p. 1) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (Official Journal 1982 L 388, p. 1), in particular Articles 21, 22 and 23.

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, M. Díez de Velasco, C.N. Kakouris and F.A. Schockweiler, Judges, and P.J.G. Kapteyn, Judge-Rapporteur,

Advocate General: C.O. Lenz,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Fulvio Bracco and Bracco Industria Chimica SpA, by Barbara Dohmann QC and Thomas Beazley, Barrister,

- the United Kingdom, by S. Lucinda Hudson, of the Treasury Solicitor' s Department, and

- the Commission of the European Communities, by Xavier Lewis and Pieter van Nuffel, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Fulvio Bracco and Bracco Industria Chimica SpA, represented by Barbara Dohmann QC, Thomas Beazley and Michelle Duncan, Solicitor, of the United Kingdom, represented by S. Lucinda Hudson, assisted by Sarah Lee, Barrister, and of the Commission at the hearing on 8 July 1993,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1993,

gives the following

Judgment

1 By order of 1 April 1992, received at the Court on 22 April 1992, the House of Lords referred to the Court for a preliminary ruling 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 (Official Journal 1972 L 299, p. 32) three questions on the interpretation of that Convention, 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 (Official Journal 1978 L 304, p.1) and by the Convention of 25 October 1982 on the accession of the Hellenic Republic (Official Journal 1982 L 388, p. 1) (hereinafter referred to as "the Convention"), in particular Articles 21, 22 and 23, relating to lis pendens and related actions.

2 Those questions arose in proceedings between Owens Bank Ltd (hereinafter referred to as "Owens Bank"), a company domiciled in the independent Caribbean State known as Saint Vincent and the Grenadines (hereinafter referred to as "Saint Vincent") and Bracco Industria Chimica SpA, a company domiciled in Italy (hereinafter referred to as "Bracco SpA"), and its chairman and managing director, Fulvio Bracco, domiciled in Italy.

3 Owens Bank claims to have lent SFR 9 000 000 in cash to Fulvio Bracco in 1979. According to a clause in the documentation relating to the loan, the High Court of Justice of Saint Vincent was to have jurisdiction to decide all disputes. On 29 January 1988 Owens Bank obtained from that court a judgment (hereinafter referred to as "the Saint Vincent judgment") ordering Fulvio Bracco and Bracco SpA to repay the loan. An appeal lodged by the last named parties was dismissed by the Court of Appeal of Saint Vincent on 12 December 1989.

4 In the course of those proceedings Fulvio Bracco and Bracco SpA denied that a loan was made. They alleged that the documents submitted by Owens Bank were forgeries and that certain witnesses had given false testimony.

5 On 11 July 1989 Owens Bank applied in Italy for an order for the enforcement of the Saint Vincent judgment. Before the Italian court Fulvio Bracco and Bracco SpA claimed, inter alia, that Owens Bank had obtained that decision by fraud.

6 On 7 March 1990 Owens Bank applied to an English court, pursuant to section 9 of the Administration of Justice Act 1920, for a declaration that the Saint Vincent judgment was enforceable in England. Fulvio Bracco and Bracco SpA maintained, as they had done in the Italian proceedings, that Owens Bank had obtained by fraud the judgment it was seeking to enforce. Relying on Articles 21 and 22 of the Brussels Convention, they also requested the English court to decline jurisdiction or to stay proceedings pending the conclusion of the Italian enforcement proceedings.

7 In support of their application the defendants relied on the fact that the question whether the plaintiff had obtained the Saint Vincent judgment by fraud had to be examined in both the English and the Italian enforcement proceedings.

8 The House of Lords, as court of last instance, considered that the case raised issues concerning the interpretation of the Convention and decided to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

> "1. Does the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (' the 1968 Convention') have any application to proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of the judgments in civil and commercial matters of non-contracting States?

2. Do Articles 21, 22 or 23 of the 1968 Convention, or any of them, apply to proceedings, or issues arising in proceedings, which are brought in more than one Contracting State to enforce the judgment of a non-contracting State?

3. If the court in a Contracting State has the power to stay proceedings under the 1968 Convention on the grounds of lis pendens, what are the communautaire principles which should be applied by a national court in determining whether there should be a stay of the proceedings in the national court second seised?"

The first and second questions

9 Since the first and second questions are closely linked, they will be examined together.

10 Before answering them, the nature of the procedure before the national court needs to be described.

11 As the Advocate General explained in paragraphs 7 and 8 of his Opinion, there are a number of ways in which foreign judgments may be recognized and enforced under English law. The procedure followed in this case consisted in having the foreign judgment registered pursuant to section 9 of the Administration of Justice Act 1920 so that it could be enforced in the same way as a judgment given by an English court.

12 That section provides, inter alia, that a judgment shall not be registered if it was obtained by fraud or it was in respect of a cause of action which, for reasons of public policy, could not have been entertained by the registering court. Any such judgment, if registered, is open to challenge in legal proceedings. The court seised of the matter may then order the issue to be determined following a trial inter partes.

13 The first and second questions referred to the Court have therefore arisen in proceedings which are intended to pave the way in one of the States parties to the Convention (hereinafter referred to as "Contracting States") to the execution of a judgment given in a civil and commercial matter in a State other than a Contracting State (hereinafter referred to as "a non-contracting State").

14 In view of the purpose of such proceedings, the national court asks whether the Convention,

in particular Articles 21, 22 or 23, applies to proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of judgments given in civil and commercial matters in non-contracting States.

15 Fulvio Bracco and Bracco SpA maintain that such proceedings involve civil and commercial matters as defined in Article 1 of the Convention and that consequently they fall within the scope of the Convention.

16 That view cannot be accepted.

17 First, it follows from the wording of Articles 26 and 31 of the Convention, which must be read in conjunction with its Article 25, that the procedures envisaged by Title III of the Convention, concerning recognition and enforcement, apply only in the case of decisions given by the courts of a Contracting State.

18 Articles 26 and 31 refer only to "a judgment given in a Contracting State" whilst Article 25 provides that, for the purposes of the Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called.

19 Next, as regards the rules on jurisdiction contained in Title II of the Convention, the Convention is, according to its preamble, intended to implement provisions in Article 220 of the EEC Treaty by which the Member States of the Community undertook to simplify formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals.

20 Moreover, according to its preamble, one of the objectives of the Convention is to strengthen in the Community the legal protection of persons therein established.

21 The experts' report drawn up at the time when the Convention was drafted (Official Journal 1979 C 59, p. 1, in particular at p. 15), states in this regard that

> "the purpose of the Convention is... by establishing common rules of jurisdiction, to achieve... in the field which it was required to cover, a genuine legal systematization which will ensure the greatest possible degree of legal certainty. To this end, the rules of jurisdiction codified in Title II determine which State' s courts are most appropriate to assume jurisdiction, taking into account all relevant matters...".

22 To that end, Title II of the Convention establishes certain rules of jurisdiction which, after laying down the principle that persons domiciled in a Contracting State are to be sued in the courts of that State, go on to determine restrictively the cases in which that principle is not to apply.

23 So it is clear that Title II of the Convention lays down no rules determining the forum for proceedings for the recognition and enforcement of judgments given in non-contracting States.

24 Contrary to the arguments advanced by Fulvio Bracco and Bracco SpA, Article 16(5), which provides that in proceedings concerned with the enforcement of judgments the courts of the Contracting State in which the judgment has been or is to be enforced are to have exclusive jurisdiction, must indeed be read in conjunction with Article 25, which, it will be recalled, applies only to judgments given by a court or tribunal of a Contracting State.

25 The conclusion must therefore be that the Convention does not apply to proceedings for the enforcement of judgments given in civil and commercial matters in non-contracting States.

26 Fulvio Bracco and Bracco SpA argue that a distinction should be made between an order for enforcement simpliciter and a decision of a court of a Contracting State on an issue arising in proceedings to enforce a judgment given in a non-contracting State, such as the question whether the judgment in question was obtained by fraud. Decisions of the second type are, they argue, independent of the enforcement proceedings and should be recognized in the other Contracting States in accordance

with Article 26 of the Convention.

27 According to the defendants, that interpretation follows from the principles and objectives of the EEC Treaty and of the Convention, as identified by the Court. It is therefore necessary, in the interests of the proper administration of justice, to prevent parallel proceedings before the courts of different Contracting States and the conflicting decisions which might result from them, and, similarly, to preclude as far as possible a situation where a Contracting State refuses to recognize a decision of another Contracting State on the ground that it is irreconcilable with a decision given between the same parties in the State in which recognition is sought. They refer in this regard to the judgments in Case 144/86 Gubisch Maschinenfabrik [1987] ECR 4861, Case C-220/88 Dumez France and Tracoba [1990] ECR I-49 and Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317.

28 That interpretation cannot be accepted.

29 First, the essential purpose of a decision given by a court of a Contracting State on an issue arising in proceedings for the enforcement of a judgment given in a non-contracting State, even where that issue is tried inter partes, is to determine whether, under the law of the State in which recognition is sought or, as the case may be, under the rules of any agreement applicable to that State' s relations with non-contracting States, there exists any ground for refusing recognition and enforcement of the judgment in question. That decision is not severable from the question of recognition and enforcement.

30 Secondly, according to Articles 27 and 28 of the Convention, read in conjunction with Article 34, the question whether any such ground exists in the case of judgments given in another Contracting State falls to be determined in the proceedings in which recognition and enforcement of those judgments are sought.

31 There is no reason to consider that the position is any different where the same question arises in proceedings concerning the recognition and enforcement of judgments given in non-contracting States.

32 On the contrary, the principle of legal certainty, which is one of the objectives of the Convention (see the judgment in Case 38/81 Effer [1982] ECR 825, paragraph 6), militates against making the distinction advocated by Fulvio Bracco and Bracco SpA.

33 The rules of procedure governing the recognition and enforcement of judgments given in a non-contracting State differ according to the Contracting State in which recognition and enforcement are sought.

34 Lastly, it is clear from the judgment in Case C-190/89 Rich [1991] ECR I-3855, at paragraph 26, that if, by virtue of its subject-matter, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.

35 Fulvio Bracco and Bracco SpA also argue that, even assuming that the jurisdiction of the courts seised is not conferred by the Convention, the judgment in Overseas Union Insurance, cited above, shows that Articles 21, 22 and 23 of the Convention apply even where the courts seised derive their jurisdiction, not from the provisions of the Convention, but from the applicable national law.

36 In response to that argument, it is sufficient to state that the judgment in Overseas Union Insurance relates to proceedings which, unlike those with which the present dispute is concerned, fell, by virtue of their subject-matter, within the scope of the Convention.

37 The answer to the first and second questions must therefore be that the Convention, in particular Articles 21, 22 and 23, does not apply to proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of judgments given in civil and commercial matters

in non-contracting States.

The third question

38 In view of the answer given to the first and second questions, the third question does not call for a reply.

Costs

39 The costs incurred by the United Kingdom and the Commission of the European Communities, 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 (Sixth Chamber),

in answer to the questions referred to it by the House of Lords, by order of 1 April 1992, hereby rules:

The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, in particular Articles 21, 22 and 23,

does not apply to proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of judgments given in civil and commercial matters in non-contracting States.

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FORM	Judgment
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PUBREF	European Court reports 1994 Page I-00117
DOC	1994/01/20
LODGED	1992/04/22
JURCIT	41968A0927(01)-A21 : N 1 6 8 35 41968A0927(01)-A22 : N 1 6 8 35 41968A0927(01)-A23 : N 1 35 41978A1009(01) : N 1 41982A1025(01) : N 1 61992C0129 : N 11 41968A0927(01)-A01 : N 15 41968A0927(01)-A26 : N 17 18 26 41968A0927(01)-A31 : N 17 18

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41968A0927(01)-TIT3 : N 17
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41968A0927(01)-C : N 19 20
11957E220 : N 19
41968A0927(01)-A16PT5 : N 24
61986J0144 : N 27
61988J0220 : N 27
61989J0351 : N 27 35
41968A0927(01)-A27 : N 30
41968A0927(01)-A28 : N 30
41968A0927(01)-A34 : N 30
61981J0038 : N 32
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CONCERNS Interprets 41968A0927(01) -A21
Interprets 41968A0927(01) -A22
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SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG English

OBSERV United Kingdom ; Commission ; Member States ; Institutions

NATIONA United Kingdom

NATCOUR *A9* House of Lords, judgment of 01/04/1992 ; - The All England Law Reports 1992 Vol.2 p.193-204 ; - The Law Reports ; Appeal Cases 1992 Vol.2 p.474-490 ; - Financial Times 08/04/92 (résumé) ; - X: Enforcement of Foreign Judgment Tainted by Fraud, Civil Justice Quarterly 1992 p.221-223 ; - Carter, P.B.: Decisions of British Courts during 1992, British Yearbook of International Law 1992 p.522-527

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PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Kapteyn

DATES of document: 20/01/1994
of application: 22/04/1992

**Judgment of the Court
of 13 July 1993
Mulox IBC Ltd v Hendrick Geels. Reference for a preliminary ruling: Cour d'appel de Chambéry - France. Brussels Convention - Article 5 (1) - Place of performance of the contractual obligation - Contract of employment - Work performed in more than one country. Case C-125/92.**

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1. Convention on Jurisdiction and the Enforcement of Judgments ° Rules of jurisdiction ° Autonomous interpretation

2. Convention on Jurisdiction and the Enforcement of Judgments ° Special jurisdiction ° Court of the place of performance of the contractual obligation ° Contract of employment ° Place of performance of the obligation characterizing the contract ° Autonomous concept ° Place of performance by the employee of the work stipulated ° Work performed in more than one Contracting State ° Place where or from which the employee principally discharges his obligations

(Convention of 27 September 1968, Art. 5(1))

1. The terms used in the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted autonomously. Only such an interpretation is capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued.

2. In view of the specific nature of contracts of employment, the place of performance of the obligation in question, for the purposes of applying Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, must, in the case of such contracts, be determined by reference not to the applicable national law in accordance with the conflict rules of the court seised but, rather, to uniform criteria laid down by the Court of Justice on the basis of the scheme and the objectives of the Convention. The place of performance is the place where the employee actually carries out the work covered by the contract with his employer.

Where the employee performs his work in more than one Contracting State, the place of performance of the contractual obligation, within the meaning of that provision, must be defined as the place where or from which the employee discharges principally his obligations towards his employer.

In Case C-125/92,

REFERENCE to the Court under 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 (OJ 1978 L 304, p. 97) by the Social Chamber of the Cour d' Appel, Chambéry, France, for a preliminary ruling in the proceedings pending before that court between

Mulox IBC Ltd

and

Hendrick Geels,

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

THE COURT,

composed of: O. Due, President, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P.J.G. Kapteyn, Judges,

Advocate General: F.G. Jacobs,

Registrar: J.-G. Giraud,

after considering the written observations submitted on behalf of:

° the Government of the Federal Republic of Germany, by C. Boehmer, Ministerialrat, Federal Ministry of Justice, acting as Agent,

° the Government of the French Republic, by E. Belliard, Directeur Adjoint, Directorate for Legal Affairs, Ministry of Foreign Affairs, acting as Agent, and H. Duchène, Secretary for Foreign Affairs in the same directorate and ministry, acting as Joint Agent,

° the Commission of the European Communities, by P. Van Nuffel, of its Legal Service, and T. Margellos, a national civil servant seconded to the Legal Service of the Commission under the scheme for secondment, acting as Agents,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 May 1993,

gives the following

Judgment

1 By judgment of 17 March 1992, received at the Court on 17 April 1992, the Cour d' Appel, Chambéry, 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 (OJ 1978 L 304, p. 97), 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, hereinafter "the Convention"), a question on the interpretation of Article 5(1) of the Convention.

2 That question was raised in the course of proceedings between Mulox IBC Ltd, a company incorporated under English law whose registered office is in London (hereinafter "Mulox"), and one of its former employees, Hendrick Geels, a Netherlands national residing in Aix-les-Bains, France, following termination of his contract of employment by his employer.

3 It is apparent from the documents before the Court that Mr Geels, who had been employed by Mulox as international marketing director since 1 November 1988, established his office in Aix-les-Bains and sold Mulox products initially in Germany, Belgium, the Netherlands and the Scandinavian countries, to which he travelled frequently. As from January 1990, Mr Geels worked in France.

4 Following termination of his contract of employment, Mr Geels sued his former employer before the Conseil de Prud' Hommes, Aix-les-Bains, for compensation in lieu of notice and for damages.

5 By judgment of 4 December 1990, that court declared that it had jurisdiction under Article 5(1) of the Convention and, applying French law, ordered Mulox to pay Mr Geels various sums by way of compensation.

6 Mulox then appealed to the Cour d' Appel, Chambéry, claiming that the French courts lacked

jurisdiction to hear the case on the grounds that the place of performance of the contract of employment at issue was not confined to France and that Mulox was established in the United Kingdom.

7 The Cour d' Appel, Chambéry, entertained doubts as to whether the French courts had jurisdiction to hear the case, whereupon it stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

> "Does the application of the jurisdiction rule under Article 5(1) of the Brussels Convention of 27 September 1968 require the obligation characterizing the employment contract to have been performed wholly and solely in the territory of the State of the court seised of the dispute, or is it sufficient for its operation that part of the obligation ° possibly the principal part ° has been performed in the territory of that State?"

8 Reference is made to the Report of the Judge-Rapporteur for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 In answering the question from the national court, it must be borne in mind first of all that, by way of derogation from the general principle laid down in the first paragraph of Article 2 of the Convention, namely that the courts of the State where the defendant is domiciled are to have jurisdiction, Article 5(1) of the Convention provides:

> "A person domiciled in a Contracting State may, in another Contacting State, be sued:
>
> 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question."

10 It is settled case-law that, as far as possible, the Court of Justice will interpret the terms of the Convention autonomously so as to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty, for the implementation of which it was adopted.

11 That autonomous interpretation alone is capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued.

12 It is true that, with regard to the rule in Article 5(1) of the Convention on special jurisdiction, the Court has already held (Case 12/76 Tessili v Dunlop [1976] ECR 1473) that, for contracts in general, "the place of performance of contractual obligations", within the meaning of that provision, cannot be understood otherwise than by reference to the law which governs the obligations in question under the conflict rules of the court before which the matter is brought.

13 In reaching that conclusion, the Court stated that the various Contracting States have very different views as to the meaning of the place of performance of the relevant obligation under a contract such as the sales transaction at issue in that case.

14 However, no such problem arises in relation to contracts of employment. The Court has consistently held that, in view of the specific nature of contracts of that kind (Case 133/81 Ivenel v Schwab [1982] ECR 1891, paragraph 20, Case 266/85 Shenavai v Kreischer [1987] ECR 239, paragraph 11, and Case 32/88 Six Constructions v Humbert [1989] ECR 341, paragraph 10), the obligation to be taken into consideration for the purposes of the application of Article 5(1) of the Convention to contracts of employment is always the obligation which characterizes such contracts, namely the employee' s obligation to carry out the work stipulated.

15 The Court found in Ivenel, Shenavai and Six Constructions, cited above, that such contracts display certain particular features compared with other contracts in that they create a lasting bond which brings the worker to some extent within the organizational framework of the employer' s business and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements protecting the employee.

16 It follows that, in the case of a contract of employment, it is appropriate to determine the place of performance of the relevant obligation, for the purposes of applying Article 5(1) of the Convention, by reference not to the applicable national law in accordance with the conflict rules of the court seised but, rather, to uniform criteria which it is for the Court to lay down on the basis of the scheme and the objectives of the Convention.

17 In order specifically to define the place of performance, it must first be noted that, in Ivenel and Shenavai, the Court held that the rule on special jurisdiction in Article 5(1) of the Convention was justified by the existence of a particularly close relationship between a dispute and the court which may most conveniently be called on to take cognizance of the matter. In its judgments in Shenavai and Six Constructions, the Court added that, in view of the particular features of contracts of employment, it is the courts of the place in which the work is to be carried out which are best suited to resolving the disputes to which one or more obligations under such contracts may give rise.

18 Furthermore, in Ivenel and Six Constructions, the Court took the view that, in interpreting that provision of the Convention, account must be taken of the concern to afford proper protection to the party to the contract who is the weaker from the social point of view, in this case the employee.

19 Proper protection of that kind is best assured if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the employee discharges his obligations towards his employer. That is the place where it is least expensive for the employee to commence, or defend himself against, court proceedings.

20 It follows that in relation to contracts of employment, the place of performance of the relevant obligation must be interpreted as meaning, for the purposes of Article 5(1) of the Convention, the place where the employee actually performs the work covered by the contract with his employer.

21 Where, as in this case, the work is performed in more than one Contracting State, it is important to interpret the Convention so as to avoid any multiplication of courts having jurisdiction, thereby precluding the risk of irreconcilable decisions and facilitating the recognition and enforcement of judgments in States other than those in which they were delivered (Case C-220/88 Dumez France and Tracoba [1990] ECR I-49, paragraph 18).

22 In that connection, the Court has held that, where various obligations derive from the same contract and form the basis of the plaintiff' s action, it is the principal obligation which must be relied on in order to determine jurisdiction (Shenavai, paragraph 19).

23 It follows that Article 5(1) of the Convention cannot be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee performs part of his work.

24 Where the work entrusted to the employee is performed in the territory of more than one Contracting State, it is important to define the place of performance of the contractual obligation, within the meaning of Article 5(1) of the Convention, as being the place where or from which the employee principally discharges his obligations towards his employer.

25 In order to determine the place of performance, which is a matter for the national court, it is necessary to take account of the fact that, in this case, the work entrusted to the employee

was carried out from an office in a Contracting State, where the employee had established his residence, from which he performed his work and to which he returned after each business trip. Furthermore, it is open to the national court to take account of the fact that, when the dispute before it arose, the employee was carrying out his work solely in the territory of that Contracting State. In the absence of other determining factors, that place must be deemed, for the purposes of Article 5(1) of the Convention, to be the place of performance of the obligation on which a claim relating to a contract of employment is based.

26 It follows from all the foregoing considerations that Article 5(1) of the Convention must be interpreted as meaning that, in the case of a contract of employment in pursuance of which the employee performs his work in more than one Contracting State, the place of performance of the obligation characterizing the contract, within the meaning of that provision, is the place where or from which the employee principally discharges his obligations towards his employer.

Costs

27 The costs incurred by German and French Governments and the Commission of the European Communities, 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 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, Chambéry, by judgment of 17 March 1992, hereby rules:

Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that, in the case of a contract of employment in pursuance of which the employee performs his work in more than one Contracting State, the place of performance of the obligation characterizing the contract, within the meaning of that provision, is the place where or from which the employee principally discharges his obligations towards his employer.

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CONCERNS	Interprets 41968A0927(01) -A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Federal Republic of Germany ; France ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*A9* Cour d'appel de Chambéry, Chambre sociale, arrêt du 17/03/1992 (194-91/P) ; - International Litigation Procedure 1993 p.324-329
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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Schockweiler

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**Judgment of the Court
of 21 April 1993
Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Brussels Convention of 27 September 1968 - Interpretation of Articles 1, 27 and 37. Case C-172/91.**

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1. Convention on jurisdiction and the enforcement of judgments ° Scope ° Civil and commercial matters ° Concept of "civil matters" ° Claim brought before a criminal court for compensation for loss caused to an individual by a person committing a criminal offence ° Claim brought against a state-school teacher who has failed to fulfil his duty of supervision vis-à-vis his pupils ° Included

(Convention of 27 September 1968, Art. 1, first para.)

2. Convention on jurisdiction and the enforcement of judgments ° Enforcement ° Remedies ° Appeal in cassation and "Rechtsbeschwerde" ° Remedy available to interested third parties under domestic law ° Excluded

(Convention of 27 September 1968, Art. 37, second para.)

3. Convention on jurisdiction and the enforcement of judgments ° Recognition and enforcement ° Grounds for refusal ° Document which instituted the proceedings not served in due form and in sufficient time on defendant in default ° Concept of "default" ° Defendant to a civil claim made in the context of criminal proceedings ° Appearance to the civil claim precluding default

(Convention of 27 September 1968, Art. 27(2))

1. A claim for compensation for loss to an individual resulting from a criminal offence, even though made in the context of criminal proceedings, is civil in nature unless the person against whom it is made is to be regarded as a public authority which acted in the exercise of its powers. That is not the case where the activity called in question is the supervision by a state-school teacher of his pupils during a school trip. It follows that "civil matters" within the meaning of the first sentence of the first paragraph of Article 1 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters covers a claim for damages brought before a criminal court against a state-school teacher who, during a school trip, occasioned loss to a pupil as a result of a culpable and unlawful breach of his duties of supervision, even where there is coverage by a scheme of social insurance under public law.

2. The second paragraph of Article 37 of the Convention must be interpreted as precluding any appeal by interested third parties against the judgment given on an appeal against authorization to enforce a judgment given in another Contracting State, even where the domestic law of the State in which enforcement is sought confers on such third parties a right of appeal.

3. Since non-recognition of a judgment given in another Contracting State for the reasons set out in Article 27(2) of the Convention is possible only where the defendant was in default of appearance in the original proceedings, that provision may not be relied upon where the defendant appeared. A defendant is deemed to have appeared for the purposes of Article 27(2) of the Convention where, in connection with a claim for damages made in the context of the criminal proceedings pending before the criminal court, the defendant, through defence counsel of his own choice, answered the criminal charges at the trial but did not express a view on the civil claim, on which oral argument was also submitted in the presence of his counsel.

In Case C-172/91,

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 Bundesgerichtshof of the Federal Republic of Germany for a preliminary ruling in the proceedings pending before that court between

Volker Sonntag,

supported by

Land Baden-Wuerttemberg,

and

Hans Waidmann

Elisabeth Waidmann

Stefan Waidmann,

on the interpretation of the first paragraph of Articles 1, 27(2) and 37(2) of the Brussels 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 (OJ 1978 L 304, p. 1),

THE COURT,

composed of: O. Due, President, C.N. Kakouris, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco, P.J.G. Kapteyn and D.A.O. Edward, Judges,

Advocate General: M. Darmon,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° Hans Waidmann and others by Dr. E. Kersten, Rechtsanwalt, Karlsruhe,

° the German Government by Professor C. Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

° the Italian Government by Professor L. Ferrari Bravo, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, assisted by O. Fiumara, Avvocato dello Stato, acting as Agents,

° the Commission of the European Communities by P. van Nuffel, of its Legal Service, assisted by W.-D. Krause-Ablass, Rechtsanwalt, Duesseldorf,

having regard to the Report for the Hearing,

after hearing the oral observations of Volker Sonntag, represented by H. Buettner, Rechtsanwalt, Karlsruhe, the Italian Government, the German Government and the Commission at the hearing on 14 October 1992,

after hearing the Opinion of the Advocate General at the sitting on 2 December 1992,

gives the following

Judgment

Costs

45 The costs incurred by the Federal Republic of Germany, the Italian Republic and the Commission

of the European Communities, 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 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 questions referred to it by the Bundesgerichtshof, by order of 28 May 1991, hereby rules:

1. "Civil matters" within the meaning of the first sentence of the first paragraph of Article 1 of the Convention cover an action for compensation for damage brought before a criminal court against a teacher in a State school who, during a school trip, caused injury to a pupil through a culpable and unlawful breach of his duties of supervision; this is so even where cover is provided under a social insurance scheme governed by public law.

2. Article 37(2) of the Convention must be interpreted as precluding any appeal by interested third parties against a judgment given on an appeal under Article 36 of the Convention, even where the domestic law of the State in which enforcement is sought confers on such third parties a right of appeal.

3. Non-recognition of a judgment for the reasons set out in Article 27(2) of the Convention is possible only where the defendant was in default of appearance in the original proceedings. Consequently, that provision may not be relied upon where the defendant appeared. A defendant is deemed to have appeared for the purposes of Article 27(2) of the Convention where, in connection with a claim for compensation joined to criminal proceedings, he answered at the trial, through counsel of his own choice, to the criminal charges but did not express a view on the civil claim, on which oral argument was also submitted in the presence of his counsel.

1 By order of 28 May 1991 received at the Court on 1 July 1991, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling 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 (Journal Officiel 1972 L 299, p. 32), 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, hereinafter "the Convention") a number of questions on the interpretation of the first paragraph of Articles 1, 27(2) and 37(2) of the Convention.

2 Those questions arose in proceedings between Mr V. Sonntag, supported by the Land Baden-Wuerttemberg, and Mr and Mrs H. Waidmann and their son Stefan Waidmann (hereinafter "the parties seeking enforcement"), concerning the enforcement in the Federal Republic of Germany of the civil-law provisions of a judgment given by an Italian criminal court.

3 It appears from the documents before the Court that the parties seeking enforcement are the parents and brother of Thomas Waidmann, a pupil in a school administered by the Land Baden-Wuerttemberg who, on 8 June 1984, during a school trip to Italy, suffered a fatal accident in the mountains. Criminal proceedings were brought against the accompanying teacher, Mr Volker Sonntag, in the Bolzano Criminal Court for causing death by negligence.

4 On 22 September 1986 the parties seeking enforcement joined those criminal proceedings as civil parties seeking an order against the accused teacher for compensation for the loss caused by the accident. The court document drawn up for that purpose was served on Mr Sonntag on 16 February 1987.

5 The trial took place before the Bolzano Criminal Court on 25 January 1988. During the hearing Mr Sonntag was represented by counsel. In the judgment given on the same day Mr Sonntag was found guilty of causing death by negligence and ordered to make a provisionally enforceable payment on account of LIT 20 million to the Waidmann family together with costs. The judgment was served on Mr Sonntag and became final.

6 On application by the parties seeking enforcement, the Landgericht (Regional Court) Ellwangen granted them, on 29 September 1989, an order for enforcement of the civil-law part of the judgment of the Bolzano court.

7 Mr Sonntag appealed to the Oberlandesgericht (Higher Regional Court) against that decision and in the course of those proceedings he served notice of the dispute on the Land Baden-Wuerttemberg, contending in that document that if the decision in the proceedings were unfavourable to him, he was entitled under the law governing the civil service to be relieved by the Land Baden-Wuerttemberg of his obligation to pay damages. The Land Baden-Wuerttemberg intervened in the proceedings in support of the form of order sought by Mr Sonntag.

8 The Oberlandesgericht dismissed the appeal on 20 July 1990 on the ground inter alia that the criminal judgment of the Bolzano court related to a civil matter within the meaning of the first sentence of the first paragraph of Article 1 of the Convention and that the civil claim had been served on Mr Sonntag in sufficient time.

9 Mr Sonntag and the Land Baden-Wuerttemberg appealed to the Bundesgerichtshof against that decision. Both maintained, inter alia, that the criminal judgment of the Bolzano court related to a claim under public law, since the supervision of pupils by Mr Sonntag in his capacity as a civil servant was a matter that fell within the province of administrative law. They also considered that the document of 22 September 1986 giving notice of the civil parties' claims was too vague to be regarded as a "document which instituted the proceedings" within the meaning of Article 27(2) of the Convention.

10 Taking the view that the dispute raised questions regarding the interpretation of the Convention, the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> "1. Does the second paragraph of Article 37 of the Convention preclude any appeal by interested third parties against the decision given on the appeal under Article 36 of the Convention, even where the domestic law of the State in which enforcement is sought allows such parties to appeal?

2. (a) Where the holder of a public office who has caused injury to another person by reason of an unlawful breach of his official duties is personally sued by that person for damages, does such an action constitute a civil matter within the meaning of the first sentence of the first paragraph of Article 1 of the Convention?

(b) If the question under (a) is answered in the affirmative: is this also the case where the accident is covered under a social insurance scheme governed by public law?

3. If the defendant is given notice by a procedural document that in criminal proceedings a claim will also be made against him for compensation for material and non-material damage, although the document in question gives no additional details of the civil claim which is to be made, is such a document capable of being treated as a 'document which instituted the proceedings' within the meaning of Article 27(2) of the Convention?

4. Has a defendant appeared for the purposes of Article 27(2) of the Convention where the case concerns a civil claim for damages in connection with charges brought before a criminal court (Article 5(4) of the Convention) and the person against whom enforcement is sought, through counsel of his own choice, answered to the criminal charges but did not express a view on the civil claim, on which

oral argument was also submitted in the presence of his counsel?"

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

12 In so far as the questions referred by the national court concern the interpretation of a number of provisions of the Convention, the first point for consideration is whether the action for damages which has given rise to the dispute in this case, as described in the order for reference, falls within the scope of the Convention. Accordingly, the second question must be answered first.

The second question

13 The wording of the question submitted and the grounds of the order for reference show that the national court is essentially seeking to ascertain whether "civil matters" within the meaning of the first sentence of the first paragraph of Article 1 of the Convention cover a claim for damages made before a criminal court against a teacher in a State school who, during a school trip, caused injury to a pupil through a culpable and unlawful breach of his duties of supervision, and whether this is so even where cover is provided under a social insurance scheme governed by public law.

14 In order to answer that question, it is necessary first to determine whether a claim for damages made before a criminal court may fall within the scope of the Convention.

15 In the words of the first paragraph of Article 1, the Convention "shall apply in civil and commercial matters whatever the nature of the court or tribunal".

16 It follows from the wording of that provision that the Convention also applies to decisions given in civil matters by a criminal court.

17 It must next be determined whether an action for damages against a teacher in a State school who caused injury to a pupil during a school trip as a result of a breach of his official duties constitutes a "civil matter" within the meaning of the first sentence of the first paragraph of Article 1 of the Convention.

18 As the Court has consistently held (see, in particular, Case 29/76 LTU v Eurocontrol [1976] ECR 1541, paragraphs 3 and 4; Case 133/78 Gourdain v Nadler [1979] ECR 733, paragraph 3; and Case 814/79 Netherlands v Rueffer [1980] 3807, paragraphs 7 and 8), the concept of "civil matters" in Article 1 of the Convention must be regarded as an independent concept to be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.

19 Even though it is joined to criminal proceedings, a civil action for compensation for injury to an individual resulting from a criminal offence is civil in nature. In the legal systems of the Contracting States the right to obtain compensation for injury suffered as a result of conduct regarded as culpable in criminal law is generally recognized as being a civil-law right. That, moreover, is the conception underlying Article 5(4) of the Convention.

20 It follows from the judgments in the LTU and Rueffer cases, cited above, that such an action falls outside the scope of the Convention only where the author of the damage against whom it is brought must be regarded as a public authority which acted in the exercise of public powers.

21 The first point to be noted in that respect is that the fact that a teacher has the status of civil servant and acts in that capacity is not conclusive. Even though he acts on behalf of the State, a civil servant does not always exercise public powers.

22 Secondly, in the majority of the legal systems of the Member States the conduct of a teacher in a State school, in his function as a person in charge of pupils during a school trip, does not

constitute an exercise of public powers, since such conduct does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals.

23 Thirdly, a teacher in a State school assumes the same functions vis-à-vis his pupils, in a case such as that in point in the main proceedings, as those assumed by a teacher in a private school.

24 Fourthly, the Court has already held, although in a different factual and legal context, in Case 66/85 Lawrie-Blum v Land Baden-Wuerttemberg [1986] ECR 2121, paragraph 28 in conjunction with paragraph 24, that a teacher does not exercise public powers even when he awards marks to pupils and participates in the decisions on whether they should move to a higher class. That must be so a fortiori in relation to the duty of a teacher, as a person in charge of pupils, to supervise them during a school trip.

25 Finally, it should be added that even if the activity of supervising pupils is characterized in the Contracting State of origin of the teacher concerned as an exercise of public powers, that fact does not affect the characterization of the dispute in the main proceedings in the light of Article 1 of the Convention.

26 It follows from all the foregoing considerations that the action for damages brought in the main proceedings against the State-school teacher by the parties seeking enforcement is covered by the term "civil matters" within the meaning of the first sentence of the first paragraph of Article 1 of the Convention.

27 It still remains to be considered whether that interpretation may be invalidated by the fact that the accident giving rise to the action is covered by a social insurance scheme governed by public law.

28 In that respect, it need only be stated that the availability of insurance cover is irrelevant since the basis of the civil claim, that is to say liability in tort or delict, is not affected by the existence of that public insurance.

29 The answer to the second question referred by the national court must therefore be that "civil matters" within the meaning of the first sentence of the first paragraph of Article 1 of the Convention cover an action for damages brought before a criminal court against a teacher in a State school who, during a school trip, caused injury to a pupil through a culpable and unlawful breach of his duties of supervision and that this is so even where cover is provided under a social insurance scheme governed by public law.

The first question

30 By this question the national court seeks essentially to ascertain whether the second paragraph of Article 37 of the Convention must be interpreted as meaning that it precludes any appeal by interested third parties against a judgment given on an appeal brought under Article 36 of the Convention, even where the domestic law of the State in which enforcement is sought confers on such parties a right of appeal.

31 In order to answer that question, it should first be pointed out that according to the first paragraph of Article 36 of the Convention it is the party against whom enforcement is sought who may appeal against the decision authorizing enforcement. According to the second paragraph of Article 37(2) of the Convention, in the Federal Republic of Germany the judgment given on the appeal may be contested only by a Rechtsbeschwerde (appeal on a point of law).

32 Secondly, the Court has found in favour of a narrow interpretation of the concept "judgment given on the appeal" in Article 37(2) of the Convention and has ruled that under the general scheme of the Convention, and in the light of one of its principal objectives, which is to simplify procedures in the State in which enforcement is sought, that provision cannot be extended so as to enable

an appeal in cassation to be lodged against a judgment other than that given on the appeal (Case 258/83 Brennero v Wendel [1984] ECR 3971, paragraph 15, and Case C-183/90 Van Dalfsen v van Loon [1991] ECR I-4743, paragraph 19).

33 Finally, the Court made it clear in its judgment in Case 148/84 Deutsche Genossenschaftsbank v Brasserie du Pêcheur [1985] ECR 1981, paragraph 17), that the Convention has established an enforcement procedure which constitutes an autonomous and complete system, including the matter of appeals, and that it follows that Article 36 of the Convention excludes procedures whereby interested third parties may challenge an enforcement order under domestic law.

34 That principle must also be applied to a subsequent appeal brought under Article 37(2) of the Convention. To preclude an interested third party from bringing an appeal under Article 36, whilst allowing that party to intervene at a later stage in the proceedings by means of an appeal under Article 37, would be contrary to the abovementioned system and also to one of the principal objectives of the Convention, which is to simplify the procedure in the State in which enforcement is sought.

35 The answer to the second question referred by the national court must therefore be that the second paragraph of Article 37(2) of the Convention must be interpreted as meaning that it precludes any appeal by interested third parties against a judgment given on an appeal brought under Article 36 of the Convention, even where the domestic law of the State in which enforcement is sought confers on such third parties a right of appeal.

The third and fourth questions

36 By these last two questions, which must be examined together and which concern the interpretation of Article 27(2) of the Convention, the national court seeks to ascertain, first, whether there is a "document which instituted the proceedings" within the meaning of that article where the defendant is given notice by a procedural document that he will be called upon, in the context of criminal proceedings, to make reparation for both material and non-material damage, even though that document does not mention the amount of the claim under civil law that will be made against him. Secondly, the national court seeks to ascertain whether a defendant has appeared for the purposes of Article 27(2) of the Convention where, in the context of a claim for compensation joined to criminal proceedings, the defendant, through counsel of his choice, answered at the trial to the criminal charges but did not express a view on the civil claim, on which oral argument was also submitted in the presence of his counsel.

37 Article 27 lists the conditions to which recognition in a Contracting State of judgments given in another Contracting State is subject. Under point 2 of that article it is provided that recognition must be refused "if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence".

38 As the Court has consistently held, Article 27(2) is intended to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised (Case 166/80 Klomps v Michel [1981] ECR 1593, paragraph 9, and Case C-123/91 Minalmet v Brandeis [1992] ECR I-5661, paragraph 18).

39 It follows that non-recognition of a judgment for the reasons set out in Article 27(2) of the Convention is possible only where the defendant was in default of appearance in the original proceedings. Consequently, that provision may not be relied upon where the defendant appeared, at least if he was notified of the elements of the claim and had the opportunity to arrange for his defence.

40 In view of the facts in the main proceedings, it should be recalled that, according to the first paragraph of Article II of the Protocol annexed to the Convention, "[w]ithout prejudice to any more favourable provisions of national laws, persons domiciled in a Contracting State who are being

prosecuted in the criminal courts of another Contracting State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person".

41 Where a defendant, through his counsel, answers at the trial to the charges against him and is aware of the civil-law claim made against him in the context of the criminal prosecution, he must in principle be regarded as having appeared in the proceedings taken as a whole, without there being any need to distinguish between the criminal prosecution and the civil-law claim. This, however, does not preclude the possibility for the defendant to decline to appear in the civil action; but if he does not do so his reply to the criminal charges is to be taken as constituting, at the same time, an appearance for the purposes of the civil-law claim.

42 It is apparent from the order for reference that the counsel chosen by the defendant in the main proceedings raised no objections to the civil claim, even during oral argument on that claim.

43 It follows that in this case the defendant cannot be regarded as being in default of appearance and that Article 27(2) of the Convention must therefore be declared inapplicable. Consequently, it is unnecessary to consider whether there was a document instituting the proceedings within the meaning of that provision.

44 The answer to be given to the national court must therefore be that non-recognition of a judgment for the reasons set out in Article 27(2) of the Convention is possible only where the defendant was in default of appearance in the original proceedings. Consequently, that provision may not be relied upon where the defendant appeared. A defendant is deemed to have appeared for the purposes of Article 27(2) of the Convention where, in connection with a claim for compensation joined to criminal proceedings, he answered at the trial, through counsel of his own choice, to the criminal charges but did not express a view on the civil claim, on which oral argument was also submitted in the presence of his counsel.

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61976J0029 : N 18 20
61978J0133 : N 18
61979J0814 : N 18 20
61985J0066 : N 24
41968A0927(01)-A36L1 : N 31
61983J0258 : N 32
61990J0183 : N 32
61984J0148 : N 33
61980J0166 : N 38
61991J0123 : N 38
41968A0927(02)-A02L1 : N 40

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Interprets 41968A0927(01) -A27PT2
Interprets 41968A0927(01) -A37L2

SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

AUTLANG German

OBSERV Federal Republic of Germany ; Italy ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *P1* Bundesgerichtshof, Beschluß vom 16/09/1993 (IX ZB 82/90) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1993 no 178 ; - Neue juristische Wochenschrift 1993 p.3269-3273 ; - Wertpapier-Mitteilungen 1993 p.2252-2258 ; - Die Sozialgerichtsbarkeit 1994 p.130 (résumé) ; - Europäische Zeitschrift für Wirtschaftsrecht 1994 p.29-32 ; - Juristenzeitung 1994 p.2* (résumé) ; - Juristenzeitung 1994 p.254-258 ; - Monatsschrift für deutsches Recht 1994 p.39-41 ; - Praxis des internationalen Privat- und Verfahrensrechts 1994 p.118-122 ; - Versicherungsrecht 1994 p.243-246 ; - Jahrbuch für italienisches Recht 1995 Bd.8 p.259 (résumé) ; - Zeitschrift für europäisches Privatrecht 1995 p.850-853 ; - Zeitschrift für Zivilprozeß 1995 p.241-250 ; - Entscheidungen des Bundesgerichtshofes in Zivilsachen Bd.123 p.268-281 ; - Eichenhofer, Eberhard: Juristenzeitung 1994 p.258-259 ; - Basedow, Jürgen: Haftungsersetzung durch Versicherungsschutz - ein Stück ordre public?, Praxis des internationalen Privat- und Verfahrensrechts 1994 p.85-86 ; - Haas, Ulrich: Unfallversicherungsschutz und ordre public, Zeitschrift für Zivilprozeß 1995 p.219-239 ; - Kubis, Sebastian: Amtshaftung im GVÜ und ordre public, Zeitschrift für europäisches Privatrecht 1995 p.853-863

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PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Diéz de Velasco

DATES of document: 21/04/1993
of application: 01/07/1991

Judgment of the Court (Fourth Chamber) of 12 November 1992

Minalmet GmbH v Brandeis Ltd. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Brussels Convention of 27 September 1968 - Recognition of a judgment given in default of appearance - Article 27 (2). Case C-123/91.

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Convention on jurisdiction and the enforcement of judgments ° Recognition and enforcement ° Grounds of refusal ° Defendant who failed to appear not served, or not duly served, with the document instituting the proceedings ° Failure by defendant to have recourse to the remedies provided for in the State where judgment was delivered after becoming aware of the judgment delivered in default of appearance ° Refusal of recognition

(Convention of 27 September 1968, Art. 27(2))

Article 27(2) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as precluding a judgment given in default of appearance in one Contracting State from being recognized in another Contracting State where the defendant was not duly served with the document which instituted the proceedings, even if he subsequently became aware of the judgment which was given and did not avail himself of the remedies provided for under the code of procedure of the State where the judgment was delivered.

In Case C-123/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the proceedings pending before that court between

Minalmet GmbH

and

Brandeis Ltd

on the interpretation of Article 27 (2) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by the 1978 Convention of Accession (OJ 1978 L 304, p. 1, hereinafter "the Brussels Convention"),

THE COURT (Fourth Chamber),

composed of: C.N. Kakouris, President of the Chamber, M. Diez de Velasco and P.J.G. Kapteyn, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

Minalmet GmbH, by Ekkehart Schott, Rechtsanwalt Karlsruhe,

° Brandeis Limited, by Anna-Dorothea Polzer, Rechtsanwalt, Duesseldorf,

° the German Government, by C. Boehmer, Ministerialrat, Federal Ministry of Justice, acting as Agent,

° the United Kingdom, by S. Lucinda Hudson, of the Treasury Solicitor' s Department, acting as Agent,

° the Commission, by P. van Nuffel, of its Legal Service, acting as Agent, assisted by A. Boehlke,

Rechtsanwalt, Frankfurt,

having regard to the Report for the Hearing,

after hearing the oral observations of Brandeis Ltd and the Commission at the hearing on 11 June 1992,

after hearing the Opinion of the Advocate General at the sitting on 8 July 1992,

gives the following

Judgment

1 By order of 4 April 1991, received at the Court Registry on 26 April 1991, the Bundesgerichtshof referred to the Court of Justice for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters a question on the interpretation of Article 27(2) of that convention, as amended by the 1978 Convention of Accession (OJ 1978 L 304, p. 1, hereinafter "the Brussels Convention").

2 That question was raised in proceedings between Minalmet GmbH, whose registered office is in Duesseldorf, Germany (hereinafter "Minalmet"), and Brandeis Ltd, whose registered office is in London (hereinafter "Brandeis").

3 It is apparent from the documents before the Court that Brandeis seeks the enforcement in Germany of a judgment delivered, in default of appearance, by the High Court of Justice, Queen' s Bench Division, ordering Minalmet to pay it a certain sum.

4 The document instituting the proceedings which led to the judgment at issue was forwarded by the competent authorities in the United Kingdom to the competent judicial authority in Germany in order to be served in accordance with Article 5(a) of the Hague Convention of 15 November 1965 on the service and notification abroad of judicial and extra-judicial documents in civil and commercial matters.

5 The Amtsgericht (Local Court) Duesseldorf, the competent authority in Germany, then effected service by post. The post-office employee, finding no-one at the Minalmet' s premises, lodged the documents to be served at the appropriate post office and issued a certificate to the effect that he had left at the debtor' s address a notice of such lodgment, in accordance with the procedure normally followed for the delivery of mail (substituted service under Paragraph 182 of the German Code of Civil Procedure). On the basis of that certificate, the Amtsgericht Duesseldorf issued a certificate recording due service and referring to the lodgment of the documents.

6 By order of 21 February, the Landgericht (Regional Court), Duesseldorf, ordered, at the request of Brandeis, that the judgment be certified as enforceable.

7 Minalmet brought an action for the annulment of that order before the Oberlandesgericht (Higher Regional Court), Duesseldorf, contending that the document instituting proceedings had not been served on it in accordance with the formal requirements of German law and solemnly affirmed that it had no knowledge either of the notice of lodgment by the post-office employee or of the said document. The Oberlandesgericht dismissed the application on 14 May 1990.

8 Minalmet then brought an appeal (Rechtsbeschwerde) against that decision before the Bundesgerichtshof. In its analysis of the case, that court found that the document instituting proceedings had not been validly served, the procedure being governed, by virtue of Article 5(a) of the Hague Convention, by the civil law of Germany, the State to which application had been made for service to be effected. It stated that substituted service could have been properly effected only at the private address

of the statutory representative of the company, not at the debtor' s premises.

9 In those circumstances, the Bundesgerichtshof decided to stay the proceedings pending a preliminary ruling by the Court on the following question:

> "Is recognition of a judgment given in default of appearance to be refused under Article 27(2) of the Brussels Convention where it cannot be proved that the defendant was served with the document which instituted the proceedings or he was not duly served with that document, if he was nevertheless aware of the judgment delivered in the proceedings but availed himself of none of the legal remedies against the judgment provided for in the procedure of the State in which the judgment was delivered?"

10 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 By its question, the national court wishes essentially to ascertain whether Article 27(2) of the Brussels Convention must be interpreted as precluding recognition in one contracting State of a judgment given in default of appearance in another contracting State where the document instituting the proceedings was not served in due form on the defaulting defendant, even if the latter subsequently had notice of the judgment in question but did not avail himself of the legal remedies against that judgment provided for under the procedure of the State where it was delivered.

12 It must be borne in mind first of all that Article 27 of the Brussels Convention sets out the conditions for recognition in one contracting State of judgments given in another contracting State. According to Article 27(2), recognition must be refused "if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence".

13 It must next be noted that, in its judgment in Case C-305/88 Lancray [1990] ECR I-2725, paragraph 18, the Court held that due service and service in sufficient time constituted two separate and concurrent safeguards for a defendant who fails to appear. The absence of one of those safeguards is therefore a sufficient ground for refusing to recognize a foreign judgment.

14 It follows that a decision given in default of appearance in a contracting State must not be recognized in another contracting State if the document instituting proceedings was not duly served on the defaulting defendant.

15 That interpretation is not invalidated by the fact that the defendant had notice of the judgment given in default and did not avail himself of the remedies provided for under the procedure of the State where it was delivered.

16 Any other conclusion would be difficult to reconcile with the wording and purpose of Article 27(2) of the Brussels Convention.

17 It follows from the wording of the aforesaid provision that service on the defendant of the document instituting proceedings in due form and in sufficient time is required by that provision for recognition of that decision in a contracting State.

18 Furthermore, as the Court held in its judgment in Case 166/80 Klomps [1981] ECR 1593, paragraph 9, Article 27(2) of the Brussels Convention is intended to uphold the rights of the defence and ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the Court first seised.

19 It must be emphasized in that regard that, as is apparent from the provision at issue, the proper time for the defendant to have an opportunity to defend himself is the time at which proceedings

are commenced. The possibility of having recourse, at a later stage, to a legal remedy against a judgment given in default of appearance, which has already become enforceable, cannot constitute an equally effective alternative to defending the proceedings before judgment is delivered.

20 As correctly pointed out by the national court, once a judgment has been delivered and has become enforceable, the defendant can obtain suspension of its enforcement, if suspension is appropriate, only under more difficult circumstances and may also find himself confronted by procedural difficulties. The possibility for a defaulting defendant to defend himself is thus considerably diminished. Such a result would run counter to the purpose of the provision in question.

21 It follows from all the foregoing considerations that recognition in one contracting State of a judgment delivered in default of appearance in another contracting State must be refused where the document which instituted the proceedings was not duly served on the defendant, even if the defendant had notice of the judgment and did not have recourse to the available legal remedies.

22 It must therefore be stated in reply to the question submitted by the national court that Article 27 (2) of the Brussels Convention must be interpreted as precluding a judgment given in default of appearance in one Contracting State from being recognized in another Contracting State where the defendant was not duly served with the document which instituted the proceedings, even if he subsequently became aware of the judgment which was given and did not avail himself of the legal remedies available under the procedure of the State where the judgment was delivered.

Costs

23 The costs incurred by the German Government, the United Kingdom and the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question referred to it by the Bundesgerichtshof by order of 4 April 1991, hereby rules:

Article 27(2) of the Brussels Convention must be interpreted as precluding a judgment given in default of appearance in one Contracting State from being recognized in another Contracting State where the defendant was not duly served with the document which instituted the proceedings, even if he subsequently became aware of the judgment which was given and did not avail himself of the legal remedies provided for under the procedure of the State where the judgment was delivered.

DOCNUM	61991J0123
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1992 Page I-05661

DOC	1992/11/12
LODGED	1991/04/26
JURCIT	41968A0927(01)-A27PT2 : N 1 9 - 22 41978A1009(01) : N 1 61988J0305 : N 13 61980J0166 : N 18
CONCERNS	Interprets 41968A0927(01) -A27PT2
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	German
OBSERV	Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*P1* Bundesgerichtshof, Beschluß vom 18/02/1993 (IX ZB 87/90) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1993 no 169 ; - Europäische Zeitschrift für Wirtschaftsrecht 1993 p.579-581 ; - Europäisches Wirtschafts- & Steuerrecht - EWS 1993 p.258-260 ; - Monatsschrift für deutsches Recht 1993 p.1014-1015 ; - Neue Juristische Wochenschrift 1993 p.2688-2689 ; - Praxis des internationalen Privat- und Verfahrensrechts 1993 p.396-398 ; - Recht der internationalen Wirtschaft 1993 p.673-676 ; - Wertpapier-Mitteilungen 1993 p.1352-1355 ; - International Litigation Procedure 1994 p.137 (résumé) ; - International Litigation Procedure 1995 p.523-531 ; - Rauscher, Thomas: Keine EuGVÜ-Anerkennung ohne ordnungsgemäße Zustellung, Praxis des internationalen Privat- und Verfahrensrechts 1993 p.376-379
NOTES	Stürner, Rolf: Juristenzeitung 1993 p.358 ; Droz, Georges A.L.: Revue critique de droit international privé 1993 p.85-87 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1993 p.468-469 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1993 p.307-308 ; Rauscher, Thomas: Keine EuGVÜ-Anerkennung ohne ordnungsgemäße Zustellung, Praxis des internationalen Privat- und Verfahrensrechts 1993 p.376-379 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments of 27 September 1968, Netherlands International Law Review 1993 p.512-515 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1993 p.887-890 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1992), Schweizerische Zeitschrift für internationales und europäisches Recht 1993 p.382-384 ; Hartley, Trevor: Article 27(2): due service of the document instituting the proceedings, European Law Review 1994 p.535-537 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1992-1993 et 1993-1994, Cahiers de droit européen 1995 p.163-165 ; Vassalli di Dachenausen, T.: Il Foro italiano 1995 IV Col.238-239
PROCEDU	Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Diez de Velasco

DATES of document: 12/11/1992
of application: 26/04/1991

Judgment of the Court of 19 January 1993

Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Brussels Convention - First and second paragraphs of Article 13 - Jurisdiction in proceedings concerning contracts concluded by consumers - Concept of consumer - Proceedings brought by a company, as assignee of the claims of a private individual. Case C-89/91.

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Convention on Jurisdiction and the Enforcement of Judgments ° Jurisdiction in proceedings concerning contracts concluded by consumers ° Concept of "consumer" ° Plaintiff acting in pursuance of his trade or professional activity, as the assignee of the rights of a private individual ° Excluded

(Convention of 27 September 1968, Art. 13, first para., and Art. 14, as amended by the 1978 Accession Convention)

The special system established by Article 13 et seq. of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is inspired by the concern to protect the consumer, as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, so that the consumer must not be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled. Those provisions affect only a private final consumer, not engaged in trade or professional activities, who is bound by one of the contracts listed in Article 13 and who is a party to the action, in accordance with Article 14. It follows that Article 13 of the Convention is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity, and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

In Case C-89/91,

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 (OJ 1978 L 304, p. 36), by the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the proceedings pending before that court between

Shearson Lehman Hutton Inc.

and

TVB Treuhandgesellschaft fuer Vermoegensverwaltung und Beteiligungen mbH

on the interpretation of the first and second paragraphs of Article 13 of the above-mentioned Convention of 27 September 1968, 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 to that Convention (OJ 1978 L 304, p. 1),

THE COURT,

composed of: C.N. Kakouris, President of Chamber, acting for the President, G.C. Rodríguez Iglesias, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, R. Joliet, F.A. Schockweiler, J.C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P.J.G. Kapteyn, Judges,

Advocate General: M. Darmon,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

° Shearson Lehman Hutton Inc., by G. Limberger, Rechtsanwalt, Frankfurt,

° TVB Treuhandgesellschaft fuer Vermoegensverwaltung und Beteiligungen mbH, by J. Kummer, Rechtsanwalt, Karlsruhe,

° the German Government, by C. Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

° the Commission of the European Communities, by P. van Nuffel, of its Legal Service, acting as Agent, assisted by A. Boehlke, Rechtsanwalt, Frankfurt,

having regard to the Report for the Hearing,

after hearing the oral observations of Shearson Lehman Hutton Inc., TVB Treuhandgesellschaft fuer Vermoegensverwaltung und Beteiligungen mbH and the Commission at the hearing on 7 July 1992,

after hearing the Opinion of the Advocate General at the sitting on 27 October 1992,

gives the following

Judgment

1 By order of 29 January 1991, received at the Court on 11 March 1991, the Bundesgerichtshof 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 (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, hereinafter "the Convention"), four questions on the interpretation of the first and second paragraphs of Article 13 of the Convention.

2 Those questions were raised in proceedings between TVB Treuhandgesellschaft fuer Vermoegensverwaltung und Beteiligungen mbH, a company established at Munich (Federal Republic of Germany) (hereinafter "TVB"), and E.F. Hutton & Co. Inc., a firm established in New York (United States of America), which has in the meantime been taken over by the company Shearson Lehman Hutton Inc., also established in New York (hereinafter "Hutton Inc.").

3 It is apparent from the documents forwarded to the Court that TVB brought an action before the German courts against Hutton Inc., in reliance on a right assigned to it. The assignor, a German judge, had instructed the brokers Hutton Inc. to carry out currency, security and commodity futures transactions under an agency contract. To that end, the assignor paid over considerable sums in 1986 and 1987, but lost nearly all of his investments in those transactions.

4 Hutton Inc. had offered its services through press advertisements in the Federal Republic of Germany. The business relationships with the assignor were arranged through E.F. Hutton & Co. GmbH (hereinafter "Hutton GmbH"), whose registered office is in Germany, which is dependent on Hutton Inc. and undertakes consultancy functions vis-à-vis its customers for the purposes of Hutton Inc.' s operations. Hutton GmbH had acted, at least in an intermediary capacity, in connection with all the orders to buy and sell given by the assignor. The shares in Hutton GmbH belong to E.F. Hutton International Inc., a wholly-owned subsidiary of Hutton Inc. whose registered office is in New York. In addition, many persons having managerial responsibilities within Hutton Inc. also have like responsibilities within Hutton GmbH.

5 TVB claims from Hutton Inc. the return of the sums lost by the assignor. It bases its claims

on unjust enrichment and on the right to damages for breach of contractual and pre-contractual obligations and for tortious conduct, on the ground that Hutton Inc. had not sufficiently informed the assignor of the risks involved in futures transactions.

6 The case was brought before the Landgericht Muenchen (Regional Court, Munich), which declined jurisdiction to hear TVB' s claim. On appeal, the Oberlandesgericht Muenchen (Higher Regional Court, Munich) overturned that decision and held that the Landgericht did have jurisdiction. Hutton Inc. appealed on a point of law against that decision to the Bundesgerichtshof.

7 Taking the view that the dispute raised issues relating to interpretation of the Convention, the Bundesgerichtshof decided to stay the proceedings until the Court had given a preliminary ruling on the following questions:

"Question 1

Does subparagraph 3 of the first paragraph of Article 13 of the Convention cover agency contracts concerning currency, security and commodity futures dealings?

Question 2

Is it sufficient, for subparagraph 3(a) of the first paragraph of Article 13 of the Convention to apply, that before conclusion of the contract the other party to the contract with the consumer advertised in newspapers in the State of the consumer' s domicile, or does the provision require a connection between the advertising and the conclusion of the contract?

Question 3

Does the other party to the contract with the consumer have a branch, agency or other establishment within the meaning of the second paragraph of Article 13 if, for the conclusion of and performance of the contract, it uses a company having its registered office in the State of the consumer' s domicile, which is effectively owned by it and has staff links with it but has no authority to contract on its behalf, acting only as intermediary and advising the consumer, and are disputes which arise in connection with the relations so arranged between the consumer and the other party to the contract disputes arising out of the operation of the branch, agency or other establishment?

Question 4

(a) In addition to claims for damages for breach of contractual obligations, does the phrase 'proceedings concerning a contract' in the first paragraph of Article 13 of the Convention also cover claims arising out of the breach of pre-contractual obligations (culpa in contrahendo) and unjust enrichment in connection with the unwinding of contractual transactions?

(b) In an action in which claims for damages for breach of contractual and pre-contractual obligations, claims relating to unjust enrichment and claims for damages for tort or delict are put forward, does the first paragraph of Article 13 of the Convention give ancillary jurisdiction to hear the non-contractual claims because of their relationship to the contractual claims?"

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 As a preliminary point, it should be noted that the questions submitted by the national court all relate to the interpretation of the first and second paragraphs of Article 13 of the Convention, which form part of Section 4, entitled "Jurisdiction over consumer contracts", of Title II of the Convention, concerning the rules governing jurisdiction.

10 Consequently, it must first be ascertained whether the conditions for the application of that

provision are satisfied in a situation such as that in point in the main proceedings, since the questions relating to the scope of application of the provisions of the Convention, which determine jurisdiction within the international legal order, must be regarded as being matters of public policy.

11 It is apparent from the order for reference that, in the case in the main proceedings, the action for the recovery of debts was brought against Hutton Inc., not by the private individual who was the other party to the contract with Hutton Inc., but by a company, the assignee of the rights of that individual.

12 It must therefore be considered whether a plaintiff, such as the plaintiff in the main proceedings, may be regarded as a consumer within the meaning of the Convention and must, therefore, benefit from the special rules governing jurisdiction laid down by the Convention with respect to consumer contracts.

13 For the purpose of answering that question, it is necessary to bear in mind the principle, established by case-law (see, in particular, the judgments in Case 150/77 Bertrand v Ott [1978] ECR 1431, paragraphs 14 to 16 and 19, and in Case C-26/91 Handte v Traitements Mécano-chimiques des Surfaces [1992] ECR I-3967, paragraph 10), according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This rule must apply, in particular, to the concept of "consumer" within the meaning of Article 13 et seq. of the Convention, in so far as that concept is the principal factor in the determination of rules governing jurisdiction.

14 In that connection, it must first be noted that under the system of the Convention the general principle, stated in the first paragraph of Article 2, is that the national courts of the Contracting State in which the defendant is domiciled are to have jurisdiction.

15 It is only by way of derogation from that general principle that the Convention provides for the cases, exhaustively listed in Sections 2 to 6 of Title II, in which a defendant domiciled or established in a Contracting State may, where the situation comes under a rule of special jurisdiction, or must, where the situation comes under a rule of exclusive jurisdiction or of prorogation of jurisdiction, be sued in the courts of another Contracting State.

16 Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (see the judgments in Bertrand, paragraph 17, and Handte, paragraph 14, cited above).

17 Such an interpretation must apply a fortiori with respect to a rule of jurisdiction, such as that contained in Article 14 of the Convention, which allows a consumer, within the meaning of Article 13 of the Convention, to sue the defendant in the courts of the Contracting State in which the plaintiff is domiciled. Apart from the cases expressly provided for, the Convention appears clearly hostile towards the attribution of jurisdiction to the courts of the plaintiff' s domicile (see judgment in Case C-220/88 Dumez France and Tracoba v Hessische Landesbank (Helaba) and Others [1990] ECR I-49, paragraphs 16 and 19).

18 Secondly, the special system established by Article 13 et seq. of the Convention is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, and the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled.

19 The protective role fulfilled by those provisions implies that the application of the rules

of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified.

20 In that regard, it is important to note, in the first place, that the first paragraph of Article 13 of the Convention defines the consumer as a person acting "for a purpose which can be regarded as being outside his trade or profession" and provides that the various types of contracts listed in that article, and to which the provisions of Section 4 of Title II of the Convention apply, must have been concluded by the consumer.

21 Secondly, the first paragraph of Article 14 of the Convention provides for the courts of the Contracting State in which the consumer is domiciled to have jurisdiction to hear and determine the "proceedings against the other party to a contract".

22 It follows from the wording and the function of those provisions that they affect only a private final consumer, not engaged in trade or professional activities (see also, to that effect, the judgment in Bertrand, cited above, paragraph 21, and the Expert Report drawn up when the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland acceded to the Convention, OJ 1979 C 59, p. 71, paragraph 153), who is bound by one of the contracts listed in Article 13 and who is a party to the action, in accordance with Article 14.

23 As the Advocate General pointed out in paragraph 26 of his Opinion, the Convention protects the consumer only in so far as he personally is the plaintiff or defendant in proceedings.

24 It follows that Article 13 of the Convention is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

25 It follows from the foregoing considerations that it is not necessary to give a ruling on the specific questions put to the Court by the Bundesgerichtshof.

Costs

26 The costs incurred by the German Government and the Commission of the European Communities, 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 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 questions referred to it by the Bundesgerichtshof by order of 29 January 1991, hereby rules:

Article 13 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts.

DOCNUM 61991J0089

AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1993 Page I-00139
DOC	1993/01/19
LODGED	1991/03/11
JURCIT	41978A1009(01) : N 1 41968A0927(01)-A13L1 : N 1 20 41968A0927(01)-A13L2 : N 1 7 41968A0927(01)-A13L1PT3LA : N 7 61977J0150 : N 13 16 22 61991J0026 : N 13 16 41968A0927(01)-A02L1 : N 14 41968A0927(01)-A13 : N 13 18 22 24 41968A0927(01)-A14 : N 17 22 61988J0220 : N 17 41968A0927(01)-A14L1 : N 21
CONCERNS	Interprets 41968A0927(01) -A13
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*P1* Bundesgerichtshof, Urteil vom 20/04/1993 (XI ZR 17/90) ; - Der Betrieb 1993 p.2020-2021 (résumé) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1993 no 138 ; - Europäische Zeitschrift für Wirtschaftsrecht 1993 p.517-518 ; - Europäisches Wirtschafts-& Steuerrecht - EWS 1993 p.224-225 ; - Juristenzeitung 1993 p.216* (résumé) ; - Neue Juristische Wochenschrift 1993 p.2683-2684 ; - Recht der internationalen Wirtschaft 1993 p.670-671 ; - Wertpapier-Mitteilungen 1993 p.1109-1110 ; - Zeitschrift für Wirtschaftsrecht 1993 p.1000-1001 ; - Monatsschrift für deutsches Recht 1994 p.1146 (résumé) ; - Praxis des internationalen Privat- und Verfahrensrechts 1995 p.98-99 ; - International Litigation Procedure 1994 p.326-331 ; - International Litigation Procedure 1994 p.68 (résumé) ; - Geimer, Reinhold: Kompetenzrechtlicher Verbraucherschutz, Europäische Zeitschrift für Wirtschaftsrecht 1993 p.564-567 ; - Koch, Harald: Verbrauchergerichtsstand nach dem EuGVÜ und Vermögensgerichtsstand nach der ZPO für Termingeschäfte?, Praxis des internationalen Privat- und Verfahrensrechts 1995 p.71-72
NOTES	Van Houtte, Hans: Wat een EG-vreemdeling of consument weten moet, Tijdschrift rechtsdocumentatie 1993 p.153-154 ; Gaudemet-Tallon, H.: Revue critique de droit international privé 1993 p.325-332 ; Kullmann, Jérôme: Droit

communautaire, groupes de contrats et sécurité juridique, Recueil Dalloz Sirey 1993 Som. p.214-215 ; Huet, André: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1993 p.466-468 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1993 p.275-277 ; Guzman Zapater, Monica: Cesion de crédito y nocion de consumidor: segunda decision del TJCE sobre la competencia judicial internacional en materia de contratos de consumo en el Convenio de Bruselas, La ley - Comunidades Europeas 1993 no 82 p.1-7 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments of 27 September 1968, Netherlands International Law Review 1993 p.501-504 ; Capelli, Fausto: "Consumatore" e cessione dei diritti nella Convenzione di Bruxelles, Diritto comunitario e degli scambi internazionali 1993 p.363-365 ; Guzman Zapater, Monica: Revista española de Derecho Internacional 1993 p.457-461 ; Briggs, Adrian: The Brussels Convention, Yearbook of European Law 1993 p.511-517 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1993 p.1180-1182 ; Kohl, Alphonse: Du champ d'application de l'article 13 de la Convention CEE de 1968, Revue de jurisprudence de Liège, Mons et Bruxelles 1994 p.457-459 ; Hartley, Trevor: Article 13: Consumer contracts, European Law Review 1994 p.537-538 ; Koch, Harald: Verbrauchergerichtsstand nach dem EuGVÜ und Vermögensgerichtsstand nach der ZPO für Termingeschäfte?, Praxis des internationalen Privat- und Verfahrensrechts 1995 p.71-72 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles. Années judiciaires 1992-1993 et 1993-1994, Cahiers de droit européen 1995 p.170-173 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1993/94), Schweizerische Zeitschrift für internationales und europäisches Recht 1995 p.302-305 ; Janssens, Thomas: The Shearson Judgment of the European Court of Justice: Problems Raised by the "Europeanisation" and "Communitisation" of the Term "Consumer" in the Brussels Jurisdiction and Judgments Convention, European Review of Private Law 1995 p.605-612

PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Schockweiler

DATES of document: 19/01/1993
of application: 11/03/1991

Judgment of the Court of 17 June 1992

Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA. Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Interpretation of Article 5 (1) - Jurisdiction in matters relating to a contract - Chain of contracts - Action to establish liability brought by a sub-buyer of goods against the manufacturer. Case C-26/91.

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Convention on Jurisdiction and the Enforcement of Judgments ° Special jurisdiction ° Jurisdiction "in matters relating to a contract" ° Concept ° Independent interpretation ° Chain of contracts ° Action to establish liability brought by a sub-buyer against the manufacturer ° Excluded

(Convention of 27 September 1968, Arts 2 and 5(1))

The phrase "matters relating to a contract" in Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which must be interpreted independently, is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another. Strengthening legal protection of persons established in the Community, which is one of the objectives of the Convention, also requires that the jurisdictional rules which derogate from the general principle set out in Article 2 of the Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to predict before which courts, other than those of the State in which he is domiciled, he may be sued. It follows that Article 5(1) of the Convention is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose.

In Case C-26/91,

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 (OJ 1978 L 304, p. 36) by the French Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

Jakob Handte & Co. GmbH

and

Traitements Mécano-chimiques des Surfaces SA (TMCS)

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

THE COURT,

composed of: O. Due, President, F. A. Schockweiler (President of Chamber), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, M. Diez de Velasco and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs,

Registrar: H. A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° Jakob Handte & Co. GmbH, by J. P. Desaché, of the Paris Bar,

° the Government of the Federal Republic of Germany, by C. Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

° the Commission of the European Communities, by X. Lewis, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 25 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 8 April 1992,

gives the following

Judgment

1 By judgment of 8 January 1991, received at the Court on 25 January 1991, the French Cour de Cassation (Court of Cassation) 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 (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) (hereinafter "the Convention"), a question concerning the interpretation of Article 5(1) of the Convention.

2 The question has arisen in proceedings between Jakob Handte & Co. GmbH, whose registered office is at Tuttlingen (Federal Republic of Germany) (hereinafter "Handte Germany"), and Traitements Mécano-chimiques des Surfaces, a limited liability company whose registered office is at Bonneville (France) (hereinafter "TMCS").

3 It appears from the documents submitted to the Court that in 1984 and 1985 TMCS purchased from Bula et Fils (hereinafter "Bula"), which is a limited liability company governed by Swiss law, two metal-polishing machines to which TMCS had a suction system fitted that was manufactured by Handte Germany but sold and installed by Société Handte France S.à r.l. (hereinafter "Handte France"), whose registered office is at Strasbourg (France).

4 In 1987 TMCS instituted proceedings against Bula, Handte Germany and Handte France in the Tribunal de Grande Instance (Regional Court), Bonneville (France), seeking compensation for damage incurred by reason of the fact that the equipment manufactured and sold did not comply with rules on hygiene and safety at work and was unsuitable for its intended purpose.

5 By judgment of 4 May 1988, that court ruled that it had no jurisdiction ratione loci to entertain the action against Bula but that it did have jurisdiction under Article 5(1) of the Convention to rule on the claim against Handte Germany and Handte France.

6 By judgment of 20 March 1989, the Cour d' Appel (Court of Appeal), Chambéry (France), dismissed Handte Germany' s appeal on the ground that the action brought by TMCS against that company was an action to establish the manufacturer' s liability for defects in the goods sold, that such a direct action by a sub-buyer against the manufacturer related to a contractual matter under both French law and the Convention and that the lower court was accordingly right in finding that it had jurisdiction under Article 5(1) of the Convention as the court for the place of performance of the obligation.

7 Handte Germany considered that Article 5(1) of the Convention was not applicable where there was a chain of contracts and appealed on a point of law against the judgment of the Cour d' Appel, Chambéry.

8 The French Cour de Cassation found that the dispute raised a problem concerning interpretation of the Convention and accordingly decided to stay proceedings until the Court of Justice has given a preliminary ruling on the following question:

"Does Article 5(1) of the Convention, which provides for special jurisdiction in matters relating

to a contract, apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose?"

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed below only in so far as is necessary for the reasoning of the Court.

10 In replying to the question from the national court, it should first be observed that the Court has consistently held that the phrase "matters relating to a contract" in Article 5(1) of the Convention is to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention, in order to ensure that it is applied uniformly in all the Contracting States (see the judgment in Case 34/82 Martin Peters Bauunternehmung v Zuid Nederlandse Aannemers Vereniging [1983] ECR 987, paragraphs 9 and 10, and the judgment in Case 9/87 Arcado v Haviland [1988] ECR 1539, paragraphs 10 and 11). The phrase should not therefore be taken as referring to how the legal relationship in question before the national court is classified by the relevant national law.

11 Secondly, it should be noted that, according to the preamble to the Convention, one of its objectives is to "strengthen in the Community the legal protection of persons therein established".

12 In that connection, the expert report prepared at the time when the Convention was drawn up (OJ 1979 C 59, p. 1) states that:

"... the purpose of the Convention is... , by establishing common rules of jurisdiction, to achieve,... in the field which it was required to cover, a genuine legal systematization which will ensure the greatest possible degree of legal certainty. To this end, the rules of jurisdiction codified in Title II determine which State' s courts are most appropriate to assume jurisdiction, taking into account all relevant matters...".

13 The Convention achieves that objective by laying down a number of jurisdictional rules which determine the cases, exhaustively listed in Sections 2 to 6 of Title II of the Convention, in which a defendant domiciled or established in a Contracting State may, under a rule of special jurisdiction, or must, under a rule of exclusive jurisdiction or prorogation of jurisdiction, be sued before a court of another Contracting State.

14 The rules on special and exclusive jurisdiction and those relating to prorogation of jurisdiction thus derogate from the general principle, set out in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction. That jurisdictional rule is a general principle because it makes it easier, in principle, for a defendant to defend himself. Consequently, the jurisdictional rules which derogate from that general principle must not lead to an interpretation going beyond the situations envisaged by the Convention.

15 It follows that the phrase "matters relating to a contract", as used in Article 5(1) of the Convention, is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.

16 Where a sub-buyer of goods purchased from an intermediate seller brings an action against the manufacturer for damages on the ground that the goods are not in conformity, it must be observed that there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former.

17 Furthermore, particularly where there is a chain of international contracts, the parties' contractual obligations may vary from contract to contract, so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer.

18 The objective of strengthening legal protection of persons established in the Community, which

is one of the objectives which the Convention is designed to achieve, also requires that the jurisdictional rules which derogate from the general principle of the Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to predict before which courts, other than those of the State in which he is domiciled, he may be sued.

19 However, in a situation such as that with which the main proceedings are concerned, the application of the special jurisdictional rule laid down by Article 5(1) of the Convention to an action brought by a sub-buyer of goods against the manufacturer is not foreseeable by the latter and is therefore incompatible with the principle of legal certainty.

20 Apart from the fact that the manufacturer has no contractual relationship with the sub-buyer and undertakes no contractual obligation towards that buyer, whose identity and domicile may, quite reasonably, be unknown to him, it appears that in the great majority of Contracting States the liability of a manufacturer towards a sub-buyer for defects in the goods sold is not regarded as being of a contractual nature.

21 It follows that the answer to the question submitted by the national court must be that Article 5(1) of the Convention is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose.

Costs

22 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, 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,

in answer to the question referred to it by the French Cour de Cassation by judgment of 8 January 1991, hereby rules:

Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose.

DOCNUM	61991J0026
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1992 Page I-03967 Swedish special edition Page I-00137 Finnish special edition Page I-00181

DOC	1992/06/17
LODGED	1991/01/25
JURCIT	41968A0927(01)-A05PT1 : N 1 - 21 41978A1009(01) : N 1 61982J0034 : N 10 61987J0009 : N 10 41968A0927(01)-A02L1 : N 14
CONCERNS	Interprets 41968A0927(01) -A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*P1* Cour de cassation (France), 1re chambre civile, arrêt du 27/01/1993 (184 89-14.179) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1993 I no 34 ; - Bulletin d'information de la Cour de Cassation 1993 no 362 p.9 (résumé) ; - Contrats - concurrence - consommation 1993 no 5 p.2 ; - Gazette du Palais 1993 II Panor. p.128 (résumé) ; - La Semaine juridique - édition générale 1993 IV p.89 (résumé) ; - Revue critique de droit international privé 1993 p.485-486 ; - International Litigation Procedure 1993 p.526-527 (résumé) ; - Leveneur, Laurent: Ombre et lumière sur les actions directes dans les chaines de contrats, Contrats - concurrence - consommation 1993 no 5 p.1-2 ; - Gaudemet-Tallon, Hélène: Revue critique de droit international privé 1993 p.486-489
NOTES	Larroumet, Christian: La Semaine juridique - édition générale 1992 II 21927 ; Jourdain, Patrice: Les actions contractuelles directes en responsabilité et l'application des règles de compétence internationale, La Semaine juridique - édition entreprise 1992 II 363 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles: Années judiciaires 1990-1991 et 1991-1992, Cahiers de droit européen 1992 p.705-706 ; Gaudemet-Tallon, Hélène: Revue critique de droit international privé 1992 p.730-738 ; De Vareilles-Sommières, Pascal: Revue trimestrielle de droit européen 1992 p.712-727 ; X: Revue de jurisprudence de droit des affaires 1992 p.714 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1993 p.259-262 ; Boutard-Labarde, Marie-Chantal: Droit communautaire, La Semaine juridique - édition générale 1993 I 3666 ; Rigaux, Paul: Les groupes de contrats: jurisprudences belge et française, Journal des tribunaux 1993 p.471-472 ; Decker, Micheline: Contract or Tort: A Conflict of Characterisation, International and Comparative Law Quarterly 1993 p.366-369 ; Kullmann, Jérôme: Droit communautaire, groupes de contrats et sécurité juridique, Recueil Dalloz Sirey 1993 Som. p.214-215 ; Bischoff, Jean-Marc: Chronique de jurisprudence du Tribunal et de la Cour de justice des Communautés européennes, Journal du droit international 1993 p.469-474 ; Roscioni, G.: Il Foro italiano 1993 IV Col.301-304 ; Deli, Maria Beatrice: Criteri

di giurisdizione e Convenzione di Bruxelles del 1968 nelle vendite a catena, Rivista di diritto internazionale privato e processuale 1993 p.305-314 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1993 p.248 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments of 27 September 1968, Netherlands International Law Review 1993 p.497-499 ; Hartley, Trevor C.: Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the Case of the Dissatisfied Sub-Purchaser, European Law Review 1993 p.506-516 ; Jourdain, Patrice: Responsabilité civile, Revue trimestrielle de droit civil 1993 p.133 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1992), Schweizerische Zeitschrift für internationales und europäisches Recht 1993 p.352-354 ; Viney, Geneviève: Responsabilité civile, La Semaine juridique - édition générale 1993 I 3664 ; Marchal, P.: Chronique de jurisprudence, Revue de droit international et de droit comparé 1994 p.163-166 ; Peifer, Karl-Nikolaus: Juristenzeitung 1995 p.91-93 ; Leclerc, Frédéric: Les chaines de contrats en droit international privé, Journal du droit international 1995 p.267-320 ; Bauerreis, Jochen: Le rôle de l'action directe contractuelle dans les chaines internationales de contrats, Revue critique de droit international privé 2000 p.341-348

PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Schockweiler

DATES of document: 17/06/1992
of application: 25/01/1991

Judgment of the Court of 26 February 1992

Elisabeth Hacker v Euro-Relais GmbH. Reference for a preliminary ruling: Landgericht Köln - Germany. Brussels Convention - Jurisdiction in proceedings relating to tenancies of immovable property (Article 16 (1)). Case C-280/90.

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Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - Proceedings relating to tenancies of immovable property - Concept - Letting of holiday accommodation by a business organizing travel - Not applicable - Conditions

(Convention of 27 September 1968, Art. 16(1))

Article 16(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as not applying to a contract concluded in a Contracting State whereby a business organizing travel with its seat in that State undertakes to procure for a client domiciled in the same State the use for several weeks of holiday accommodation not owned by it in another Contracting State, and to book the travel arrangements. A complex contract of that type, which concerns a range of services provided in return for a lump sum paid by the customer, is outside the scope within which the exclusive jurisdiction laid down in Article 16(1) finds its raison d' être and cannot constitute a "tenancy agreement" within the meaning of that provision.

In Case C-280/90,

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 Landgericht Koeln (District Court, Cologne) for a preliminary ruling in the action pending before that court between

Elisabeth Hacker

and

Euro-Relais GmbH

on the interpretation of Article 16(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 to the Convention and to the Protocol on its interpretation by the Court of Justice (amended text published in Official Journal 1978 L 304, p. 77),

THE COURT,

composed of: O. Due, President, F. Grévisse and P.J.G. Kapteyn, (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, M. Díez de Velasco, M. Zuleeg and J.L. Murray, Judges,

Advocate General: M. Darmon,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Euro-Relais, by Mr Kuehn and Mr Jaeger, Rechtsanwaelte,

- the United Kingdom, by H. Kaya, of the Treasury Solicitor' s Department, acting as Agent,

- the Commission of the European Communities, by Henri Etienne and Pieter van Nuffel, members

of its Legal Service, acting as Agents, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Euro-Relais, represented by Joachim Sturm, Rechtsanwalt, the German Government, represented by Joerg Pirrung, Ministerialrat at the Federal Ministry of Justice, acting as Agent, and the Commission, at the hearing on 15 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1991,

gives the following

Judgment

1 By order of 28 June 1990, which was received at the Court on 14 September 1990, the Landgericht Koeln (District Court, Cologne) referred 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 (hereinafter referred to as "the Convention"), two questions on the interpretation of Article 16(1) of the Convention.

2 Those questions were raised in the course of proceedings between Mrs Hacker, who is domiciled in the Federal Republic of Germany, and Euro-Relais GmbH ("Euro-Relais"), carrying on a business as a travel organizer with a head office in the Federal Republic of Germany and which advertises by way of brochures. The proceedings concern a contract described as a "tenancy agreement" concluded by the parties on 5 April 1989 also in the Federal Republic of Germany.

3 Under that contract Euro-Relais undertook, in return for payment, to procure a holiday home situated in Ameland, in the Netherlands, not owned by Euro-Relais, for the use of Mrs Hacker and six other persons accompanying her, for the period from 29 July to 12 August 1989. The contract also provided that, in return for an additional payment, Euro-Relais undertook to arrange the booking of the ferry crossing to Ameland for Mrs Hacker; the cost of the crossing itself was to be paid separately by Mrs Hacker to the ferry company.

4 Mrs Hacker considered that the size of the holiday home was less than that indicated in the Euro-Relais brochure, so that she had been compelled first to rent an additional room and then to cut short her holiday. She commenced proceedings in the Amtsgericht Koeln (Local Court, Cologne) against Euro-Relais, claiming a reduction in the price paid, damages for the cost of renting an additional room and damages for loss of holiday enjoyment.

5 The Amtsgericht rejected Mrs Hacker' s claim and she then appealed to the Landgericht Koeln, which considered that the outcome of the proceedings depended on the interpretation of Article 16(1) of the Convention; it therefore stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

> "(1) Is there a tenancy agreement within the meaning of Article 16(1) of the Convention when a travel organizer and a customer who are both domiciled in the Federal Republic of Germany conclude a contract in the Federal Republic of Germany under which the travel organizer undertakes to provide for the use of the customer for a number of weeks a holiday home in the Netherlands not owned by the travel organizer and to arrange the booking of the ferry crossing?

(2) If so, does Article 16(1) of the Convention also apply to actions in which the travel organizer' s customer claims:

(a) a reduction owing to an alleged shortcoming in the holiday home;

(b) damages on the ground that, because of an alleged shortcoming in the holiday home, it was necessary to rent an additional room;

(c) damages for loss of holiday enjoyment?"

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Question 1

7 Article 16 of the Convention, in the version applicable at the time the dispute arose, provides:

"The following courts shall have exclusive jurisdiction, regardless of domicile:

1. In proceedings which have as their object rights in rem in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated;

...".

8 As the Court pointed out in its judgment in Case 241/83 Roesler v Rottwinkel [1985] ECR 99, at paragraph 19, the raison d' être of the exclusive jurisdiction conferred by Article 16(1) on the courts of the Contracting State in which the property is situated is the fact that tenancies are closely bound up with the law of immovable property and with the provisions, generally of a mandatory character, governing its use, such as legislation controlling the level of rents and protecting the rights of tenants, including tenant farmers.

9 In the above judgment, the Court also pointed out that Article 16(1) seeks to ensure a rational allocation of jurisdiction by opting for a solution whereby the court having jurisdiction is determined on the basis of its proximity to the property since that court is in a better position to obtain first-hand knowledge of the facts relating to the creation of tenancies and to the performance of the terms thereof (paragraph 20).

10 On those considerations the Court held (at paragraph 24 of the judgment) that the provision in question applied to all tenancies of immovable property irrespective of their special characteristics.

11 However, it must be borne in mind that the Court had previously stated, in its judgment in Case 73/77 Sanders v Van der Putte ([1977] ECR 2383, at paragraphs 15 and 16), that although those considerations explained the assignment of exclusive jurisdiction to the courts of the State in which the immovable property was situated in the case of tenancies of immovable property properly so-called, they did not apply where the principal aim of the agreement was of a different nature.

12 It is also apparent from the same judgment that the assignment, in the interests of the proper administration of justice, of exclusive jurisdiction to the courts of one Contracting State in accordance with Article 16 of the Convention deprives the parties of the choice of the forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of the domicile of any of them (paragraph 17). Having regard to that consideration the provisions of Article 16 must not be given a wider interpretation than is required by their objective (paragraph 18).

13 On those grounds the Court held that Article 16(1) did not apply to a contract which concerned the operation of a business.

14 The situation is similar with regard to an agreement of the type in dispute in the main proceedings, which is concluded between a travel organizer and a customer in the place where they are both domiciled. Irrespective of its title, and although providing a service concerning the use of short-term holiday accommodation, such an agreement also includes other services, such as information and advice, where the travel organiser proposes a range of holiday offers, the reservation of accommodation during the period chosen by the customer, the reservation of seats in connection with travel arrangements, the reception at the destination and, possibly, travel cancellation insurance.

15 A complex contract of that type, which concerns a range of services provided in return for a lump sum paid by the customer, is outside the scope within which the exclusive jurisdiction laid down by Article 16(1) finds its raison d' être and cannot constitute a "tenancy agreement" within the meaning of that article as interpreted in the judgment in Sanders v Van der Putte, cited above.

16 Consequently, the reply to the first question put by the national court must be that Article 16(1) of the Brussels Convention is to be interpreted as not applying to a contract concluded in a Contracting State whereby a business organizing travel with its seat in that State undertakes to procure for a client domiciled in the same State the use for several weeks of holiday accommodation not owned by it in another Contracting State and to book the travel arrangements.

The second question

17 Having regard to the answer given to the first question, it is not necessary to reply to the second question.

Costs

18 The costs incurred by the Federal Republic of Germany, the United Kingdom and 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 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 questions referred to it by the Landgericht Koeln by order of 28 June 1990, hereby rules:

Article 16(1) of the Brussels Convention is to be interpreted as not applying to a contract concluded in a Contracting State whereby a business organizing travel with its seat in that State undertakes to procure for a client domiciled in the same State the use for several weeks of holiday accommodation not owned by it in another Contracting State, and to book the travel arrangements.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1992 Page I-01111
DOC	1992/02/26
LODGED	1990/09/14
JURCIT	41968A0927(01)-A16PT1 : N 1 - 16

61983J0241 : N 8 - 10
61977J0073 : N 11 12 15

CONCERNS Interprets 41968A0927(01) -A16PT1

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Landgericht Köln, Vorlagebeschluß vom 02/08/1990 (1 S 186/90) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1990 no 175 ; - Europäische Zeitschrift für Wirtschaftsrecht 1990 p.453-456 ; - Neue Juristische Wochenschrift 1990 p.2584 (résumé) ; - Busl, Peter: Europäische Zeitschrift für Wirtschaftsrecht 1990 p.456 ; - Busl, Peter: Europäische Zeitschrift für Wirtschaftsrecht 1990 p.456

NOTES X: Holiday Lettings Released from º16, Business Law Brief 1992 March p.17 ; Huet, André: Chronique de jurisprudence de la Cour de justice des Communautés européennes. Convention de Bruxelles du 27 septembre 1968, Journal du droit international 1992 p.505-507 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1992 p.1121-1128 ; Hartley, Trevor: Article 16(1): Holiday Homes and Package Holidays, European Law Review 1992 p.550-552 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles: Années judiciaires 1990-1991 et 1991-1992, Cahiers de droit européen 1992 p.684-687 ; Osman, Filali: Recueil Dalloz Sirey 1992 Jur. p.455-456 ; Huff, Martin W.: Europäische Zeitschrift für Wirtschaftsrecht 1992 p.221 ; Jayme, Erik: Ferienhausvermittlung und Verbraucherschutz: Zur einschränkenden Auslegung des Art. 16 Nr. 1 EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 1993 p.18-19 ; Droz, Georges A.L.: Revue critique de droit international privé 1993 p.78-81 ; Mosconi, Franco: Quando la vacanza finisce in tribunale: competenza giurisdizionale e legge regolatrice della locazione di immobili all'estero, Rivista di diritto internazionale privato e processuale 1993 p.5-32 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1993 p.277-278 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments of 27 September 1968, Netherlands International Law Review 1993 p.505-507 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1992), Schweizerische Zeitschrift für internationales und europäisches Recht 1993 p.367-370 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1994 no 238 ; X: Giustizia civile 1994 I p.575-577 ; X: Il Foro italiano 1994 IV Col.236 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions Relating to the Judgments Convention, The Scots Law Times 1995 p.a2

PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Kakouris

DATES of document: 26/02/1992
of application: 14/09/1990

Judgment of the Court (Fifth Chamber)
of 26 March 1992
Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG. Reference for a preliminary ruling: Cour d'appel d'Aix-en-Provence - France. Brussels Convention of 27 September 1968 - Action paulienne - Articles 5 (3), 16 (5) and 24 of the Convention. Case C-261/90.

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1. Convention on Jurisdiction and the Enforcement of Judgments - Special jurisdiction - Jurisdiction "in matters relating to tort, delict or quasi-delict" - Concept - "Action paulienne" - Not included

(Convention of 27 September 1968, Art.5(3))

2. Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - "Proceedings concerned with the enforcement of judgments" - Concept - Disputes regarding the action of authorities responsible for enforcement - "Action paulienne" - Not included

(Convention of 27 September 1968, Art.16(5))

3. Convention on Jurisdiction and the Enforcement of Judgments - Jurisdiction to adopt provisional or protective measures - Concept of provisional or protective measures - Measures seeking to maintain a factual or legal situation pending a decision on the substance of the matter - "Action paulienne" - Not included

(Convention of 27 September 1968, Art. 24)

1. An action provided for by national law, such as the so-called "action paulienne" in French law, the purpose of which is not to have the debtor ordered to make good the damage he has caused his creditor by fraudulent conduct, but to render ineffective, as against his creditor, the disposition which the debtor has made, cannot be regarded as a claim seeking to establish the liability of a defendant in the sense in which it is understood in Article 5(3) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Such an action therefore does not come within the scope of that provision.

2. Article 16(5) of the Convention confers exclusive jurisdiction on the courts of the place in which the judgment has been or is to be enforced to deal with proceedings which may arise from recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments.

An action such as the action paulienne, by which the creditor seeks to obtain the revocation with regard to himself of the transaction whereby the debtor has effected a disposition in fraud of the creditor' s rights and which therefore seeks to protect whatever security the creditor may have with a view to a subsequent enforcement of the obligation of his debtor, is not intended to obtain a decision in such proceedings and does not therefore come within the scope of that provision.

3. Provisional or protective measures within the meaning of Article 24 must be understood as being measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.

Whilst an action such as the action paulienne enables the creditor' s security to be protected by preventing the dissipation of his debtor' s assets, its purpose is that the court may vary the legal situation of the assets of the debtor and that of the beneficiary of the disposition effected by the debtor, and it cannot be described as a provisional or protective measure.

In Case C-261/90,

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 d' Aix-en-Provence (Court of Appeal, Aix-en-Provence) for a preliminary ruling in the proceedings pending before that court between

Mario Reichert,

Hans-Heinz Reichert,

Ingeborg Kockler

and

Dresdner Bank AG,

on the interpretation of Articles 5(3), 16(5) and 24 of the Brussels Convention of 27 September 1968,

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of Chamber, F. Grévisse, J.C. Moitinho de Almeida, G.C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: C. Gulmann,

Registrar: J.A. Pompe, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Dresdner Bank AG, by Egbert Jestaedt and Otto Steinmann, Rechtsanwaelte, Saarbruecken;

- the Commission of the European Communities, by Etienne Lasnet, Legal Adviser, acting as Agent, assisted by Hervé Lehman, of the Paris Bar;

having regard to the Report for the Hearing,

after hearing the oral observations of Dresdner Bank AG and the Commission at the hearing on 6 December 1991,

after hearing the Opinion of the Advocate General at the sitting on 20 February 1992,

gives the following

Judgment

Costs

37 The costs incurred by the Commission of the European Communities, 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 (Fifth Chamber),

in answer to the question referred to it by the Cour d' Appel d' Aix-en-Provence, by judgment of 7 May 1990, hereby rules:

An action provided for by national law, such as the action paulienne in French law, whereby a creditor seeks to obtain the revocation in regard to him of a transfer of rights in rem in immovable property by his debtor in a way which the creditor regards as being in fraud of his rights does not come

within the scope of Articles 5(3), 16(5) or 24 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

1 By judgment of 7 May 1990, received at the Court Registry on 28 August 1990, the Cour d' Appel d' Aix-en-Provence 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 (hereinafter referred to as "the Convention") a question on the interpretation of Articles 5(3), 16(5) and 24 of the Convention.

2 The question was raised in proceedings between Mr and Mrs Reichert and their son Mario Reichert, on the one hand, and Dresdner Bank AG on the other.

3 Mr and Mrs Reichert, who reside in Germany, are the owners of immovable property in the Commune of Antibes, Alpes-Maritimes, France, the legal ownership of which they donated to their son, Mario Reichert, by a notarial instrument executed at Creutzwald, Moselle, France. That donation was challenged by Dresdner Bank AG, a creditor of Mr and Mrs Reichert, in the Tribunal de Grande Instance (Regional Court), Grasse, in whose judicial district the property at issue lies, on the basis of Article 1167 of the French Civil Code, under which creditors may "challenge in their own name transactions entered into by their debtors in fraud of their rights" by a procedure known as the "action paulienne".

4 By a judgment of 20 February 1987, the Tribunal de Grande Instance de Grasse held that it had jurisdiction (which the Reicherts denied) on the basis of Article 16(1) of the Convention, under which, "in proceedings which have as their object rights in rem in immovable property, ... the courts of the Contracting State in which the property is situated" have exclusive jurisdiction, regardless of domicile.

5 The Reicherts appealed against the ruling on jurisdiction to the Cour d' Appel d' Aix-en-Provence which, by a judgment of 18 November 1987, decided to stay the proceedings and referred to the Court for a preliminary ruling a first question asking substantially whether a case in which a creditor challenges, by an action under national law, in this case the action paulienne under French law, a donation of immovable property which he regards as having been made by his debtor in fraud of his rights, comes within the scope of Article 16(1) of the Convention.

6 By judgment of 10 January 1990, in Case C-115/88 Reichert and Others v Dresdner Bank [1990] ECR I-27, the Court ruled as follows:

> "An action whereby a creditor seeks to have a disposition of a right in rem in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor does not come within the scope of Article 16(1) of the Convention."

7 However, at the request of Dresdner Bank AG, which intended to rely, in its defence to the appeal on jurisdiction, on other articles of the Convention in addition to Article 16(1) mentioned in the first question, the Cour d' Appel d' Aix-en-Provence, by the aforesaid judgment of 7 May 1990, referred to the Court for a preliminary ruling the following further question:

> "If Article 16(1) of the Brussels Convention of 27 September 1968 does not apply, is an action under Article 1167 of the French Civil Code, by which a creditor seeks to obtain the revocation in regard to him of a transfer of rights in rem in immovable property by his debtor in a way which he regards as in fraud of his rights, covered by the rules on jurisdiction in Article 5(3), Article 24 or Article 16(5) of the said convention if regard is had to the tortious, delictual or quasi-delictual nature of the alleged fraud or to the existence of protective measures which the decision on the substance of the case is intended to make it possible to enforce against the property which is the subject of the rights in rem transferred by the debtor?"

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure 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.

9 As the Court has replied in its judgment in Case C-115/88 Reichert, cited above, that an action such as the action paulienne under French law does not come within the scope of Article 16(1) of the Convention, it is appropriate to reply to the further question raised by the national court.

10 Under Article 2 of the Convention, subject to special provisions, persons domiciled in a Contracting State, whatever their nationality, are to be sued in the courts of that State. The Convention envisages exceptions to that general rule by making provision for the applicant, in certain cases, to sue the defendant in the courts of the State of the latter' s domicile or in the courts of another State (as in Articles 5 and 24 of the Convention). The Convention also provides for certain cases of exclusive jurisdiction regardless of domicile (as in Article 16).

11 To reply to the question referred to the Court, it is thus appropriate to consider in turn whether an action such as the action paulienne in French law comes within the scope of one of the exceptions for which the Convention provides and which are referred to in the order for reference.

Interpretation of Article 5(3) of the Convention

12 Article 5 of the Convention provides that:

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

...

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred".

13 The Dresdner Bank, the respondent in the main proceedings, maintains that the action paulienne comes within the scope of Article 5(3) of the Convention inasmuch as it is a revocatory action which, as such, aims at rendering ineffective a culpable or deliberate act or omission which is contrary to the law or to unwritten rules of care and causes damage to a third party, that is, an act of a quasi-delictual nature.

14 The Commission, on the contrary, thinks that the action paulienne, which may affect a third party acting in good faith, who has therefore not committed any wrongful act or omission, and which not only leads, in certain circumstances, to imposing on such a third party acquiring the property an obligation to make reparation but may also result in an indirect depletion of his assets, cannot be regarded as an action for liability in tort, delict or quasi-delict. It does not, therefore, come within the scope of Article 5(3) of the Convention.

15 As the Court held in the judgment in Case 189/87 Kalfelis v Schroeder [1988] ECR 5565, paragraphs 15 and 16, 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. Regard being had 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 as a simple reference to the national law of one or other of the States concerned. Accordingly, the concept of "matters relating to tort, delict or quasi-delict" must be regarded as an independent 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.

16 The Court also held in its abovementioned judgment in Case 189/87 Kalfelis, at paragraph 17,

that 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).

17 In the abovementioned judgment in Case C-115/88 Reichert, at paragraph 12, the Court pointed out that the action paulienne in French law was based on the creditor' s personal claim against the debtor and sought to protect whatever security he might have over the debtor' s estate. If successful, its effect was to render the transaction whereby the debtor had effected a disposition in fraud of the creditor' s rights ineffective as against the creditor alone.

18 It may be seen, moreover, from the Commission' s observations, which are not challenged on this point, that in French law the action paulienne may be instituted both against dispositions made for consideration by the debtor when the beneficiary acts in bad faith and against transactions entered into without consideration by the debtor even if the beneficiary acts in good faith.

19 The purpose of such an action is not to have the debtor ordered to make good the damage he has caused his creditor by his fraudulent conduct, but to render ineffective, as against his creditor, the disposition which the debtor has made. It is directed not only against the debtor but also against the person who benefits from the act, who is not a party to the obligation binding the creditor to his debtor, even, in cases where there is no consideration for the transaction, where that third party has not committed any wrongful act.

20 In these circumstances an action such as the action paulienne in French law cannot be regarded as a claim seeking to establish the liability of a defendant in the sense in which it is understood in Article 5(3) of the Convention and therefore does not come within the scope of that provision.

Article 16(5) of the Convention

21 Article 16 of the Convention provides that:

"The following courts shall have exclusive jurisdiction, regardless of domicile:

...

(5) in proceedings concerned with the enforcement of judgments, the courts of the Contracting State in which the judgment has been or is to be enforced."

22 The Dresdner Bank claims that the action paulienne, in so far as it is preparatory to the enforcement of a decision, does come within the exceptions set out in Article 16(5) of the Convention.

23 The Commission' s view, on the contrary, is that the action paulienne, as its purpose is not to obtain a decision of the court with regard to a difficulty in enforcing a judgment, but to obtain from the court a judgment varying the legal situation of the debtor' s assets, does not come within the scope of that article.

24 It should be pointed out, in the first place, that, as the Court held in its judgment in Case 220/84 AS-Autoteile Service v Malhé [1985] ECR 2267, at paragraph 16, Article 16 of the Convention makes a number of exceptions to the general rule set out in Article 2 of the Convention by granting exclusive jurisdiction to the courts of a Contracting State other than that specified under Article 2 in proceedings which have a particular connection with that other State, on the basis of the location of immovable property, the seat of a company, an entry in a public register or, in the case of paragraph (5), the place where a judgment is to be enforced.

25 In the second place it should be pointed out that Article 16 must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, in their being brought before a court which

is not that of the domicile of any of them (judgments in Cases 73/77 Sanders v van der Putte [1977] ECR 2383, at paragraphs 17 and 18, and C-115/88 Reichert, cited above, at paragraph 9).

26 From that point of view it is necessary to take account of the fact that the essential purpose of the exclusive jurisdiction of the courts of the place in which the judgment has been or is to be enforced is that it is only for the courts of the Member State on whose territory enforcement is sought to apply the rules concerning the action on that territory of the authorities responsible for enforcement.

27 Thirdly, it should be pointed out that the report drawn up by the committee of experts which prepared the text of the Convention (Official Journal 1979 C 59, p. 1) states that the expression "proceedings concerned with the enforcement of judgments" is to be understood as meaning proceedings which may arise from "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments" and that "problems arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement."

28 As has been stated in paragraph 17 above, an action such as the action paulienne under French law seeks to protect whatever security the creditor may have by requesting the court having jurisdiction to render the transaction whereby the debtor has effected a disposition in fraud of the creditor' s rights ineffective as against the creditor. Although it thus preserves the interests of the creditor with a view in particular to a subsequent enforcement of the obligation, it is not intended to obtain a decision in proceedings relating to "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments" and does not therefore come within the scope of Article 16(5) of the Convention.

Article 24 of the Convention

29 Article 24 of the Convention provides that:

> "Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter."

30 Dresdner Bank claims that the action paulienne seeks to give the creditor a provisional security and so constitutes a "protective measure" within the meaning of Article 24 of the Convention.

31 The Commission' s view, on the contrary, is that the action paulienne does not seek to preserve a factual or legal situation so as to safeguard rights the recognition of which is, moreover, sought from the court having jurisdiction as to the substance of the matter, but that it seeks to vary the legal situation of an asset. It therefore constitutes neither a provisional nor a protective measure within the meaning of Article 24 of the Convention.

32 The Court has already declared in the judgment in Case 143/78 De Cavel v De Cavel [1979] ECR 1055, at paragraph 8, that as provisional or protective measures may serve to safeguard a variety of rights, their inclusion in the scope of the Convention is determined not by their own nature but by the nature of the rights which they serve to protect. It added, in paragraph 9 of that judgment, that the provisions of Article 24 of the Convention cannot be relied upon to bring within the scope of the Convention provisional or protective measures relating to matters which are excluded therefrom.

33 The Court also pointed out in the judgment in Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, at paragraphs 15 and 16, that an analysis of the function attributed under the general scheme of the Convention to Article 24 leads to the conclusion that, where such types of measures are concerned, special rules were contemplated so as to take account of the particular care and

detailed knowledge of the actual circumstances required by the granting of this type of measure as well as the determination of procedures and conditions intended to guarantee the provisional and protective character of such measures.

34 The expression "provisional, including protective, measures" within the meaning of Article 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.

35 Whilst an action such as the action paulienne under French law enables the creditor' s security to be protected by preventing the dissipation of his debtor' s assets, it does not seek to preserve a factual or legal situation pending a decision of the court having jurisdiction as to the substance of the matter. Its purpose is that the court may vary the legal situation of the assets of the debtor and that of the beneficiary by ordering the revocation as against the creditor of the disposition effected by the debtor in fraud of the creditor' s rights. It cannot, therefore, be described as a provisional or protective measure within the meaning of Article 24 of the Convention.

36 It follows from the foregoing that the answer to the national court should be that an action provided for by national law, such as the action paulienne in French law, whereby a creditor seeks to obtain the revocation in regard to him of a transfer of rights in rem in immovable property by his debtor in a way which the creditor regards as being in fraud of his rights does not come within the scope of Articles 5(3), 16(5) or 24 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

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PROCEDU Reference for a preliminary ruling

ADVGEN Gulmann

JUDGRAP Grévisse

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Judgment of the Court (Sixth Chamber) of 4 October 1991

B. J. van Dalfsen and others v B. van Loon and T. Berendsen. Reference for a preliminary ruling: Hoge Raad - Netherlands. Brussels Convention - Interpretation of Articles 37 and 38. Case C-183/90.

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1. Convention on jurisdiction and the enforcement of judgments - Enforcement - Legal remedies - Appeal in cassation - Judgments which may be contested by an appeal in cassation - Decision by the court with which the appeal against the enforcement order is lodged as to a stay of proceedings or the provision of security - Excluded

(Convention of 27 September 1968, second paragraph of Art. 37 and Art. 38)

2. Convention on jurisdiction and the enforcement of judgments - Enforcement - Appeal against the enforcement order - Power of the court with which the appeal is lodged to stay the proceedings - Exercise - Taking into consideration only submissions not already put forward by or known to the applicant at the time of the proceedings before the court of the State in which the judgment was given

(Convention of 27 September 1968, Art. 31, third paragraph of Art. 34 and first paragraph of Art. 38)

1. The second paragraph of Article 37 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as meaning that a decision taken under Article 38 of the Convention by which the court with which an appeal has been lodged against an order for the enforcement of a judgment given in another Contracting State has refused to stay the proceedings and has ordered the party to whom the enforcement order was granted to provide security does not constitute a "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention and may not, therefore, be contested by an appeal in cassation or similar form of appeal. The position is the same where the decision taken under Article 38 of the Convention and the "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention are given in a single judgment.

2. The first paragraph of Article 38 of the Convention is to be strictly interpreted so as not to prejudice the effectiveness either of Article 31, which lays down the principle that a judgment given in a Contracting State and enforceable in that State may be enforced in another Contracting State even if it has not yet become res judicata, or of the third paragraph of Article 34, which prohibits the courts of the State in which enforcement is sought from reviewing the substance of the judgment given in the first State.

Hence the first paragraph of Article 38 of the Convention is to be interpreted as meaning that a court with which an appeal is lodged against an order for the enforcement of a judgment given in another Contracting State may take into consideration, in a decision concerning an application for the proceedings to be stayed under that paragraph, only such submissions as the appellant was unable to put before the court of the State in which the judgment was given.

In Case C-183/90,

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 (Official Journal 1978 L 304, p. 36) by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before it between

B.J. Van Dalfsen,

J. Timmerman,

H. Van Dalfsen,

J. Harmke,

G. Van Dalfsen

and

B. Van Loon,

T. Berendsen,

on the interpretation of Articles 37 and 38 of the Convention of 27 September 1968,

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of Chamber, T.F. O' Higgins, C.N. Kakouris, F.A. Schockweiler and P.J.G. Kapteyn, Judges,

Advocate General: W. Van Gerven,

Registrar: J. A. Pompe, Deputy Registrar,

after considering the written observations submitted on behalf of

- the German Government, by Christof Boehmer, Ministerialrat at the Federal Ministry of Justice;

- the Netherlands Government, by B.R. Bot, Secretary-General at the Ministry of Foreign Affairs; and

- the Commission of the European Communities, by B.J. Drijber, a member of its Legal Service, acting as Agent;

having regard to the Report for the Hearing,

after hearing the Commission' s oral observations submitted at the hearing on 18 June 1991,

after hearing the opinion of the Advocate General at the sitting on 11 July 1991,

gives the following

Judgment

Costs

38 The costs incurred by the German and Netherlands Governments 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by order of 1 June 1990, hereby rules:

1. The second paragraph of Article 37 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is to be interpreted as meaning that a decision taken under Article 38 of the Convention by which the court with which an appeal has been lodged against

an order for the enforcement of a judgment given in another Contracting State has refused to stay the proceedings and has ordered the party to whom the enforcement order was granted to provide security does not constitute a "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention and may not, therefore, be contested by an appeal in cassation or similar form of appeal. The position is the same where the decision taken under Article 38 of the Convention and the "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention are given in a single judgment.

2. The first paragraph of Article 38 of the Convention is to be interpreted as meaning that a court with which an appeal is lodged against an order for the enforcement of a judgment given in another Contracting State may take into consideration, in a decision concerning an application for the proceedings to be stayed under that paragraph, only such submissions as the appellant was unable to make before the court of the State in which the judgment was given.

1 By order dated 1 June 1990, which was received at the Court on 11 June 1990, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling 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 (Official Journal 1978 L 304, p. 36) (hereinafter referred to as "the Convention") three questions on the interpretation of the second paragraph of Article 37 and the first paragraph of Article 38 of the Convention.

2 Those questions arose in the context of proceedings pending before that court between B.J. Van Dalfsen, J. Timmerman, H. Van Dalfsen, J. Harmke and G. Van Dalfsen (hereinafter referred to as "Van Dalfsen"), residing in the Netherlands, on the one hand, and B. Van Loon and T. Berendsen (hereinafter referred to as "Van Loon"), residing in Belgium, on the other.

3 It appears from the documents before the Court that, by judgment of 21 October 1986, the Vrederechter van het Kanton Herentals (Belgium) dismissed the principal claim, for the annulment of a tenancy agreement between the parties to the main action, brought by Van Dalfsen against Van Loon, and accepted in principle the substance of Van Dalfsen' s alternative claim that Van Loon should be ordered to repay the cost of Van Dalfsen' s capital expenditure on the premises rented, and ordered an expert' s report to determine the exact amount thereof. Giving judgment on Van Loon' s counterclaim, the Vrederechter ordered Van Dalfsen to pay to Van Loon the sum of BFR 2 700 000 arrears of rent plus interest. The court declared the judgment to be "provisionally enforceable notwithstanding any appeal and without security".

4 On 17 December 1986, Van Dalfsen appealed to the Rechtbank van Eerste Aanleg te Turnhout (Belgium) against the part of the judgment relating to the counterclaim.

5 Van Loon, for their part, applied to the presiding judge of the Arrondissementsrechtbank te Zwolle (Netherlands) pursuant to Article 31 of the Convention for an order for the enforcement in the Netherlands of the Belgian Vrederechter' s judgment. By decision of 23 January 1987 the presiding judge of the Arrondissementsrechtbank made the order requested.

6 On 2 April 1987 Van Dalfsen, pursuant to Article 36 of the Convention, appealed to the Arrondissementsrechtbank te Zwolle against that decision, applying merely for a stay of the proceedings on that appeal in pursuance of the first paragraph of Article 38 of the Convention, on the ground that they had appealed against the judgment given by the Vrederechter te Herentals and provided a bank guarantee as security for the amount which they had been ordered by that judgment to pay to Van Loon; they also emphasized that their alternative claim for payment had been accepted in principle and assessed in a provisional expert report at BFR 477 954.

7 By judgment of 13 April 1988, the Arrondissementsrechtbank te Zwolle dismissed the application

to stay the proceedings on the ground that Van Dalfsen had not cited,in support of their application, any arguments other than those which the foreign court had been able to consider in its decision. By the same judgment the Arrondissementsrechtbank declared the appeal unfounded and hence ordered enforcement in the Netherlands of the judgment given by the Belgian Vrederechter, whilst deciding, of its own motion, to make enforcement conditional, under the third paragraph of Article 38 of the Convention, upon the provision by Van Loon of a bank guarantee in the sum of BFR 478 000 until the final judgment on Van Dalfsen' s alternative claim.

8 Van Dalfsen appealed in cassation against that judgment to the Hoge Raad der Nederlanden under the second paragraph of Article 37 of the Convention. Their sole submission was to the effect that the Arrondissementsrechtbank based its decision on an incorrect interpretation of the scope of the powers conferred by Article 38 of the Convention on the "court with which the appeal... is lodged". According to Van Dalfsen, a court giving judgment under that article must take account of all the circumstances which the foreign court has already been able to take into account in its decision and must in particular assess the chances of success of the ordinary appeal which has been or is to be lodged in another Contracting State.

9 The Hoge Raad der Nederlanden first considered whether the judgment appealed against must be regarded as a "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention. If not, Van Dalfsen' s appeal in cassation would be inadmissible. On the other hand, if that question is answered in the affirmative, it would be necessary to consider the substance of the appeal in cassation and the question of the scope of the powers conferred by Article 38 of the Convention on the "court with which the appeal is lodged" would then arise.

10 The Hoge Raad, taking the view that the action therefore raised questions concerning the interpretation of the Convention, decided, by order of 1 June 1990, in pursuance of the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention, to stay the proceedings until the Court had given a preliminary ruling on the following questions:

> "1. Can decisions of 'the court with which the appeal under the first paragraph of Article 37 is lodged' as to whether or not use should be made, or whether use should be made in a particular way, of the powers conferred on it by Article 38 of the Brussels Convention be regarded as 'the judgment given on the appeal' against which an appeal in cassation may be lodged in the Netherlands under the second paragraph of Article 37 of the Brussels Convention?

2. Does it make any difference to the answer given to Question (1) whether or not the decisions based on Article 38 of the Brussels Convention which are referred to in that question are set out in the (final) judgment ruling on the appeal?

3. May 'the court with which the appeal under the first paragraph of Article 37 is lodged' make use of the powers conferred on it by the first paragraph of Article 38 of the Brussels Convention:

(a) where the party lodging the appeal states no grounds for its application for the proceedings to be stayed or for enforcement to be made conditional on the provision of security other than grounds that the foreign court could have taken into account in its decision;

(b) only where the application in question is based partly or exclusively on submissions not put forward in the proceedings before the foreign court; or

(c) only where the application is based partly or exclusively on submissions which could not have been put forward in the proceedings before the foreign court because the party lodging the appeal was at that time unaware of the facts on which those submissions are based?"

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the course of the procedure and the written observations submitted to

the Court, which are hereinafter mentioned or discussed only in so far as is necessary for the reasoning of the Court.

12 It should first be recalled that the second paragraph of Article 37 and the first paragraph of Article 38 of the Convention are part of Section 2 of Title III of the Convention, on enforcement of judgments which are enforceable in the Contracting State in which they have been given.

13 Under Article 31 of the Convention, such decisions are to be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there, by the competent court referred to in Article 32 of the Convention and in accordance with the rules laid down in Articles 33 to 35 and 42 to 45 thereof. It should be observed in particular that under Article 34 of the Convention the party against whom enforcement is sought is not, at this stage of the proceedings, entitled to make any submissions, that the application for enforcement may be refused only for one of the reasons specified in Articles 27 and 28 of the Convention and that the foreign judgment may in no circumstances be reviewed as to its substance.

14 If enforcement is authorized, the party against whom enforcement is sought may, under Article 36 of the Convention, appeal against the decision to one of the courts referred to in the first paragraph of Article 37 thereof. Article 39 of the Convention provides that, during the time specified for an appeal and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought.

15 If an ordinary appeal has been lodged in the State in which the foreign judgment was given against its enforcement, or if the time for such an appeal has not yet expired, Article 38 of the Convention provides that the court of the State in which enforcement is sought may, on the application of the party who has lodged the appeal under Article 36, stay the proceedings thereon. In pursuance of the third paragraph of Article 38 of the Convention, that court may however also make enforcement subject to the provision of security by the party seeking the enforcement order.

16 Under the second paragraph of Article 37 of the Convention, the judgment given on the appeal may be contested only by an appeal in cassation or a similar form of appeal.

The first and second questions

17 The court of reference, in its first two questions, which it is appropriate to consider together, substantially seeks to determine whether the second paragraph of Article 37 of the Convention is to be interpreted as meaning that a decision taken under Article 38 of the Convention, by which the court with which the appeal is lodged against an order for the enforcement of a judgment given in another Contracting State has refused to stay the proceedings and has ordered the party to whom the enforcement order was granted to provide security, constitutes a "judgment given on the appeal" under the second paragraph of Article 37 of the Convention and may accordingly be contested by an appeal in cassation or a similar form of appeal. The court also asks whether the answer to that question varies according to whether or not the decision based on Article 38 of the Convention and the "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention are set out in the same judgment.

18 It should first be observed that the Convention gives no definition of what is to be understood by "judgment given on the appeal" within the meaning of the second paragraph of Article 37.

19 Secondly it should be noted that the Court has stated in the judgment in Case 258/83 (Brennero v Wendel [1984] ECR 3971, paragraph 15), that the concept of "judgment given on the appeal" appearing in the second paragraph of Article 37 of the Convention must be restrictively interpreted and has ruled that under the general scheme of the Convention, and in the light of one of its principal

objectives which is to simplify procedures in the State in which enforcement is sought, that provision cannot be extended so as to enable an appeal in cassation to be lodged against a judgment other than that given on the appeal, for instance against a preliminary or interlocutory order requiring preliminary inquiries to be made.

20 The committee of experts set up on the occasion of the drafting of the Convention (Official Journal 1979 C 59, p. 1) also emphasized the need for a strict interpretation of the second paragraph of Article 37 of the Convention. According to that report, "an excessive number of avenues of appeal might be used by the losing party purely as delaying tactics, and this would constitute an obstacle to the free movement of judgments which is the object of the Convention".

21 It follows from the foregoing that, since the object of the Convention is to facilitate the free movement of judgments by establishing a simple and rapid procedure in the Contracting State in which application is made for the enforcement of a foreign judgment, the expression "judgment given on the appeal" in the second paragraph of Article 37 of the Convention must be interpreted as denoting only judgments deciding on the substance of the appeal lodged against an order for the enforcement of a judgment given in another Contracting State, to the exclusion of judgments given under Article 38 of the Convention.

22 It should be added that even where the decision refusing to stay the proceedings or requiring the provision of security is contained in the same judgment as the decision on the substance of the appeal against the enforcement order, the procedure under Article 36 and that under Article 38 nevertheless have a different object.

23 In fact the appeal procedure envisaged by Article 36 relates to the legal question of whether, regard being had to the reasons exhaustively specified in Articles 27 and 28 of the Convention, the enforcement order has been lawfully issued, whereas the decision relating to a stay of proceedings or the provision of security under Article 38 constitutes a subsidiary measure designed to settle the subsequent course of the procedure, which implies a balancing of the respective interests of the creditor and the debtor.

24 In those circumstances, a judgment given under Article 38 of the Convention cannot be assimilated to a judgment allowing or dismissing the appeal lodged against the order for enforcement despite the fact that in form it constitutes part of the same judgment.

25 It follows that, even when a decision based on Article 38 of the Convention appears in the same judgment as the decision on the substance of the appeal lodged against the enforcement order, such a decision is not to be regarded as a "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention and cannot therefore be the subject of an appeal in cassation.

26 The answer to the first and second questions of the court of reference should therefore be that the second paragraph of Article 37 of the Convention is to be interpreted as meaning that a decision taken under Article 38 of the Convention by which the court with which an appeal has been lodged against an order for the enforcement of a judgment given in another Contracting State has refused to stay the proceedings and has ordered the party to whom the enforcement order was granted to provide security does not constitute a "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention and may not, therefore, be contested by an appeal in cassation or similar form of appeal. The position is the same where the decision taken under Article 38 of the Convention and the "judgment given on the appeal" within the meaning of the second paragraph of Article 37 of the Convention are in fact given in a single judgment.

The third question

27 In its third question, the court of reference seeks substantially to determine whether the first paragraph of Article 38 of the Convention is to be interpreted as meaning that the court with which the appeal is lodged against an order for the enforcement of a judgment given in another Contracting State may take into consideration, in its decision concerning an application for the proceedings to be stayed under that paragraph, only such submissions as the appellant was unable to make before the court of the State in which the judgment was given, or whether that court may also take into consideration in such a decision submissions which were already before the foreign court, as well as arguments of which the court was unaware at the time of its judgment because the party lodging the appeal had failed to put them before it.

28 It must first be pointed out that the first paragraph of Article 31 of the Convention lays down the principle that a judgment given in a Contracting State and enforceable in that State may be enforced in another Contracting State even if it has not yet become res judicata.

29 An exception is made to that principle by the power to stay the proceedings, conferred by the first paragraph of Article 38 of the Convention on the court with which the appeal was lodged against an order for the enforcement of a judgment given in another Contracting State. As may be seen from the report of the committee of experts prepared on the occasion of the drafting of the Convention, the object of that exception is to protect the party against whom enforcement is sought against any damage which might result from the enforcement of a judgment which has not yet become res judicata and might be amended, and it therefore serves as a counterbalance to the unilateral nature of the procedure for enforcement laid down by Article 31 et seq. of the Convention.

30 It follows that the first paragraph of Article 38 of the Convention, since it constitutes a derogation, must be strictly interpreted so as not to prejudice the effectiveness of Article 31 of the Convention and detract from its object, namely to permit the free movement of judgments by allowing judgments given in a Contracting State and enforceable in that State to be enforced in another Contracting State.

31 It should next be recalled that the basic principle of the third paragraph of Article 34 of the Convention is that a foreign judgment may in no circumstances be reviewed as to its substance by the courts of the State in which enforcement is sought.

32 If the court with which the appeal is lodged were able to take into consideration, in giving its decision on an application for a stay of proceedings under the first paragraph of Article 38 of the Convention, submissions already put before the foreign court, there would be a real risk of its proceeding, directly or indirectly, to review the foreign judgment as to its substance, which is expressly prohibited by the Convention. The position would be the same if that court were empowered to assess the chances of success of an ordinary appeal lodged or to be lodged in the State in which the judgment was given.

33 In those circumstances, the first paragraph of Article 38 of the Convention cannot be interpreted as meaning that the court with which the appeal is lodged may take into consideration, in a decision concerning an application for a stay of proceedings, submissions already put before the foreign court.

34 As regards the question whether the court with which the appeal is lodged may take into consideration, in a decision concerning an application for a stay of proceedings under the first paragraph of Article 38 of the Convention, arguments unknown to the foreign court at the time of its judgment because the appellant had failed to put them before it, it should be remembered that in its judgment in Case 145/86 (Hoffmann v Krieg [1988] ECR 645) the Court ruled, in connection with Article 36 of the Convention, that a party who had not appealed was precluded, at a later stage in the proceedings, from relying on a ground which he could have pleaded in such an appeal.

35 It must be stated that this principle applies equally as regards the first paragraph of Article 38 of the Convention. The scheme of the Convention and in particular the principle of the free movement of judgments, which is one of the Convention' s essential objects, prevents a party from invoking before the court called upon to decide, under the first paragraph of Article 38, upon an application for a stay of the proceedings in the appeal lodged against the enforcement order, grounds which he could have pleaded before the foreign court.

36 Accordingly, the first paragraph of Article 38 of the Convention cannot be interpreted, either, as meaning that the court with which the appeal is lodged can take into consideration, in a decision regarding a stay of proceedings under that paragraph, submissions which were not known to the foreign court at the time of its judgment because the appellant had failed to put them before it.

37 It follows from all the foregoing considerations that the answer to the third question from the court of reference must be that the first paragraph of Article 38 of the Convention is to be interpreted as meaning that a court with which an appeal is lodged against an order for the enforcement of a judgment given in another Contracting State may take into consideration, in a decision concerning an application for the proceedings to be stayed under that paragraph, only such submissions as the appellant was unable to put before the court of the State in which the judgment was given.

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OBSERV	Federal Republic of Germany ; Netherlands ; Commission ; Member States ; Institutions
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NATCOUR	*P1* Hoge Raad, 1e kamer, arrest van 15/05/1992 (13.825) ; - Nederlands Internationaal Privaatrecht 1992 no 256 ; - Nederlands juristenblad 1992 Bijl. p.259 (résumé) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1992 no 585 ; - Rechtspraak van de week 1992 no 139 ; - European Current Law 1992 Part 12 no 327 (résumé) ; - Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1992 no 585 ; *A8* Arrondissementsrechtbank Zwolle, vonnis van 13/04/1988 ; - Nederlands Internationaal Privaatrecht 1990 no 486 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1992 no 583 ; *A9* Hoge Raad, 1e kamer, arrest van 01/06/1990 (13.825) ; - Nederlands Internationaal Privaatrecht 1990 no 486 ; - Rechtspraak van de week 1990 no 114 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1992 no 583
NOTES	Briggs, Adrian: The Brussels Convention, Yearbook of European Law 1991 p.530-531 ; Gaudemet-Tallon, Hélène: Revue critique de droit international privé 1992 p.128-132 ; Volken, Paul: Rechtsprechung zum Lugano-Übereinkommen (1991), Schweizerische Zeitschrift für internationales und europäisches Recht 1992 p.248-249 ; Huet, André: Chronique de jurisprudence de la Cour de justice des Communautés européennes. Convention de Bruxelles du 27 septembre 1968, Journal du droit international 1992 p.499-505 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1992 no 585 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1992 p.217-218 ; Gallego Caballero, Fabiola: Interpretacion de los artículos 37 y 38 del Convenio relativo a la competencia judicial y a la ejecucion de resoluciones judiciales en materia civil y mercantil de 27 de septiembre de 1968, Noticias CEE 1992 no 93 p.111-115 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1992 p.1121-1128 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments of 27 September 1968, Netherlands International Law Review 1992 p.411-414 ; Tagaras, H.: Chronique de jurisprudence de la Cour de justice relative à la Convention de Bruxelles: Années judiciaires 1990-1991 et 1991-1992, Cahiers de droit européen 1992 p.677-681 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions Relating to the Judgments Convention, The Scots Law Times 1995 p.a7
PROCEDU	Reference for a preliminary ruling
ADVGEN	Van Gerven
JUDGRAP	Schockweiler

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Judgment of the Court (Sixth Chamber)
of 27 June 1991
Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v New Hampshire Insurance Company.
Reference for a preliminary ruling: Court of Appeal - United Kingdom.
Brussels Convention - Lis alibi pendens - Taking into account the domicile of the parties - Powers of the court second seised - Jurisdiction in matters relating to insurance - Re-insurance.
Case C-351/89.

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Convention on Jurisdiction and the Enforcement of Judgments - Lis alibi pendens - Proceedings brought before courts in different Contracting States - Domicile of the parties to the two proceedings - Lack of effect on the application of the rules of the Convention - Options available to the court second seised where the jurisdiction of the court first seised is contested - Jurisdiction to be declined or proceedings to be stayed - Examination of the jurisdiction of the court first seised - Precluded

(Convention of 27 September 1968, Art. 21)

Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that the rules applicable to lis alibi pendens set out therein must be applied irrespective of the domicile of the parties to the two sets of proceedings.

Without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof, Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised.

In Case C-351/89,

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 Court of Appeal, London, for a preliminary ruling in the proceedings pending before that court between

Overseas Union Insurance Limited,

Deutsche Ruck UK Reinsurance Limited, and

Pine Top Insurance Company Limited,

and

New Hampshire Insurance Company,

on the interpretation of Articles 7 to 12a and Article 21 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 to that Convention and to the Protocol on its interpretation by the Court of Justice (amended version published in Official Journal 1978 L 304, p. 77),

THE COURT (Sixth Chamber),

composed of: G.F. Mancini, President of the Chamber, T.F. O' Higgins, C.N. Kakouris, F.A.

Schockweiler and P.J.G. Kapteyn, Judges,

Advocate General: W. Van Gerven,

Registrar: V. Di Bucci, Administrator,

after considering the written observations submitted on behalf of:

- Overseas Union Insurance Limited, Deutsche Ruck UK Reinsurance Limited and Pine Top Insurance Company Limited, by Peter Goldsmith QC and David Railton, Barrister-at-Law, instructed initially by Messrs Holman Fenwick Willan, Solicitors, and subsequently, as regards Overseas Union Insurance Limited, by Messrs Stephenson Harwood, Solicitors,

- New Hampshire Insurance Company, by Jonathan Mance QC and Alan Newman QC, instructed by Messrs Hextall, Erskine Co, Solicitors,

- the Government of the Federal Republic of Germany, by Christof Boehmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

- the United Kingdom, by Rosemary Caudwell, of the Treasury Solicitor' s Department, acting as Agent, and

- the Commission of the European Communities, by John Forman, Legal Adviser, and Adam Blomefield, a member of the Commission' s Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument from Overseas Union Insurance Limited, Deutsche Ruck UK Reinsurance Limited, Pine Top Insurance Company Limited, New Hampshire Insurance Company and the Commission at the hearing on 5 February 1991,

after hearing the Opinion of the Advocate General at the sitting on 7 March 1991,

gives the following

Judgment

1 By order dated 26 July 1989, which was received at the Court on 17 November 1989, the Court of Appeal, London, referred to the Court for a preliminary ruling 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 (hereinafter referred to as "the Convention") a number of questions on the interpretation of Articles 7 to 12a and Article 21 of that Convention.

2 The questions arose in proceedings between Overseas Union Insurance Limited (hereinafter referred to as "OUI"), Deutsche Ruck UK Reinsurance Limited ("Deutsche Ruck") and Pine Top Insurance Company Limited ("Pine Top"), on the one hand, and New Hampshire Insurance Company ("New Hampshire"), on the other, relating to the obligations which may arise on the part of OUI, Pine Top and Deutsche Ruck on account of insurance contracts which they concluded with New Hampshire.

3 It appears from the documents before the Court that New Hampshire, a company incorporated in the State of New Hampshire, USA, is registered in England as an overseas company pursuant to the provisions of the Companies Act 1985 and in France as a foreign company, since it has several offices in that country. In 1979 it issued a policy of insurance covering certain costs relating to the repair or replacement of electrical appliances sold with the benefit of a five-year warranty by Société Française des Nouvelles Galeries Réunies, a company incorporated in France with its registered office in Paris.

4 In 1980 New Hampshire reinsured a proportion of its risk under that policy inter alia with OUI, a company incorporated in Singapore and registered in England as an overseas company, and with Deutsche Ruck and Pine Top, companies incorporated in England with their registered offices in London.

5 After raising a number of queries with Hew Hampshire concerning the management of the insurance account, OUI, Deutsche Ruck and Pine Top first ceased all payment of claims and then purported to avoid their respective insurance commitments on the grounds of non-disclosure, misrepresentation and breach of duty in both the placing and operation of the reinsurance policies.

6 On 4 June 1987 New Hampshire issued proceedings against Deutsche Ruck and Pine Top in the Tribunal de Commerce (Commercial Court) in Paris, claiming monies due under the reinsurance policies. On 9 February 1988 New Hampshire brought similar proceedings against OUI in the same court. Deutsche Ruck and Pine Top formally challenged the jurisdiction of the French court, whilst OUI made clear its intention to do likewise.

7 On 6 April 1988, OUI, Deutsche Ruck and Pine Top brought an action against New Hampshire in the Commercial Court of the Queen' s Bench Division of the High Court of Justice in which they sought a declaration that they had lawfully avoided their obligations under the reinsurance policies. On 9 September 1988 the Commercial Court granted a stay of the proceedings pursuant to the second paragraph of Article 21 of the Convention until such time as the French court gave a decision on the question of its jurisdiction in the proceedings pending before it.

8 OUI, Deutsche Ruck and Pine Top appealed that order to the Court of Appeal. Taking the view that the dispute raised a question concerning the interpretation of the Convention, that court stayed the proceedings and submitted the following questions to the Court of Justice for a preliminary ruling:

"(1) Does Article 21 of the Convention apply:

(a) irrespective of the domicile of the parties to the two sets of proceedings?

or

(b) only if the defendant in the proceedings before the court second seised is domiciled in a Contracting State, irrespective of the domicile of any other party?

or

(c) if at least one, and if so which, of the parties to the two sets of proceedings is domiciled in a Contracting State?

(2) Under Article 21, paragraph 2, of the Convention, where the jurisdiction of the court first seised is contested, is the court second seised obliged in all circumstances to stay its proceedings as an alternative to declining jurisdiction?

(3) (a) If the court second seised is not so obliged, is it (i) required or (ii) permitted for the purpose of deciding whether to stay its proceedings to examine whether the court first seised has jurisdiction?

(b) If so, under what circumstances and to what extent may the second-seised court examine the jurisdiction of the first-seised court?

(4) If the answer to questions 3(a) and (b) indicate that the court second seised is required, or, if not required, is permitted, in circumstances which do, or may, include the present to examine whether the court first seised has jurisdiction, do the provisions of Title II Section 3 of the Convention apply as between an insurer (reassured) and a reinsurer under a contract

of quota share reinsurance?"

9 In its order the Court of Appeal makes it clear that it is common ground between the parties that the French court was in each case the court first seised and that the proceedings before the courts of the two Contracting States involve in each case the same cause of action between the same parties within the meaning of Article 21 of the Convention, as interpreted by the Court of Justice in the judgment of 8 December 1987 in Case 144/86 Gubisch Maschinenfabrik v Palumbo [1987] ECR 4861.

10 Reference is made to the Report for the Hearing for a fuller account of the legal and factual background to the main proceedings, the course of the procedure and the written 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

11 In its first question the national court essentially seeks to establish whether Article 21 of the Convention applies irrespective of the domicile of the parties to the two sets of proceedings.

12 In order to answer that question it should be recalled that Article 21 of the Convention provides that:

"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."

13 Thus, the wording of Article 21, unlike the wording of other provisions of the Convention, makes no reference to the domicile of the parties to the proceedings. Moreover, Article 21 does not draw any distinction between the various heads of jurisdiction provided for in the Convention. In particular, it does not provide for any derogation to cover a case where, in accordance with the provisions of Article 4 of the Convention, a court of a Contracting State exercises its jurisdiction by virtue of the law of that State over a defendant who is not domiciled in a Contracting State.

14 Consequently, it appears from the wording of Article 21 that it must be applied both where the jurisdiction of the court is determined by the Convention itself and where it is derived from the legislation of a Contracting State in accordance with Article 4 of the Convention.

15 The interpretation suggested by the wording is borne out by an examination of the aims of the Convention. In the judgment of 11 January 1990 in Case C-220/88 (Dumez France and Tracoba v Hessische Landesbank and Others [1990] ECR I-49), the Court held that essentially the aim of the Convention was to promote the recognition and enforcement of judgments in States other than those in which they were delivered and that it was therefore indispensable to limit the risk of irreconcilable decisions, which is a reason for withholding recognition or an order for enforcement by virtue of Article 27(3) of the Convention.

16 With regard in particular to Article 21, the Court observed in the judgment in Gubisch, cited above, that that provision, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention, which is 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 possible and from the outset, 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 proceedings between the

same parties in the State in which recognition is sought. It follows that, in order to achieve those aims, Article 21 must be interpreted broadly so as to cover, in principle, all situations of lis pendens before courts in Contracting States, irrespective of the parties' domicile.

17 In view of that conclusion, it is necessary to reject the argument of the appellants in the main proceedings to the effect that the very existence of Article 27(3) of the Convention shows that Articles 21 and 22 cannot prevent irreconcilable judgments from being given in certain cases in different Contracting States. The fact that the Convention makes provision for cases in which such situations might nevertheless arise cannot constitute an argument against an interpretation of Articles 21 and 22, which, according to the case-law of the Court (see the judgment in Dumez France and Tracoba, cited above), have the specific aim of precluding or limiting the risk of irreconcilable judgments and non-recognition.

18 The answer to the first question submitted by the national court must therefore be that Article 21 of the Convention must be interpreted as applying irrespective of the domicile of the parties to the two sets of proceedings.

The second and third questions

19 By its second and third questions, the national court essentially seeks to establish whether Article 21 of the Convention must be interpreted as meaning that, if it does not decline jurisdiction, the court second seised may only stay its proceedings, or whether Article 21 permits or requires it to examine whether the court first seised has jurisdiction and, if so, to what extent.

20 In that connection, it must be observed in the first place that nothing in the documents before the Court suggests that the main proceedings fall within an exclusive head of jurisdiction laid down in the Convention, in particular in Article 16 thereof. The Court' s ruling does not, therefore, have to cover cases in which the court second seised has such exclusive jurisdiction.

21 In the case of a dispute over which it is not claimed that the court second seised has exclusive jurisdiction, the only exception to the obligation imposed by Article 21 of the Convention on that court to decline jurisdiction is where it stays proceedings, an option which it may exercise only if the jurisdiction of the court first seised is contested.

22 It appears from the report of the committee of experts which drafted the Convention (Official Journal 1979 C 59, p. 1) that that rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction. However, the objective of the provision, which is to avoid negative conflicts of jurisdiction, may be achieved without the court second seised examining the jurisdiction of another court.

23 Moreover, it should be noted that in no case is the court second seised in a better position than the court first seised to determine whether the latter has jurisdiction. Either the jurisdiction of the court first seised is determined directly by the rules of the Convention, which are common to both courts and may be interpreted and applied with the same authority by each of them, or it is derived, by virtue of Article 4 of the Convention, from the law of the State of the court first seised, in which case that court is undeniably better placed to rule on the question of its own jurisdiction.

24 Moreover, the cases in which a court in a Contracting State may review the jurisdiction of a court in another Contracting State are set out exhaustively in Article 28 and the second paragraph of Article 34 of the Convention. Those cases are limited to the stage of recognition or enforcement and relate only to certain rules of special or exclusive jurisdiction having a mandatory or public-policy nature. It follows that, apart from those limited exceptions, the Convention does not authorize the jurisdiction of a court to be reviewed by a court in another Contracting State.

25 It therefore appears both from the wording of Article 21 and from the scheme of the Convention that the only other possibility available, as an alternative solution, to the court second seised, which should normally decline jurisdiction, is to stay the proceedings if the jurisdiction of the court first seised is contested. However, it cannot itself examine the jurisdiction of the court first seised.

26 The answer to the second and third questions submitted by the national court must therefore be that, without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof, Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised.

27 In view of the answers given to the first three questions, the fourth question is redundant.

Costs

28 The costs incurred by the Federal Republic of Germany, the United Kingdom and 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in reply to the questions submitted to it by the Court of Appeal, London, by order of 26 July 1989, hereby rules:

1. Article 21 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as applying irrespective of the domicile of the parties to the two sets of proceedings;

2. Without prejudice to the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof, Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised.

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AUTHOR Court of Justice of the European Communities

FORM Judgment

TREATY European Economic Community

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41968A0927(01)-A28 : N 24
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SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG English

OBSERV Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA United Kingdom

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A8 High Court of Justice (England), Queen's Bench Division, Commercial Court, judgment and Order of 09/09/88 (1988 No 1164)
- International Litigation Procedure 1991 p.510-523
- Lloyd's Law Reports 1992 Vol.1 p.218-225
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A9 Court of Appeal (England), Civil Division, Order of 26/07/89 (1610/89)
P1 Court of Appeal (England), Civil Division, letter of 13/07/94

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PROCEDU Reference for a preliminary ruling

ADVGEN Van Gerven

JUDGRAP Mancini

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Continental Bank N.A., 1994 (English Court of Appeal) (examiniation of jurisdiction)

Judgment of the Court
of 10 March 1992
Powell Duffryn plc v Wolfgang Petereit.
Reference for a preliminary ruling: Oberlandesgericht Koblenz - Germany.
Brussels Convention - Agreement conferring jurisdiction - Clause in the statutes of a company limited by shares.
Case C-214/89.

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1. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Concept - Independent interpretation - Clause conferring jurisdiction contained in the statutes of a company limited by shares - Included - Validity as against shareholders - Conditions

(Convention of 27 September 1968, Art. 17, as amended by the 1978 Accession Convention)

2. Convention on Jurisdiction and the Enforcement of Judgments - Prorogation of jurisdiction - Agreement conferring jurisdiction - Scope - Disputes arising from a given legal relationship - Dispute between a company and its shareholders as such

(Convention of 27 September 1968, Art. 17, as amended by the 1978 Accession Convention)

1. The concept of "agreement conferring jurisdiction" in Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be regarded as an independent concept.

A clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction.

The formal requirements laid down in Article 17 of the Convention must be considered to be complied with in regard to any shareholder, irrespective of how the shares were acquired, if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register.

2. The requirement that a dispute arise in connection with a particular legal relationship, for the solution of which Article 17 of the Convention permits the assignment of jurisdiction by agreement, is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted by the national court, which has exclusive competence in that regard, as referring to the disputes between the company and its shareholders as such.

In Case C-214/89,

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 Oberlandesgericht Koblenz for a preliminary ruling in the proceedings pending before that court between

Powell Duffryn plc

and

Wolfgang Petereit

on the interpretation of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the 1978 Accession

Convention,

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F.A. Schockweiler, F. Grévisse, and P.J.G. Kapteyn (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, G.C. Rodríguez Iglesias, M. Diez de Velasco, M. Zuleeg and J.L. Murray, Judges,

Advocate General: G. Tesauro,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Powell Duffryn plc, by Eckart Wilcke, Rechtsanwalt of Frankfurt am Main;

- Wolfgang Petereit, by Karl Otto Armbruester, Rechtsanwalt of Mainz;

- the German Government, by Professor Christof Boehmer, acting as Agent;

- the Commission of the European Communities, by Friedrich-Wilhelm Albrecht, Legal Adviser, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt of Duesseldorf;

having regard to the Report for the Hearing,

after hearing the oral observations of Powell Duffryn plc, Wolfgang Petereit and the Commission, represented by Henri Etienne, Principal Legal Adviser, acting as Agent, assisted by Wolf-Dietrich Krause-Ablass, at the hearing on 15 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 20 November 1991,

gives the following

Judgment

1 By order of 1 June 1989, which was received at the Court on 10 July 1989, the Oberlandesgericht (Higher Regional Court) Koblenz referred to the Court for a preliminary ruling 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 a number of questions on the interpretation of Article 17 of that convention, as amended by the 1978 Accession Convention (Official Journal 1978 L 304, p. 1, hereinafter referred to as the "Brussels Convention").

2 The questions arose in proceedings between W. Petereit, acting as liquidator of the company IBH-Holding AG, in liquidation, and Powell Duffryn plc (hereinafter referred to as "Powell Duffryn"). It appears from the papers in the case that Powell Duffryn, a company under English law, had subscribed for registered shares in IBH-Holding AG (hereinafter referred to as "IBH-Holding"), a company limited by shares under German law, when the latter' s capital was increased in September 1979. On 28 July 1980 Powell Duffryn participated in the proceedings of a general meeting of IBH-Holding during which, by a show of hands, the shareholders adopted resolutions amending the statutes of IBH, in particular by inserting into them the following clause:

> "By subscribing for or acquiring shares or interim certificates the shareholder submits, with regard to all disputes between himself and the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company."

3 In 1981 and 1982 Powell Duffryn subscribed for further shares on successive increases in the capital of IBH-Holding and also received dividends. In 1983 IBH-Holding was put into liquidation and Mr Petereit, acting as liquidator, brought an action before the Landgericht Mainz claiming

that Powell Duffryn had not fulfilled its obligations to IBH-Holding to make the cash payments due in respect of the increases in capital. He also sought to recover dividends which he maintained had been wrongly paid to Powell Duffryn.

4 The Landgericht dismissed the plea of lack of jurisdiction raised by Powell Duffryn whereupon the latter appealed to the Oberlandesgericht Koblenz. That court considered that the dispute raised a question of interpretation of Article 17 of the Brussels Convention, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"1. Does the rule contained in the statutes of a company limited by shares on the basis of which the shareholder by subscribing for or acquiring shares submits, with regard to all disputes with the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company constitute an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention which is concluded between the shareholder and the company?

(Must this question be answered differently depending on whether the shareholder himself subscribes for shares on the occasion of an increase in the company' s capital or acquires existing shares?)

2. If Question (1) is answered in the affirmative:

(a) Does subscription for and acceptance of shares, by means of a written declaration of subscription, on the occasion of an increase in the capital of a company limited by shares comply with the requirement for writing laid down in the first paragraph of Article 17 of the Brussels Convention as regards a jurisdiction clause contained in the statutes of the company?

(b) Does the jurisdiction clause satisfy the requirement that the dispute must arise in connection with a particular legal relationship within the meaning of Article 17 of the Brussels Convention?

(c) Does the jurisdiction clause in the statutes also cover claims for payment arising out of a contract relating to the subscription of shares and claims for repayment of wrongly paid dividends?"

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written 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 Article 17 of the Brussels Convention provides that if the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court of a Contracting State is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court is to have exclusive jurisdiction.

7 It is necessary to examine whether a clause conferring jurisdiction inserted in the statutes of a company limited by shares constitutes an agreement within the meaning of Article 17 between the company and its shareholders.

8 Powell Duffryn maintains that a clause conferring jurisdiction contained in the statutes of a company limited by shares cannot constitute an agreement because the statutes are normative by nature and thus the contents are not open to discussion by shareholders; shareholders even face the risk of clauses being introduced against their express wishes if such a possibility is provided for in the statutes or the applicable national law.

9 In contrast, Mr Petereit and the Commission argue, on the basis of German law and in particular the provisions of the German Aktiengesetz (Law on share companies), that the statutes are contractual by nature and therefore a clause conferring jurisdiction contained therein constitutes an agreement within the meaning of Article 17 of the Brussels Convention.

10 In that regard, it appears from a comparative examination of the different legal systems of the Contracting States that the characterization of the nature of the relationship between a company limited by shares and its shareholders is not always the same. In some legal systems the relationship is characterized as contractual and in others it is regarded as institutional, normative or sui generis.

11 The question therefore arises whether the concept of "agreement conferring jurisdiction" in Article 17 of the Brussels Convention must be given an independent interpretation or be construed as referring to the national law of one or other of the States concerned.

12 It must be emphasized that, as the Court held in its judgment in Case 12/76 Tessili v Dunlop [1976] ECR 1473, neither of those two options rules out the other since the appropriate choice can only be made in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty.

13 The concept of "agreement conferring jurisdiction" is decisive for the assignment, in derogation from the general rules on jurisdiction, of exclusive jurisdiction to the court of the Contracting State designated by the parties. Having regard to the objectives and general scheme of the Brussels Convention, and 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 persons concerned, therefore, it is important that the concept of "agreement conferring jurisdiction" should not be interpreted simply as referring to the national law of one or other of the States concerned.

14 Accordingly, as the Court has held for similar reasons as regards, in particular, the concept of "matters relating to a contract" and other concepts, referred to in Article 5 of the Convention, which serve as criteria for determining special jurisdiction (see the judgment in Case 34/82 Peters v ZNAV [1983] ECR 987, paragraphs 9 and 10), the concept of "agreement conferring jurisdiction" in Article 17 must be regarded as an independent concept.

15 In that connection, it must be recalled that, when it was requested to interpret the concept of "matters relating to a contract", referred to in Article 5 of the Convention, the Court held that the obligations imposed on a person in his capacity as member of an association were to be considered to be contractual obligations, on the ground that membership of an association created between the members close links of the same kind as those which are created between the parties to a contract (see the judgment in Case 34/82 Peters v ZNAV, referred to above, paragraph 13).

16 Similarly, the links between the shareholders of a company are comparable to those between the parties to a contract. The setting up of a company is the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective. In order to achieve that objective each shareholder is assigned, as regards other shareholders and the organs of the company, rights and obligations set out in the company' s statutes. It follows that, for the purposes of the application of the Brussels Convention, the company' s statutes must be regarded as a contract covering both the relations between the shareholders and also the relations between them and the company they set up.

17 It follows that a clause conferring jurisdiction in the statutes of a company limited by shares is an agreement, within the meaning of Article 17 of the Brussels Convention, which is binding on all the shareholders.

18 It is immaterial that the shareholder against whom the clause conferring jurisdiction is invoked opposed the adoption of the clause or that he became a shareholder after the clause was adopted.

19 By becoming and by remaining a shareholder in a company, the shareholder agrees to be subject to all the provisions appearing in the statutes of the company and to the decisions adopted by the

organs of the company, in accordance with the provisions of the applicable national law and the statutes, even if he does not agree with some of those provisions or decisions.

20 Any other interpretation of Article 17 of the Brussels Convention would lead to a multiplication of the heads of jurisdiction for disputes arising from the same legal and factual relationship between the company and its shareholders and would run counter to the principle of legal certainty.

21 Consequently, the reply to the national court' s first question must be that a clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

The first part of the second question

22 In the first part of the second question the national court seeks essentially to ascertain the circumstances in which a clause conferring jurisdiction contained in a company' s statutes satisfies the formal requirements laid down in Article 17 of the Brussels Convention.

23 Pursuant to Article 17 of the Brussels Convention an agreement conferring jurisdiction must be either in writing or evidenced in writing or, in international trade or commerce, in a form which accords with usage in that area and of which the parties are or ought to be aware.

24 As the Court held in Case 24/76 Estasis Salotti v Ruewa [1976] ECR 1831, paragraph 7, the purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.

25 It must nevertheless be emphasized that the situation of shareholders as regards the statutes of a company - which are the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective - is different from that, referred to in the abovementioned judgment, of a party to a contract of sale as regards general conditions of sale.

26 First of all, in the legal systems of all the Contracting States the statutes of a company are in writing. Moreover, in the company law of all the Contracting States it is acknowledged that the statutes of companies play a particular role in so far as they constitute the basic instrument governing the relations between a shareholder and the company.

27 Furthermore, irrespective of how shares are acquired, every person who becomes a shareholder of a company knows, or ought to know, that he is bound by the company' s statutes and by the amendments made to them by the company' s organs in accordance with the provisions of the applicable national law and the statutes.

28 Consequently, when the company' s statutes contain a clause conferring jurisdiction, every shareholder is deemed to be aware of that clause and actually to consent to the assignment of jurisdiction for which it provides if the statutes are lodged in a place to which the shareholder may have access, such as the seat of the company, or are contained in a public register.

29 Having regard to the foregoing, the reply to the first part of the national court' s second question must be that, irrespective of how shares are acquired, the formal requirements laid down in Article 17 must be considered to be complied with in regard to any shareholder if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register.

The second part of the second question

30 Pursuant to Article 17 of the Brussels Convention, jurisdiction is conferred for the purpose of settling disputes which have arisen or which may arise "in connection with a particular legal

relationship".

31 That requirement is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made.

32 In that regard, a clause conferring jurisdiction contained in a company' s statutes satisfies that requirement if it relates to disputes which have arisen or which may arise in connection with the relationship between the company and its shareholders as such.

33 The question whether in the present case the clause conferring jurisdiction is to be regarded as having such an effect is a question of interpretation which is a matter for the national court to resolve.

34 Consequently, the reply to the second part of the national court' s second question must be that the requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted as referring to the disputes between the company and its shareholders as such.

The third part of the second question

35 In the third part of the second question the national court is essentially seeking to ascertain whether the clause conferring jurisdiction raised before it applies to the disputes brought before it.

36 In that regard, it should be observed that it is for the national court to interpret the clause conferring jurisdiction invoked before it.

37 Consequently, the reply to the third part of the national court' s second question must be that it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.

Costs

38 The costs incurred by the German Government and the Commission of the European Communities, 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 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 questions referred to it by the Oberlandesgericht Koblenz, by order of 1 June 1989, hereby rules:

1. A clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention;

2. Irrespective of how shares are acquired, the formal requirements laid down in Article 17 must

be considered to be complied with in regard to any shareholder if the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access or are contained in a public register;

3. The requirement that a dispute arise in connection with a particular legal relationship within the meaning of Article 17 is satisfied if the clause conferring jurisdiction contained in the statutes of a company may be interpreted as referring to the disputes between the company and its shareholders as such;

4 It is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope.

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NATIONA	Federal Republic of Germany

NATCOUR

A8 Landgericht Mainz, Zwischenurteil vom 03/12/1987 (12 HO 91/86)
A9 Oberlandesgericht Koblenz, Vorlagebeschluß vom 01/06/1989 (6 U 1946/87)
- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1989 no 192
- Entscheidungen der Oberlandesgerichte in Zivilsachen 1989 p.483-489
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- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1992 no 195
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PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Sir Gordon Slynn

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of application: 10/07/1989

Judgment of the Court
of 25 July 1991
Marc Rich Co. AG v Società Italiana Impianti PA.
Reference for a preliminary ruling: Court of Appeal - United Kingdom.
Brussels Convention - Article 1 (4) - Arbitration.
Case C-190/89.

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Convention on Jurisdiction and Enforcement of Judgments - Scope - Matters excluded - Arbitration - Meaning - Application to a court for the appointment of an arbitrator - Included - Need to settle a preliminary question concerning the existence or validity of the arbitration clause - No effect

(Convention of 27 September 1968, Article 1(4))

By excluding arbitration from the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by virtue of Article 1(4) thereof, on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.

Consequently, the abovementioned provision must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

In Case C-190/89,

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 Court of Appeal of England and Wales for a preliminary ruling in the proceedings pending before that court between

Marc Rich and Co. A.G.

and

Società Italiana Impianti P.A.

on the interpretation of Article 1(4) of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,

THE COURT,

composed of: O. Due, President, G.F. Mancini, T.F. O' Higgins and G.C. Rodríguez Iglesias (Presidents of Chambers), Sir Gordon Slynn, R. Joliet, F.A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: M. Darmon,

Registrar: D. Louterman, Principal Administrator,

after considering the written observations submitted on behalf of:

- Marc Rich and Co. A.G., by Iain Milligan, Barrister,

- Società Italiana Impianti P.A., by Peter Gross, QC,

- the United Kingdom Government, by John E. Collins, acting as Agent,

- the German Government, by Professor Christof Boehmer,

- the French Government, by Edwige Belliard and Claude Chavance, acting as Agents,

- the Commission of the European Communities, by John Forman and Adam Blomefield, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument presented by the plaintiff in the main proceedings, the defendants in the main proceedings, the United Kingdom Government, represented by John E. Collins and Van Vechten Veeder, QC, and the Commission at the sitting on 17 October 1990,

after hearing the Opinion of the Advocate General at the sitting on 19 February 1991,

gives the following

Judgment

1 By order of 26 January 1989, which was received at the Court Registry on 31 May 1989, the Court of Appeal of England and Wales 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 (hereinafter referred to as "the Convention") three questions on the interpretation of certain provisions of the Convention.

2 The questions were raised in proceedings pending before that court between Marc Rich and Co. A.G. (hereinafter referred to as "Marc Rich"), whose registered office is in Zug, Switzerland, and Società Italiana Impianti P.A. (hereinafter referred to as "Impianti"), whose registered office is in Genoa, Italy.

3 It appears from the documents forwarded to the Court that, by telex message of 23 January 1987, Marc Rich made an offer to purchase a quantity of Iranian crude oil on f.o.b. terms from Impianti. On 25 January 1987, Impianti accepted the offer subject to certain further conditions. On 26 January, Marc Rich confirmed acceptance of those further conditions and on 28 January sent a further telex message setting out the terms of the contract and including the following clause:

"Law and arbitration

Construction, validity and performance of this contract shall be construed in accordance with English law. Should any dispute arise between buyer and seller the matter in dispute shall be referred to three persons in London. One to be appointed by each of the parties hereto and the third by the two so-chosen, their decision or that of any two of them shall be final and binding on both parties."

4 The vessel which Marc Rich then nominated completed loading by 6 February. On the same day Marc Rich complained that the cargo was seriously contaminated, causing it to incur a loss in excess of US (7) 000 000.

5 On 18 February 1988, Impianti summoned Marc Rich to appear before the Tribunale (Regional Court), Genoa, Italy, in an action for a declaration that it was not liable to Marc Rich. The summons was served on Marc Rich on 29 February 1988, and on 4 October 1988 the latter, relying on the existence of the arbitration clause, lodged submissions to the effect that the Italian court had no jurisdiction.

6 Also on 29 February 1988, Marc Rich commenced arbitration proceedings in London, in which Impianti refused to take part. On 20 May 1988, Marc Rich commenced proceedings before the High Court of Justice, London, for the appointment of an arbitrator pursuant to section 10(3) of the Arbitration Act 1950. By decision of 19 May 1988, the High Court had granted leave to serve an originating

summons on Impianti in Italy.

7 On 8 July 1988, Impianti requested that the order granting leave be set aside, contending that the real dispute between the parties was linked to the question whether or not the contract in question contained an arbitration clause. It considered that such a dispute fell within the scope of the Convention and should therefore be adjudicated on in Italy. Marc Rich, on the other hand, took the view that the dispute fell outside the scope of the Convention by virtue of Article 1 thereof.

8 On 5 November 1988, the High Court held that the Convention did not apply, that the putative proper law of the contract between the parties was English and that it was a proper case to give leave to serve out of the jurisdiction.

9 On appeal, the Court of Appeal decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

"1. Does the exception in Article 1(4) of the Convention extend:

(a) to any litigation or judgments and, if so,

(b) to litigation or judgments where the initial existence of an arbitration agreement is in issue?

2. If the present dispute falls within the Convention and not within the exception to the Convention, whether the buyers can nevertheless establish jurisdiction in England pursuant to:

(a) Article 5(1) of the Convention, and/or

(b) Article 17 of the Convention.

3. If the buyers are otherwise able to establish jurisdiction in England than under paragraph 2 above, whether:

(a) the Court must decline jurisdiction or should stay its proceedings under Article 21 of the Convention or, alternatively,

(b) whether the Court should stay its proceedings under Article 22 of the Convention, on the grounds that the Italian court was first seised."

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written 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

11 The first question submitted by the national court seeks, in substance, to determine whether Article 1(4) of the Convention must be interpreted in such a manner that the exclusion provided for therein extends to proceedings pending before a national court concerning the appointment of an arbitrator and, if so, whether that exclusion also applies where in those proceedings a preliminary issue is raised as to whether an arbitration agreement exists or is valid. These two points will be considered successively.

12 The first paragraph of Article 1 of the Convention provides that it is to apply in civil and commercial matters whatever the nature of the court or tribunal. According to the second paragraph of that article, the Convention shall not apply to:

"1.

...

4. arbitration".

Exclusion of proceedings for the appointment of an arbitrator from the scope of the Convention

13 Impianti considers that the exclusion in Article 1(4) of the Convention does not apply to proceedings before national courts or to decisions given by them. It contends that "arbitration" in the strict sense concerns proceedings before private individuals on whom the parties have conferred the authority to settle the dispute between them. Impianti bases that view essentially on the purpose of Article 220 of the Treaty which, it argues, is to establish a complete system for the free movement of decisions determining a dispute. Consequently, it is legitimate to interpret Article 1(4) of the Convention in such a way as to avoid lacunae in the legal system for ensuring the free movement of decisions terminating a dispute.

14 Marc Rich and the governments which have submitted observations support a wide interpretation of the concept of arbitration, which would exclude completely from the scope of the Convention any disputes relating to the appointment of an arbitrator.

15 The purpose of the Convention, according to the preamble thereto, is to implement the provisions of Article 220 of the EEC Treaty concerning the reciprocal recognition and enforcement of judgments of courts or tribunals. Pursuant to the fourth paragraph of Article 220, the Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

16 In referring to decisions of courts and tribunals and to arbitration awards, Article 220 of the Treaty thus relates both to proceedings brought before national courts and tribunals which culminate in a judicial decision and to those commenced before private arbitrators which culminate in arbitral awards. However, it does not follow that the Convention, whose purpose is in particular the reciprocal recognition and enforcement of judicial decisions, must necessarily have attributed to it a wide field of application. In so far as the Member States are called upon, by virtue of Article 220, to enter into negotiations "so far as necessary", it is incumbent on them to determine the scope of any agreement concluded between them.

17 With respect to the exclusion of arbitration from the scope of the Convention, the report by the group of experts set up in connection with the drafting of the Convention (Official Journal 1979 C 59, p. 1) explains that

> "There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration, and this will probably be accompanied by a Protocol which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration".

18 The international agreements, and in particular the abovementioned New York Convention on the recognition and enforcement of foreign arbitral awards (New York, 10 June 1958, United Nations Treaty Series, Vol. 330, p. 3), lay down rules which must be respected not by the arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to agreements whereby parties refer a dispute to arbitration and the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.

19 More particularly, it must be pointed out that the appointment of an arbitrator by a national court is a measure adopted by the State as part of the process of setting arbitration proceedings in motion. Such a measure therefore comes within the sphere of arbitration and is thus covered

by the exclusion contained in Article 1(4) of the Convention.

20 That interpretation is not affected by the fact that the international agreements in question have not been signed by all the Member States and do not cover all aspects of arbitration, in particular the procedure for the appointment of arbitrators.

21 That conclusion is also corroborated by the opinion expressed by the experts in the report drawn up by them at the time of the accession of Denmark, Ireland and the United Kingdom to the Convention, according to which the Convention does not apply to court proceedings which are ancillary to arbitration proceedings, for example the appointment or dismissal of arbitrators (Official Journal 1979 C 59, p. 93). Similarly, in the report drawn up at the time of the accession of the Hellenic Republic to the Convention, the experts considered that cases where a court is instrumental in setting up the arbitration body are not covered by the Convention (Official Journal 1986 C 298, p. 1).

Whether a preliminary issue concerning the existence or validity of an arbitration agreement affects the application of the Convention to the dispute in question

22 Impianti contends that the exclusion in Article 1(4) of the Convention does not extend to disputes or judicial decisions concerning the existence or validity of an arbitration agreement. In its view, that exclusion likewise does not apply where arbitration is not the principal issue in the proceedings but is merely a subsidiary or incidental issue.

23 Impianti argues that, if that were not so, a party could avoid the application of the Convention merely by alleging the existence of an arbitration agreement.

24 Impianti contends that, in any event, the exception in Article 1(4) of the Convention does not apply where the existence or validity of an arbitration agreement is being disputed before different courts to which the Convention applies, regardless of whether that issue has been raised as a main issue or as a preliminary issue.

25 The Commission shares Impianti' s opinion in so far as the question of the existence or validity of an arbitration agreement is raised as a preliminary issue.

26 Those interpretations cannot be accepted. In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.

27 It would also be contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention (see judgment in Case 38/81 Effer v Kantner [1982] ECR 825, paragraph 6) for the applicability of the exclusion laid down in Article 1(4) of the Convention to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.

28 It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.

29 Consequently, the reply must be that Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

The second and third questions

30 In view of the answer given to the first question, the second and third questions do not call

for a reply.

Costs

31 The costs incurred by the Governments of the Federal Republic of Germany, the French Republic and the United Kingdom of Great Britain and Northern Ireland and also by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As 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,

in reply to the questions submitted to it by the Court of Appeal, London, by order of 26 January 1989, hereby rules:

Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation.

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NATIONA United Kingdom

NATCOUR *A8* High Court of Justice (England), Queen's Bench Division, judgment of 03/11/88
- European Commercial Cases 1989 p.198-208
A9 Court of Appeal (England), Civil Division, Order and judgment of 26/01/89
- Civil Justice Quarterly 1989 p.188
- Lloyd's Law Reports 1989 Vol.1 p.548-556
- International Litigation Procedure 1991 p.562-567
P1 Court of Appeal (England), Civil Division, Order of 15/10/91 (Hearing of 15/10/91) (2200/91 1988-1628)
P2 High Court of Justice (England), Queen's Bench Division, Commercial Court, judgment of 11/11/91
P3 Court of Appeal (England), Civil Division, judgment of 19/12/91
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PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Zuleeg

DATES of document: 25/07/1991
of application: 31/05/1989

Judgment of the Court (First Chamber) of 15 May 1990

Kongress Agentur Hagen GmbH v Zeehaghe BV. Reference for a preliminary ruling: Hoge Raad - Netherlands. Brussels Convention - Article 6 (2) - Action on a warranty or guarantee. Case C-365/88.

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Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Special jurisdiction - Action on a warranty or guarantee - Jurisdiction subject solely to the action on a warranty or guarantee being related to the main action - Action brought before the court seised of the original proceedings on the basis of Article 5(1) of the Convention - Included - Conditions of admissibility - Application of the procedural rules of the lex fori - Limits

(Convention of 27 September 1968, Arts 5(1) and 6(2))

Where a defendant domiciled in a Contracting State is sued in a court of another Contracting State pursuant to Article 5(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgment in civil and commercial matters, that court also has jurisdiction by virtue of Article 6(2) of the Convention to entertain an action on a warranty or guarantee brought against a person domiciled in a Contracting State other than that of the court seised of the original proceedings. To enable the entire dispute to be heard by a single court, Article 6(2) simply requires there to be a connecting factor between the main action and the action on a warranty or guarantee, irrespective of the basis on which the court has jurisdiction in the original proceedings.

Article 6(2) must be interpreted as meaning that it does not require the national court to accede to the request for leave to bring an action on a warranty or guarantee and that the national court may apply the procedural rules of its national law in order to determine whether that action is admissible, provided that the effectiveness of the Convention in that regard is not impaired and, in particular, that leave to bring the action on the warranty or guarantee is not refused on the ground that the third party resides or is domiciled in a Contracting State other than that of the court seised of the original proceedings .

In Case C-365/88

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 Hoge Raad der Nederlanden (Supreme Court of the Netherlands) for a preliminary ruling in the proceedings pending before that court between

Kongress Agentur Hagen GmbH, whose registered office is in Duesseldorf (Federal Republic of Germany),

and

Zeehaghe BV, whose registered office is in The Hague (The Netherlands),

on the interpretation of Article 6(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,

THE COURT (First Chamber)

composed of : Sir Gordon Slynn, President of Chamber, R. Joliet and G . C . Rodríguez Iglesias, Judges,

Advocate General : C. O. Lenz

Registrar : J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

Hagen GmbH, the appellant in the main proceedings, by Elisabeth C. M . Schippers, of The Hague Bar,

the Government of the Federal Republic of Germany, by Dr Christof Boehmer, acting as Agent,

the Government of the French Republic, by Régis de Gouttes, acting as Agent, and Gérard de Bergues, acting as Deputy Agent,

the Commission of the European Communities, by B. J. Drijber, a member of its Legal Department, assisted by G. Cherubini, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 22 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 13 December 1989,

gives the following

Judgment

1 By judgment dated 9 December 1988 which was received at the Court on 15 December 1988, the Hoge Raad der Nederlanden referred 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 (hereinafter referred to as "the Convention ") three questions for a preliminary ruling on the interpretation of Article 6(2) of that Convention.

2 Those questions were raised in proceedings between Kongress Agentur Hagen GmbH (hereinafter referred to as "Hagen "), whose registered office is in Duesseldorf (Federal Republic of Germany), and Zeehaghe BV, whose registered office is in The Hague (The Netherlands).

3 It appears from the documents before the Court that Hagen cancelled a reservation made at the request and on behalf of Garant Schuhgilde eG (hereinafter referred to as "Schuhgilde "), Duesseldorf, with Zeehaghe for a large number of hotel rooms, whereupon Zeehaghe summoned Hagen to appear before the Arrondissementsrechtbank (District Court), The Hague, claiming payment of a sum of money, together with interest and costs, for breach of contract. Hagen contended that the court should declare that it had no jurisdiction to entertain the action or, in the alternative, join Schuhgilde, as its principal, to answer a claim for indemnity.

4 The Arrondissementsrechtbank refused leave to bring an action on a warranty or guarantee on the ground that it would delay and complicate the main proceedings. Hagen appealed against that judgment to the Gerechtshof (Regional Court of Appeal), The Hague, arguing that Article 6(2) of the Convention required the court seised of the original proceedings to grant leave to bring an action on a warranty or guarantee "unless these were instituted solely with the object of removing ((the third party)) from the jurisdiction of the court which would be competent in his case", this exception being set out in Article 6(2) itself.

5 The Gerechtshof rejected that argument and upheld the decision of the Arrondissementsrechtbank on the ground that Article 6 did not impose an obligation but merely created a power to grant leave to bring an action on a warranty or guarantee.

6 Hagen appealed against that judgment on a point of law to the Hoge Raad der Nederlanden, which decided to refer the following questions to the Court for a preliminary ruling :

> "A -If a defendant domiciled in a Contracting State is sued on the basis of Article 5(1) of the Brussels Convention in another Contracting State, may the court in the latter State derive from Article 6(2) of the Brussels Convention jurisdiction to entertain an action on a warranty

or guarantee brought by the defendant against a person domiciled in a Contracting State other than that of the court?

B -Must Article 6(2) of the Brussels Convention be interpreted as meaning that the court is bound to grant leave for the action on a warranty or guarantee to be brought unless the exception provided for in that provision applies?

C -If question B is answered in the negative, may the court apply the procedural rules of its national law in assessing whether the request for leave to bring the action on a warranty or guarantee should be granted or do the provisions of the Brussels Convention mean that the court must consider the request in the light of criteria other than those laid down in its national procedural law and, if so, what are those criteria?"

7 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the course of the procedure and the written 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

8 The first question is concerned with the case in which the court having jurisdiction under Article 5(1) of the Convention, which derogates from the general principle laid down in Article 2, is requested to grant the defendant leave to bring an action on a warranty or guarantee against a person domiciled in a Contracting State other than that of the court.

9 Hagen and the parties which have submitted observations to the Court infer from the general terms in which Article 6(2) is couched that the rule that a person may be sued as a third party in an action on a warranty or guarantee "in the court seised of the original proceedings" applies irrespective of the head of jurisdiction by virtue of which the court was seised of the original proceedings.

10 It is appropriate to point out in limine that Article 6(2), which occurs in Section 2 of the Convention entitled "Special jurisdiction", constitutes, in the same way as Article 5(1), an exception to the rule of jurisdiction laid down in Article 2 under which the courts in the State in which the defendant is domiciled are to have jurisdiction.

11 Article 6(2) makes provision for a special jurisdiction, which the plaintiff may choose because of the existence, in clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings (judgment of 22 November 1978 in Case 33/78 Somafer SA v Saar-Ferngas AG ((1978)) ECR 2183). The Convention thus enables the entire dispute to be heard by a single court . Consequently, the related nature of the main action and the action on a warranty or guarantee suffices to found jurisdiction on the part of the court in which the action on a warranty or guarantee has been brought, irrespective of the basis on which it has jurisdiction in the original proceedings; in this respect, the jurisdiction provided for in Article 2 and that provided for in Article 5 are equivalent.

12 The answer to the first question must therefore be that where a defendant domiciled in a Contracting State is sued in a court of another Contracting State pursuant to Article 5(1) of the Brussels Convention, that court also has jurisdiction by virtue of Article 6(2) of the Brussels Convention to entertain an action on a warranty or guarantee brought against a person domiciled in a Contracting State other than that of the court seised of the original proceedings.

The second and third questions

13 These two questions seek to establish whether Article 6(2) of the Convention requires the court to grant leave to bring an action on a warranty or guarantee, provided that proceedings were not brought with the object of removing the third party from the jurisdiction of the court which would

be competent in his case, or whether, on the contrary, the court may assess the admissibility of the application for leave in the light of the rules of the national procedural law.

14 Hagen, the French Government and the Government of the Federal Republic of Germany interpret Article 6(2) as an independent provision . In their view, this follows from considerations relating to the sound administration of justice : the full legal protection which the Contracting States are bound to guarantee the parties where one of their courts has jurisdiction cannot be restricted by the application of national procedural rules.

15 In its written observations, the Commission also supported this view, which, it stated, would have the advantage of simplicity and would ensure the uniform application of the Convention : on this view, the national court seised of the original proceedings would be bound to grant leave to bring an action on a warranty or guarantee.

16 At the hearing, the Commission argued that jurisdiction is only one of the conditions governing the admissibility of the application; the court seised must first decide whether it has jurisdiction under the provisions of the Convention and then determine whether the application satisfies such other conditions for an action on a warranty or guarantee as are laid down by the lex fori.

17 It should be stressed that the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments . It is therefore necessary to draw a clear distinction between jurisdiction and the conditions governing the admissibility of an action .

18 With regard to an action on a warranty or guarantee, Article 6(2) therefore merely determines which court has jurisdiction and is not concerned with conditions for admissibility properly so called.

19 Moreover, the Court has consistently held that, as regards procedural rules, reference must be made to the national rules applicable by the national court (see in particular, as regards the concept of lis alibi pendens, the judgment of 7 June 1984 in Case 129/83 Zelger v Salinitri ((1984)) ECR 2397, and, as regards the conditions for the enforcement of a foreign judgment, the judgments of 2 July 1985 in Case 148/84 Deutsche Genossenschaftsbank v Brasserie du pêcheur SA ((1985)) ECR 1981, and of 4 February 1988 in Case 145/86 Hoffmann v Krieg ((1988)) ECR 645).

20 It should be noted, however, that the application of national procedural rules may not impair the effectiveness of the Convention. As the Court has held, in particular in its judgment of 15 November 1983 in Case 288/82 Duijnstee v Goderbauer ((1983)) ECR 3663, a court may not apply conditions of admissibility laid down by national law which would have the effect of restricting the application of the rules of jurisdiction laid down in the Convention.

21 Accordingly, an application for leave to bring an action on a warranty or guarantee may not be refused expressly or by implication on the ground that the third parties sought to be joined reside or are domiciled in a Contracting State other than that of the court seised of the original proceedings.

22 The answer to the second and third questions must therefore be that Article 6(2) must be interpreted as meaning that it does not require the national court to accede to the request for leave to bring an action on a warranty or guarantee and that the national court may apply the procedural rules of its national law in order to determine whether that action is admissible, provided that the effectiveness of the Convention in that regard is not impaired and, in particular, that leave to bring the action on the warranty or guarantee is not refused on the ground that the third party resides or is domiciled in a Contracting State other than that of the court seised of the original proceedings .

Costs

23 The costs incurred by the Government of the Federal Republic of Germany, the Government of the French Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 (First Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden, hereby rules :

(1) Where a defendant domiciled in a Contracting State is sued in a court of another Contracting State pursuant to Article 5(1) of the Brussels Convention, that court also has jurisdiction by virtue of Article 6(2) of the Brussels Convention to entertain an action on a warranty or guarantee brought against a person domiciled in a Contracting State other than that of the court seised of the original proceedings .

(2) Article 6(2) must be interpreted as meaning that it does not require the national court to accede to the request for leave to bring an action on a warranty or guarantee and that the national court may apply the procedural rules of its national law in order to determine whether that action is admissible, provided that the effectiveness of the Convention in that regard is not impaired and, in particular, that leave to bring the action on the warranty or guarantee is not refused on the ground that the third party resides or is domiciled in a Contracting State other than that of the court seised of the original proceedings .

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LODGED	1988/12/15
JURCIT	41968A0927(01)-A06PT2 : N 1 - 22 41968A0927(01)-A05PT1 : N 8 - 12 41968A0927(01)-A02 : N 8 - 11 61978J0033 : N 11 61983J0129 : N 19 61984J0148 : N 19 61986J0145 : N 19 61982J0288 : N 20

CONCERNS	Interprets 41968A0927(01) -A06PT2
SUB	Brussels Convention of 27 September 1968
AUTLANG	Dutch
OBSERV	Federal Republic of Germany ; France ; Commission ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A7* Arrondissementsrechtbank 's-Gravenhage, vonnis van 27/11/1985 (85/5620) ; - Nederlands Internationaal Privaatrecht 1987 no 262 ; *A8* Gerechtshof 's-Gravenhage, 2e kamer A, arrest van 09/01/1987 (86/118) ; - Nederlands Internationaal Privaatrecht 1987 no 262 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1991 no 556 ; *A9* Hoge Raad, 1e kamer, arrest van 09/12/1988 (13.389) ; - Rechtspraak van de week 1988 no 215 ; - Nederlands Internationaal Privaatrecht 1989 no 128 ; - Nederlands juristenblad 1989 p.26 (résumé) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1991 no 556 ; - Revue critique de droit international privé 1990 p.564-568 ; *P1* Hoge Raad, 1e kamer, arrest van 14/12/1990 (13.389) ; - Nederlands Internationaal Privaatrecht 1991 no 453 ; - Nederlands juristenblad 1991 p.83 (résumé) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1991 no 558 ; - Rechtspraak van de week 1991 no 10 ; - Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1991 no 558
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PROCEDU	Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Sir Gordon Slynn

DATES of document: 15/05/1990
of application: 15/12/1988

Judgment of the Court (Sixth Chamber)
of 3 July 1990
Isabelle Lancray SA v Peters und Sickert KG.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention of 27 September 1968 - Recognition of default judgment - Article 27 (2).
Case C-305/88.

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1 . Convention on jurisdiction and the enforcement of judgments - Recognition and enforcement - Grounds for refusal - Document instituting the proceedings not served in due form and in sufficient time on a defendant who fails to appear - Concurrent nature of conditions of due form and sufficient time - Document served in sufficient time but not in due form - Refusal of recognition

(Convention of 27 September 1968, Art. 27(2))

2 . Convention on jurisdiction and the enforcement of judgments - Recognition and enforcement - Grounds for refusal - Document instituting the proceedings not served in due form and in sufficient time on a defendant who fails to appear - Review of service by the courts of the State in which recognition is sought - Curing of defective service - To be determined in accordance with the law of the State in which judgment was given

(Convention of 27 September 1968, Art. 27(2))

1 . The conditions laid down in Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, that a defendant who fails to appear must have been served with the document instituting the proceedings in due form and in sufficient time, must both be met in order for a foreign judgment given against that defendant to be recognized. That provision is therefore to be interpreted as meaning that a judgment given in default of appearance may not be recognized where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to enable him to arrange for his defence.

2 . Article 27(2) of the Convention is to be interpreted as meaning that questions concerning the curing of defective service are governed by the law of the State in which judgment was given, including any relevant international agreements.

In Case C-305/88,

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 Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the proceedings pending before it between

Isabelle Lancray SA, whose registered office is at Neuilly-sur-Seine (France),

and

Peters und Sickert KG, whose registered office is at Essen (Federal Republic of Germany),

on the interpretation of Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,

THE COURT (Sixth Chamber)

composed of : C. N. Kakouris, President of Chamber, F. A. Schockweiler, G. F. Mancini, T. F. O' Higgins and M. Díez de Velasco, Judges,

Advocate General : F. G. Jacobs

Registrar : J. A. Pompe, Deputy Registrar,

after considering the observations submitted on behalf of

Isabelle Lancray SA, by Heinz-Joachim Freund, Rechtsanwalt, Frankfurt;

Peters und Sickert KG, by Dieter Eikelau, Rechtsanwalt, Duesseldorf;

the Government of the Federal Republic of Germany, by C. Boehmer, acting as Agent;

the Government of the French Republic, by Régis de Gouttes, acting as Agent;

the Italian Government, by Oscar Fiumara, acting as Agent; and

the Commission, by Friedrich-Wilhelm Albrecht and G. Cherubini, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 28 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 3 May 1990,

gives the following

Judgment

1 By order dated 22 September 1988, which was received at the Court on 19 October 1988, the Bundesgerichtshof referred to the Court for a preliminary ruling 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 (hereinafter referred to as "the Convention ") two questions on the interpretation of Article 27(2) of the Convention.

2 Those questions arose in the context of proceedings pending before that court between Isabelle Lancray SA, a public limited liability company governed by French law whose registered office is at Neuilly-sur-Seine, France (hereinafter referred to as "Lancray "), and Peters und Sickert KG, a limited partnership governed by German law whose registered office is at Essen, Federal Republic of Germany (hereinafter referred to as "Peters ").

3 It appears from the documents before the Court that the parties had business relations, based on a contract of 2 November 1983, in respect of which they had agreed to apply French law and to give jurisdiction to the Tribunal de commerce (Commercial Court), Nanterre . A number of problems led Lancray to bring legal proceedings against Peters, and on 18 July 1986 Lancray obtained an interim order from the Amtsgericht (Local Court) Essen prohibiting Peters from selling or delivering to third parties any products in its possession bearing Lancray' s trade mark. On 30 July 1986, Lancray applied to the Tribunal de commerce, Nanterre, to have the Amtsgericht' s order confirmed and for a number of additional measures. Also on 30 July 1986, the competent French authorities sent to the President of the Landgericht (Regional Court) Essen a summons to Peters, drawn up in French, to appear on 18 November 1986 before the French court, together with a request that the summons be served on Peters and that a certificate of service be returned to the French authorities.

4 By a certificate of service dated 19 August 1986 the competent German authority stated that the documents had been served by handing them to a secretary in Peters' s offices. No German translation was appended to the documents. A further summons dated 19 September 1986, drawn up in French, to appear at a hearing before the Tribunal de commerce, Nanterre, on 16 December 1986 was sent to Peters by registered mail.

5 On 16 October 1986, on appeal by Peters, the Landgericht Essen quashed the interim order obtained by Lancray from the Amtsgericht on 18 July 1986. By a letter of 11 November 1986, Peters informed the Tribunal de commerce, Nanterre, of this fact and also stated that the summonses had not been duly served because they were not accompanied by a translation in German.

6 Peters did not appear at the hearing on 16 December 1986 and, by judgment of 15 January 1987, the Tribunal de commerce, Nanterre, upheld Lancray' s application. That judgment was served on Peters by delivery to its managing partner on 9 March 1987. By order of 6 July 1987, the Landgericht Essen ruled that the judgment of the Tribunal de commerce, Nanterre, was to be recognized in the Federal Republic of Germany and authorized its enforcement in certain respects.

7 Peters then appealed against that judgment to the Oberlandesgericht (Higher Regional Court) on the ground that under Article 27(2) of the Convention Lancray' s application should not have been allowed. The Oberlandesgericht allowed that appeal. Lancray then appealed to the Bundesgerichtshof against the latter judgment .

8 Article 27(2) of the Convention, in the version to which the Bundesgerichtshof refers, provides :

"A judgment shall not be recognized

...

(2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence;

..."

9 The Bundesgerichtshof agrees with the Oberlandesgericht that the summons was served on Peters in sufficient time to enable it to arrange for its defence. It further agrees with the Oberlandesgericht that the document instituting the proceedings was not served in due form . It considers that the summons was served not on the addressee who accepted it voluntarily but by delivery to a secretary in the addressee' s offices, that is to say by substituted service. In accordance with the relevant international conventions, such service would have been acceptable only if the document served had been accompanied by a German translation, and that was not the case. The Bundesgerichtshof also notes that the Oberlandesgericht held that the national rules concerning the curing of defective service were not applicable since the addressee did not have a command of the foreign language used.

10 The Bundesgerichtshof therefore decided to stay the proceedings and to seek a preliminary ruling from the Court on the following questions :

"(1) Is recognition of a judgment given in default of appearance to be refused in accordance with Article 27(2) of the pre-accession version of the Brussels Convention where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to enable him to arrange for his defence?

(2) In the event that a judgment given in default of appearance is not recognized because, although the defendant was served with the document instituting the proceedings in sufficient time to enable him to arrange for his defence, the service was not duly effected, does Article 27(2) of the pre-accession version of the Brussels Convention preclude recognition of the judgment even where the laws of the State in which recognition is sought permit the defective service to be cured?"

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the course of the procedure and the written 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

12 The first question seeks to determine, in the light of the facts established by the national

court, whether Article 27(2) of the Convention is to be interpreted as meaning that a judgment given in default of appearance may not be recognized where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to enable him to arrange for his defence.

13 In order to examine that question, it must first be determined whether the article in question lays down two mutually independent grounds for refusing to recognize a foreign judgment.

14 The Court observed in its judgment in Case 166/80 Klomps v Michel [1981] ECR 1593 that Article 27(2) lays down two conditions, the first of which, that service should be duly effected, entails a decision based on the legislation of the State in which judgment was given and on the conventions binding on that State in regard to service, whilst the second, concerning the time necessary to enable the defendant to arrange for his defence, implies appraisals of a factual nature.

15 It must then be determined whether the conditions of due service and sufficient time laid down in the aforementioned provision must both be met concurrently for a foreign judgment to be recognized.

16 The wording of the different language versions of the provision in question suggests that that question must be answered in the affirmative .

17 That interpretation is corroborated by the experts' report on the Brussels Convention (Official Journal 1979 C 59, p. 1) which observes, in relation to Article 27(2) of the Convention : "Where judgment is given abroad in default of appearance, the Convention affords the defendant double protection. ... Secondly, even where service has been duly effected, recognition can be refused if the court in which recognition is sought considers that the document was not served in sufficient time to enable the defendant to arrange for his defence ".

18 It must therefore be held that the requirements of due service and service in sufficient time constitute two separate and concurrent safeguards for a defendant who fails to appear. The absence of one of those safeguards is therefore a sufficient ground for refusal to recognize a foreign judgment.

19 The contrary view has been submitted that it is not necessary to insist on proper service if the defendant has, in any event, had sufficient time to arrange for his defence. According to that interpretation, due service is merely prima-facie evidence that service was effected in sufficient time, and failure to comply with the time requirement is the only true ground for refusing recognition

20 That reasoning cannot be accepted. First, it is difficult to reconcile that interpretation with the wording of the relevant provision or with the Court' s ruling cited above. Secondly, it would render completely inoperative the requirement of due service. If the sole issue were whether the document came to the defendant' s attention in sufficient time, plaintiffs would be tempted to ignore the prescribed forms for due service, the requirements of which have in any event been considerably relaxed by international agreements. That would create considerable uncertainty as to whether documents had actually been served, thus thwarting the uniform application of the provisions of the Convention. Finally, a defendant could not know with certainty whether proceedings which might lead to a finding against him had been properly instituted and whether it was therefore necessary to arrange for a defence, a situation which would also be inconsistent with the aims of the Convention.

21 It must be added that, as the Court held in its judgment in Case 49/84 Debaecker v Bouwman [1985] ECR 1779, although the Convention is, as is clear from the preamble, intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, that aim cannot be attained by undermining in any way the right to a fair hearing.

22 It follows from all of the foregoing considerations that recognition of a foreign judgment should be refused if service has not been effected in due form, regardless of whether the defendant was

actually aware of the document instituting the proceedings.

23 The answer to the first question must therefore be that Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters is to be interpreted as meaning that a judgment given in default of appearance may not be recognized where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to enable him to arrange for his defence.

The second question

24 The national court' s second question seeks to determine whether Article 27(2) of the Convention is to be interpreted as authorizing the courts of the State in which enforcement is sought to cure defective service by applying their national law.

25 It must be pointed out first of all that Article 27(2) of the Convention does not itself contain any rule as to whether defective service may be cured.

26 The question must therefore be answered on the basis of the rules applicable to the service of foreign judgments.

27 The first paragraph of Article IV of the Protocol of 27 September 1968 (Official Journal 1978 L 304, p. 47), to which Article 65 of the Convention refers, provides :

> "Judicial and extra-judicial documents drawn up in one Contracting State which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States ."

28 In its judgment in Case 228/81 Pendy Plastic Products v Pluspunkt [1982] ECR 2723, the Court held that, although they do not seek to harmonize the different systems of service abroad of legal documents which are in force in the Member States, the provisions of the Brussels Convention are designed to ensure that the defendant' s rights are effectively protected. For that reason, jurisdiction to determine whether the document instituting the proceedings was properly served was conferred both on the court of the State in which the judgment was given and on the court of the State in which enforcement is sought.

29 The Brussels Convention does not determine which law is to be applied to that question. Since the rules governing the service of the document instituting the proceedings form part of the procedure before the court of the State in which judgment was given, the question whether service was duly effected can only be answered by reference to the law to be applied by that court, including any relevant international conventions.

30 Consequently, questions concerning the curing of defective service are governed by that law.

31 The answer to the second question must therefore be that Article 27(2) of the Convention is to be interpreted as meaning that questions concerning the curing of defective service are governed by the law of the State in which judgment was given, including any relevant international agreements.

Costs

32 The costs incurred by the Governments of the Federal Republic of Germany, the French Republic and the Italian Republic and by the Commission, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Bundesgerichtshof, by order of 22 September 1988, hereby rules :

(1) Article 27(2) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters is to be interpreted as meaning that a judgment given in default of appearance may not be recognized where the document instituting the proceedings was not served on the defendant in due form, even though it was served in sufficient time to enable him to arrange for his defence.

(2) Article 27(2) of the Convention is to be interpreted as meaning that questions concerning the curing of defective service are governed by the law of the State in which judgment was given, including any relevant international agreements.

DOCNUM	61988J0305
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1988 ; J ; judgment
PUBREF	European Court reports 1990 Page I-02725
DOC	1990/07/03
LODGED	1988/10/19
JURCIT	41968A0927(01)-A04L1 : N 27 41968A0927(01)-A27PT2 : N 1 - 31 61980J0166 : N 14 61981J0228 : N 28 61984J0049 : N 21
CONCERNS	Interprets 41968A0927(01)-A27PT2
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	German
OBSERV	Federal Republic of Germany ; France ; Italy ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany

NATCOUR

A5 Landgericht Essen, Urteil vom 16/10/86 (43 O 146/86)
A6 Tribunal de commerce de Nanterre, 2e chambre, jugement du 15/01/87 (86/5845)
A7 Landgericht Essen, Beschluß vom 06/07/87 (5 O 161/87)
A8 Oberlandesgericht Hamm, Beschluß vom 27/11/87 (20 W 34/87)
- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1987 no 159
- Droit et CEE affaires international 1988 p.141
- Recht der internationalen Wirtschaft 1988 p.131-133
ºNOTESº
- Mezger, Ernst: Recht der internationalen Wirtschaft 1988 p.477-478
A9 Bundesgerichtshof, Vorlagebeschluß vom 22/09/88 (IX ZB 1/88)
- Wertpapier-Mitteilungen 1988 p.1617-1620
P1 Bundesgerichtshof, Beschluß vom 20/09/90 (IX ZB 1/88)
- Der Betrieb 1990 p.2319
- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1990 no 200
- Recht der internationalen Wirtschaft 1990 p.1010-1012
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Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1992 p.a6
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Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1993 no 75

PROCEDU

Reference for a preliminary ruling

ADVGEN

Jacobs

JUDGRAP Diez de Velasco

DATES of document: 03/07/1990
of application: 19/10/1988

Judgment of the Court (Sixth Chamber)
of 11 January 1990
Dumez France SA and Tracoba SARL v Hessische Landesbank and others. Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Tort, delict or quasi-delict - Interpretation of Article 5 (3) - Indirect victim - Damage suffered by a parent company through financial losses sustained by a subsidiary. Case C-220/88.

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Convention on jurisdiction and the enforcement of judgments - Special jurisdictions - Jurisdiction in tort, delict or quasi-delict - Place where the harmful event occurred - Place where the damage occurred - Concept - Place of occurrence of damage suffered by a third party through damage sustained by the immediate victim - Exclusion

(Convention of 27 September 1968, Article 5(3))

The expression "place where the harmful event occurred" contained in Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters may refer to the place where the damage occurred, but the latter concept can be understood only as indicating the place where the event giving rise to the damage, and causing tortious, delictual or quasi-delictual liability to be incurred, directly produced its harmful effects upon the person who is the victim of that event.

Accordingly, the rule on jurisdiction laid down in that article cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act before the courts in the place in which he himself ascertained the damage to his assets.

In Case C-220/88

REFERENCE 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 by the French Cour de cassation in the proceedings pending before that court between

(1) Dumez France, formerly Dumez Bâtiment, société anonyme, whose registered office is at Nanterre, France,

(2) Tracoba, société à responsabilité limitée, whose registered office is in Paris, France, whose rights are now held by Oth Infrastructure, of the same address,

and

(1) Hessische Landesbank (Helaba), whose registered office is in Frankfurt am Main, Federal Republic of Germany,

(2) Salvatorplatz-Grundstuecksgesellschaft mbH & Co. oHG Saarland, whose registered office is in Munich, Federal Republic of Germany, formerly Gebrueder Roechling Bank,

(3) Luebecker Hypotheken Bank, whose registered office is in Luebeck, Federal Republic of Germany,

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

THE COURT (Sixth Chamber)

composed of : C. N. Kakouris and F. A. Schockweiler (Presidents of Chambers), T. Koopmans, G. F. Mancini and M. Diez de Velasco, Judges,

Advocate General : M. Darmon

Registrar : H. A. Ruehl, Principal Administrator

after considering the observations submitted on behalf of

Dumez France and Tracoba, the plaintiffs in the main proceedings, by Jean-Denys Barbey, of the Paris Bar,

Hessische Landesbank, defendant in the main proceedings, by Michel Wolfer, of the Paris Bar,

Salvatorplatz-Grundstuecksgesellschaft mbH & Co. oHG Saarland, defendant in the main proceedings, by Richard Neuer, of the Paris Bar,

the Government of the Federal Republic of Germany, by Dr Christof Boehmer, Ministerialrat im Bundesministerium der Justiz, in the written procedure only,

the Government of the French Republic, by Edwige Belliard, sous-directeur, direction des affaires juridiques, ministère des Affaires étrangères, assisted by Claude Chavance, attaché principal d' administration centrale, direction des affaires juridiques, in the same Ministry, in the written procedure only,

the United Kingdom, by J. A. Gensmantel, Treasury Solicitor' s Department, Queen Anne' s Chambers, assisted by M. C. L. Carpenter of the Lord Chancellor' s Department, in the written procedure only,

the Commission of the European Communities by Georgios Kremlis, a member of its Legal Department, assisted by Giorgio Cherubini, an Italian official working in the Commission under the scheme for exchanges with national officials,

having regard to the Report for the Hearing and further to the hearing on 14 June 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 23 November 1989,

gives the following

Judgment

1 By judgment of 21 June 1988, which was received at the Court on 4 August 1990, the French Cour de cassation 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 (hereinafter referred to as "the Convention ") a question on the interpretation of Article 5(3) of the Convention .

2 That question was raised in proceedings to establish quasi-delictual liability brought before the French courts by the French companies Sceper and Tracoba, whose rights are now held by the companies Dumez France and Oth Infrastructure (hereinafter referred to as "Dumez and Oth "), against Hessische Landesbank, Salvatorplatz-Grundstuecksgesellschaft mbH & Co. oHG Saarland, and Luebecker Hypotheken Bank, whose registered offices are in the Federal Republic of Germany (hereinafter referred to as "the German banks ").

3 Dumez and Oth seek compensation for the damage which they claim to have suffered owing to the insolvency of their subsidiaries established in the Federal Republic of Germany, which was brought about by the suspension of a property-development project in the Federal Republic of Germany for a German prime contractor, allegedly because of the cancellation by the German banks of the loans granted to the prime contractor.

4 By judgment of 14 May 1985 the tribunal de commerce (Commercial Court), Paris, upheld the objection of lack of jurisdiction raised by the German banks, on the ground that the initial damage was suffered by the subsidiaries of Dumez and Oth in the Federal Republic of Germany and that the French parent

companies sustained a financial loss thereafter only indirectly.

5 By judgment of 13 December 1985, the cour d' appel, Paris, confirmed that judgment, taking the view that the financial repercussions which Dumez and Oth claimed to have experienced at their head offices in France were not of such a kind as to affect the location of the damage suffered initially by the subsidiaries in the Federal Republic of Germany.

6 In support of their appeal in cassation against that judgment, Dumez and Oth claimed that the decision of the Court in Case 21/76 G. J . Bier BV v Mines de potasse d' Alsace SA ((1976)) ECR 1735, according to which the expression "place where the harmful event occurred" used in Article 5(3) of the Convention covered both the place where the damage occurred and the place of the event giving rise to the damage, with the result that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places, was also applicable to cases of indirect damage. In those circumstances, the place where the harmful event occurred was, according to Dumez and Oth, for a victim who has sustained damage as a consequence of the loss suffered by the initial victim, the place where his interests were adversely affected; the plaintiffs in this case being French companies, the place of the financial loss which they suffered following the insolvency of their subsidiaries in the Federal Republic of Germany was therefore the registered offices of Dumez and Oth in France .

7 Considering that the dispute raised a problem of interpretation of Community law, the French Cour de cassation stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling :

> "Is the rule on jurisdiction which allows the plaintiff, under Article 5(3) of the Convention, to choose between the court for the place of the event giving rise to damage and the court for the place where that damage occurs to be extended to cases in which the damage alleged is merely the consequence of the harm suffered by persons who were the immediate victims of damage occurring at a different place, which would enable the indirect victim to bring proceedings before the court of the State in which he is domiciled?"

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 In order to answer the question submitted, it must first be borne in mind that, in the terms of Article 5 of the Convention,

> "A person domiciled in a Contracting State may, in another Contracting State, be sued :...
>
> (3)in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred ".

10 It must then be pointed out that, in its judgment in Mines de potasse d' Alsace, cited above, the Court ruled that where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred" which appears in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to the damage, with the result that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.

11 Dumez and Oth observe that in that judgment the Court interpreted Article 5(3) of the Convention without drawing any distinction between direct and indirect victims of damage. In their view, it follows that where an indirect victim claims to have suffered personal damage the court of competent

jurisdiction is the court for the place where the victim sustained that damage.

12 It must first be stated in that connection that the judgment in Mines de potasse d' Alsace related to a situation in which the damage - to crops in the Netherlands - occurred at some distance from the event giving rise to the damage - the discharge of saline waste into the Rhine by an undertaking established in France - but by the direct effect of the causal agent, namely the saline waste which had moved physically from one place to another.

13 By contrast, in the present case, the damage allegedly suffered by Dumez and Oth through cancellation, by the German banks, of the loans granted for financing the works originated and produced its direct consequences in the same Member State, namely the one in which the lending banks, the prime contractor and the subsidiaries of Dumez and Oth, which were responsible for the building work, were all established . The harm alleged by the parent companies, Dumez and Oth, is merely the indirect consequence of the financial losses initially suffered by their subsidiaries following cancellation of the loans and the subsequent suspension of the works.

14 It follows that, in a case such as this, the damage alleged is no more than the indirect consequence of the harm initially suffered by other legal persons who were the direct victims of damage which occurred at a place different from that where the indirect victim subsequently suffered harm.

15 It is therefore necessary to consider whether the expression "place where the damage occurred" as used in the judgment in Mines de potasse d' Alsace may be interpreted as referring to the place where the indirect victims of the damage ascertain the repercussions on their own assets.

16 In that connection the Convention, in establishing the system for the attribution of jurisdiction, adopted the general rule that the courts of the defendant' s domicile would have jurisdiction (Title II, Article 2). Moreover, the hostility of the Convention towards the attribution of jurisdiction to the courts of the plaintiff' s domicile was demonstrated by the fact that the second paragraph of Article 3 precluded the application of national provisions attributing jurisdiction to such courts for proceedings against defendants domiciled in the territory of a Contracting State.

17 It is only by way of exception to the general rule whereby jurisdiction is attributed to the courts of the defendant' s domicile that Title II, Section 2, attributes special jurisdiction in certain cases, including the case envisaged by Article 5(3) of the Convention . As the Court has already held (Mines de potasse d' Alsace, paragraphs 10 and 11), those cases of special jurisdiction, the choice of which is a matter for the plaintiff, are based on the existence of a particularly close connecting factor between the dispute and courts other than those of the defendant' s domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.

18 In order to meet that objective, which is of fundamental importance in a convention which has essentially to promote the recognition and enforcement of judgments in States other than those in which they were delivered, it is necessary to avoid the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions, this being the reason for which recognition or an order for enforcement is withheld by virtue of Article 27(3) of the Convention.

19 Furthermore, that objective militates against any interpretation of the Convention which, otherwise than in the cases expressly provided for, might lead to recognition of the jurisdiction of the courts of the plaintiff' s domicile and would enable a plaintiff to determine the competent court by his choice of domicile.

20 It follows from the foregoing considerations that although, by virtue of a previous judgment of the Court (in Mines de potasse d' Alsace, cited above), the expression "place where the harmful event occurred" contained in Article 5(3) of the Convention may refer to the place where the damage

occurred, the latter concept can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event.

21 Moreover, whilst the place where the initial damage manifested itself is usually closely related to the other components of the liability, in most cases the domicile of the indirect victim is not so related .

22 It must therefore be stated in reply to the question submitted by the national court that the rule on jurisdiction laid down in Article 5(3) of the Convention cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets .

Costs

23 The costs incurred by the Government of the Federal Republic of Germany, the Government of the French Republic and the United Kingdom, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, 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 (Sixth Chamber),

in reply to the question submitted to it by judgment of the French Cour de cassation of 21 June 1988, hereby rules :

The rule on jurisdiction laid down in Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets.

DOCNUM	61988J0220
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1990 Page I-00049
DOC	1990/01/11
LODGED	1988/08/04

JURCIT	41968A0927(01)-A05PT3 : N 1 - 22 61976J0021 : N 6 10 - 12 15 17 20 41968A0927(01)-A02 : N 16 41968A0927(01)-A03L2 : N 16
CONCERNS	Interprets 41968A0927(01) -A05PT3
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Federal Republic of Germany ; France ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*A8* Cour d'appel de Paris, 5e chambre B, arrêt du 13/12/1985 (M 10184) ; *A9* Cour de cassation (France), 1re chambre civile, arrêt du 21/06/1988 (86-11.448 762) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1988 I no 197 ; - La Semaine juridique - édition générale 1988 IV p.307 (résumé) ; - Recueil Dalloz Sirey 1988 IR. p.196 (résumé) ; - Revue critique de droit international privé 1988 p.795 (résumé) ; - European Commercial Cases 1989 p.188-190 ; *P1* Cour de cassation (France), 1re chambre civile, arrêt du 29/05/1990 (658 86-11.448) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1990 I no 124 ; - La Semaine juridique - édition générale 1990 IV p.287 (résumé) ; - Recueil Dalloz Sirey 1990 IR. p.158 (résumé) ; - Gazette du Palais 1991 II Panor. p.15-16 (résumé) ; - Revue critique de droit international privé 1991 p.849-850 (résumé) ; - Revue critique de droit international privé 1992 p.806 (résumé)
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Lupoi, Michele Angelo: La giurisdizione in materia di responsabilità extracontrattuale nella Convenzione di Bruxelles, Rivista trimestrale di diritto e procedura civile 1992 p.365-377 ; Matteini Chiari, Sergio: Competenza giurisdizionale in materia di danni ("diretti" e "indiretti") prodotti da delitti/quasi-delitti, secondo la giurisprudenza interpretativa della Corte di giustizia delle Comunità europee, Il Foro italiano 1992 IV Col.114-120 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions relating to the Judgments Convention, The Scots Law Times 1992 p.a3 ; Fuentes Camacho, Víctor: Principio de proximidad y precision del forum delicti commissi en las hipotesis de pluralidad de daños sobrevenidos en distintos Estados, La ley - Comunidades Europeas 1992 no 77 p.1-8

PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Schockweiler

DATES of document: 11/01/1990
of application: 04/08/1988

Judgment of the Court (Fifth Chamber)
of 10 January 1990
Mario P. A. Reichert and others v Dresdner Bank. Reference for a preliminary ruling: Cour d'appel d'Aix-en-Provence - France. Brussels onvention of 27 September 1968 - Action paulienne - Donation of legal ownership of immovable property - Article 16 (1). Case C-115/88.

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Convention on jurisdiction and the enforcement of judgments - Exclusive jurisdiction - "Proceedings which have as their object rights in rem in immovable property" - Concept - Independent interpretation - "Action paulienne" - Not included

(Brussels Convention of 27 September 1968, Art. 16(1))

The concept of "proceedings which have as their object rights in rem in immovable property" mentioned in Article 16(1) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be given an independent interpretation. It encompasses only those actions concerning rights in rem in immovable property which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest .

It does not apply to an action whereby a creditor seeks to have a disposition of a right in rem in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor.

In Case C-115/88

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 d' appel (Court of Appeal), Aix-en-Provence, for a preliminary ruling in the proceedings pending before it between

Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler,

and

Dresdner Bank AG,

on the interpretation of Article 16(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

THE COURT (Fifth Chamber)

composed of : Sir Gordon Slynn, President of Chamber, M. Zuleeg, R . Joliet, J . C. Moitinho de Almeida and F. Grévisse, judges,

Advocate General : J. Mischo

Registrar : J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

Dresdner Bank AG, by Mr Jestaedt,

the French Government, by Régis de Gouttes, assisted by Géraud de Bergues, acting as Agents,

the German Government, by C. Boehmer, acting as Agent,

the United Kingdom, by J. A. Gensmantel, of the Treasury Solicitor' s Department, assisted by

M. C. L. Carpenter, of the Lord Chancellor' s Department, acting as Agents,

the Italian Government, by O. Fiumara, avvocato dello Stato, acting as Agent, and

the Commission of the European Communities, by Georgios Kremlis, a member of its Legal Department, assisted by G. Cherubini, an Italian official on detachment with the Commission under the arrangements for exchanges with national officials, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 7 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 November 1989,

gives the following

Judgment

1 By judgment dated 18 November 1987 which was received at the Court on 11 April 1988, the cour d' appel, Aix-en-Provence, referred to the Court for a preliminary ruling 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 (hereinafter referred to as "the Convention ") a question on the interpretation of Article 16(1) of that Convention.

2 That question was raised during the course of proceedings between Mr and Mrs Reichert and their son, Mario Peter Antonio Reichert, on the one hand, and Dresdner Bank AG on the other hand.

3 Mr and Mrs Reichert, who reside in the Federal Republic of Germany, are the owners of immovable property in the commune of Antibes, Alpes-Maritimes, France, the legal ownership of which they donated to their son, Mario Reichert, by a notarial instrument executed at Creutzwald, Moselle, France. That donation was challenged by Dresdner Bank AG, a creditor of Mr and Mrs Reichert, in the tribunal de grande instance (Regional Court), Grasse, in whose judicial district the property in issue lies, on the basis of Article 1167 of the French civil code under which creditors may "challenge in their own name transactions entered into by their debtors in fraud of their rights" by a procedure known as the "action paulienne ".

4 By a judgment of 20 February 1987 the tribunal de grande instance, Grasse, held that it had jurisdiction (which the Reicherts denied) on the basis of Article 16(1) of the Convention, under which "in proceedings which have as their object rights in rem in immovable property ... the courts of the Contracting State in which the property is situated" have exclusive jurisdiction, regardless of domicile.

5 The Reicherts appealed against the ruling on jurisdiction to the cour d' appel, Aix-en-Provence, which decided to stay the proceedings and seek a preliminary ruling from the Court on whether

> "by providing that the courts of the Contracting State in which the property is situated are to have exclusive jurisdiction in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, it was the intention of the Brussels Convention to lay down a rule of jurisdiction without any reference whatever to the classification of actions as personal, real or mixed actions, taking account only of the substantive legal issue, namely the nature of the rights concerned, and whether the rule of jurisdiction thus laid down entitles a creditor who contests transactions entered into by his debtor in fraud of his rights - in this case a donation of rights in rem in immovable property - to bring his action before the courts of the Contracting State in which the property is situated ".

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case in the main proceedings, the course of the procedure 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.

7 It is clear from the actual wording of the national court' s question and from the grounds set out in its judgment that it seeks to determine whether Article 16(1) of the Convention covers a case in which a creditor applies, by means of an action available under national law, in the present case the action paulienne in French law, to have a donation of immovable property set aside on the ground that it was made by his debtor in fraud of his rights.

8 First of all, it is evident that in order to ensure that the rights and obligations arising out of the Convention for the Contracting States and for individuals concerned are as equal and as uniform as possible, an independent definition must be given in Community law to the phrase "in proceedings which have as their object rights in rem in immovable property", as has been done by the Court, with regard to other grounds of exclusive jurisdiction laid down in Article 16, in its judgment of 14 December 1977 in Case 73/77 Sanders v Van der Putte ((1977)) ECR 2383 - concept of "tenancies of immovable property", Article 16(1) - and in its judgment of 15 November 1983 in Case 288/82 Duijnstee v Goderbauer ((1983)) ECR 3663 - concept of "proceedings concerned with the registration or validity of patents", Article 16(4).

9 Secondly, as the Court has already held, Article 16 must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of any of them (judgment of 14 December 1977 in Sanders v Van der Putte, cited above).

10 In that regard, it is necessary to take into consideration the fact that the essential reason for conferring exclusive jurisdiction on the courts of the Contracting State in which the property is situated is that the courts of the locus rei sitae are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices which are generally those of the State in which the property is situated (judgments of 14 December 1977 in Sanders v Van der Putte, cited above, and of 15 January 1985 in Case 241/83 Roesler v Rottwinkel ((1985)) ECR 99).

11 In those circumstances, Article 16(1) must be interpreted as meaning that the exclusive jurisdiction of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with the protection of the powers which attach to their interest.

12 The action paulienne, however, is based on the creditor' s personal claim against the debtor and seeks to protect whatever security he may have over the debtor' s estate. If successful, its effect is to render the transaction whereby the debtor has effected a disposition in fraud of the creditor' s rights ineffective as against the creditor alone. The hearing of such an action, moreover, does not involve the assessment of facts or the application of rules and practices of the locus rei sitae in such a way as to justify conferring jurisdiction on a court of the State in which the property is situated .

13 Finally, although in certain Member States the rules governing the public registration of rights in immovable property require public notice to be given of legal actions seeking to have transactions affecting such rights avoided or declared ineffective as against third parties and of judgments given in such actions, that fact alone is not enough to justify conferring exclusive jurisdiction on the courts of the Contracting State in which the property affected by those rights is situated . Such rules of national law are based on the need to afford legal protection to the interests

of third parties, and such protection can be ensured, if need be, by public notice in the form and at the place prescribed by the law of the Contracting State in which the property is situated.

14 Consequently, such an action, brought by a creditor against a contract of sale of immovable property entered into, or a donation thereof made, by his debtor, does not come within the scope of Article 16(1).

15 The answer to the national court' s question must therefore be that an action whereby a creditor seeks to have a disposition of a right in rem in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor does not come within the scope of Article 16(1) of the Convention.

Costs

16 The costs incurred by the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom, the Italian Republic 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 proceedings 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 d' appel, Aix-en-Provence, by judgment of 18 November 1987, hereby rules :

An action whereby a creditor seeks to have a disposition of a right in rem in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor does not come within the scope of Article 16(1) of the Convention.

DOCNUM	61988J0115
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1990 Page I-00027
DOC	1990/01/10
LODGED	1988/04/11
JURCIT	41968A0927(01)-A16PT1 : N 1 4 7 8 11 14 15 41968A0927(01)-A16PT4 : N 8 61977J0073 : N 8 - 10 61982J0288 : N 8 41968A0927(01)-A16 : N 9

61983J0241 : N 10

CONCERNS Interprets 41968A0927(01) -A16PT1

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG French

OBSERV France ; Federal Republic of Germany ; United Kingdom ; Italy ; Commission ; Member States ; Institutions

NATIONA France

NATCOUR *I1* Cour d'appel d'Aix-en-Provence, 1re chambre civile, arrêt du 07/05/1990 (87/3323) ; - International Litigation Procedure 1991 p.241-244 ; *A8* Tribunal de grande instance de Grasse, 1re chambre I, jugement du 20/02/1987 (183 85/3226/1) ; *A9* Cour d'appel d'Aix-en-Provence, 1re chambre civile, arrêt du 16/11/1987 (87/3323) ; - European Commercial Cases 1989 p.62-65 ; - International Litigation Procedure 1990 p.105-114

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PROCEDU	Reference for a preliminary ruling
ADVGEN	Mischo
JUDGRAP	Grévisse
DATES	of document: 10/01/1990 of application: 11/04/1988

Judgment of the Court (Sixth Chamber)
of 15 February 1989
Six Constructions Ltd v Paul Humbert. Reference for a preliminary ruling: Cour de cassation - France. Brussels Convention - Place of performance of the obligation. Case 32/88.

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Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters - Special jurisdictions - Court for the place in which the contractual obligation is to be performed - Contract of employment - Obligation to be taken into consideration - Obligation to carry out the agreed work - Performance outside the territory of the Contracting States - Article 5(1) of the Convention not applicable - Application of Article 2 of the Convention

(Convention of 27 September 1968, Arts 2 and 5(1))

Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that, as regards contracts of employment, the obligation to be taken into consideration is that which characterizes such contracts, in particular the obligation to carry out the agreed work. Where the obligation of the employee to carry out the agreed work was performed and had to be performed outside the territory of the Contracting States, Article 5(1) of the Convention is not applicable; in such a case jurisdiction is to be determined on the basis of the place of the defendant' s domicile in accordance with Article 2 of the Convention.

In Case 32/88

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 de cassation (Court of Cassation) of the French Republic for a preliminary ruling in the proceedings pending before that court between

Six Constructions Ltd, Brussels (Belgium)

and

Paul Humbert, residing in Labrède (Gironde, France)

on the interpretation of Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978, L 304, p. 36)

THE COURT (Sixth Chamber)

composed of : T. Koopmans, President of Chamber, T. F. O' Higgins, G . F. Mancini, F. A. Schockweiler and M. Díez de Velasco, Judges,

Advocate General : G. Tesauro

Registrar : J.-G. Giraud

After considering the observations submitted on behalf of

P . Humbert, the respondent in the main proceedings, by H. Masse-Dessen and B. Georges, avocats au conseil d' Etat et a la Cour de cassation, Paris,

the Government of the Federal Republic of Germany, by C. Boehmer, acting as Agent,

the Government of the French Republic, by R. de Gouttes and C. Chavance, acting as Agents,

the Government of the Italian Republic, by L. Ferrari Bravo, Head of the Servizio del Contenzioso

Diplomatico, acting as Agent, assisted by O . Fiumara, avvocato dello Stato,

the United Kingdom, by S. J. Hay, acting as Agent, assisted by C. L . Carpenter,

the Commission of the European Communities, by Georgios Kremlis, acting as Agent, assisted by G. Cherubini,

having regard to the Report for the Hearing and further to the hearing on 19 October 1988,

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

gives the following

Judgment

1 By judgment dated 14 January 1988, which was received at the Court on 28 January 1988, the French Cour de cassation referred to the Court for a preliminary ruling 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, two questions on the interpretation of Article 5(1) of that Convention.

2 Those questions arose in proceedings between Paul Humbert, residing in Labrède, France, and Six Constructions Ltd, established in Brussels, concerning a breach of a contract of employment which gave rise to an application for the payment of several amounts by way of payment in lieu of notice, damages, gratuities and various amounts by way of compensation and arrears of salary.

3 It is apparent from the documents before the Court that Six Constructions Ltd is a company incorporated under the law of Sharjah, one of the United Arab Emirates, which has a branch in Brussels. During the main proceedings, it asserted that its registered office was in Brussels. That assertion was accepted by the French courts because it was not contested at the proper time.

4 Two problems of jurisdiction arose before the conseil de prud' hommes (Labour Conciliation Tribunal), Bordeaux, before which the application was brought, and before the cour d' appel (Court of Appeal). On the one hand, Six Constructions Ltd invoked a term of the contract of employment according to which disputes concerning the performance of the contract were subject to the jurisdiction of the Brussels courts. However, the written instrument containing the terms of the contract had never been signed by Mr Humbert. On the other hand, Six Constructions Ltd contested the jurisdiction of the French courts on the ground that the contract of employment was performed not in France but in several countries outside the territory of the Community, since between March 1979, when he was taken on as a deputy project manager and December 1979, when he was dismissed, Mr Humbert had been sent to Libya, Zaïre and Abu Dhabi, one of the United Arab Emirates .

5 The Cour de cassation considered the two submissions mentioned above . It decided in regard to the first that the term attributing jurisdiction did not fulfil the conditions for validity under Article 17 of the Convention. With regard to the second, the Cour de cassation pointed out that, under Article 5(1) of the Convention, in matters relating to a contract, a person may be sued in the courts of the place of performance of the obligation in question and it is clear from the previous decisions of the Court of Justice that the obligation to be taken into account in the case of a contract of employment is the obligation which characterizes the contract, in particular the obligation to carry out the agreed work. However, the Cour de cassation considered that the question of which obligation was to be taken into account where the work was performed outside the territory of the Community raised a problem of interpretation.

6 In those circumstances, the Cour de cassation stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling :

"(1) What is the obligation to be taken into account for the purposes of the application of Article 5(1) of the Brussels Convention of 27 September 1968 where the court is hearing an action based on obligations arising under a contract of employment binding an employee residing in France to a company having its registered office in Belgium which posted him to several countries ouside Community territory?

(2) Must the characteristic obligation be considered as being performed in the establishment which engaged him, or must jurisdiction be determined pursuant to Article 2 of the Brussels Convention?"

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the course of the procedure and the written observations submitted to the Court which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 It should be observed at the outset that the main proceedings were brought before 1 November 1986, the date on which the version of the Convention amended as a result of the accession of new Member States came into effect. The provisions to be interpreted are therefore those of the Convention in the form in which it existed in 1971.

First question

9 The first question covers the case in which, as in the main proceedings, proceedings have been brought before a court on the basis of several obligations arising under a single contract of employment. For the purposes of applying Article 5(1) of the Convention, it must be determined, in that situation, where the "place of performance of the obligation in question" is situated.

10 According to the Court' s case-law, as the national court rightly pointed out, the obligation to be taken into consideration for the purposes of applying Article 5(1) of the Convention to contracts of employment is the obligation which characterizes such a contract, in particular, the obligation to carry out the agreed work (judgments of 26 May 1982 in Case 133/81 Ivenel v Schwab ((1982)) ECR 1891, and of 15 January 1987 in Case 266/85 Shenavai v Kreischer ((1987)) ECR 239). In that regard, the Court based its decision on the finding that contracts of employment, and more generally contracts for the performance of work other than work on a self-employed basis differ from other contracts by virtue of certain particularities inasmuch as they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements.

11 On the basis that in this case the employee carried out work not in Brussels where, according to the documents before the Court, he regularly returned to make reports, but only in African and Arab countries to which he was posted to take part there in certain construction work, the national court asked how it should apply the criterion of the place where the work is carried out in order to determine which courts have jurisdiction.

12 In that regard, the French Government, the German Government and the United Kingdom argued that if an employed person does not normally perform his work in a single country, it must be the courts for the place in which the business which engaged the employee is situated that have jurisdiction under Article 5(1) of the Convention for disputes arising under the contract of employment. That interpretation is in accordance with the solution envisaged in such situations by the Rome Convention on the Law Applicable to Contractual Obligations (Official Journal 1980, L 266, p. 1) and with the wording chosen in the draft Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to be concluded by the Member States of the Community and the Member States of the European Free Trade Association (the "parallel" convention to the Brussels Convention). After the observations had been submitted in this case, that Convention was concluded in Lugano on 16 September 1988 (Official Journal L 319, p. 9). Article 5(1) thereof provides that in matters

relating to a contract of employment, the place of performance of the obligation is the place "where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged ".

13 That argument was contested by the Italian Government and the Commission . According to the latter, the interpretation put forward by those three governments has the twofold weakness of departing significantly from the actual terms of Article 5(1) of the Convention and of not taking account of the need to ensure adequate protection to the socially weaker contracting party, namely the employee. In that regard, the Commission argues that the effect of the criterion of the place of business through which the employee was engaged is to give jurisdiction to the courts for the place where the employer' s registered office is located, even if the employer is the plaintiff, and to establish thereby a forum actoris, whereas the underlying idea of the Convention, as is clearly stated in Articles 2 and 3, is precisely to limit the number of cases in which a person may be sued in the courts of the plaintiff' s domicile.

14 The Commission' s arguments on that point must be accepted. As the Court held in its judgments of 26 March 1982 and 15 January 1987, cited above, on account of the particularities of contracts of employment, it is the courts of the place in which the work is to be carried out which are best suited to resolving disputes to which one or more obligations under such contracts may give rise. Those particularities of contracts of employment do not justify an interpretation of Article 5(1) of the Convention which would permit account to be taken of the place of business through which the employee was engaged if it is difficult or impossible to determine in which State the work was performed.

15 The reply to the first question should therefore be that Article 5(1) of the Convention must be interpreted as meaning that, as regards contracts of employment, the obligation to be taken into consideration is that which characterizes such contracts, in particular the obligation to carry out the agreed work.

Second question

16 The second question concerns how to apply, in regard to contracts of employment, the criterion of the characteristic obligation when the employee carries out all his work outside the territory of the Community . It asks in particular whether, in such a case, jurisdiction is determined by reference to the place of business in which the employee was engaged or whether it must be determined pursuant to Article 2 of the Convention.

17 The possible choice of the criterion of the place of business in which the employee was engaged has already been considered in regard to the first question.

18 It should be added in that regard that, as the Court pointed out in its judgment of 27 September 1988 in Case 189/87 Kalfelis v HEMA ((1988)) ECR , the provisions on "special jurisdiction" in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State of the defendant' s domicile, laid down in the general provisions of Articles 2 and 3 and, therefore, those provisions on special jurisdiction must be interpreted restrictively.

19 In those circumstances when a court finds that claims made before it are based on obligations arising from a contract of employment and that the employee' s obligation to carry out the agreed work was and must be fulfilled outside the territory of the Contracting States, it has no choice but to conclude that the place provided for in Article 5(1) of the Convention cannot serve as a basis for attributing jurisdiction to a court within that territory and that Article 5(1) cannot therefore be applicable.

20 Although there are indeed some disadvantages in the alternative jurisdiction envisaged by the Convention in contract matters being precluded by the manner in which the parties to the contract have agreed that it is to be performed, it should be observed that the plaintiff is always entitled to bring his action before the courts of the place of the defendant' s domicile in accordance with Article 2 of the Convention, which thereby provides a certain and reliable criterion .

21 It should also be noted that that interpretation corresponds to the system laid down by the laws of the Contracting States in regard to jurisdiction in disputes arising out of contracts of employment. A comparative study of those laws shows that the criteria most often applied are those of the defendant' s domicile and the place where the work is performed. In most case, those laws give the plaintiff the choice between those two places.

22 The reply to the second question should therefore be that where, in the case of a contract of employment, the obligation of the employee to carry out the agreed work was performed and has to be performed outside the territory of the Contracting States, Article 5(1) of the Convention is not applicable and that in such a case jurisdiction is determined on the basis of the place of the defendant' s domicile in accordance with Article 2 of the Convention.

Costs

23 The costs incurred by the Governments of the Federal Republic of Germany, the French Republic, the Italian Republic, the United Kingdom and 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 (Sixth Chamber),

in answer to the questions referred to it by the Cour de cassation, by judgment of 14 January 1988, hereby rules :

(1) Article 5(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that, as regards contracts of employment, the obligation to be taken into consideration is that which characterizes such contracts, in particular the obligation to carry out the agreed work.

(2) Where, in the case of a contract of employment, the obligation of the employee to carry out the agreed work was performed and has to be performed outside the territory of the Contracting States, Article 5(1) of the Convention is not applicable; in such a case jurisdiction is to be determined on the basis of the place of the defendant' s domicile in accordance with Article 2 of the Convention.

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TREATY	European Economic Community

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SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Federal Republic of Germany ; France ; Italy ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*A7* Cour d'appel de Bordeaux, Chambre sociale, arrêt du 21/11/1984 (3553/84) ; *A8* Cour d'appel de Bordeaux, Chambre sociale, arrêt du 08/10/1986 (2225/86) ; *A9* Cour de cassation (France), Chambre sociale, arrêt du 14/01/1988 (85-40.348 376) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1988 V no 45 ; - Droit et CEE affaires international 1988 no 470 p.35 (résumé) ; - Gazette du Palais 1988 II Rés. p.63-64 (résumé) ; - Recueil Dalloz Sirey 1988 IR. p.31-32 ; - Praxis des internationalen Privat- und Verfahrensrechts 1990 p.173-175 ; - International Litigation Procedure 1990 p.22-28 ; - Huet, André: Journal du droit international 1989 p.91-94 ; - Huet, André: Journal du droit international 1989 p.91-94 ; *I1* Cour de cassation (France), Chambre sociale, arrêt du 14/01/1988 (86-44.939 377) ; *P1* Cour de cassation (France), Chambre sociale, arrêt du 14/06/1989 (2450) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1989 V no 444 ; - La Semaine juridique - édition entreprise 1989 I 18930 (résumé) ; - La Semaine juridique - édition générale 1989 IV p.302 (résumé) ; - Revue de jurisprudence sociale 1989 p.432-433 ; - International Litigation Procedure 1990 p.225-226 ; - Revue critique de droit international privé 1990 p.816 (résumé) ; *P2* Cour d'appel d'Agen, 1re chambre, arrêt du 03/10/1990 (328 331/89)
NOTES	Huet, André: Chronique de jurisprudence de la Cour de justice des Communautés européennes. Convention de Bruxelles du 27 septembre 1968, Journal du droit international 1989 p.461-465 ; Gill, A.V.: Obligations in Employment Contracts and the Brussels Convention, Irish Law Times and Solicitors'

Journal 1989 p.107-109 ; Mauro, Jacques: Encore l'art. 5, alinéa 1 de la Convention de Bruxelles sur le lieu de l'obligation!, Gazette du Palais 1989 II Som. no 102-103 p.19-20 ; Hartley, Trevor: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, European Law Review 1989 p.236-238 ; Rodière, Pierre: Revue critique de droit international privé 1989 p.560-567 ; Borras Rodríguez, Alegría: Revista Jurídica de Catalunya 1989 p.1113-1117 ; Jeammaud, Antoine: Rapport de travail international et compétence prud'homale, Droit social 1989 p.729-737 ; Guzman Zapater, Monica: Competencia judicial internacional en materia de contrato laboral a ejecutar en diversos países y el artículo 5.1 del Convenio de Bruselas, La ley - Comunidades Europeas 1989 no 51 p.7-12 ; Deprez, Jean: Conditions de mise en oeuvre de la règle de l'article 5,1o de la Convention de Bruxelles, Revue de jurisprudence sociale 1989 p.543-545 ; Briggs, Adrian: The Brussels Convention, Yearbook of European Law 1989 p.323-328 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1990 p.182-183 ; Rauscher, Thomas: Der Arbeitnehmergerichtsstand im EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 1990 p.152-157 ; Mori, Paola: Giustizia civile 1990 I p.2480-2481 ; Tagaras, H.: Cahiers de droit européen 1990 p.676-681 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1991 p.a2 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments of 27 September 1968, Netherlands International Law Review 1992 p.391-395

PROCEDU Reference for a preliminary ruling

ADVGEN Tesauro

JUDGRAP Koopmans

DATES of document: 15/02/1989
of application: 28/01/1988

Judgment of the Court (Fifth Chamber)
of 27 September 1988
Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Articles 5 (1) and 6 (3) of the Brussels Convention - More than one defendant - Concept of tort, delict and quasi-delict. Case 189/87.

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1 . Convention on Jurisdiction and the Enforcement of Judgments - Special Jurisdictions - More than one defendant - Jurisdiction of the court for the place where one of the defendants is domiciled - Conditions - Connection between the actions within the meaning of the Convention

(Convention of 27 September 1968, Art. 6 (1))

2 . Convention on Jurisdiction and the Enforcement of Judgments - Special Jurisdictions - Jurisdiction for "matters relating to tort, delict or quasi-delict" - Concept - Independent interpretation - Action to establish liability unconnected with matter relating to a contract - Action based on several grounds - Exclusion of claims not based on grounds of tort or delict

(Convention of 27 September 1968, Art. 5 (3))

1 . For Article 6 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to apply, a connection must exist between the various actions brought by the same plaintiff against different defendants. That connection, whose nature must be determined independently, must be 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 . The expression "matters relating to tort, delict or quasi-delict" contained 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).

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.

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 Schroeder, Muenchmeyer, Hengst und Co., now known as HEMA Beteiligungsgesellschaft mbH KG, in liquidation,

(2) Bankhaus Schroeder, Muenchmeyer, Hengst International SA, Luxembourg,

and

(3) Ernst Markgraf, procuration holder of Bankhaus Schroeder, Muenchmeyer, Hengst und Co., Frankfurt am Main,

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

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 Boehmer, 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 la Bourse, acting as Agent, assisted by Nicolas Decker, avocat,

the Commission of the European Communities, by Joern Pipkorn, a member of its Legal Department, assisted by Wolf-Dietrich Krause-Abklass, 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 Schroeder, Muenchmeyer, Hengst und Co., Frankfurt am Main, and Bankhaus Schroeder, Muenchmeyer, Hengst International SA, Luxembourg, and Ernst Markgraf, a procuration 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 procuration-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 Buergerliches Gesetzbuch (Civil Code) in conjunction with Paragraph 263 of the Strafgesetzbuch (Criminal Code) and Paragraph 826 of the Buergerliches 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 Schroeder, Muenchmeyer, 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 Streitgennossenschaft' (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.

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CONCERNS	Interprets 41968A0927(01) -A05PT3 Interprets 41968A0927(01) -A06PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; Italy ; United Kingdom ; Luxembourg ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Bundesgerichtshof, Vorlagebeschluß vom 27/04/1987 (II ZR 71/86) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1987 no 127 ; - Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1987 p.623-624 ; - Wertpapier-Mitteilungen 1987 p.883-884
NOTES	Schlosser, Peter: EuGÜbk: Zuständigkeit bei mehreren Beklagten an verschiedenen Wohnsitzen - Begriff der unerlaubten Handlung, Recht der internationalen Wirtschaft 1988 p.987-989 ; Geimer, Reinhold: Streitgenossenzuständigkeit und forum delicti commissi, Neue juristische Wochenschrift 1988 p.3089-3090 ; Huet, André: Chronique de jurisprudence de la Cour de justice des Communautés européennes. Convention de Bruxelles du 27 septembre 1968, Journal du droit international 1989 p.457-461 ; Gill, A.V.: Multiple Defendants, Jurisdiction in Tort and the Brussels Convention, Irish Law Times and Solicitors' Journal 1989 p.2-4 ; Ekelmans, Marc: Journal des tribunaux 1989 p.215-216 ; Gaudemet-Tallon, H.: Communautés européennes, Revue critique de droit international privé 1989 p.117-123 ; Jiménez Fortea, Francisco Javier: Comentario a la sentencia del Tribunal de Justicia de las Comunidades Europeas de 27 de septiembre de 1988 (artículos 5 y 6 del Convenio de Bruselas), Revista General de Derecho 1989 p.3939-3955 ; Hartley, Trevor: Jurisdictional Issues under Articles 5(1), 5(3) and 6(1), European Law Review 1989 p.172-175 ; Audit, Bernard: Droit international privé, Recueil Dalloz Sirey 1989 Som. p.254-255 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1989 p.181-182 ; Gottwald, Peter: Europäische Gerichtspflichtigkeit kraft Sachzusammenhangs, Praxis des internationalen Privat- und Verfahrensrechts

1989 p.272-274 ; Borras Rodríguez, Alegría: Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 1989 p.538-540 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1990 no 425 ; Tagaras, H.: Cahiers de droit européen 1990 p.667-670 ; Makridou, Kalliopi Th.: Ermineftika zitimata tis dosidikias tis "adikopraxias" kai "oionei adikopraxias" tou arthrou 5 º 3 tis Symvaseos ton Vryxellon (Me aformi tin apofasi tou DEvrK stin ypothesi Kalfelis/Schröder), Armenopoulos 1990 p.1165-1172 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1991 p.a4 ; Ullmann, Eike: Die Verwarnung aus Schutzrechten - mehr als eine Meinungsäußerung?, Gewerblicher Rechtsschutz und Urheberrecht 2001 p.1027-1032 ; Ebbink, Richard: A Fire-Side Chat On Cross-Border Issues (before the ECJ in GAT v. LuK), Festschrift für Jochen Pagenberg 2006 p. 255-262

PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Galmot

DATES of document: 27/09/1988
of application: 16/06/1987

Judgment of the Court (Sixth Chamber)
of 6 July 1988
R. O. E. Scherrens v M. G. Maenhout and others. Reference for a preliminary ruling: Gerechtshof Arnhem - Netherlands. Brussels Convention - Exclusive jurisdiction. Case 158/87.

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Convention on Jurisdiction and the Enforcement of Judgments - Exclusive jurisdiction - Disputes regarding tenancies of immovable property - Lease relating to a property consisting of parts situated in two contracting States - Exclusive jurisdiction of the courts of each State over the part situated in that State

(Convention of 27 September 1968, Article 16 (1))

Article 16 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that, in a dispute as to the existence of a lease relating to immovable property situated in two contracting States, exclusive jurisdiction over the immovable property situated in each contracting State is, in

principle and subject to special cases in which the particular disposition of the property may necessitate a different solution, held by the courts of that State.

In Case 158/87

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 Gerechtshof (Regional Court of Appeal), Arnhem, for a preliminary ruling in the proceedings pending before that court between

R . O . E . Scherrens (Belgium)

and

Maria G . Maenhout (Belgium), Rita A. M. van Poucke (Netherlands) and Lise M.L. van Poucke (Belgium),

on the interpretation of Article 16 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978, L 304, p. 77),

THE COURT (Sixth Chamber)

composed of : O. Due, President of the Chamber, T. Koopmans, K. Bahlmann, C . Kakouris and T. F. O' Higgins, Judges,

Advocate General : G. F. Mancini

Registrar : H. A. Ruehl, Principal Administrator

after considering the observations submitted on behalf of

Maria G . Maenhout and Rita A. M. Van Poucke, the respondents, by H.M . den Hollander, Advocaat en Procureur, Oostburg, the Netherlands,

the Commission of the European Communities by its Legal Adviser, Joern Pipkorn, assisted by Willem Jacob Calkoen, of Dutilh, Van der Hoeven & Slager, Advocaten en Notarissen, Rotterdam, the Netherlands,

having regard to the Report for the Hearing and further to the hearing on 11 February 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 19 April 1988,

gives the following

Judgment

1 By judgment of 23 March 1987, which was received at the Court on 26 May 1987, the Gerechtshof, Arnhem, 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 (hereinafter referred to as "the Convention ") a question concerning the interpretation of Article 16 (1) of the Convention.

2 The question was raised in the course of proceedings between Mr Scherrens and Maria Maenhout and others in a dispute as to whether a lease of a farm was concluded orally between Mr Scherrens, as agricultural tenant, and Maria Maenhout and her (now deceased) husband, as landlords, in respect of a farm consisting of buildings and approximately five hectares of agricultural land situated at Maldegem (Belgium) and four plots of land, covering altogether twelve hectares, situated in the commune of Sluis (Netherlands).

3 It appears from the documents before the Court that the land in the Netherlands is not adjacent to the part of the holding in Belgium but is situated seven kilometres away.

4 The dispute over the lease was brought by Mr Scherrens not only before the Vrederechter (Cantonal Judge), Eeklo (Belgium) in respect of the land in Belgium but also before the Pachtkamer (chamber dealing with leasehold matters) of the Kantongerecht (Cantonal Court) Oostburg (Netherlands) in respect of the land situated in the Netherlands . The Kantongerecht was not satisfied that a lease had been concluded and accordingly it dismissed the action, whereupon Mr Scherrens appealed to the Pachtkamer of the Gerechtshof, Arnhem.

5 According to the judgment making the reference, the farmer, the appellant, claims that there is a single lease covering both the farm and the plots of land. Taking the view that it was therefore possible that the Belgian court and the Netherlands court might give contradictory rulings, the Gerechtshof considered that it was necessary to settle the question as to which court had jurisdiction under Article 16 (1) of the Convention in cases such as this. It therefore stayed the proceedings and requested the Court to rule on "how Article 16 (1) of the Convention is to be interpreted with regard to the lease of a farm of which the buildings (with some of the land) are situated in one contracting State (Belgium) and (most of) the land in another (the Netherlands)".

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure 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.

7 Article 16 of the Convention provides as follows :

"1 . The following courts shall have exclusive jurisdiction, regardless of domicile;

1 . in proceedings which have as their object rights in rem in, or tenancies of, immovable property, the courts of the contracting State in which the property is situated;

...".

8 The question submitted by the Gerechtshof seeks to establish whether Article 16 (1) of the Convention is to be interpreted as meaning that, in a dispute as to the existence of a lease relating to immovable property situated in two contracting States, exclusive jurisdiction over the property situated in each contracting State is held by the courts of that State.

9 It should be recalled that the Court, in its judgment of 15 January 1985 in Case 241/83 (Roesler

v Rottwinkel ((1985)) ECR 99), ruled that the raison d' être of the exclusive jurisdiction conferred by Article 16 (1) on the courts of the contracting State in which the property is situated is the fact that tenancies are closely bound up with the law of immovable property and with the provisions, generally of a mandatory character, governing its use, such as legislation controlling the level of rents and protecting the rights of tenants, including tenant farmers.

10 The Court further held that Article 16 (1) seeks to ensure a rational allocation of jurisdiction by opting for a solution whereby the court having jurisdiction is determined on the basis of its proximity to the property since that court is in a better position to obtain first-hand knowledge of the facts relating to the creation of tenancies and to the performance of the terms thereof.

11 In the light of those considerations the Court concluded in that case, in respect of a letting of immovable property situated entirely within a single contracting State, that Article 16 (1) applies to all tenancies of immovable property irrespective of their special characteristics.

12 The same considerations hold good in principle in the case of a tenancy of immovable property whose component parts are situated in two contracting States.

13 Article 16 (1) of the Convention must therefore be interpreted as meaning that, in a dispute as to the existence of a lease relating to immovable property situated in two contracting States, exclusive jurisdiction over the immovable property situated in each contracting State is held by the courts of that State.

14 It is, however, possible that cases may arise in which immovable property whose component parts are situated in two contracting States but are the subject of a single lease has special characteristics such as will necessitate an exception to the general rule of exclusive jurisdiction described above. This might occur when, for example, the immovable property situated in one contracting State is adjacent to the property in another State and the property is situated almost entirely in one of those States. In those circumstances it might be appropriate to regard the property as a single unit and deem it to be entirely situated in one of those States for the purposes of conferring on the courts of that State exclusive jurisdiction over the tenancy of that property.

15 Consideration of the documents laid before the Court does not, however disclose any such special characteristics in this case, since the component parts of the immovable property at issue situated in the two contracting States are neither adjacent to one another nor situated almost entirely in one of those States.

16 The reply to be given to the question referred to the Court is therefore that Article 16 (1) of the Convention must be interpreted as meaning that, in a dispute as to the existence of a lease relating to immovable property situated in two contracting States, exclusive jurisdiction over the immovable property situated in each contracting State is held by the courts of that State.

Costs

17 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Gerechtshof, Arnhem, by judgment of 23 March 1987, hereby rules :

Article 16 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that, in a dispute as to the existence of a lease relating to immovable property situated in two contracting States, exclusive jurisdiction over the immovable property situated in each contracting State is held by the courts of that State

DOCNUM	61987J0158
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1988 Page 03791
DOC	1988/07/06
LODGED	1987/05/26
JURCIT	41968A0927(01)-A16PT1 : N 1 5 - 16 61983J0241 : N 9
CONCERNS	Interprets 41968A0927(01) -A16PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
OBSERV	Commission ; Institutions
NATIONA	Netherlands
NATCOUR	*A7* Kantongerecht Oostburg, vonnis van 03/05/1984 (PC 1/1983) ; *A8* Kantongerecht Oostburg, vonnis van 02/05/1985 (PC 1/1985) ; *A9* Gerechtshof Arnhem, arrest van 23/03/1987 (P 45/85) ; *P1* Gerechtshof Arnhem, arrest van 28/11/1988 (P 45/85)
NOTES	Mauro, Jacques: Gazette du Palais 1988 II Som. p.423-424 ; Huet, André: Chronique de jurisprudence de la Cour de justice des Communautés européennes. Convention de Bruxelles du 27 septembre 1968, Journal du droit international 1989 p.454-457 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1989 p.206 ; Gaudemet-Tallon, H.: Revue critique de droit international privé 1989 p.548-554 ; Hartley, Trevor: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, European Law Review 1989 p.57-58 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1989 no 360 ; Mac Gillavry, Olivier E.: Journal

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PROCEDU Reference for a preliminary ruling

ADVGEN Mancini

JUDGRAP O'Higgins

DATES of document: 06/07/1988
of application: 26/05/1987

Judgment of the Court (Sixth Chamber)
of 8 March 1988
SPRL Arcado v SA Haviland. Reference for a preliminary ruling: Cour d'appel de Bruxelles - Belgium. Brussels Convention - Jurisdiction - Matters relating to a contract. Case 9/87.

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CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPECIAL JURISDICTION - JURISDICTION "IN MATTERS RELATING TO A CONTRACT" - CONCEPT - INDEPENDENT INTERPRETATION - INDEPENDENT COMMERCIAL AGENCY AGREEMENT - CLAIMS FOR THE PAYMENT OF COMMISSION AND COMPENSATION FOR WRONGFUL REPUDIATION OF A CONTRACT - INCLUSION

(CONVENTION OF 27 SEPTEMBER 1968, ART. 5 (1))

THE CONCEPT OF "MATTERS RELATING TO A CONTRACT" IN ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IS TO BE REGARDED AS AN INDEPENDENT CONCEPT WHICH, FOR THE PURPOSE OF THE APPLICATION OF THE CONVENTION, MUST BE INTERPRETED BY REFERENCE PRINCIPALLY TO THE SYSTEM AND OBJECTIVES OF THE CONVENTION IN ORDER TO ENSURE THAT IT IS FULLY EFFECTIVE.

PROCEEDINGS RELATING TO THE WRONGFUL REPUDIATION OF AN INDEPENDENT COMMERCIAL AGENCY AGREEMENT AND THE PAYMENT OF COMMISSION DUE UNDER SUCH AN AGREEMENT ARE PROCEEDINGS IN MATTERS RELATING TO A CONTRACT WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION.

IN CASE 9/87

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 ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BY THE COUR D' APPEL (COURT OF APPEAL), BRUSSELS, FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

ARCADO SPRL, WHOSE REGISTERED OFFICE IS IN WATERLOO (BELGIUM),

AND

HAVILAND SA, WHOSE REGISTERED OFFICE IS IN LIMOGES (FRANCE),

ON THE INTERPRETATION OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 (OFFICIAL JOURNAL 1978 L 304, P. 36),

THE COURT (SIXTH CHAMBER)

COMPOSED OF : O. DUE, PRESIDENT OF THE CHAMBER, T. KOOPMANS, K. BAHLMANN, C . KAKOURIS, AND T.F. O' HIGGINS, JUDGES,

ADVOCATE GENERAL : SIR GORDON SLYNN

REGISTRAR : D. LOUTERMAN, ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF :

ARCADO SPRL BY P. VAN DE WIELE AND O. RALET DURING THE WRITTEN AND ORAL PROCEDURE,

HAVILAND SA BY F.X. DE DORLODOT DURING THE WRITTEN AND ORAL PROCEDURE,

THE GOVERNMENT OF THE ITALIAN REPUBLIC BY O. FIUMARA DURING THE WRITTEN PROCEDURE,

THE UNITED KINGDOM BY H.R.L. PURSE AND M.C.L. CARPENTER DURING THE WRITTEN PROCEDURE,

THE COMMISSION OF THE EUROPEAN COMMUNITIES BY G. KREMLIS ACTING AS AGENT, ASSISTED BY G. CHERUBINI, DURING THE WRITTEN AND ORAL PROCEDURE,

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 18 NOVEMBER 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 17 DECEMBER 1987,

GIVES THE FOLLOWING

JUDGMENT

1 BY JUDGMENT OF 11 SEPTEMBER 1986, WHICH WAS RECEIVED AT THE COURT ON 16 JANUARY 1987, THE COUR D' APPEL, 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 (HEREINFTER REFERRED TO AS "THE CONVENTION "), A QUESTION CONCERNING THE INTERPRETATION OF ARTICLE 5 (1) OF THE CONVENTION.

2 THAT QUESTION WAS RAISED IN THE CONTEXT OF PROCEEDINGS CONCERNING THE PERFORMANCE OF AN INDEPENDENT COMMERCIAL AGENCY AGREEMENT BY WHICH HAVILAND SA, WHOSE REGISTERED OFFICE IS IN LIMOGES (FRANCE) APPOINTED AGECOBEL SA, WHOSE REGISTERED OFFICE IS IN BELGIUM, AS ITS AGENT FOR THE SALE OF PORCELAIN PRODUCTS IN BELGIUM AND LUXEMBOURG.

3 FOLLOWING THE TERMINATION OF THAT AGREEMENT BY HAVILAND, AGECOBEL INSTITUTED PROCEEDINGS AGAINST HAVILAND ON 13 NOVEMBER 1978 BEFORE THE TRIBUNAL DE COMMERCE (COMMERCIAL COURT), BRUSSELS, SEEKING THE PAYMENT OF COMPENSATION FOR WRONGFUL TERMINATION OF THE AGREEMENT AND THE BALANCE OF OUTSTANDING COMMISSION. HAVILAND OBJECTED THAT THE COURT HAD NO JURISDICTION RATIONE LOCI ON THE GROUND THAT THE ACTION FOR COMPENSATION WAS BASED ON A QUASI-DELICT COMMITTED AT THE PLACE FROM WHICH TERMINATION OF THE AGREEMENT WAS NOTIFIED TO THE OTHER PARTY, NAMELY ITS REGISTERED OFFICE.

4 BY JUDGMENT OF 26 MAY 1982 THE TRIBUNAL DE COMMERCE REJECTED THE OBJECTION THAT IT LACKED JURISDICTION BECAUSE IT CONSIDERED THAT THE DISPUTE WAS CONTRACTUAL IN ORIGIN AND THAT IT THEREFORE HAD JURISDICTION UNDER ARTICLE 5 (1) OF THE CONVENTION. BY JUDGMENT OF 22 JUNE 1983 THE TRIBUNAL DE COMMERCE ORDERED HAVILAND TO PAY COMPENSATION FOR ITS SUDDEN AND PREMATURE REPUDIATION OF THE AGREEMENT AND TO PAY ARREARS OF COMMISSION. IN ADDITION, IT GRANTED HAVILAND' S COUNTERCLAIM AND THEREFORE ORDERED AGECOBEL TO PAY OUTSTANDING BALANCES ON INVOICES AND COMPENSATION.

5 AGECOBEL LODGED AN APPEAL BEFORE THE COUR D' APPEL, BRUSSELS SEEKING AN INCREASE IN THE COMPENSATION AWARDED AND AN ORDER THAT HAVILAND PAY STATUTORY INTEREST. IN A CROSS-APPEAL HAVILAND RELIED ON ARTICLE 5 (3) OF THE CONVENTION AND CONTESTED THE JURISDICTION OF THE BELGIAN COURTS.

BY A DOCUMENT LODGED AT THE REGISTRY OF THE COUR D' APPEL, BRUSSELS ON 5 JUNE 1985, ARCADO SPRL, WHOSE REGISTERED OFFICE IS IN BELGIUM AND WHICH HAD SUCCEEDED TO THE RIGHTS OF AGECOBEL, TOOK OVER THE PROCEEDINGS INSTITUTED BY THE LATTER.

6 THE COUR D' APPEL TOOK THE VIEW THAT WHILST THE DISPUTE CONCERNING THE PAYMENT OF COMMISSION CLEARLY SUGGESTED THAT THE MATTERS AT ISSUE WERE CONTRACTUAL IN NATURE IT WAS NEVERTHELESS NECESSARY TO DETERMINE WHETHER THE CLAIM FOR COMPENSATION FOR THE SUDDEN AND PREMATURE REPUDIATION OF THE CONTRACT FALLS WITHIN THE CONCEPT OF "MATTERS RELATING TO A CONTRACT" WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION ACCORDING TO THE INDEPENDENT INTERPRETATION OF THAT CONCEPT

7 THE COUR D' APPEL ALSO DECIDED TO STAY THE PROCEEDINGS AND TO REFER THE FOLLOWING QUESTION TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING :

> "ARE PROCEEDINGS RELATING TO THE WRONGFUL REPUDIATION OF AN (INDEPENDENT) COMMERCIAL AGENCY AGREEMENT AND THE PAYMENT OF COMMISSION DUE UNDER SUCH AN AGREEMENT PROCEEDINGS IN MATTERS RELATING TO A CONTRACT WITHIN THE MEANING OF ARTICLE 5 (1) OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968?"

8 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS, THE COURSE OF THE PROCEDURE AND THE WRITTEN OBSERVATIONS SUBMITTED TO THE COURT BY THE PARTIES TO THE MAIN PROCEEDINGS, THE COMMISSION, THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE UNITED KINGDOM, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

9 BY WAY OF DEROGATION FROM THE GENERAL RULE GOVERNING JURISDICTION SET OUT IN THE FIRST PARAGRAPH OF ARTICLE 2 OF THE CONVENTION, ARTICLE 5 (1) OF THE CONVENTION PROVIDES AS FOLLOWS :

> "A PERSON DOMICILED IN A CONTRACTING STATE MAY, IN ANOTHER CONTRACTING STATE, BE SUED :
>
> 1 . IN MATTERS RELATING TO A CONTRACT, IN THE COURTS OF THE PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION...".

10 AS THE COURT HELD IN ITS JUDGMENT OF 22 MARCH 1983 IN CASE 34/82 (MARTIN PETERS BAUUNTERNEHMUNG GMBH V ZUID NEDERLANDSE AANNEMERS VERENIGING ((1983)) ECR 987) THE CONCEPT OF "MATTERS RELATING TO A CONTRACT" SERVES AS A CRITERION TO DEFINE THE SCOPE OF ONE OF THE RULES OF SPECIAL JURISDICTION AVAILABLE TO THE PLAINTIFF. HAVING REGARD TO THE OBJECTIVE AND THE 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.

11 CONSEQUENTLY, THE CONCEPT OF "MATTERS RELATING TO A CONTRACT" IS TO BE REGARDED AS AN INDEPENDENT CONCEPT WHICH, FOR THE PURPOSE OF THE APPLICATION OF THE CONVENTION, MUST BE INTERPRETED BY REFERENCE PRINCIPALLY TO THE SYSTEM AND OBJECTIVES OF THE CONVENTION IN ORDER TO ENSURE THAT IT IS

FULLY EFFECTIVE.

12 THERE IS NO DOUBT THAT A CLAIM FOR THE PAYMENT OF COMMISSION DUE UNDER AN INDEPENDENT COMMERCIAL AGENCY AGREEMENT FINDS ITS VERY BASIS IN THAT AGREEMENT AND CONSEQUENTLY CONSTITUTES A MATTER RELATING TO A CONTRACT WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION.

13 THE SAME VIEW MUST BE TAKEN OF A CLAIM FOR COMPENSATION FOR THE WRONGFUL REPUDIATION OF SUCH AN AGREEMENT AS THE BASIS FOR SUCH COMPENSATION IS THE FAILURE TO COMPLY WITH A CONTRACTUAL OBLIGATION.

14 AS REGARDS, MORE PARTICULARLY, THE RIGHT OF A SELF-EMPLOYED COMMERCIAL AGENT TO NOTICE, ITS CONTRACTUAL NATURE AND THEREFORE THE CONTRACTUAL NATURE OF THE COMPENSATION IN LIEU OF NOTICE WERE RECOGNIZED IN ARTICLES 15 AND 17 OF COUNCIL DIRECTIVE 86/653 OF 18 DECEMBER 1986 ON THE COORDINATION OF THE LAWS OF THE MEMBER STATES RELATING TO SELF-EMPLOYED COMMERCIAL AGENTS (OFFICIAL JOURNAL 1986 L 382, P . 17).

15 IN ADDITION, ARTICLE 10 OF THE CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS OF 19 JUNE 1980 (OFFICIAL JOURNAL 1980 L 266, P . 1) CONFIRMS THE CONTRACTUAL NATURE OF JUDICIAL PROCEEDINGS SUCH AS THOSE IN POINT INASMUCH AS IT PROVIDES THAT THE LAW APPLICABLE TO A CONTRACT GOVERNS THE CONSEQUENCES OF A TOTAL OR PARTIAL FAILURE TO COMPLY WITH OBLIGATIONS ARISING UNDER IT AND CONSEQUENTLY THE CONTRACTUAL LIABILITY OF THE PARTY RESPONSIBLE FOR SUCH BREACH.

16 THE REPLY TO THE QUESTION RAISED BY THE COUR D' APPEL, BRUSSELS, MUST THEREFORE BE THAT PROCEEDINGS RELATING TO THE WRONGFUL REPUDIATION OF AN INDEPENDENT COMMERCIAL AGENCY AGREEMENT AND THE PAYMENT OF COMMISSION DUE UNDER SUCH AN AGREEMENT ARE PROCEEDINGS IN MATTERS RELATING TO A CONTRACT WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968.

COSTS

17 THE COSTS INCURRED BY THE GOVERNMENT OF THE ITALIAN REPUBLIC, THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED, IN THE NATURE OF A STEP IN THE ACTION BEFORE THE NATIONAL COURT, THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

ON THOSE GROUNDS,

THE COURT (SIXTH CHAMBER)

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE COUR D' APPEL, BRUSSELS, BY A JUDGMENT OF 11 SEPTEMBER 1986, HEREBY RULES :

PROCEEDINGS RELATING TO THE WRONGFUL REPUDIATION OF AN INDEPENDENT COMMERCIAL AGENCY AGREEMENT AND THE PAYMENT OF COMMISSION DUE UNDER SUCH AN AGREEMENT ARE PROCEEDINGS IN MATTERS RELATING TO A CONTRACT WITHIN THE MEANING OF ARTICLE 5 (1) OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968.

DOCNUM	61987J0009
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1988 Page 01539
DOC	1988/03/08
LODGED	1987/01/16
JURCIT	41968A0927(01)-A02L1 : N 9 41968A0927(01)-A05PT1 : N 1 4 6 - 13 16 41968A0927(01)-A05PT3 : N 5 41980A0934-A10 : N 15 31986L0653-A15 : N 14 31986L0653-A17 : N 14 61982J0034 : N 10
CONCERNS	Interprets 41968A0927(01) -A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Italy ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Belgium
NATCOUR	*A8* Tribunal de commerce de Bruxelles, jugement du 26/05/82 (RG.11.895/78) ; - Revue de droit commercial belge 1983 p.241-244 ; *A9* Cour d'appel de Bruxelles, 2e chambre, arrêt du 11/09/86 (1311/84) ; *P1* Cour d'appel de Bruxelles, 2e chambre, arrêt du 07/04/89 (1311/84)
NOTES	Gill, A.V.: Two Recent Decisions of the European Court on the 'Brussels Convention', Irish Law Times and Solicitors' Journal 1988 p.164-166 ; Gaudemet-Tallon, H.: Revue critique de droit international privé 1988 p.613-616 ; Audit, Bernard: Droit international privé, Recueil Dalloz Sirey 1988 Som. p.344 ; Allwood, Wendy: The Scope of "Matters relating to Contract", European Law Review 1988 p.366-368 ; Schlosser, Peter: EuGÜbk: Zuständigkeit bei mehreren Beklagten an verschiedenen Wohnsitzen - Begriff der unerlaubten Handlung, Recht der internationalen Wirtschaft 1988 p.987-989 ; Mauro, Jacques: Gazette du Palais 1988 II Som. p.425-426 ; Esplugues-Mota, Carlos: Hacia una delimitacion de la nocion "materia contractual" presente en el artículo 5.1 del Convenio de Bruselas: la sentencia "Arcado c. Haviland", La ley - Comunidades Europeas 1989 no 44 p.7-10 ; Lugato, Monica: Disdetta arbitraria di contratto e Convenzione di Bruxelles, Giustizia civile 1989 I p.1037-1038 ; Huet, André: Chronique de jurisprudence de la Cour de justice des Communautés européennes. Convention de Bruxelles du 27 septembre 1968, Journal du droit international 1989 p.453-454 ; Vlas, P.: TVVS ondernemingsrecht en rechtspersonen 1989 p.180-181 ; Mezger, Ernst: Anspruch aus Vertrag oder Anspruch aus unerlaubter

Handlung im Sinne von Art.5 Nr.1 oder Nr.3 EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 1989 p.207-209 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1990 no 424 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1990 p.a6 ; Vlas, P.: The EEC Convention on Jurisdiction and Judgments of 27 September 1968, Netherlands International Law Review 1992 p.390-391

PROCEDU Reference for a preliminary ruling

ADVGEN Sir Gordon Slynn

JUDGRAP O'Higgins

DATES of document: 08/03/1988
of application: 16/01/1987

Judgment of the Court (Sixth Chamber)
of 9 December 1987
SAR Schotte GmbH v Parfums Rothschild SARL. Reference for a preliminary ruling: Oberlandesgericht Düsseldorf - Germany. Brussels Convention - Concept of a branch, agency or other establishment. Case 218/86.

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CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - SPECIAL JURISDICTION - DISPUTE ARISING OUT OF THE "OPERATIONS OF A BRANCH, AGENCY OR OTHER ESTABLISHMENT" - CONCEPT - BUSINESS CONDUCTED BY A COMPANY THROUGH ANOTHER COMPANY WITH THE SAME NAME AND IDENTICAL MANAGEMENT - INCLUDED

(CONVENTION OF 28 SEPTEMBER 1968, ART. 5 (5))

ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS APPLYING TO A CASE IN WHICH A LEGAL ENTITY ESTABLISHED IN A CONTRACTING STATE MAINTAINS NO DEPENDENT BRANCH, AGENCY OR OTHER ESTABLISHMENT IN ANOTHER CONTRACTING STATE BUT NEVERTHELESS PURSUES ITS ACTIVITIES THERE THROUGH AN INDEPENDENT COMPANY WITH THE SAME NAME AND IDENTICAL MANAGEMENT WHICH NEGOTIATES AND CONDUCTS BUSINESS IN ITS NAME AND WHICH IT USES AS AN EXTENSION OF ITSELF .

IN CASE 218/86

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 OBERLANDESGERICHT (HIGHER REGIONAL COURT) DOESSELDORF FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

SAR SCHOTTE GMBH, HEMER (FEDERAL REPUBLIC OF GERMANY),

AND

PARFUMS ROTHSCHILD SARL, PARIS (FRANCE),

ON THE INTERPRETATION OF ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (OFFICIAL JOURNAL 1978, L 304, P. 1),

THE COURT (SIXTH CHAMBER)

COMPOSED OF : O. DUE, PRESIDENT OF CHAMBER, G. C. RODRIGUEZ IGLESIAS, T . KOOPMANS, K. BAHLMANN AND C. KAKOURIS, JUDGES,

ADVOCATE GENERAL : SIR GORDON SLYNN

REGISTRAR : D. LOUTERMAN, ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, BY C. BOEHMER, ACTING AS AGENT,

THE COMMISSION OF THE EUROPEAN COMMUNITIES, BY J. PIPKORN, A MEMBER OF ITS LEGAL DEPARTMENT, ACTING AS AGENT, ASSISTED BY S. PIERI,

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 11 JUNE 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 28 OCTOBER 1987,

GIVES THE FOLLOWING

JUDGMENT

1 BY AN ORDER OF 10 JULY 1986, WHICH WAS RECEIVED AT THE COURT ON 7 AUGUST 1986, THE OBERLANDESGERICHT DOESSELDORF 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 (HEREINAFTER REFERRED TO AS "THE CONVENTION "), A QUESTION ON THE INTERPRETATION OF ARTICLE 5 (5) OF THE CONVENTION.

2 THAT QUESTION AROSE IN THE COURSE OF A DISPUTE BETWEEN A GERMAN UNDERTAKING, SAR SCHOTTE GMBH, ESTABLISHED AT HEMER, AND A FRENCH UNDERTAKING, PARFUMS ROTHSCHILD SARL, WHOSE REGISTERED OFFICE IS IN PARIS . THE DISPUTE CONCERNS ORDERS PLACED FOR THE DELIVERY BY SCHOTTE TO THE FRENCH UNDERTAKING OF ATOMIZER PUMPS AND OTHER ACCESSORIES FOR PERFUMERY ARTICLES. THE PURCHASER COMPLAINED THAT THE ATOMIZERS DID NOT WORK PROPERLY. WHEN THE MATTER WAS NOT SETTLED BY EXCHANGE OF LETTERS, SCHOTTE BROUGHT AN ACTION BEFORE THE LANDGERICHT (REGIONAL COURT) DOESSELDORF FOR PAYMENT OF AN AMOUNT REPRESENTING SIX INVOICES WHICH HAD NOT BEEN PAID.

3 IT APPEARS FROM THE DOCUMENTS BEFORE THE COURT THAT THE NEGOTIATIONS PRECEDING THE ORDERS AND DELIVERIES WERE CONDUCTED BY SCHOTTE NOT WITH THE FRENCH UNDERTAKING BUT WITH ROTHSCHILD GMBH, WHOSE REGISTERED OFFICE IS IN DOESSELDORF. ROTHSCHILD GMBH ALSO EXCHANGED EXTENSIVE CORRESPONDENCE WITH SCHOTTE CONCERNING THE COMPLAINTS OVER THE ATOMIZERS SUPPLIED. ALL THE LETTERS FROM ROTHSCHILD GMBH, BOTH IN THE PRELIMINARY NEGOTIATIONS AND IN CONNECTION WITH THE COMPLAINTS, WERE SIGNED BY TWO PERSONS, ONE OF WHOM WAS A DIRECTOR OF ROTHSCHILD GMBH AND PARFUMS ROTHSCHILD SARL AND THE OTHER A DIRECTOR OF PARFUMS ROTHSCHILD SARL.

4 INITIALLY SCHOTTE BROUGHT PROCEEDINGS BEFORE THE LANDGERICHT AGAINST ROTHSCHILD GMBH. HOWEVER, IN THE COURSE OF THE PROCEEDINGS ROTHSCHILD GMBH CONTENDED THAT IT WAS NOT LIABLE FOR THE DEBTS IN QUESTION SINCE THEY CONCERNED ONLY PARFUMS ROTHSCHILD SARL. SCHOTTE THEREFORE, WITH THE LEAVE OF THE LANDGERICHT, AMENDED ITS CLAIM BY SUBSTITUTING THE FRENCH UNDERTAKING AS DEFENDANT.

5 BEFORE THE LANDGERICHT, PARFUMS ROTHSCHILD SARL CONTENDED THAT THE GERMAN COURTS HAD NO JURISDICTION TO DETERMINE THE DISPUTE. SCHOTTE, HOWEVER, CLAIMED THAT THEY HAD JURISDICTION ON THE BASIS OF ARTICLE 5 (5) OF THE CONVENTION, WHICH PROVIDES THAT A DEFENDANT MAY BE SUED IN A CONTRACTING STATE OTHER THAN THAT IN WHICH HE IS DOMICILED "AS REGARDS A DISPUTE ARISING OUT OF THE OPERATIONS OF A BRANCH, AGENCY OR OTHER ESTABLISHMENT, IN THE COURTS FOR THE PLACE IN WHICH THE BRANCH, AGENCY OR OTHER ESTABLISHMENT IS SITUATED ". IN ITS SUBMISSION, ROTHSCHILD GMBH SHOULD BE REGARDED AS

AN "ESTABLISHMENT" OF PARFUMS ROTHSCHILD SARL WITHIN THE MEANING OF THAT PROVISION.

6 THE LANDGERICHT HELD THAT IT HAD NO JURISDICTION ON THE GROUND THAT THE CONDITIONS LAID DOWN IN ARTICLE 5 (5) OF THE CONVENTION WERE NOT SATISFIED. IN PARTICULAR, IT CONSIDERED THAT ROTHSCHILD GMBH COULD NOT BE REGARDED AS AN AGENCY OR ESTABLISHMENT OF PARFUMS ROTHSCHILD SARL, SINCE THE LATTER WAS, ON THE CONTRARY, A SUBSIDIARY OF ROTHSCHILD GMBH.

7 ON APPEAL, THE OBERLANDESGERICHT STAYED THE PROCEEDINGS AND ASKED THE COURT TO GIVE A PRELIMINARY RULING ON THE FOLLOWING QUESTION :

> "DOES THE JURISDICTION CONFERRED BY ARTICLE 5 (5) OF THE CONVENTION IN REGARD TO A BRANCH, AGENCY OR OTHER ESTABLISHMENT EXTEND TO THE CASE WHERE A LEGAL ENTITY UNDER FRENCH LAW (A 'SOCIETE A RESPONSABILITE LIMITEE'), WHOSE REGISTERED OFFICE IS IN PARIS, MAINTAINS NO DEPENDENT ESTABLISHMENT IN ANOTHER CONTRACTING STATE (IN THIS CASE, THE FEDERAL REPUBLIC OF GERMANY) BUT WHERE THERE IS IN THAT OTHER CONTRACTING STATE AN INDEPENDENT LEGAL ENTITY UNDER GERMAN LAW (A 'GESELLSCHAFT MIT BESCHRAENKTER HAFTUNG') WHICH HAS THE SAME NAME AND IDENTICAL MANAGEMENT, NEGOTIATES AND CONDUCTS BUSINESS IN THE NAME OF THE FRENCH LEGAL ENTITY AND IS USED BY THE LATTER AS AN EXTENSION OF ITSELF?"

8 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS, THE COURSE OF THE PROCEDURE AND THE WRITTEN OBSERVATIONS SUBMITTED TO THE COURT BY THE GERMAN GOVERNMENT AND THE COMMISSION, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT.

9 ARTICLE 5 (5) OF THE CONVENTION CONFERS JURISDICTION TO HEAR DISPUTES ARISING OUT OF THE OPERATIONS OF A BRANCH, AGENCY OR OTHER ESTABLISHMENT. THIS JURISDICTION FORMS PART OF THE "SPECIAL JURISDICTION" PROVIDED FOR BY ARTICLES 5 AND 6 OF THE CONVENTION, WHICH IS JUSTIFIED IN PARTICULAR BY THE EXISTENCE OF A CLOSE CONNECTION BETWEEN THE DISPUTE AND THE COURT WHICH IS CALLED UPON TO HEAR IT .

10 IN ITS JUDGMENT OF 22 NOVEMBER 1978 IN CASE 33/78 SOMAFER V SAAR-FERNGAS ((1978)) ECR 2183, THE COURT HELD THAT THE CONCEPT OF A BRANCH, AGENCY OR OTHER ESTABLISHMENT IMPLIES A PLACE OF BUSINESS WHICH HAS THE APPEARANCE OF PERMANENCY, SUCH AS THE EXTENSION OF A PARENT BODY, HAS A MANAGEMENT AND IS MATERIALLY EQUIPPED TO NEGOTIATE BUSINESS WITH THIRD PARTIES SO THAT THE LATTER, ALTHOUGH KNOWING THAT THERE WILL IF NECESSARY BE A LEGAL LINK WITH THE PARENT BODY, THE HEAD OFFICE OF WHICH IS ABROAD, DO NOT HAVE TO DEAL DIRECTLY WITH SUCH PARENT BODY BUT MAY TRANSACT BUSINESS AT THE PLACE OF BUSINESS CONSTITUTING THE EXTENSION.

11 THE NATIONAL COURT CONSIDERS THAT THESE CONDITIONS MIGHT ALSO BE SATISFIED IN A CASE SUCH AS THE PRESENT, WHERE THE UNDERTAKING WHICH ACTED AS AN EXTENSION OF A COMPANY ESTABLISHED IN ANOTHER CONTRACTING STATE IS NOT A SUBSIDIARY OF THAT COMPANY BUT IS AN INDEPENDENT COMPANY OR EVEN ITS PARENT COMPANY.

12 THE GERMAN GOVERNMENT AND THE COMMISSION SHARE THAT VIEW ON THE GROUND, FIRST, THAT LEGAL CERTAINTY REQUIRES THE APPLICATION OF ARTICLE 5 (5) OF

THE CONVENTION IN ANY CASE IN WHICH AN ESTABLISHMENT WHICH CAN NEGOTIATE BUSINESS WITH THIRD PARTIES CLEARLY APPEARS TO BE THE EFFECTIVE EXTENSION OF AN UNDERTAKING ESTABLISHED IN ANOTHER CONTRACTING STATE AND, SECONDLY, THAT UNDERTAKINGS WHICH ARE IN LAW INDEPENDENT COMPANIES MAY NEVERTHELESS DISPLAY ALL THE CHARACTERISTICS OF AN EXTENSION.

13 THE QUESTION REFERRED CONCERNS A CASE IN WHICH TWO COMPANIES BEAR THE SAME NAME AND ARE UNDER COMMON MANAGEMENT, AND IN WHICH ONE OF THOSE UNDERTAKINGS, ALTHOUGH NOT A DEPENDENT BRANCH OR AGENCY OF THE OTHER, NEVERTHELESS ENTERS INTO TRANSACTIONS ON BEHALF OF THE OTHER AND THUS ACTS AS ITS EXTENSION IN BUSINESS RELATIONS.

14 IT SHOULD BE ADDED THAT IN THE PRESENT CASE ROTHSCHILD GMBH NOT ONLY TOOK PART IN THE NEGOTIATIONS AND IN THE CONCLUSION OF THE CONTRACT BUT WAS ALSO RESPONSIBLE, DURING THE PERFORMANCE OF THE CONTRACT, FOR ENSURING THAT THE DELIVERIES CONTRACTED FOR WERE MADE AND THAT INVOICES WERE PAID. MOREOVER, THE CORRESPONDENCE ADDRESSED TO SCHOTTE SEEMED TO INDICATE THAT IT WAS ACTING AS A PLACE OF BUSINESS OF PARFUMS ROTHSCHILD SARL.

15 IN SUCH A CASE, THIRD PARTIES DOING BUSINESS WITH THE ESTABLISHMENT ACTING AS AN EXTENSION OF ANOTHER COMPANY MUST BE ABLE TO RELY ON THE APPEARANCE THUS CREATED AND REGARD THAT ESTABLISHMENT AS AN ESTABLISHMENT OF THE OTHER COMPANY EVEN IF, FROM THE POINT OF VIEW OF COMPANY LAW, THE TWO COMPANIES ARE INDEPENDENT OF EACH OTHER.

16 THE CLOSE CONNECTION BETWEEN THE DISPUTE AND THE COURT CALLED UPON TO HEAR IT MUST BE ASSESSED NOT ONLY ON THE BASIS OF THE LEGAL RELATIONS BETWEEN LEGAL ENTITIES ESTABLISHED IN DIFFERENT CONTRACTING STATES BUT ALSO BY REFERENCE TO THE WAY IN WHICH THESE TWO UNDERTAKINGS BEHAVE IN THEIR BUSINESS RELATIONS AND PRESENT THEMSELVES VIS-A-VIS THIRD PARTIES IN THEIR COMMERCIAL DEALINGS.

17 CONSEQUENTLY, IT SHOULD BE CONCLUDED THAT ARTICLE 5 (5) OF THE CONVENTION MUST BE INTERPRETED AS APPLYING TO A CASE IN WHICH A LEGAL ENTITY ESTABLISHED IN A CONTRACTING STATE MAINTAINS NO DEPENDENT BRANCH, AGENCY OR OTHER ESTABLISHMENT IN ANOTHER CONTRACTING STATE BUT NEVERTHELESS PURSUES ITS ACTIVITIES THERE THROUGH AN INDEPENDENT COMPANY WITH THE SAME NAME AND IDENTICAL MANAGEMENT WHICH NEGOTIATES AND CONDUCTS BUSINESS IN ITS NAME AND WHICH IT USES AS AN EXTENSION OF ITSELF .

COSTS

18 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE, SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED, IN THE NATURE OF 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 (SIXTH CHAMBER),

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE OBERLANDESGERICHT DUSSELDORF

BY ORDER OF 10 JULY 1986, HEREBY RULES :

ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS APPLYING TO A CASE IN WHICH A LEGAL ENTITY ESTABLISHED IN A CONTRACTING STATE MAINTAINS NO DEPENDENT BRANCH, AGENCY OR OTHER ESTABLISHMENT IN ANOTHER CONTRACTING STATE BUT NEVERTHELESS PURSUES ITS ACTIVITIES THERE THROUGH AN INDEPENDENT COMPANY WITH THE SAME NAME AND IDENTICAL MANAGEMENT WHICH NEGOTIATES AND CONDUCTS BUSINESS IN ITS NAME AND WHICH IT USES AS AN EXTENSION OF ITSELF .

DOCNUM	61986J0218
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1987 Page 04905
DOC	1987/12/09
LODGED	1986/08/07
JURCIT	41968A0927(01)-A05PT5 : N 1 5 - 17 61978J0033 : N 10
CONCERNS	Interprets 41968A0927(01) -A05PT5
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A8* Landgericht Düsseldorf, Urteil vom 10/12/1985 (35 O 2/85) ; *A9* Oberlandesgericht Düsseldorf, Vorlagebeschluß vom 10/07/1986 (6 U 17/86) ; *P1* Oberlandesgericht Düsseldorf, Urteil vom 04/02/1988 (6 U 17/86)
NOTES	Gill, A.V.: Two Recent Decisions of the European Court on the 'Brussels Convention', Irish Law Times and Solicitors' Journal 1988 p.164-166 ; Alvarez Rodríguez, Aurelia: El lugar de situacion de las sucursales, agencias o cualesquiera otros establecimientos como criterio determinante de la competencia judicial internacional, La ley - Comunidades Europeas 1988

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PROCEDU Reference for a preliminary ruling

ADVGEN Sir Gordon Slynn

JUDGRAP Koopmans

DATES of document: 09/12/1987
of application: 07/08/1986

Judgment of the Court
of 4 February 1988
Horst Ludwig Martin Hoffmann v Adelheid Krieg.
Reference for a preliminary ruling: Hoge Raad - Netherlands.
Brussels Convention - Articles 26, 27, 31 and 36.
Case 145/86.

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1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION OF JUDGMENTS - SCOPE - EFFECTS OF A JUDGMENT IN THE STATE IN WHICH IT WAS GIVEN - SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT

(CONVENTION OF 27 SEPTEMBER 1968, ART. 26)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - JUDGMENT ORDERING MAINTENANCE PAYMENTS - OBSTACLES TO PROCEEDING WITH ENFORCEMENT - CIRCUMSTANCE FALLING OUTSIDE THE SCOPE OF THE CONVENTION - DIVORCE DECREED IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT .

(CONVENTION OF 27 SEPTEMBER 1968, SECOND PARAGRAPH OF ART. 1 AND ART . 31)

3 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT - GROUNDS FOR REFUSING ENFORCEMENT - IRRECONCILABLE JUDGMENTS - FOREIGN JUDGMENT MAKING A MATRIMONIAL MAINTENANCE ORDER - DECREE OF DIVORCE GRANTED IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT

(CONVENTION OF 27 SEPTEMBER 1968, ARTICLE 27 (3))

4 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - FAILURE TO APPEAL AGAINST THE JUDGMENT GRANTING LEAVE TO ENFORCE - PLEADING, AT THE EXECUTION STAGE, OF GROUNDS FOR REFUSAL - NOT PERMITTED - OBLIGATIONS ON THE PART OF THE COURT SEISED - LIMITS

(CONVENTION OF 27 SEPTEMBER 1968, ART. 36)

1 . A FOREIGN JUDGMENT WHICH HAS BEEN RECOGNIZED BY VIRTUE OF ARTICLE 26 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST IN PRINCIPLE HAVE THE SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT AS IT DOES IN THE STATE IN WHICH JUDGMENT WAS GIVEN.

2 . A FOREIGN JUDGMENT WHOSE ENFORCEMENT HAS BEEN ORDERED IN A CONTRACTING STATE PURSUANT TO ARTICLE 31 OF THE CONVENTION AND WHICH REMAINS ENFORCEABLE IN THE STATE IN WHICH IT WAS GIVEN MUST NOT CONTINUE TO BE ENFORCED IN THE STATE WHERE ENFORCEMENT IS SOUGHT WHEN, UNDER THE LAW OF THE LATTER STATE, IT CEASES TO BE ENFORCEABLE FOR REASONS WHICH LIE OUTSIDE THE SCOPE OF THE CONVENTION.

THE CONVENTION DOES NOT PRECLUDE THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT FROM DRAWING THE NECESSARY INFERENCES FROM A NATIONAL DECREE OF DIVORCE WHEN CONSIDERING THE ENFORCEMENT OF THE FOREIGN ORDER MADE IN REGARD TO MAINTENANCE OBLIGATIONS BETWEEN SPOUSES .

3 . A FOREIGN JUDGMENT ORDERING A PERSON TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS CONJUGAL OBLIGATIONS TO SUPPORT HER IS

IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3) OF THE CONVENTION WITH A NATIONAL JUDGMENT PRONOUNCING THE DIVORCE OF THE SPOUSES .

4 . ARTICLE 36 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A PARTY WHO HAS NOT APPEALED AGAINST THE ENFORCEMENT ORDER REFERRED TO IN THAT PROVISION IS THEREAFTER PRECLUDED, AT THE STAGE OF THE EXECUTION OF THE JUDGMENT, FROM RELYING ON A VALID GROUND WHICH HE COULD HAVE PLEADED IN SUCH AN APPEAL, AND THAT THAT RULE MUST BE APPLIED OF THEIR OWN MOTION BY THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT. HOWEVER, THAT RULE DOES NOT APPLY WHEN IT HAS THE RESULT OF OBLIGING THE NATIONAL COURT TO MAKE THE EFFECTS OF A NATIONAL JUDGMENT WHICH LIES OUTSIDE THE SCOPE OF THE CONVENTION CONDITIONAL ON ITS RECOGNITION IN THE STATE IN WHICH THE FOREIGN JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE WAS GIVEN.

IN CASE 145/86

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 HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS), FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

HORST LUDWIG MARTIN HOFFMAN, RESIDING AT ENSCHEDE (NETHERLANDS),

AND

ADELHEID KRIEG, RESIDING AT NECKARGEMOEND (FEDERAL REPUBLIC OF GERMANY),

ON THE INTERPRETATION OF ARTICLES 26, 27, 31 AND 36 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS,

THE COURT

COMPOSED OF : LORD MACKENZIE STUART, PRESIDENT, G. BOSCO AND G. C . RODRIGUEZ IGLESIAS (PRESIDENTS OF CHAMBERS), T. KOOPMANS, K. BAHLMANN, R . JOLIET AND T. F. O' HIGGINS, JUDGES,

ADVOCATE GENERAL : M. DARMON

REGISTRAR : D. LOUTERMAN, ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

HORST HOFFMAN, THE APPELLANT IN THE MAIN PROCEEDINGS, IN THE WRITTEN PROCEDURE BY E. KORTHALS ALTES, OF THE HAGUE BAR, AND IN THE ORAL PROCEDURE BY H. AE. UNIKEN VENEMA, ALSO OF THE HAGUE BAR,

ADELHEID KRIEG, THE RESPONDENT IN THE MAIN PROCEEDINGS, IN THE WRITTEN PROCEDURE BY H. J. BRONKHORST, OF THE HAGUE BAR, AND IN THE ORAL PROCEDURE BY B. J. DRIJBER, ALSO OF THE HAGUE BAR,

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY BY C. BOEHMER, ACTING AS AGENT,

THE UNITED KINGDOM BY S. J. HAY, ACTING AS AGENT,

THE COMMISSION OF THE EUROPEAN COMMUNITIES, IN THE WRITTEN PROCEDURE BY L . GYSELEN, A MEMBER OF ITS LEGAL DEPARTMENT, ACTING AS AGENT, ASSISTED BY S. PIERI, AN ITALIAN CIVIL SERVANT ON SECONDMENT TO THE COMMISSION, AND IN THE WRITTEN PROCEDURE BY H. VAN LIER, A MEMBER OF ITS LEGAL DEPARTMENT,

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 20 MAY 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 9 JULY 1987, GIVES THE FOLLOWING

JUDGMENT

COSTS

35 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE . AS 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,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HOGE RAAD BY A JUDGMENT OF 6 JUNE 1986, HEREBY RULES :

(1) A FOREIGN JUDGMENT WHICH HAS BEEN RECOGNIZED BY VIRTUE OF ARTICLE 26 OF THE CONVENTION MUST IN PRINCIPLE HAVE THE SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT AS IT DOES IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN;

(2) A FOREIGN JUDGMENT WHOSE ENFORCEMENT HAS BEEN ORDERED IN A CONTRACTING STATE PURSUANT TO ARTICLE 31 OF THE CONVENTION AND WHICH REMAINS ENFORCEABLE IN THE STATE IN WHICH IT WAS GIVEN MUST NOT CONTINUE TO BE ENFORCED IN THE STATE WHERE ENFORCEMENT IS SOUGHT WHEN, UNDER THE LAW OF THE LATTER STATE, IT CEASES TO BE ENFORCEABLE FOR REASONS WHICH LIE OUTSIDE THE SCOPE OF THE CONVENTION;

3 A FOREIGN JUDGMENT ORDERING A PERSON TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS CONJUGAL OBLIGATIONS TO SUPPORT HER IS IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3) OF THE CONVENTION WITH A NATIONAL JUDGMENT PRONOUNCING THE DIVORCE OF THE SPOUSES;

4 ARTICLE 36 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A PARTY WHO HAS NOT APPEALED AGAINST THE ENFORCEMENT ORDER REFERRED TO IN THAT PROVISION IS THEREAFTER PRECLUDED, AT THE STAGE OF THE EXECUTION OF THE JUDGMENT, FROM RELYING ON A VALID GROUND WHICH HE COULD HAVE PLEADED IN SUCH AN APPEAL AGAINST THE ENFORCEMENT ORDER, AND THAT THAT RULE MUST BE APPLIED OF THEIR OWN MOTION BY THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT. HOWEVER, THAT RULE DOES NOT APPLY WHEN IT HAS THE RESULT OF OBLIGING THE NATIONAL COURT TO MAKE THE EFFECTS OF A NATIONAL JUDGMENT WHICH LIES OUTSIDE THE SCOPE OF THE CONVENTION CONDITIONAL ON ITS RECOGNITION

IN THE STATE IN WHICH THE FOREIGN JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE WAS GIVEN.

1 BY A JUDGMENT OF 6 JUNE 1986, WHICH WAS RECEIVED AT THE COURT ON 13 JUNE 1986, THE HOGE RAAD DER NEDERLANDEN 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 (HEREINAFTER REFERRED TO AS "THE CONVENTION ") FIVE QUESTIONS ON THE INTERPRETATION OF A NUMBER OF ARTICLES CONTAINED IN THAT CONVENTION.

2 THE QUESTIONS AROSE IN THE COURSE OF PROCEEDINGS BETWEEN H. L. M . HOFFMAN (HEREINAFTER REFERRED TO AS "THE HUSBAND ") AND A. KRIEG (HEREINAFTER "THE WIFE "), CONCERNING THE ENFORCEMENT IN THE NETHERLANDS OF A JUDGMENT OF THE AMTSGERICHT (LOCAL COURT) HEIDELBERG, ORDERING THE HUSBAND TO MAKE MONTHLY MAINTENANCE PAYMENTS TO THE WIFE .

3 IT IS APPARENT FROM THE DOCUMENTS BEFORE THE COURT THAT THE PARTIES TO THE MAIN PROCEEDINGS ARE GERMAN NATIONALS WHO WERE MARRIED IN 1950 AND THAT, IN 1978, THE HUSBAND LEFT THE MATRIMONIAL HOME IN THE FEDERAL REPUBLIC OF GERMANY AND SETTLED IN THE NETHERLANDS. ON APPLICATION BY THE WIFE, THE HUSBAND WAS ORDERED BY A DECISION OF THE AMTSGERICHT, HEIDELBERG OF 21 AUGUST 1979 TO MAKE MAINTENANCE PAYMENTS TO HER AS A SEPARATED SPOUSE.

4 ON THE APPLICATION OF THE HUSBAND, THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT), MAASTRICHT, GRANTED A DECREE OF DIVORCE BY A JUDGMENT OF 1 MAY 1980 GIVEN IN DEFAULT, APPLYING GERMAN LAW IN ACCORDANCE WITH NETHERLANDS RULES ON THE CONFLICT OF LAWS. ON 19 AUGUST THE DIVORCE WAS ENTERED IN THE CIVIL REGISTER AT THE HAGUE WHEREUPON IN THE NETHERLANDS THE MARRIAGE WAS DISSOLVED. THE DECREE OF DIVORCE, WHICH FALLS OUTSIDE THE SCOPE OF THE CONVENTION, HAD NOT BEEN RECOGNIZED IN THE FEDERAL REPUBLIC OF GERMANY AT THE TIME WHICH THE NATIONAL COURT CONSIDERS MATERIAL FOR THE PURPOSES OF THE CASE.

5 ON THE APPLICATION OF THE WIFE, THE PRESIDENT OF THE ARRONDISSMENTSRECHTBANK, ALMELO, MADE AN ORDER ON 29 JULY 1981 FOR THE ENFORCEMENT OF THE JUDGMENT OF THE AMTSGERICHT, HEIDELBERG, IN ACCORDANCE WITH ARTICLE 31 OF THE CONVENTION. IN APRIL 1982 NOTICE OF THAT ENFORCEMENT ORDER WAS SERVED ON THE HUSBAND WHO DID NOT APPEAL AGAINST THE ORDER.

6 ON 28 FEBRUARY 1983 THE WIFE OBTAINED AN ATTACHMENT OF THE HUSBAND' S EARNINGS PAID BY HIS EMPLOYER. THE HUSBAND BROUGHT INTERLOCUTORY PROCEEDINGS BEFORE THE ARRONDISSEMENTSRECHTBANK, ALMELO, IN ORDER TO HAVE THE ATTACHMENT ORDER DISCHARGED, OR AT LEAST SUSPENDED . HE WAS SUCCESSFUL AT FIRST INSTANCE BUT ON APPEAL THE GERECHTSHOF (REGIONAL COURT OF APPEAL), ARNHEM, DISMISSED HIS APPLICATION . HE APPEALED IN CASSATION AGAINST THAT JUDGMENT TO THE HOGE RAAD .

7 THE HOGE RAAD TOOK THE VIEW THAT THE RESOLUTION OF THE DISPUTE DEPENDED ON THE INTERPRETATION OF A NUMBER OF ARTICLES IN THE CONVENTION AND REFERRED THE FOLLOWING QUESTIONS TO THE COURT FOR A PRELIMINARY RULING :

"1 . DOES THE OBLIGATION IMPOSED ON THE CONTRACTING STATES TO RECOGNIZE

A JUDGMENT GIVEN IN ANOTHER CONTRACTING STATE (ARTICLE 26 OF THE BRUSSELS CONVENTION) MEAN THAT SUCH A JUDGMENT MUST BE GIVEN THE SAME EFFECT IN THE OTHER CONTRACTING STATES AS IT HAS UNDER THE LAW OF THE STATE IN WHICH IT WAS GIVEN AND DOES THIS MEAN THAT IT IS THEREFORE ENFORCEABLE IN THE SAME CASES AS IN THAT STATE?

2 . IF QUESTION 1 IS ANSWERED IN THE AFFIRMATIVE :

MUST ARTICLES 26 AND 31 OF THE BRUSSELS CONVENTION, READ TOGETHER, BE INTERPRETED AS MEANING THAT THE OBLIGATION TO RECOGNIZE A JUDGMENT GIVEN IN A CONTRACTING STATE REQUIRES THAT, BECAUSE THE JUDGMENT REMAINS ENFORCEABLE UNDER THE LAW OF THE STATE IN WHICH IT WAS GIVEN, IT IS ALSO ENFORCEABLE IN THE SAME CASES IN THE OTHER CONTRACTING STATE?

3 . IF QUESTION 2 IS ANSWERED IN THE AFFIRMATIVE :

IN A CASE SUCH AS THIS, IS IT POSSIBLE TO PLEAD THAT THE GERMAN MAINTENANCE ORDER IS IRRECONCILABLE WITH THE SUBSEQUENT NETHERLANDS DECREE OF DIVORCE OR TO PLEAD PUBLIC POLICY (ARTICLE 27 (1) AND (3) OF THE BRUSSELS CONVENTION)?

4 . DOES (THE SCHEME OF) THE BRUSSELS CONVENTION REQUIRE ACCEPTANCE OF THE RULE THAT, IF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT OF A JUDGMENT GIVEN IN ANOTHER CONTRACTING STATE FAILS TO PLEAD, IN THE APPEAL AGAINST THE ORDER FOR ENFORCEMENT OF THE JUDGMENT, MATTERS OF WHICH HE WAS AWARE BEFORE THE END OF THE PERIOD REFERRED TO IN THE FIRST PARAGRAPH OF ARTICLE 36 OF THE BRUSSELS CONVENTION AND WHICH PRECLUDE (FURTHER) ENFORCEMENT OF THAT JUDGMENT, HE MAY NO LONGER PLEAD THOSE MATTERS IN SUBSEQUENT EXECUTION PROCEEDINGS IN WHICH HE IS APPEALING AGAINST (CONTINUED) ENFORCEMENT?

5 . IF QUESTION 4 IS ANSWERED IN THE AFFIRMATIVE :

DOES (THE SCHEME OF) THE BRUSSELS CONVENTION REQUIRE IT TO BE ASSUMED THAT THE COURT OF THE STATE IN WHICH AN ENFORCEMENT ORDER IS ISSUED MUST APPLY OF ITS OWN MOTION THE RULE REFERRED TO IN THE FOURTH QUESTION IN SUBSEQUENT EXECUTION PROCEEDINGS, EVEN IF ITS OWN LAW MAKES NO PROVISION FOR THE APPLICATION OF SUCH A RULE?

8 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS, THE COURSE OF THE PROCEDURE AND THE WRITTEN OBSERVATIONS SUBMITTED TO THE COURT, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT .

9 THE NATIONAL COURT' S FIRST QUESTION SEEKS, IN ESSENCE, TO ESTABLISH WHETHER A FOREIGN JUDGMENT, WHICH HAS BEEN RECOGNIZED PURSUANT TO ARTICLE 26 OF THE CONVENTION, MUST IN PRINCIPLE HAVE THE SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT AS IT DOES IN THE STATE IN WHICH JUDGMENT WAS GIVEN.

10 IN THAT REGARD IT SHOULD BE RECALLED THAT THE CONVENTION "SEEKS TO FACILITATE AS FAR AS POSSIBLE THE FREE MOVEMENT OF JUDGMENTS, AND SHOULD BE INTERPRETED IN THIS SPIRIT ". RECOGNITION MUST THEREFORE "HAVE THE RESULT OF CONFERRING ON JUDGMENTS THE AUTHORITY AND EFFECTIVENESS ACCORDED TO THEM IN THE STATE IN WHICH THEY WERE GIVEN" (JENARD REPORT ON THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, OFFICIAL

JOURNAL 1979, C 59, PP . 42 AND 43).

11 IT FOLLOWS THAT THE ANSWER TO BE GIVEN TO THE NATIONAL COURT' S FIRST QUESTION IS THAT A FOREIGN JUDGMENT WHICH HAS BEEN RECOGNIZED BY VIRTUE OF ARTICLE 26 OF THE CONVENTION MUST IN PRINCIPLE HAVE THE SAME EFFECTS IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT AS IT DOES IN THE STATE IN WHICH JUDGMENT WAS GIVEN.

12 IN THE CIRCUMSTANCES OF THE MAIN PROCEEDINGS, AS DISCLOSED BY THE DOCUMENTS BEFORE THE COURT, THE NATIONAL COURT' S SECOND QUESTION SEEKS, IN ESSENCE, TO ESTABLISH WHETHER A FOREIGN JUDGMENT WHOSE ENFORCEMENT HAS BEEN ORDERED IN A CONTRACTING STATE PURSUANT TO ARTICLE 31 OF THE CONVENTION MUST CONTINUE TO BE ENFORCED IN ALL CASES IN WHICH IT WOULD STILL BE ENFORCEABLE IN THE STATE IN WHICH IT WAS GIVEN EVEN WHEN, UNDER THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT, THE JUDGMENT CEASES TO BE ENFORCEABLE FOR REASONS WHICH LIE OUTSIDE THE SCOPE OF THE CONVENTION.

13 IN THIS INSTANCE, THE JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE IS ONE WHICH ORDERS A HUSBAND TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS OBLIGATIONS, ARISING OUT OF THE MARRIAGE, TO SUPPORT HER . SUCH A JUDGMENT NECESSARILY PRESUPPOSES THE EXISTENCE OF THE MATRIMONIAL RELATIONSHIP.

14 CONSIDERATION SHOULD THEREFORE BE GIVEN TO WHETHER THE DISSOLUTION OF THAT MATRIMONIAL RELATIONSHIP BY A DECREE OF DIVORCE GRANTED BY A COURT OF THE STATE IN WHICH THE ENFORCEMENT IS SOUGHT CAN TERMINATE THE ENFORCEMENT OF THE FOREIGN JUDGMENT EVEN WHEN THAT JUDGMENT REMAINS ENFORCEABLE IN THE STATE IN WHICH IT WAS GIVEN, THE DECREE OF DIVORCE NOT HAVING BEEN RECOGNIZED THERE.

15 IN THAT CONNECTION IT MUST BE OBSERVED THAT INDENT (1) OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION PROVIDES THAT THE CONVENTION DOES NOT APPLY INTER ALIA TO THE STATUS OR LEGAL CAPACITY OF NATURAL PERSONS. MOREOVER, IT CONTAINS NO RULE REQUIRING THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT TO MAKE THE EFFECTS OF A NATIONAL DECREE OF DIVORCE CONDITIONAL ON RECOGNITION OF THAT DECREE IN THE STATE IN WHICH THE FOREIGN MAINTENANCE ORDER IS MADE.

16 THAT IS CONFIRMED BY ARTICLE 27 (4) OF THE CONVENTION, WHICH EXCLUDES IN PRINCIPLE THE RECOGNITION OF ANY FOREIGN JUDGMENT INVOLVING A CONFLICT WITH A RULE - CONCERNING INTER ALIA THE STATUS OF NATURAL PERSONS - OF THE PRIVATE INTERNATIONAL LAW OF THE STATE IN WHICH THE RECOGNITION IS SOUGHT. THAT PROVISION DEMONSTRATES THAT, AS FAR AS THE STATUS OF NATURAL PERSONS IS CONCERNED, IT IS NOT THE AIM OF THE CONVENTION TO DEROGATE FROM THE RULES WHICH APPLY UNDER THE DOMESTIC LAW OF THE COURT BEFORE WHICH THE ACTION HAS BEEN BROUGHT.

17 IT FOLLOWS THAT THE CONVENTION DOES NOT PRECLUDE THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT FROM DRAWING THE NECESSARY INFERENCES FROM A NATIONAL DECREE OF DIVORCE WHEN CONSIDERING THE ENFORCEMENT OF THE FOREIGN MAINTENANCE ORDER.

18 THUS THE ANSWER TO BE GIVEN TO THE NATIONAL COURT IS THAT A FOREIGN JUDGMENT WHOSE ENFORCEMENT HAS BEEN ORDERED IN A CONTRACTING STATE PURSUANT TO ARTICLE 31 OF THE CONVENTION AND WHICH REMAINS ENFORCEABLE IN THE STATE

IN WHICH IT WAS GIVEN MUST NOT CONTINUE TO BE ENFORCED IN THE STATE WHERE ENFORCEMENT IS SOUGHT WHEN, UNDER THE LAW OF THE LATTER STATE, IT CEASES TO BE ENFORCEABLE FOR REASONS WHICH LIE OUTSIDE THE SCOPE OF THE CONVENTION.

19 THE NATIONAL COURT' S THIRD QUESTION SEEKS, IN ESSENCE, TO ESTABLISH WHETHER A FOREIGN JUDGMENT ORDERING A PERSON TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS CONJUGAL OBLIGATIONS TO SUPPORT HER IS IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3) OF THE CONVENTION WITH A NATIONAL JUDGMENT PRONOUNCING THE DIVORCE OF THE SPOUSES OR, ALTERNATIVELY, WHETHER SUCH A FOREIGN JUDGMENT IS CONTRARY TO PUBLIC POLICY IN THE STATE IN WHICH RECOGNITION IS SOUGHT WITHIN THE MEANING OF ARTICLE 27 (1).

20 THE PROVISIONS TO BE INTERPRETED SET OUT THE GROUNDS FOR NOT RECOGNIZING FOREIGN JUDGMENTS. UNDER THE SECOND PARAGRAPH OF ARTICLE 34, AN ENFORCEMENT ORDER MAY BE REFUSED FOR THOSE SAME REASONS.

21 AS FAR AS THE SECOND PART OF THE THIRD QUESTION IS CONCERNED, IT SHOULD BE NOTED THAT, ACCORDING TO THE SCHEME OF THE CONVENTION, USE OF THE PUBLIC-POLICY CLAUSE, WHICH "OUGHT TO OPERATE ONLY IN EXCEPTIONAL CASES" (JENARD REPORT, CITED ABOVE, AT P. 44) IS IN ANY EVENT PRECLUDED WHEN, AS HERE, THE ISSUE IS WHETHER A FOREIGN JUDGMENT IS COMPATIBLE WITH A NATIONAL JUDGMENT; THE ISSUE MUST BE RESOLVED ON THE BASIS OF THE SPECIFIC PROVISION UNDER ARTICLE 27 (3), WHICH ENVISAGES CASES IN WHICH THE FOREIGN JUDGMENT IS IRRECONCILABLE WITH A JUDGMENT GIVEN IN A DISPUTE BETWEEN THE SAME PARTIES IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT.

22 IN ORDER TO ASCERTAIN WHETHER THE TWO JUDGMENTS ARE IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3), IT SHOULD BE EXAMINED WHETHER THEY ENTAIL LEGAL CONSEQUENCES THAT ARE MUTUALLY EXCLUSIVE .

23 IT IS APPARENT FROM THE DOCUMENTS BEFORE THE COURT THAT, IN THE PRESENT CASE, THE ORDER FOR ENFORCEMENT OF THE FOREIGN MAINTENANCE ORDER WAS ISSUED AT A TIME WHEN THE NATIONAL DECREE OF DIVORCE HAD ALREADY BEEN GRANTED AND HAD ACQUIRED THE FORCE OF RES JUDICATA, AND THAT THE MAIN PROCEEDINGS ARE CONCERNED WITH THE PERIOD FOLLOWING THE DIVORCE .

24 THAT BEING SO, THE JUDGMENTS AT ISSUE HAVE LEGAL CONSEQUENCES WHICH ARE MUTUALLY EXCLUSIVE. THE FOREIGN JUDGMENT, WHICH NECESSARILY PRESUPPOSES THE EXISTENCE OF THE MATRIMONIAL RELATIONSHIP, WOULD HAVE TO BE ENFORCED ALTHOUGH THAT RELATIONSHIP HAS BEEN DISSOLVED BY A JUDGMENT GIVEN IN A DISPUTE BETWEEN THE SAME PARTIES IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT.

25 THE ANSWER TO BE GIVEN TO THE THIRD QUESTION SUBMITTED BY THE NATIONAL COURT IS THEREFORE THAT A FOREIGN JUDGMENT ORDERING A PERSON TO MAKE MAINTENANCE PAYMENTS TO HIS SPOUSE BY VIRTUE OF HIS CONJUGAL OBLIGATIONS TO SUPPORT HER IS IRRECONCILABLE WITHIN THE MEANING OF ARTICLE 27 (3) OF THE CONVENTION WITH A NATIONAL JUDGMENT PRONOUNCING THE DIVORCE OF THE SPOUSES.

26 THE NATIONAL COURT' S FOURTH AND FIFTH QUESTIONS ASK WHETHER ARTICLE 36 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A PARTY WHO HAS NOT APPEALED AGAINST THE ENFORCEMENT ORDER IN ACCORDANCE WITH THAT PROVISION IS PRECLUDED, AT THE STAGE OF THE EXECUTION OF THE JUDGMENT, FROM RELYING ON A VALID ARGUMENT WHICH HE COULD HAVE RAISED IN AN APPEAL AGAINST THE

ENFORCEMENT ORDER, AND WHETHER THAT RULE MUST BE APPLIED OF THEIR OWN MOTION BY THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT.

27 IN ANSWERING THOSE QUESTIONS IT SHOULD FIRST BE POINTED OUT THAT, IN ORDER TO LIMIT THE REQUIREMENTS TO WHICH THE ENFORCEMENT OF A JUDGMENT DELIVERED IN ONE CONTRACTING STATE MAY BE SUBJECTED IN ANOTHER CONTRACTING STATE, THE CONVENTION LAYS DOWN A VERY SIMPLE PROCEDURE FOR THE ISSUE OF THE ENFORCEMENT ORDER, WHICH MAY BE WITHHELD ONLY ON THE GROUNDS EXHAUSTIVELY SET OUT IN ARTICLES 27 AND 28 . HOWEVER, THE CONVENTION MERELY REGULATES THE PROCEDURE FOR OBTAINING AN ORDER FOR THE ENFORCEMENT OF FOREIGN ENFORCEABLE INSTRUMENTS AND DOES NOT DEAL WITH EXECUTION ITSELF, WHICH CONTINUES TO BE GOVERNED BY THE DOMESTIC LAW OF THE COURT IN WHICH EXECUTION IS SOUGHT (JUDGMENT OF 2 JULY 1985 IN CASE 148/84 DEUTSCHE GENOSSENSCHAFTSBANK V BRASSERIE DU PECHEUR ((1985)) ECR 1981).

28 CONSEQUENTLY, A FOREIGN JUDGMENT FOR WHICH AN ENFORCEMENT ORDER HAS BEEN ISSUED IS EXECUTED IN ACCORDANCE WITH THE PROCEDURAL RULES OF THE DOMESTIC LAW OF THE COURT IN WHICH EXECUTION IS SOUGHT, INCLUDING THOSE ON LEGAL REMEDIES.

29 HOWEVER, THE APPLICATION, FOR THE PURPOSES OF THE EXECUTION OF A JUDGMENT, OF THE PROCEDURAL RULES OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT MAY NOT IMPAIR THE EFFECTIVENESS OF THE SCHEME OF THE CONVENTION AS REGARDS ENFORCEMENT ORDERS.

30 IT FOLLOWS THAT THE LEGAL REMEDIES AVAILABLE UNDER NATIONAL LAW MUST BE PRECLUDED WHEN AN APPEAL AGAINST THE EXECUTION OF A FOREIGN JUDGMENT FOR WHICH AN ENFORCEMENT ORDER HAS BEEN ISSUED IS LODGED BY THE SAME PERSON WHO COULD HAVE APPEALED AGAINST THE ENFORCEMENT ORDER AND IS BASED ON AN ARGUMENT WHICH COULD HAVE BEEN RAISED IN SUCH AN APPEAL . IN THOSE CIRCUMSTANCES, TO CHALLENGE THE EXECUTION WOULD BE TANTAMOUNT TO AGAIN CALLING IN QUESTION THE ENFORCEMENT ORDER AFTER THE EXPIRY OF THE STRICT TIME-LIMIT LAID DOWN BY THE SECOND PARAGRAPH OF ARTICLE 36 OF THE CONVENTION, AND WOULD THEREBY RENDER THAT PROVISION INEFFECTIVE.

31 IN VIEW OF THE MANDATORY NATURE OF THE TIME-LIMIT LAID DOWN BY ARTICLE 36 OF THE CONVENTION, THE NATIONAL COURT MUST ENSURE THAT IT IS OBSERVED . IT SHOULD THEREFORE OF ITS OWN MOTION DISMISS AS INADMISSIBLE AN APPEAL LODGED PURSUANT TO NATIONAL LAW WHEN THAT APPEAL HAS THE EFFECT OF CIRCUMVENTING THAT TIME-LIMIT.

32 NEVERTHELESS, THAT RULE, ARISING FROM THE SCHEME OF THE CONVENTION, CANNOT APPLY WHEN - AS IN THIS CASE - IT WOULD HAVE THE RESULT OF OBLIGING THE NATIONAL COURT TO IGNORE THE EFFECTS OF A NATIONAL DECREE OF DIVORCE, WHICH LIES OUTSIDE THE SCOPE OF THE CONVENTION, ON THE GROUND THAT THE DECREE IS NOT RECOGNIZED IN THE STATE IN WHICH THE FOREIGN JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE WAS GIVEN .

33 AS WAS ESTABLISHED IN THE CONTEXT OF THE REPLY TO THE SECOND QUESTION, THE CONVENTION CONTAINS NO RULE COMPELLING THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT TO MAKE THE EFFECTS OF A NATIONAL DECREE OF DIVORCE CONDITIONAL ON RECOGNITION OF THAT DECREE IN THE STATE IN WHICH A FOREIGN MAINTENANCE ORDER - FALLING WITHIN THE SCOPE OF THE CONVENTION

- WAS MADE.

34 ACCORDINGLY, THE ANSWER TO BE GIVEN TO THE NATIONAL COURT' S FOURTH AND FIFTH QUESTIONS IS THAT ARTICLE 36 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A PARTY WHO HAS NOT APPEALED AGAINST THE ENFORCEMENT ORDER REFERRED TO IN THAT PROVISION IS THEREAFTER PRECLUDED, AT THE STAGE OF THE EXECUTION OF THE JUDGMENT, FROM RELYING ON A VALID GROUND WHICH HE COULD HAVE PLEADED IN SUCH AN APPEAL AGAINST THE ENFORCEMENT ORDER, AND THAT THAT RULE MUST BE APPLIED OF THEIR OWN MOTION BY THE COURTS OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT . HOWEVER, THAT RULE DOES NOT APPLY WHEN IT HAS THE RESULT OF OBLIGING THE NATIONAL COURT TO MAKE THE EFFECTS OF A NATIONAL JUDGMENT WHICH LIES OUTSIDE THE SCOPE OF THE CONVENTION CONDITIONAL ON ITS RECOGNITION IN THE STATE IN WHICH THE FOREIGN JUDGMENT WHOSE ENFORCEMENT IS AT ISSUE WAS GIVEN.

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AUTHOR Court of Justice of the European Communities

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TREATY European Economic Community

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JURCIT 41968A0927(01)-A01L2PT1 : N 15
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41968A0927(01)-A27PT3 : N 7 19 21 25
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41968A0927(01)-A31 : N 5 7 12 18
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CONCERNS Interprets 41968A0927(01)-A26
Interprets 41968A0927(01)-A27PT3
Interprets 41968A0927(01)-A31
Interprets 41968A0927(01)-A36

SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

AUTLANG Dutch

OBSERV Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA Netherlands

NATCOUR *A7* President van de arrondissementsrechtbank Almelo, vonnis van 07/07/83
A8 Gerechtshof Arnhem, 3e civiele kamer, arrest van 24/09/84 (340/83)
- Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1990 no 208
A9 Hoge Raad, 1e kamer, arrest van 06/06/86 (12.675)
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P1 Hoge Raad, 1e kamer, arrest van 04/11/88 (12.675)
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PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Rodriguez Iglesias

DATES of document: 04/02/1988
of application: 13/06/1986

Judgment of the Court (Sixth Chamber)
of 8 December 1987
Gubisch Maschinenfabrik KG v Giulio Palumbo.
Reference for a preliminary ruling: Corte suprema di Cassazione - Italy.
Brussels Convention - Concept of Lis pendens.
Case 144/86.

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CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - LIS PENDENS - CONCEPT - INDEPENDENT INTERPRETATION - ACTIONS INVOLVING THE SAME SUBJECT-MATTER AND THE SAME CAUSE OF ACTION - ACTION FOR RESCISSION OR DISCHARGE OF A CONTRACT AND ACTION TO ENFORCE THE CONTRACT

(CONVENTION OF 27 SEPTEMBER 1968, ART. 21)

THE TERMS USED IN ARTICLE 21 OF THE CONVENTION OF 27 SEPTEMBER 1968 IN ORDER TO DETERMINE WHETHER A SITUATION OF LIS PENDENS ARISES MUST BE REGARDED AS INDEPENDENT.

LIS PENDENS WITHIN THE MEANING OF THAT ARTICLE ARISES WHERE A PARTY BRINGS AN ACTION BEFORE A COURT IN A CONTRACTING STATE FOR THE RESCISSION OR DISCHARGE OF AN INTERNATIONAL SALES CONTRACT WHILST AN ACTION BY THE OTHER PARTY TO ENFORCE THE SAME CONTRACT IS PENDING BEFORE A COURT IN ANOTHER CONTRACTING STATE.

IN CASE 144/86

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 ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BY THE CORTE SUPREMA DI CASSAZIONE, ROME, FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

GUBISCH MASCHINENFABRIK KG, WHOSE REGISTERED OFFICE IS IN FLENSBURG,

AND

GIULIO PALUMBO, RESIDENT IN ROME,

ON THE INTERPRETATION OF ARTICLE 21 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (OFFICIAL JOURNAL 1978, L 304, P. 77),

THE COURT (SIXTH CHAMBER)

COMPOSED OF : O. DUE AND G. C. RODRIGUEZ IGLESIAS (PRESIDENTS OF CHAMBERS), T. KOOPMANS, K. BAHLMANN AND C. KAKOURIS, JUDGES,

ADVOCATE GENERAL : G. F. MANCINI

REGISTRAR : H. A. ROEHL, PRINCIPAL ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

GUBISCH MASCHINENFABRIK KG, BY E. MEISSNER, IN THE WRITTEN PROCEDURE,

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, BY C. BOEHMER, IN THE WRITTEN PROCEDURE,

THE GOVERNMENT OF THE ITALIAN REPUBLIC, BY O. FIUMARA, IN THE WRITTEN PROCEDURE,

THE COMMISSION OF THE EUROPEAN COMMUNITIES, BY G. BERARDIS, IN THE WRITTEN AND ORAL PROCEDURES,

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 19 MARCH 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 11 JUNE 1987,

GIVES THE FOLLOWING

JUDGMENT

1 BY AN ORDER OF 9 JANUARY 1986, WHICH WAS RECEIVED AT THE COURT REGISTRY ON 12 JUNE 1986, THE CORTE SUPREMA DI CASSAZIONE (SUPREME COURT OF CASSATION), ROME, REFERRED 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 ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (HEREINAFTER REFERRED TO AS "THE CONVENTION ") A QUESTION ON THE INTERPRETATION OF ARTICLE 21 OF THE CONVENTION.

2 THAT QUESTION AROSE IN A DISPUTE BETWEEN GUBISCH MASCHINENFABRIK KG (HEREINAFTER REFERRED TO AS "GUBISCH "), WHOSE REGISTERED OFFICE IS IN FLENSBURG (FEDERAL REPUBLIC OF GERMANY), AND MR PALUMBO, RESIDENT IN ROME, RELATING TO THE VALIDITY OF A CONTRACT OF SALE. MR PALUMBO BROUGHT PROCEEDINGS AGAINST GUBISCH BEFORE THE TRIBUNALE DI ROMA (DISTRICT COURT, ROME) FOR A DECLARATION THAT THE CONTRACT WAS INOPERATIVE ON THE GROUND THAT HIS ORDER HAD BEEN REVOKED BEFORE IT REACHED GUBISCH FOR ACCEPTANCE. IN THE ALTERNATIVE, THE PLAINTIFF CLAIMED THE CONTRACT SHOULD BE SET ASIDE FOR LACK OF CONSENT OR, IN THE ALTERNATIVE, ITS DISCHARGE ON THE GROUND THAT GUBISCH HAD NOT COMPLIED WITH THE TIME-LIMIT FOR DELIVERY.

3 GUBISCH OBJECTED THAT THE TRIBUNALE DI ROMA LACKED JURISDICTION, IN ACCORDANCE WITH ARTICLE 21 OF THE CONVENTION, ON THE GROUND THAT IT HAD ALREADY BROUGHT AN ACTION BEFORE THE LANDGERICHT (REGIONAL COURT), FLENSBURG, TO ENFORCE PERFORMANCE BY MR PALUMBO OF HIS OBLIGATION UNDER THE CONTRACT, NAMELY PAYMENT FOR THE MACHINE HE HAD PURCHASED.

4 THE TRIBUNALE DI ROMA DISMISSED THE OBJECTION OF LIS PENDENS BASED ON ARTICLE 21 OF THE CONVENTION; GUBISCH APPEALED TO THE CORTE SUPREMA DI CASSAZIONE, WHICH STAYED THE PROCEEDINGS AND REFERRED TO THE COURT THE FOLLOWING QUESTION FOR A PRELIMINARY RULING :

> "DOES A CASE WHERE, IN RELATION TO THE SAME CONTRACT, ONE PARTY APPLIES TO A COURT IN A CONTRACTING STATE FOR A DECLARATION THAT THE CONTRACT IS INOPERATIVE (OR IN ANY EVENT FOR ITS DISCHARGE) WHILST THE OTHER INSTITUTES PROCEEDINGS BEFORE THE COURTS OF ANOTHER CONTRACTING STATE FOR ITS ENFORCEMENT FALL WITHIN THE SCOPE OF THE CONCEPT OF LIS PENDENS PURSUANT TO ARTICLE 21 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968?"

5 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS OF THE CASE, THE COURSE OF THE PROCEDURE AND THE WRITTEN OBSERVATIONS SUBMITTED TO THE COURT, WHICH ARE MENTIONED HEREINAFTER ONLY IN SO FAR

AS IS NECESSARY FOR THE REASONING OF THE COURT .

6 IN ORDER TO ANSWER THE QUESTION SUBMITTED, IT IS NECESSARY TO DETERMINE FIRST OF ALL WHETHER THE TERMS USED IN ARTICLE 21 OF THE CONVENTION IN ORDER TO DESCRIBE THE CIRCUMSTANCES CONSTITUTING LIS PENDENS (AN EXPRESSION USED SOLELY IN THE HEADING OF SECTION 8 OF TITLE II) ARE TO BE INTERPRETED INDEPENDENTLY OR ARE TO BE REGARDED AS REFERRING TO THE NATIONAL LAW OF ONE OR OTHER OF THE STATES CONCERNED .

7 AS THE COURT HAS ALREADY HELD IN ITS JUDGMENT OF 6 OCTOBER 1976 IN CASE 12/76 TESSILI V DUNLOP ((1976)) ECR 1473, NEITHER OF THOSE TWO OPTIONS RULES OUT THE OTHER SINCE THE APPROPRIATE CHOICE CAN BE MADE ONLY IN RESPECT OF EACH OF THE PROVISIONS OF THE CONVENTION TO ENSURE THAT IT IS FULLY EFFECTIVE HAVING REGARD TO THE OBJECTIVES OF ARTICLE 220 OF THE EEC TREATY.

8 ACCORDING TO ITS PREAMBLE, WHICH INCORPORATES IN PART THE TERMS OF ARTICLE 220, THE CONVENTION SEEKS IN PARTICULAR TO FACILITATE THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS OF COURTS OR TRIBUNALS AND TO STRENGTHEN IN THE COMMUNITY THE LEGAL PROTECTION OF PERSONS THEREIN ESTABLISHED . ARTICLE 21, TOGETHER WITH ARTICLE 22 ON RELATED ACTIONS, IS CONTAINED IN SECTION 8 OF TITLE II OF THE CONVENTION; THAT SECTION IS 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 AND FROM THE OUTSET, 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.

9 MOREOVER, IN ITS JUDGMENT OF 30 NOVEMBER 1976 IN CASE 42/76 DE WOLF V COX ((1976)) ECR 1759, THE COURT ACKNOWLEDGED THE IMPORTANCE OF THOSE OBJECTIVES OF THE CONVENTION EVEN OUTSIDE THE NARROW FIELD OF LIS PENDENS, HOLDING THAT IT WOULD BE INCOMPATIBLE WITH THE MEANING OF ARTICLE 26 ET SEQ. ON THE RECOGNITION OF JUDGMENTS TO ACCEPT THE ADMISSIBILITY OF AN APPLICATION CONCERNING THE SAME SUBJECT-MATTER AND BROUGHT BETWEEN THE SAME PARTIES AS AN APPLICATION UPON WHICH JUDGMENT HAS ALREADY BEEN DELIVERED BY A COURT IN ANOTHER CONTRACTING STATE.

10 FURTHERMORE, THE CONCEPT OF LIS PENDENS IS NOT THE SAME IN ALL THE LEGAL SYSTEMS OF THE CONTRACTING STATES AND, AS THE COURT HAS ALREADY HELD IN ITS JUDGMENT OF 7 JUNE 1984 IN CASE 129/83 ZELGER V SALINITRI ((1984)) ECR 2397, A COMMON CONCEPT OF LIS PENDENS CANNOT BE ARRIVED AT BY A COMBINATION OF THE VARIOUS RELEVANT PROVISIONS OF NATIONAL LAW.

11 HAVING REGARD TO THE AFORESAID OBJECTIVES OF THE CONVENTION AND TO THE FACT THAT ARTICLE 21, INSTEAD OF REFERRING TO THE TERM LIS PENDENS AS USED IN THE DIFFERENT NATIONAL LEGAL SYSTEMS OF THE CONTRACTING STATES, LAYS DOWN A NUMBER OF SUBSTANTIVE CONDITIONS AS COMPONENTS OF A DEFINITION, IT MUST BE CONCLUDED THAT THE TERMS USED IN ARTICLE 21 IN ORDER TO DETERMINE WHETHER A SITUATION OF LIS PENDENS ARISES MUST BE REGARDED AS INDEPENDENT.

12 THAT RESULT DOES NOT CONFLICT WITH THE JUDGMENT OF 7 JUNE 1984, REFERRED

TO EARLIER, IN WHICH THE COURT POINTED OUT THAT THE QUESTION AS TO THE MOMENT AT WHICH A COURT IS TO BE CONSIDERED SEISED OF A CASE FOR THE PURPOSES OF ARTICLE 21 OF THE CONVENTION MUST BE APPRAISED AND RESOLVED, IN THE CASE OF EACH COURT, ACCORDING TO THE RULES OF ITS OWN NATIONAL LAW. THAT REASONING WAS BASED ON THE ABSENCE OF ANY INDICATION IN THAT ARTICLE OF THE NATURE OF THE RELEVANT PROCEDURAL FORMALITIES, SINCE THE CONVENTION DOES NOT HAVE THE AIM OF UNIFYING THOSE FORMALITIES, WHICH ARE CLOSELY CONNECTED WITH THE PROCEDURAL SYSTEMS OF THE DIFFERENT MEMBER STATES. ACCORDINGLY, IT CANNOT PREJUDGE THE INTERPRETATION OF THE SUBSTANTIVE SCOPE OF THE CONDITIONS OF LIS PENDENS LAID DOWN IN ARTICLE 21.

13 IT IS THEREFORE IN THE LIGHT OF THE AFORESAID OBJECTIVES AND WITH A VIEW TO ENSURING CONSISTENCY AS BETWEEN ARTICLES 21 AND 27 (3) THAT THE QUESTION WHETHER A PROCEDURAL SITUATION OF THE KIND AT ISSUE IN THIS CASE IS COVERED BY ARTICLE 21 MUST BE DEALT WITH. THE SALIENT FEATURES OF THAT SITUATION ARE THAT ONE OF THE PARTIES HAS BROUGHT AN ACTION BEFORE A COURT OF FIRST INSTANCE FOR THE ENFORCEMENT OF AN OBLIGATION STIPULATED IN AN INTERNATIONAL CONTRACT OF SALE; AN ACTION IS SUBSEQUENTLY BROUGHT AGAINST HIM BY THE OTHER PARTY IN ANOTHER CONTRACTING STATE FOR THE RESCISSION OR DISCHARGE OF THE SAME CONTRACT

14 IT MUST BE OBSERVED FIRST OF ALL THAT ACCORDING TO ITS WORDING ARTICLE 21 APPLIES WHERE TWO ACTIONS ARE BETWEEN THE SAME PARTIES AND INVOLVE THE SAME CAUSE OF ACTION AND THE SAME SUBJECT-MATTER; IT DOES NOT LAY DOWN ANY FURTHER CONDITIONS. EVEN THOUGH THE GERMAN VERSION OF ARTICLE 21 DOES NOT EXPRESSLY DISTINGUISH BETWEEN THE TERMS "SUBJECT-MATTER" AND "CAUSE OF ACTION", IT MUST BE CONSTRUED IN THE SAME MANNER AS THE OTHER LANGUAGE VERSIONS, ALL OF WHICH MAKE THAT DISTINCTION .

15 IN THE PROCEDURAL SITUATION WHICH HAS GIVEN RISE TO THE QUESTION SUBMITTED FOR A PRELIMINARY RULING THE SAME PARTIES ARE ENGAGED IN TWO LEGAL PROCEEDINGS IN DIFFERENT CONTRACTING STATES WHICH ARE BASED ON THE SAME "CAUSE OF ACTION", THAT IS TO SAY THE SAME CONTRACTUAL RELATIONSHIP. THE PROBLEM WHICH ARISES, THEREFORE, IS WHETHER THOSE TWO ACTIONS HAVE THE SAME "SUBJECT-MATTER" WHEN THE FIRST SEEKS TO ENFORCE THE CONTRACT AND THE SECOND SEEKS ITS RESCISSION OR DISCHARGE

16 IN PARTICULAR, IN A CASE SUCH AS THIS, INVOLVING THE INTERNATIONAL SALE OF TANGIBLE MOVEABLE PROPERTY, IT IS APPARENT THAT THE ACTION TO ENFORCE THE CONTRACT IS AIMED AT GIVING EFFECT TO IT, AND THAT THE ACTION FOR ITS RESCISSION OR DISCHARGE IS AIMED PRECISELY AT DEPRIVING IT OF ANY EFFECT. THE QUESTION WHETHER THE CONTRACT IS BINDING THEREFORE LIES AT THE HEART OF THE TWO ACTIONS. IF IT IS THE ACTION FOR RESCISSION OR DISCHARGE OF THE CONTRACT THAT IS BROUGHT SUBSEQUENTLY, IT MAY EVEN BE REGARDED AS SIMPLY A DEFENCE AGAINST THE FIRST ACTION, BROUGHT IN THE FORM OF INDEPENDENT PROCEEDINGS BEFORE A COURT IN ANOTHER CONTRACTING STATE.

17 IN THOSE PROCEDURAL CIRCUMSTANCES IT MUST BE HELD THAT THE TWO ACTIONS HAVE THE SAME SUBJECT-MATTER, FOR THAT CONCEPT CANNOT BE RESTRICTED SO AS TO MEAN TWO CLAIMS WHICH ARE ENTIRELY IDENTICAL.

18 IF, IN CIRCUMSTANCES SUCH AS THOSE OF THIS CASE, THE QUESTIONS AT ISSUE CONCERNING A SINGLE INTERNATIONAL SALES CONTRACT WERE NOT DECIDED SOLELY

BY THE COURT BEFORE WHICH THE ACTION TO ENFORCE THE CONTRACT IS PENDING AND WHICH WAS SEISED FIRST, THERE WOULD BE A DANGER FOR THE PARTY SEEKING ENFORCEMENT THAT UNDER ARTICLE 27 (3) A JUDGMENT GIVEN IN HIS FAVOUR MIGHT NOT BE RECOGNIZED, EVEN THOUGH ANY DEFENCE PUT FORWARD BY THE DEFENDANT ALLEGING THAT THE CONTRACT WAS NOT BINDING HAD NOT BEEN ACCEPTED. THERE CAN BE NO DOUBT THAT A JUDGMENT GIVEN IN A CONTRACTING STATE REQUIRING PERFORMANCE OF THE CONTRACT WOULD NOT BE RECOGNIZED IN THE STATE IN WHICH RECOGNITION WAS SOUGHT IF A COURT IN THAT STATE HAD GIVEN A JUDGMENT RESCINDING OR DISCHARGING THE CONTRACT. SUCH A RESULT, RESTRICTING THE EFFECTS OF EACH JUDGMENT TO THE TERRITORY OF THE STATE CONCERNED, WOULD RUN COUNTER TO THE OBJECTIVES OF THE CONVENTION, WHICH IS INTENDED TO STRENGTHEN LEGAL PROTECTION THROUGHOUT THE TERRITORY OF THE COMMUNITY AND TO FACILITATE RECOGNITION IN EACH CONTRACTING STATE OF JUDGMENTS GIVEN IN ANY OTHER CONTRACTING STATE.

19 THE ANSWER TO THE QUESTION SUBMITTED BY THE NATIONAL COURT MUST THEREFORE BE THAT THE CONCEPT OF LIS PENDENS PURSUANT TO ARTICLE 21 OF THE CONVENTION OF 27 SEPTEMBER 1968 COVERS A CASE WHERE A PARTY BRINGS AN ACTION BEFORE A COURT IN A CONTRACTING STATE FOR THE RESCISSION OR DISCHARGE OF AN INTERNATIONAL SALES CONTRACT WHILST AN ACTION BY THE OTHER PARTY TO ENFORCE THE SAME CONTRACT IS PENDING BEFORE A COURT IN ANOTHER CONTRACTING STATE.

COSTS

20 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED, IN THE NATURE OF 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 (SIXTH CHAMBER),

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE CORTE SUPREMA DI CASSAZIONE, BY ORDER OF 9 JANUARY 1986, HEREBY RULES :

THE CONCEPT OF LIS PENDENS PURSUANT TO ARTICLE 21 OF THE CONVENTION OF 27 SEPTEMBER 1968 COVERS A CASE WHERE A PARTY BRINGS AN ACTION BEFORE A COURT IN A CONTRACTING STATE FOR THE RESCISSION OR DISCHARGE OF AN INTERNATIONAL SALES CONTRACT WHILST AN ACTION BY THE OTHER PARTY TO ENFORCE THE SAME CONTRACT IS PENDING BEFORE A COURT IN ANOTHER CONTRACTING STATE.

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AUTHOR Court of Justice of the European Communities

FORM Judgment

TREATY European Economic Community

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CONCERNS Interprets 41968A0927(01)-A21

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG Italian

OBSERV Federal Republic of Germany ; Italy ; Commission ; Member States ; Institutions

NATIONA Italy

NATCOUR *A8* Tribunale civile di Roma, Sezione II, sentenza del 27/04/1977
04/07/1977 (7804 - RG 19311/74)
A9 Corte di Cassazione, Sezioni unite civili, ordinanza del 09/01/1986
28/05/1986 (306 - RG 5404/78)
P1 Corte di Cassazione, Sezioni unite civili, sentenza del 07/04/1988
12/12/1988 (6755 - RG 5404/78)
- Il massimario del Foro italiano 1988 Col.1019 (résumé)

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PROCEDU Reference for a preliminary ruling

ADVGEN Mancini

JUDGRAP Bahlmann

DATES of document: 08/12/1987
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Judgment of the Court (Fifth Chamber)
of 11 November 1986
SpA Iveco Fiat v Van Hool NV.
Reference for a preliminary ruling: Hof van Cassatie - Belgium.
Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters - Application of a jurisdiction clause which has expired.
Case 313/85.

CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - PROROGATION OF JURISDICTION - WRITTEN AGREEMENT CONTAINING A JURISDICTION CLAUSE AND STIPULATING THAT THE AGREEMENT CAN BE RENEWED ONLY IN WRITING - EXPIRY OF THE AGREEMENT - MAINTENANCE OF BUSINESS RELATIONS BETWEEN THE PARTIES - VALIDITY OF THE JURISDICTION CLAUSE - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 17)

ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT WHERE A WRITTEN AGREEMENT CONTAINING A JURISDICTION CLAUSE AND STIPULATING THAT THE AGREEMENT CAN BE RENEWED ONLY IN WRITING HAS EXPIRED BUT HAS CONTINUED TO SERVE AS THE LEGAL BASIS FOR THE CONTRACTUAL RELATIONS BETWEEN THE PARTIES , THE JURISDICTION CLAUSE SATISFIES THE FORMAL REQUIREMENTS IN ARTICLE 17 IF , UNDER THE LAW APPLICABLE , THE PARTIES COULD VALIDLY RENEW THE ORIGINAL AGREEMENT OTHERWISE THAN IN WRITING , OR IF , CONVERSELY , ONE OF THE PARTIES HAS CONFIRMED IN WRITING EITHER THE JURISDICTION CLAUSE OR THE SET OF TERMS WHICH HAS BEEN TACITLY RENEWED AND OF WHICH THE JURISDICTION CLAUSE FORMS PART , WITHOUT ANY OBJECTION FROM THE OTHER PARTY TO WHOM SUCH CONFIRMATION HAS BEEN NOTIFIED.

IN CASE 313/85

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 BELGIAN COURT OF CASSATION FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

IVECO FIAT SPA , A COMPANY INCORPORATED UNDER ITALIAN LAW , HAVING ITS REGISTERED OFFICE IN TURIN (ITALY),

AND

VAN HOOL NV , A COMPANY INCORPORATED UNDER BELGIAN LAW , HAVING ITS REGISTERED OFFICE IN KONINGSHOOIKT-LIER (BELGIUM),

ON THE INTERPRETATION OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (OFFICIAL JOURNAL 1978 , L 304 , P. 36),

1 BY ORDER OF 4 OCTOBER 1985 WHICH WAS RECEIVED AT THE COURT ON 18 OCTOBER 1985 , THE BELGIAN COURT OF CASSATION REFERRED TO THE COURT OF JUSTICE 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 (HEREINAFTER REFERRED TO AS ' THE CONVENTION ') A QUESTION CONCERNING THE INTERPRETATION

OF ARTICLE 17 OF THE CONVENTION.

2 THE QUESTION AROSE IN A DISPUTE BETWEEN IVECO FIAT SPA (' FIAT '), A COMPANY INCORPORATED UNDER ITALIAN LAW , AND VAN HOOL NV (' VAN HOOL '), A COMPANY INCORPORATED UNDER BELGIAN LAW , CONCERNING THE VALIDITY OF A JURISDICTION CLAUSE INSERTED IN A WRITTEN AGREEMENT GRANTING AN EXCLUSIVE SALES CONCESSION WHICH STIPULATED THAT THE AGREEMENT COULD BE RENEWED ONLY IN WRITING BUT WHICH CONTINUED , AFTER ITS EXPIRY , TO SERVE AS THE LEGAL BASIS FOR THE CONTRACTUAL RELATIONS BETWEEN THE PARTIES NOTWITHSTANDING THE FACT THAT IT WAS NOT RENEWED IN WRITING .

3 THE BELGIAN COURT OF CASSATION , HEARING THE CASE , DECIDED TO STAY THE PROCEEDINGS AND REFER THE FOLLOWING QUESTION TO THE COURT FOR A PRELIMINARY RULING :

' ARE THE REQUIREMENTS OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 SATISFIED BY A WRITTEN AGREEMENT WHICH CONTAINS A JURISDICTION CLAUSE BUT WHOSE EXPIRY DATE HAS PASSED WHERE THAT AGREEMENT HAS CONTINUED TO SERVE AS THE LEGAL BASIS FOR THE CONTRACTUAL RELATIONS BETWEEN THE PARTIES ALTHOUGH THE CONDITION STIPULATING THAT THE AGREEMENT COULD BE RENEWED ONLY IN WRITING WAS NOT FULFILLED?

'

4 FOR A MORE DETAILED EXPOSITION OF THE FACTS OF THE CASE , THE COURSE OF THE PROCEDURE AND THE OBSERVATIONS SUBMITTED UNDER ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE , REFERENCE IS MADE TO THE REPORT FOR THE HEARING. THOSE DETAILS ARE REFERRED TO HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT .

5 IN ORDER TO PLACE THE QUESTION IN ITS PROPER CONTEXT , IT SHOULD BE NOTED IN THE FIRST PLACE THAT THE SOLE PURPOSE OF THE FORMAL REQUIREMENT LAID DOWN BY ARTICLE 17 OF THE CONVENTION TO THE EFFECT THAT A JURISDICTION CLAUSE MUST BE IN WRITING IF IT IS TO BE VALID IS TO ENSURE THAT THE CONSENSUS BETWEEN THE PARTIES IS IN FACT ESTABLISHED AND IT IMPOSES UPON THE NATIONAL COURT THE DUTY OF EXAMINING WHETHER THE CLAUSE CONFERRING JURISDICTION UPON IT WAS IN FACT THE SUBJECT OF SUCH A CONSENSUS , WHICH MUST BE CLEARLY AND PRECISELY DEMONSTRATED (JUDGMENTS OF 14 DECEMBER 1976 IN CASE 24/76 ESTASIS SALOTTI V RUWA (1976) ECR 1831 , AND IN CASE 25/76 SEGOURA V BONAKDARIAN (1976) ECR 1851).

6 IN ORDER TO ANSWER THE QUESTION RAISED BY THE NATIONAL COURT , IT IS NECESSARY TO DISTINGUISH BETWEEN TWO SITUATIONS.

7 IF THE APPLICABLE LAW ALLOWS THE ORIGINAL AGREEMENT TO BE RENEWED WITHOUT COMPLYING WITH THE CLAUSE EXPRESSLY STIPULATED THEREIN TO THE EFFECT THAT RENEWAL MUST BE IN WRITING , ALL THE TERMS OF THE AGREEMENT CONTINUE TO BE BINDING ON THE PARTIES , INCLUDING THE JURISDICTION CLAUSE , IN RELATION TO WHICH THEIR CONSENT MUST BE ESTABLISHED BEYOND DOUBT IN THE MANNER PROVIDED FOR BY ARTICLE 17.

8 IF , HOWEVER , ACCORDING TO THE APPLICABLE LAW , THE ORIGINAL AGREEMENT COULD NOT BE RENEWED OTHERWISE THAN IN WRITING , IT IS NECESSARY TO CONSIDER WHETHER THE JURISDICTION CLAUSE , IN SO FAR AS IT FORMS PART OF A SET OF

TERMS WHICH WERE TACITLY TAKEN OVER FROM A PREVIOUS WRITTEN AGREEMENT THAT HAS EXPIRED AND WHICH CONTINUED TO SERVE AS THE LEGAL BASIS FOR THE CONTRACTUAL RELATIONS BETWEEN THE PARTIES , SATISFIES THE CONDITIONS LAID DOWN BY ARTICLE 17.

9 IT IS CLEAR FROM THE CASE-LAW OF THE COURT THAT IN THE CASE OF AN UNWRITTEN AGREEMENT CONFERRING JURISDICTION , THE CONDITIONS OF ARTICLE 17 ARE SATISFIED IF WRITTEN CONFIRMATION OF THAT AGREEMENT BY ONE OF THE PARTIES HAS BEEN RECEIVED BY THE OTHER AND THE LATTER HAS RAISED NO OBJECTION TO IT WITHIN A REASONABLE TIME THEREAFTER (JUDGMENT OF 11 JULY 1985 IN CASE 221/84 BERGHOFER V ASA (1985) ECR 2699). ACCORDINGLY , ON THE ASSUMPTION THAT THE JURISDICTION CLAUSE FORMS PART OF A SET OF TERMS WHICH WERE TACITLY TAKEN OVER FROM A PREVIOUS WRITTEN AGREEMENT THAT EXPIRED AND WHICH CONTINUED TO SERVE AS THE LEGAL BASIS FOR THE CONTRACTUAL RELATIONS BETWEEN THE PARTIES , THE FORMAL REQUIREMENTS OF ARTICLE 17 ARE SATISFIED ONLY IF ONE OF THE PARTIES HAS CONFIRMED IN WRITING EITHER THE JURISDICTION CLAUSE OR THE SET OF TERMS OF WHICH THAT CLAUSE FORMS PART , WITHOUT ANY OBJECTION FROM THE OTHER PARTY TO WHOM SUCH CONFIRMATION HAS BEEN NOTIFIED.

10 THE ANSWER TO THE QUESTION SUBMITTED BY THE BELGIAN COURT OF CASSATION MUST THEREFORE BE THAT ARTICLE 17 OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT WHERE A WRITTEN AGREEMENT CONTAINING A JURISDICTION CLAUSE AND STIPULATING THAT THE AGREEMENT CAN BE RENEWED ONLY IN WRITING HAS EXPIRED BUT HAS CONTINUED TO SERVE AS THE LEGAL BASIS FOR THE CONTRACTUAL RELATIONS BETWEEN THE PARTIES , THE JURISDICTION CLAUSE SATISFIES THE FORMAL REQUIREMENTS IN ARTICLE 17 IF , UNDER THE LAW APPLICABLE , THE PARTIES COULD VALIDLY RENEW THE ORIGINAL AGREEMENT OTHERWISE THAN IN WRITING , OR IF , CONVERSELY , ONE OF THE PARTIES HAS CONFIRMED IN WRITING EITHER THE JURISDICTION CLAUSE OR THE SET OF TERMS WHICH HAS BEEN TACITLY RENEWED AND OF WHICH THE JURISDICTION CLAUSE FORMS PART , WITHOUT ANY OBJECTION FROM THE OTHER PARTY TO WHOM SUCH CONFIRMATION HAS BEEN NOTIFIED.

COSTS

11 THE COSTS INCURRED BY THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF 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 (FIFTH CHAMBER),

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE BELGIAN COURT OF CASSATION , BY ORDER OF 4 OCTOBER 1985 , HEREBY RULES :

ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT WHERE A WRITTEN AGREEMENT CONTAINING A JURISDICTION CLAUSE AND STIPULATING THAT AN AGREEMENT CAN BE RENEWED ONLY IN WRITING HAS EXPIRED BUT HAS CONTINUED TO SERVE AS THE LEGAL BASIS FOR THE CONTRACTUAL RELATIONS

BETWEEN THE PARTIES , THE JURISDICTION CLAUSE SATISFIES THE FORMAL REQUIREMENTS IN ARTICLE 17 IF , UNDER THE LAW APPLICABLE , THE PARTIES COULD VALIDLY RENEW THE ORIGINAL AGREEMENT OTHERWISE THAN IN WRITING , OR IF , CONVERSELY , ONE OF THE PARTIES HAS CONFIRMED IN WRITING EITHER THE JURISDICTION CLAUSE OR THE SET OF TERMS WHICH HAS BEEN TACITLY RENEWED AND OF WHICH THE JURISDICTION CLAUSE FORMS PART , WITHOUT ANY OBJECTION FROM THE OTHER PARTY TO WHOM SUCH CONFIRMATION HAS BEEN NOTIFIED.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
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PUBREF	European Court reports 1986 Page 03337
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JURCIT	41968A0927(01)-A17 : N 5 7 11 61976J0024 : N 5 61976J0025 : N 5 61984J0221 : N 9
CONCERNS	Interprets 41968A0927(01)-A17
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
OBSERV	United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Belgium
NATCOUR	*A7* Rechtbank van koophandel Mechelen, vonnis van 06/07/83 (1799 22752 23314) *A8* Hof van beroep Antwerpen, 4e kamer, arrest van 15/02/84 (415 454 2091/83) *A9* Hof van cassatie (Belgie), 1e kamer, arrest van 04/10/85 (4.682) - Pasicrisie belge 1986 I p.109-112 *P1* Hof van cassatie (Belgie), 1e kamer, arrest van 20/02/87 (4682)

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PROCEDU Reference for a preliminary ruling

ADVGEN Vilaça

JUDGRAP Schockweiler

DATES of document: 11/11/1986
of application: 18/10/1985

Judgment of the Court
of 15 January 1987
Hassan Shenavai v Klaus Kreischer.
Reference for a preliminary ruling: Landgericht Kaiserslautern - Germany.
Brussels Convention - Place of performance of an obligation.
Case 266/85.

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CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - SPECIAL JURISDICTION - COURT OF THE PLACE OF PERFORMANCE OF A CONTRACTUAL OBLIGATION - RELEVANT OBLIGATION FOR PURPOSES OF DETERMINING JURISDICTION - ACTION FOR RECOVERY OF ARCHITECT' S FEES

(CONVENTION OF 27 SEPTEMBER 1968, ART. 5 (1)*)

WHEREAS IN THE CASE OF AN ACTION BASED ON AN OBLIGATION UNDER A CONTRACT OF EMPLOYMENT OR ANOTHER CONTRACT WITH THE SAME PARTICULARITIES FOR WORK OTHER THAN ON A SELF-EMPLOYED BASIS THE RELEVANT OBLIGATION FOR THE PURPOSE OF DETERMINING THE PLACE OF PERFORMANCE WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 IS THE OBLIGATION WHICH CHARACTERIZES THAT CONTRACT, THE POSITION IS DIFFERENT WHERE NO SUCH PARTICULARITIES EXIST, AS IN THE CASE OF MOST CONTRACTS, WHERE THE GENERAL RULE APPLIES THAT THE RELEVANT OBLIGATION IS THAT ON WHICH THE PLAINTIFF' S ACTION IS BASED . IN A DISPUTE CONCERNING PROCEEDINGS FOR THE RECOVERY OF FEES COMMENCED BY AN ARCHITECT COMMISSIONED TO DRAW UP PLANS FOR THE BUILDING OF HOUSES, THEREFORE, THE OBLIGATION TO BE TAKEN INTO CONSIDERATION IS THE CONTRACTUAL OBLIGATION WHICH FORMS THE ACTUAL BASIS OF THE LEGAL PROCEEDINGS.

IN CASE 266/85

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 LANDGERICHT ((REGIONAL COURT)) KAISERSLAUTERN, FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

HASSAN SHENAVAI, ROCKENHAUSEN (FEDERAL REPUBLIC OF GERMANY),

AND

KLAUS KREISCHER, GELEEN (NETHERLANDS),

ON THE INTEPRETATION OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (OFFICIAL JOURNAL 1978, L*304, P.*77; HEREINAFTER REFERRED TO AS "THE CONVENTION "),

THE COURT

COMPOSED OF : LORD MACKENZIE STUART, PRESIDENT, C. KAKOURIS, T. F . O' HIGGINS AND F. SCHOCKWEILER (PRESIDENTS OF CHAMBERS), G. BOSCO, T . KOOPMANS, K. BAHLMANN, R. JOLIET AND J. C. RODRIGUEZ IGLESIAS, JUDGES,

ADVOCATE GENERAL : G. F. MANCINI

REGISTRAR : H.A. RUEHL, PRINCIPAL ADMINISTRATOR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

KLAUS KREISCHER, THE DEFENDANT IN THE MAIN PROCEEDINGS, IN THE WRITTEN PROCEDURE, BY DR H. O. MERKEL, RECHTSANWALT, KAISERSLAUTERN

THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, IN THE WRITTEN PROCEDURE, BY CHRISTOF BOEHMER,

THE UNITED KINGDOM, IN THE WRITTEN PROCEDURE, BY B. E. MCHENRY, OF THE TREASURY SOLICITOR' S DEPARTMENT,

THE GOVERNMENT OF THE ITALIAN REPUBLIC, BY L. F. BRAVO, HEAD OF THE DEPARTMENT FOR CONTENTIOUS DIPLOMATIC AFFAIRS, ASSISTED BY OSCAR FIUMARA, AVVOCATO DELLO STATO,

THE COMMISSION OF THE EUROPEAN COMMUNITIES, BY FRIEDRICH-WILHELM ALBRECHT, A MEMBER OF ITS LEGAL DEPARTMENT, ASSISTED BY SILVIO PIERI,

HAVING REGARD TO THE REPORT FOR THE HEARING AND FURTHER TO THE HEARING ON 10 JULY 1986,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 4 NOVEMBER 1986,

GIVES THE FOLLOWING

JUDGMENT

1 BY AN ORDER OF 5 MARCH 1985, WHICH WAS RECEIVED AT THE COURT ON 30 AUGUST 1985, THE LANDGERICHT ((REGIONAL COURT)) KAISERSLAUTERN 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 CONCERNING THE INTERPRETATION OF ARTICLE 5 (1) OF THE CONVENTION.

2 THE QUESTION AROSE IN THE COURSE OF PROCEEDINGS BETWEEN MR SHENAVAI, AN ARCHITECT OF ROCKENHAUSEN, FEDERAL REPUBLIC OF GERMANY, AND MR KREISCHER, RESIDING AT GELEEN, NETHERLANDS, CONCERNING THE RECOVERY OF ARCHITECT' S FEES FOR THE PREPARATION OF PLANS FOR THE CONSTRUCTION OF THREE HOLIDAY HOMES NEAR ROCKENHAUSEN.

3 THE AMTSGERICHT ((LOCAL COURT)) ROCKENHAUSEN, BEFORE WHICH THE ACTION WAS BROUGHT, ALLOWED MR KREISCHER' S OBJECTION THAT IT LACKED JURISDICTION ON THE GROUND THAT THE PLACE OF PERFORMANCE OF THE OBLIGATION TO PAY ARCHITECT' S FEES WAS THE DOMICILE OF THE PERSON WHO COMMISSIONED THE WORK; MR KREISCHER WAS DOMICILED THE NETHERLANDS, SO THAT THE REQUISITE CONDITIONS FOR HIM TO BE SUED IN A GERMAN COURT WERE NOT SATISFIED.

4 MR SHENAVAI APPEALED TO THE LANDGERICHT KAISERSLAUTERN WHICH TOOK THE VIEW THAT UNDER GERMAN LAW THE PLACE OF PERFORMANCE OF THE ARCHITECT' S CONTRACT WAS THE PLACE WHERE HIS OFFICE WAS SITUATED AND WHERE THE PLANNED BUILDINGS WERE TO BE ERECTED. THUS THE PLACE OF PERFORMANCE OF ALL THE OBLIGATIONS ARISING UNDER THE CONTRACT WAS TO BE FOUND AT THE "FOCAL POINT" OF THE CONTRACTUAL RELATIONSHIP SEEN AS A WHOLE .

5 THE LANDGERICHT WENT ON TO STATE THAT IT WAS NOT CERTAIN THAT THE SAME INTERPRETATION HAD TO BE FOLLOWED AS REGARDS ARTICLE 5 (1) OF THE CONVENTION, SINCE SOME JUDGMENTS OF THE COURT MADE INTERNATIONAL TERRITORIAL JURISDICTION DEPENDENT ON THE PLACE OF PERFORMANCE OF THE CONTRACTUAL OBLIGATION ON WHICH THE JUDICIAL PROCEEDINGS WERE BASED - IN THIS CASE, THE OBLIGATION TO PAY THE FEES. IN THOSE CIRCUMSTANCES THE LANDGERICHT DEEMED IT NECESSARY TO REFER THE FOLLOWING QUESTION TO THE COURT FOR A PRELIMINARY RULING :

> "FOR THE PURPOSES OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, IS THE PLACE OF PERFORMANCE, IN THE SPECIFIC CASE OF A CLAIM FOR FEES BY AN ARCHITECT ENGAGED SOLELY IN PLANNING WORK, TO BE DETERMINED BY REFERENCE TO THE CONTRACTUAL OBLIGATION WHICH FORMS THE ACTUAL BASIS OF THE LEGAL PROCEEDINGS (IN THIS CASE A DEBT PAYABLE UNDER GERMAN LAW AT THE PLACE WHERE THE DEFENDANT IS DOMICILED), OR BY REFERENCE TO THE OBLIGATION TYPICAL OF THE CONTRACT AND CHARACTERIZING THE CONTRACTUAL RELATIONSHIP AS A WHOLE (THAT IS TO SAY, THE PLACE WHERE THE ARCHITECT HAS HIS PRACTICE AND/OR THE SITE OF THE PLANNED BUILDING)?"

6 IT SHOULD BE RECALLED THAT ARTICLE 2 OF THE CONVENTION LAYS DOWN THE GENERAL RULE THAT JURISDICTION IS TO BE BASED ON THE DEFENDANT' S DOMICILE, BUT THAT ARTICLE 5 (1) THEREOF FURTHER PROVIDES THAT, IN MATTERS RELATING TO A CONTRACT, THE DEFENDANT MAY ALSO BE SUED "IN THE COURTS FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION ". AS THE COURT OBSERVED IN ITS JUDGMENT OF 6 OCTOBER 1976 (CASE 12/76 TESSILI V DUNLOP ((1976)) ECR 1473), THAT FREEDOM OF CHOICE WAS INTRODUCED IN VIEW OF THE EXISTENCE IN CERTAIN CASES OF A PARTICULARLY CLOSE RELATIONSHIP BETWEEN A DISPUTE AND THE COURT WHICH MAY BE MOST CONVENIENTLY CALLED UPON TO TAKE COGNIZANCE OF THE MATTER.

7 IN THE SAME JUDGMENT THE COURT RULED THAT THE QUESTION OF THE LOCATION OF THE "PLACE OF PERFORMANCE" OF AN OBLIGATION WAS TO BE DETERMINED PURSUANT TO THE LAW GOVERNING THE OBLIGATION AT ISSUE AND IN ACCORDANCE WITH THE RULES ON THE CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER WAS BROUGHT.

8 IN ANOTHER JUDGMENT OF 6 OCTOBER 1976 (CASE 14/76 DE BLOOS V BOUYER ((1976)) ECR 1497) THE COURT OBSERVED THAT THE CONVENTION WAS INTENDED TO DETERMINE THE INTERNATIONAL JURISDICTION OF THE COURTS OF THE CONTRACTING STATES, TO FACILITATE THE RECOGNITION OF JUDGMENTS AND TO INTRODUCE AN EXPEDITIOUS PROCEDURE FOR SECURING THE ENFORCEMENT OF JUDGMENTS; IT HELD THAT THOSE OBJECTIVES IMPLIED THE NEED TO AVOID, SO FAR AS POSSIBLE, CREATING A SITUATION IN WHICH A NUMBER OF COURTS HAD JURISDICTION IN RESPECT OF ONE AND THE SAME CONTRACT, AND THAT ARTICLE 5 (1) OF THE CONVENTION COULD THEREFORE NOT BE INTERPRETED AS REFERRING TO ANY OBLIGATION WHATSOEVER ARISING UNDER THE CONTRACT IN QUESTION .

9 THE COURT CONCLUDED THAT, FOR THE PURPOSES OF DETERMINING THE PLACE OF PERFORMANCE WITHIN THE MEANING OF ARTICLE 5, THE OBLIGATION TO BE TAKEN INTO ACCOUNT WAS THAT WHICH CORRESPONDED TO THE CONTRACTUAL RIGHT ON WHICH THE PLAINTIFF' S ACTION WAS BASED. IT RULED THAT, IN A CASE WHERE

THE PLAINTIFF ASSERTED THE RIGHT TO BE PAID DAMAGES OR SOUGHT DISSOLUTION OF THE CONTRACT ON THE GROUND OF THE WRONGFUL CONDUCT OF THE OTHER PARTY, THAT OBLIGATION WAS STILL THAT WHICH AROSE UNDER THE CONTRACT AND THE NON-PERFORMANCE OF WHICH WAS RELIED UPON TO SUPPORT SUCH CLAIMS.

10 THE GENERAL RULE THEREBY DEFINED ADMITS, HOWEVER, OF CERTAIN EXCEPTIONS ON THE GROUND THAT "MATTERS RELATING TO A CONTRACT" COVER RELATIONSHIPS OF WIDELY DIFFERING KINDS, BOTH FROM THE VIEWPOINT OF THEIR SOCIAL IMPORTANCE AND FROM THAT OF THE OBLIGATIONS ENTERED INTO . THE CONVENTION TAKES ACCOUNT OF THAT DIVERSITY BY LAYING DOWN CERTAIN SPECIAL RULES WHICH APPLY TO SPECIFIC CONTRACTUAL RELATIONSHIPS. FOR EXAMPLE, ARTICLE 16 OF THE CONVENTION PROVIDES FOR EXCLUSIVE JURISDICTION IN CASES CONCERNING TENANCIES OF IMMOVABLE PROPERTY .

11 GUIDED BY SIMILAR CONSIDERATIONS, THE COURT, IN ITS JUDGMENT OF 26 MAY 1982 (CASE 133/81 IVENEL V SCHWAB ((1982)) ECR 1891), HELD THAT IN THE CASE OF A CLAIM BASED ON DIFFERENT OBLIGATIONS ARISING UNDER A SINGLE CONTRACT FOR COMMERCIAL REPRESENTATION WHICH HAD BEEN DESCRIBED BY THE NATIONAL COURT AS A CONTRACT OF EMPLOYMENT, THE OBLIGATION TO BE TAKEN INTO CONSIDERATION FOR THE PURPOSES OF ARTICLE 5 (1) OF THE CONVENTION WAS THE OBLIGATION WHICH CHARACTERIZED THE CONTRACT AND WAS NORMALLY THE OBLIGATION TO CARRY OUT WORK.

12 IN THOSE CIRCUMSTANCES, THE QUESTION SUBMITTED BY THE LANDGERICHT MUST BE REGARDED AS SEEKING TO ESTABLISH IN PARTICULAR WHETHER, IN PROCEEDINGS FOR THE RECOVERY OF ARCHITECT' S FEES, THE GENERAL RULE SET OUT IN THE AFORESAID DE BLOOS JUDGMENT MUST APPLY, UNDER WHICH THE OBLIGATION TO BE TAKEN INTO CONSIDERATION IS THE ONE ON WHICH THE PLAINTIFF' S ACTION IS BASED, OR CONVERSELY WHETHER THE CASE DISPLAYS SPECIAL FEATURES ANALOGOUS TO THOSE WHICH WERE IN EVIDENCE IN THE IVENEL CASE .

13 THE ARGUMENT PRESENTED TO THE COURT DEALT NOT ONLY WITH THE PROBLEM WHETHER REGARD SHOULD BE HAD TO THE NATURE OF THE DISPUTED CONTRACT IN DETERMINING THE OBLIGATION TO BE TAKEN INTO ACCOUNT, BUT ALSO WITH THE PROBLEM RAISED BY THE PRESENCE, WITHIN ONE AND THE SAME DISPUTE, OF A NUMBER OF OBLIGATIONS FORMING THE BASIS OF THE JUDICIAL PROCEEDINGS .

14 ON THE FIRST POINT THE UNITED KINGDOM ADVOCATES A GENERALIZED APPLICATION OF THE CRITERION ADOPTED BY THE COURT IN THE ABOVEMENTIONED IVENEL JUDGMENT WITH REFERENCE TO A CONTRACT OF EMPLOYMENT, ARGUING THAT THE APPLICATION OF THAT CRITERION TO ALL CONTRACTS FOR PROFESSIONAL SERVICES WOULD OFFER CERTAIN ADVANTAGES. TO INTERPRET ARTICLE 5 (1) ACCORDINGLY WOULD IN PARTICULAR HAVE THE EFFECT OF AVOIDING A SITUATION IN WHICH COURTS IN DIFFERENT CONTRACTING STATES HAD JURISDICTION OVER DIFFERENT CLAIMS BASED ON ONE AND THE SAME CONTRACT, AND WOULD LOCATE THE FORUM IN THE CONTRACTING STATE WHOSE LAW WAS NORMALLY APPLICABLE TO THE CONTRACT. IN A CASE SUCH AS THE PRESENT ONE IT WOULD HAVE THE FURTHER ADVANTAGE OF AFFORDING A GENUINE ALTERNATIVE TO THE FORUM OF THE DEFENDANT' S DOMICILE - THE USUAL FORUM UNDER THE CONVENTION.

15 THE GERMAN AND ITALIAN GOVERNMENTS AND THE COMMISSION DO NOT SUBSCRIBE TO THAT POINT OF VIEW. THE GERMAN GOVERNMENT ADMITS THAT SOME ARGUMENTS MILITATE IN FAVOUR OF A SINGLE CONTRACTUAL FORUM BUT EMPHASIZES, FIRST, THAT SOME CONTRACTS DO NOT EMBODY A CHARACTERISTIC OBLIGATION, FOR EXAMPLE

WHEN THE OBLIGATIONS OF THE TWO PARTIES ARE OF AN EQUIVALENT NATURE (AS IN THE CASE OF A CONTRACT OF BARTER), AND, SECONDLY, THAT IT WAS THE INTENTION OF THE AUTHORS OF THE CONVENTION, AS REFLECTED IN CERTAIN LANGUAGE VERSIONS OF ARTICLE 5 (1) THEREOF, TO ESTABLISH THE FORUM OF THE PLACE OF PERFORMANCE BY REFERENCE TO THE CONTRACTUAL OBLIGATION ON WHICH THE JUDICIAL PROCEEDINGS WERE ACTUALLY BASED .

16 IN THAT CONNECTION IT SHOULD FIRST BE OBSERVED THAT CONTRACTS OF EMPLOYMENT, LIKE OTHER CONTRACTS FOR WORK OTHER THAN ON A SELF-EMPLOYED BASIS, DIFFER FROM OTHER CONTRACTS - EVEN THOSE FOR THE PROVISION OF SERVICES - BY VIRTUE OF CERTAIN PARTICULARITIES : THEY CREATE A LASTING BOND WHICH BRINGS THE WORKER TO SOME EXTENT WITHIN THE ORGANIZATIONAL FRAMEWORK OF THE BUSINESS OF THE UNDERTAKING OR EMPLOYER, AND THEY ARE LINKED TO THE PLACE WHERE THE ACTIVITIES ARE PURSUED, WHICH DETERMINES THE APPLICATION OF MANDATORY RULES AND COLLECTIVE AGREEMENTS. IT IS ON ACCOUNT OF THOSE PARTICULARITIES THAT THE COURT OF THE PLACE IN WHICH THE CHARACTERISTIC OBLIGATION OF SUCH CONTRACTS IS TO BE PERFORMED IS CONSIDERED BEST SUITED TO RESOLVING THE DISPUTES TO WHICH ONE OR MORE OBLIGATIONS UNDER SUCH CONTRACTS MAY GIVE RISE .

17 WHEN NO SUCH PARTICULARITIES EXIST, IT IS NEITHER NECESSARY NOR APPROPRIATE TO IDENTIFY THE OBLIGATION WHICH CHARACTERIZES THE CONTRACT AND TO CENTRALIZE AT THE PLACE OF PERFORMANCE THEREOF JURISDICTION, BASED ON PLACE OF PERFORMANCE, OVER DISPUTES CONCERNING ALL THE OBLIGATIONS UNDER THE CONTRACT. THE VARIETY AND MULTIPLICITY OF CONTRACTS AS A WHOLE ARE SUCH THAT THE ABOVE CRITERION MIGHT IN THOSE OTHER CASES CREATE UNCERTAINTY AS TO JURISDICTION, WHEREAS IT IS PRECISELY SUCH UNCERTAINTY WHICH THE CONVENTION IS DESIGNED TO REDUCE

18 ON THE OTHER HAND, NO SUCH UNCERTAINTY EXISTS FOR MOST CONTRACTS IF REGARD IS HAD SOLELY TO THE CONTRACTUAL OBLIGATION WHOSE PERFORMANCE IS SOUGHT IN THE JUDICIAL PROCEEDINGS. THE PLACE IN WHICH THAT OBLIGATION IS TO BE PERFORMED USUALLY CONSTITUTES THE CLOSEST CONNECTING FACTOR BETWEEN THE DISPUTE AND THE COURT HAVING JURISDICTION OVER IT, AND IT IS THIS CONNECTING FACTOR WHICH EXPLAINS WHY, IN CONTRACTUAL MATTERS, IT IS THE COURT OF THE PLACE OF PERFORMANCE OF THE OBLIGATION WHICH HAS JURISDICTION.

19 ADMITTEDLY, THE ABOVE RULE DOES NOT AFFORD A SOLUTION IN THE PARTICULAR CASE OF A DISPUTE CONCERNED WITH A NUMBER OF OBLIGATIONS ARISING UNDER THE SAME CONTRACT AND FORMING THE BASIS OF THE PROCEEDINGS COMMENCED BY THE PLAINTIFF. HOWEVER, IN SUCH A CASE THE COURT BEFORE WHICH THE MATTER IS BROUGHT WILL, WHEN DETERMINING WHETHER IT HAS JURISDICTION, BE GUIDED BY THE MAXIM ACCESSORIUM SEQUITUR PRINCIPALE; IN OTHER WORDS, WHERE VARIOUS OBLIGATIONS ARE AT ISSUE, IT WILL BE THE PRINCIPAL OBLIGATION WHICH WILL DETERMINE ITS JURISDICTION. THAT COMPLICATION DOES NOT, HOWEVER, ARISE IN THE CASE REFERRED TO IN THE QUESTION RAISED BY THE LANDGERICHT KAISERSLAUTERN.

20 THE ANSWER TO BE GIVEN TO THE QUESTION REFERRED TO THE COURT SHOULD THEREFORE BE THAT, FOR THE PURPOSES OF DETERMINING THE PLACE OF PERFORMANCE WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION, THE OBLIGATION TO BE TAKEN INTO CONSIDERATION IN A DISPUTE CONCERNING PROCEEDINGS FOR

THE RECOVERY OF FEES COMMENCED BY AN ARCHITECT COMMISSIONED TO DRAW UP PLANS FOR THE BUILDING OF HOUSES IS THE CONTRACTUAL OBLIGATION WHICH FORMS THE ACTUAL BASIS OF LEGAL PROCEEDINGS .

COSTS

21 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, THE UNITED KINGDOM, THE GOVERNMENT OF THE ITALIAN REPUBLIC, AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED, 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

in answer to the question referred to it by the Landgericht Kaiserslautern by order of 5 March 1985, hereby rules :

For the purposes of determining the place of performance within the meaning of Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the obligation to be taken into consideration in a dispute concerning proceedings for the recovery of fees commenced by an architect commissioned to draw up plans for the building of houses is the contractual obligation which forms the actual basis of legal proceedings .

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61976J0014 : N 8 12
61981J0133 : N 11 12

CONCERNS Interprets 41968A0927(01)-A05PT1

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Federal Republic of Germany ; United Kingdom ; Italy ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Landgericht Kaiserslautern, Vorlagebeschluß vom 05/03/85 (2 S 123/84)
P1 Landgericht Kaiserslautern, Urteil vom 05/05/87 (2 S 123/84)
- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1987 no 128
- Praxis des internationalen Privat- und Verfahrensrechts 1987 p.368-369
- Neue Juristische Wochenschrift 1988 p.652
- Versicherungsrecht 1988 p.754
ºNOTESº
- Mezger, Ernst: Praxis des internationalen Privat- und Verfahrensrechts 1987 p.346-349

NOTES Mezger, Ernst: Praxis des internationalen Privat- und Verfahrensrechts 1987 p.346-349
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PROCEDU Reference for a preliminary ruling

ADVGEN Mancini

JUDGRAP Koopmans

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of application: 30/08/1985

Judgment of the Court (Fifth Chamber)
of 10 July 1986
Fernand Carron v Federal Republic of Germany. Reference for a preliminary ruling: Hof van Cassatie - Belgium. Brussels Convention of 27 September 1968 - Second paragraph of Article 33 - Furnishing of an address for service. Case 198/85.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - PROCEDURE - FURNISHING OF AN ADDRESS FOR SERVICE OF PROCESS - RULES - APPLICABLE LAW - LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT - PRINCIPLES WHICH APPLY WHEN THAT LAW IS SILENT AS TO THE TIME AT WHICH AN ADDRESS FOR SERVICE IS TO BE GIVEN - FAILURE TO COMPLY WITH THE RULES ON THE FURNISHING OF AN ADDRESS FOR SERVICE - CONSEQUENCES

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 33)

THE SECOND PARAGRAPH OF ARTICLE 33 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT THE OBLIGATION TO GIVE AN ADDRESS FOR SERVICE OF PROCESS LAID DOWN IN THAT PROVISION MUST BE FULFILLED IN CONFORMITY WITH THE RULES LAID DOWN BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT , AND IF THAT LAW IS SILENT AS TO THE TIME AT WHICH THAT FORMALITY MUST BE OBSERVED , NO LATER THAN THE DATE ON WHICH THE DECISION AUTHORIZING ENFORCEMENT IS SERVED

THE CONSEQUENCES OF A FAILURE TO COMPLY WITH THE RULES ON THE FURNISHING OF AN ADDRESS FOR SERVICE ARE , BY VIRTUE OF ARTICLE 33 OF THE CONVENTION , GOVERNED BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT , PROVIDED THAT THE AIMS OF THE CONVENTION ARE RESPECTED.

IN CASE 198/85

REFERENCE TO THE COURT UNDER ARTICLE 3 (1) 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 HOF VAN CASSATIE (COURT OF CASSATION) OF BELGIUM FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

FERNAND CARRON , ANTWERP ,

AND

FEDERAL REPUBLIC OF GERMANY

ON THE INTERPRETATION OF ARTICLE 33 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY AN ORDER OF 14 JUNE 1985 , WHICH WAS RECEIVED AT THE COURT ON 26 JUNE 1985 , THE HOF VAN CASSATIE (COURT OF CASSATION) OF BELGIUM 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 (HEREINAFTER REFERRED TO AS ' THE CONVENTION ') THREE QUESTIONS CONCERNING THE INTERPRETATION OF THE SECOND PARAGRAPH OF ARTICLE 33 OF

THE CONVENTION.

2 THE QUESTIONS AROSE IN THE COURSE OF AN APPEAL IN CASSATION BROUGHT BY MR CARRON AGAINST A JUDGMENT OF 14 JUNE 1984 IN WHICH THE RECHTBANK VAN EERSTE AANLEG (COURT OF FIRST INSTANCE), ANTWERP , DISMISSED HIS APPLICATION TO SET ASIDE THE ORDER MADE BY THE SAME COURT ON 27 JULY 1982.

3 THAT ORDER , ISSUED ON THE APPLICATION OF THE FEDERAL REPUBLIC OF GERMANY , AUTHORIZED THE ENFORCEMENT IN BELGIUM OF A JUDGMENT OF 9 MARCH 1982 IN WHICH THE LANDGERICHT (REGIONAL COURT) DUISBURG ORDERED MR CARRON TO PAY THE FEDERAL REPUBLIC OF GERMANY DAMAGES IN THE SUM OF DM 5 240 000.

4 IN SUPPORT OF HIS APPLICATION TO SET ASIDE THE ENFORCEMENT ORDER MR CARRON ARGUED THAT THE PROCEEDINGS WERE VOID ON THE GROUND THAT IN THE APPLICATION INITIATING THE PROCEEDINGS THE FEDERAL REPUBLIC OF GERMANY HAD FAILED TO GIVE AN ADDRESS FOR SERVICE. IN ITS JUDGMENT OF 14 JUNE 1984 THE RECHTBANK VAN EERSTE AANLEG HELD , DISMISSING MR CARRON ' S APPLICATION , THAT THE REQUIREMENTS OF THE SECOND PARAGRAPH OF ARTICLE 33 OF THE CONVENTION HAD INDEED BEEN FULFILLED , BY THE INCLUSION OF AN ADDRESS FOR SERVICE IN THE DOCUMENT GIVING NOTICE OF THE ENFORCEMENT ORDER.

5 THE HOF VAN CASSATIE DECIDED TO REFER THE FOLLOWING QUESTIONS TO THE COURT FOR A PRELIMINARY RULING :

' 1 . IS THE QUESTION OF THE TIME AT WHICH AND THE MANNER IN WHICH AN ADDRESS FOR SERVICE OF PROCESS IS TO BE GIVEN , FOR THE PURPOSES OF THE SECOND PARAGRAPH OF ARTICLE 33 OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS TO BE DETERMINED BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT?

2 . IF QUESTION 1 IS ANSWERED IN THE AFFIRMATIVE , ARE THE RULES CONCERNING THE IMPOSITION OF A PENALTY ALSO GOVERNED BY THE STATE IN WHICH ENFORCEMENT IS SOUGHT?

3 . IF QUESTION 1 IS ANSWERED IN THE NEGATIVE , AT WHAT TIME AND IN WHAT MANNER IS AN ADDRESS FOR SERVICE OF PROCESS TO BE GIVEN AND WHAT PENALTY , IF ANY , IS TO BE IMPOSED FOR FAILURE TO COMPLY?

'

THE FIRST QUESTION

6 MR CARRON AND THE COMMISSION EMPHASIZE THAT THE CONVENTION SEEKS TO PUT INTO EFFECT A STANDARD ENFORCEMENT PROCEDURE IN ALL THE MEMBER STATES ; HENCE THE COURT IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT MAY NOT APPLY NATIONAL RULES OF PROCEDURE EXCEPT WHERE THE CONVENTION EXPRESSLY CALLS ON IT TO DO SO. SINCE ARTICLE 33 CONTAINS NO SUCH PROVISION AS REGARDS THE TIME AT WHICH AN ADDRESS FOR SERVICE SHOULD BE GIVEN , THE FIRST QUESTION MUST BE ANSWERED IN THE LIGHT OF THE AIMS OF THAT ARTICLE. IT SEEKS TO ENABLE THE DEFENDANT TO APPEAL AGAINST THE ENFORCEMENT ORDER AT THE EARLIEST OPPORTUNITY , AND ACCORDINGLY REQUIRES THAT AN ADDRESS FOR SERVICE OF PROCESS BE GIVEN , AT THE LATEST , BEFORE THE ORDER GRANTING ENFORCEMENT IS ISSUED.

7 THE GERMAN GOVERNMENT AND THE UNITED KINGDOM , ON THE OTHER HAND , TAKE THE VIEW THAT ACCORDING TO THE VERY WORDS OF ARTICLE 33 OF THE CONVENTION

THE RULES GOVERNING THE FURNISHING OF AN ADDRESS FOR SERVICE ARE TO BE LAID DOWN BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT. IN VIEW OF THE VAGUENESS OF THE ARTICLE AS TO THE TIME AT WHICH THE ADDRESS FOR SERVICE SHOULD BE GIVEN , THE GERMAN GOVERNMENT AND THE UNITED KINGDOM BELIEVE THAT REGARD SHOULD BE HAD TO THE FACT THAT THE FURNISHING OF SUCH AN ADDRESS IS OF NO IMPORTANCE TO THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT UNTIL THE COMMENCEMENT OF THE PERIOD ALLOWED FOR LODGING AN APPEAL AGAINST THE ENFORCEMENT ORDER UNDER ARTICLE 36 OF THE CONVENTION - THAT IS TO SAY , UNTIL THE ORDER IS DUE TO BE SERVED ON HIM.

8 IT MUST BE POINTED OUT THAT IN ARTICLES 31 TO 49 THE CONVENTION ESTABLISHES AN ENFORCEMENT PROCEDURE COMMON TO ALL MEMBER STATES. AT THE INITIAL EX PARTE STAGE , THAT PROCEDURE ENABLES THE APPLICANT SEEKING ENFORCEMENT OF A JUDGMENT IN ANOTHER MEMBER STATE TO OBTAIN SATISFACTION SWIFTLY. AT THE SECOND STAGE , INVOLVING PROCEEDINGS INTER PARTES , IT GUARANTEES THE RIGHTS OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT BY SETTING UP AN APPEAL PROCEDURE. UNDER THAT SYSTEM THE DUTY ON THE APPLICANT ' S PART TO GIVE AN ADDRESS FOR SERVICE OR TO APPOINT A REPRESENTATIVE AD LITEM MUST ENABLE THE PARTY AGAINST WHOM ENFORCEMENT HAS BEEN ORDERED TO LODGE AN APPEAL UNDER THE CONVENTION WITHOUT HAVING TO EMBARK ON FORMALITIES OUTSIDE THE CONFINES OF HIS HOME JURISDICTION. ALTHOUGH THE CONVENTION SETS THOSE AIMS , TO WHICH EFFECT MUST BE GIVEN IN ALL MEMBER STATES , IT MUST BE OBSERVED THAT IT DOES NOT LAY DOWN DETAILED RULES FOR IMPLEMENTING THE PROCEDURE BUT REFERS EXPRESSLY , ON SEVERAL POINTS , TO THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT.

9 THUS THE FIRST AND SECOND PARAGRAPHS OF ARTICLE 33 OF THE CONVENTION READ AS FOLLOWS : ' THE PROCEDURE FOR MAKING THE APPLICATION SHALL BE GOVERNED BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT. THE APPLICANT MUST GIVE AN ADDRESS FOR SERVICE OF PROCESS WITHIN THE AREA OF JURISDICTION OF THE COURT APPLIED TO. HOWEVER , IF THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT DOES NOT PROVIDE FOR THE FURNISHING OF SUCH AN ADDRESS , THE APPLICANT SHALL APPOINT A REPRESENTATIVE AD LITEM. '

10 IT IS CLEAR FROM THOSE PROVISIONS THAT THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT GOVERNS THE ENTIRE PROCEDURE FOR MAKING THE APPLICATION AND THAT THE FURNISHING BY THE APPLICANT OF AN ADDRESS FOR SERVICE OF PROCESS IS PART OF THAT PROCEDURE. WHERE THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT DOES NOT INDICATE THE EXACT TIME AT WHICH AN ADDRESS FOR SERVICE IS TO BE GIVEN , IT MUST BE HELD , IN ACCORDANCE WITH THE AIMS OF THE CONVENTION , THAT IT MUST BE GIVEN SUFFICIENTLY EARLY TO ENSURE THAT THE PROCEEDINGS ARE NOT IMPROPERLY DELAYED AND THAT THE RIGHTS OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT ARE SAFEGUARDED. AT THE LATEST IT MUST BE GIVEN WHEN THE DECISION AUTHORIZING ENFORCEMENT IS SERVED.

11 THE ANSWER TO BE GIVEN TO THE FIRST QUESTION SUBMITTED BY THE NATIONAL COURT MUST THEREFORE BE THAT THE SECOND PARAGRAPH OF ARTICLE 33 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT THE OBLIGATION TO GIVE AN ADDRESS FOR SERVICE OF PROCESS LAID DOWN IN THAT PROVISION MUST BE FULFILLED IN CONFORMITY WITH THE RULES LAID DOWN BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT , AND IF THAT

LAW IS SILENT AS TO THE TIME AT WHICH THAT FORMALITY MUST BE OBSERVED , NO LATER THAN THE DATE ON WHICH THE DECISION AUTHORIZING ENFORCEMENT IS SERVED.

THE SECOND QUESTION

12 MR CARRON TAKES THE VIEW THAT SINCE IT IS COMMUNITY LAW WHICH REQUIRES THAT AN ADDRESS FOR SERVICE SHOULD BE GIVEN BEFORE A DECISION AUTHORIZING ENFORCEMENT HAS BEEN ISSUED , IT IS LIKEWISE COMMUNITY LAW WHICH DETERMINES THE SANCTION ATTACHING TO ANY FAILURE TO DO SO. IN VIEW OF THE IMPERATIVE WORDING OF THE SECOND PARAGRAPH OF ARTICLE 33 , AND THE REQUIREMENT UNDER ARTICLE 35 OF THE CONVENTION THAT THE COURT TO WHICH APPLICATION IS MADE MUST ' WITHOUT DELAY ' NOTIFY ITS DECISION TO THE APPLICANT , THE SANCTION CAN ONLY BE THAT THE APPLICATION IS HELD TO BE VOID.

13 THE COURT MUST AGREE WITH THE GERMAN GOVERNMENT AND THE UNITED KINGDOM THAT INASMUCH AS THE CONVENTION PROVIDES NO SANCTION FOR FAILURE TO COMPLY WITH ARTICLE 33 THAT SANCTION MUST , LIKE THE OTHER PROCEDURAL RULES REFERRED TO IN THAT ARTICLE , BE DETERMINED BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT.

14 THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT MUST , HOWEVER , CONFORM TO THE AIMS OF THE CONVENTION ; THUS THE SANCTION PROVIDED FOR MAY NEITHER CAST DOUBT ON THE VALIDITY OF THE ENFORCEMENT ORDER NOR IN ANY WAY PREJUDICE THE RIGHTS OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT.

15 THE ANSWER TO THE SECOND QUESTION SUBMITTED BY THE NATIONAL COURT MUST THEREFORE BE THAT THE CONSEQUENCES OF A FAILURE TO COMPLY WITH THE RULES ON THE FURNISHING OF AN ADDRESS FOR SERVICE ARE , BY VIRTUE OF ARTICLE 33 OF THE CONVENTION , GOVERNED BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT , PROVIDED THAT THE AIMS OF THE CONVENTION ARE RESPECTED.

THIRD QUESTION

16 IN VIEW OF THE ANSWERS TO THE FIRST TWO QUESTIONS RAISED BY THE NATIONAL COURT , IT IS UNNECESSARY TO ANSWER THE THIRD QUESTION.

COSTS

17 THE COSTS INCURRED BY THE FEDERAL REPUBLIC OF GERMANY , THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , A STEP IN THE PROCEEDINGS 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 QUESTIONS SUBMITTED TO IT BY THE HOF VAN CASSATIE BY ORDER OF 14 JUNE 1985 , HEREBY RULES AS FOLLOWS :

(1) THE SECOND PARAGRAPH OF ARTICLE 33 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL

MATTERS MUST BE INTERPRETED AS MEANING THAT THE OBLIGATION TO GIVE AN ADDRESS FOR SERVICE OF PROCESS LAID DOWN IN THAT PROVISION MUST BE FULFILLED IN CONFORMITY WITH THE RULES LAID DOWN BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT , AND IF THAT LAW IS SILENT AS TO THE TIME AT WHICH THAT FORMALITY MUST BE OBSERVED , NO LATER THAN THE DATE ON WHICH THE DECISION AUTHORIZING ENFORCEMENT IS SERVED .

(2)THE CONSEQUENCES OF A FAILURE TO COMPLY WITH THE RULES ON THE FURNISHING OF AN ADDRESS FOR SERVICE ARE , BY VIRTUE OF ARTICLE 33 OF THE CONVENTION , GOVERNED BY THE LAW OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT , PROVIDED THAT THE AIMS OF THE CONVENTION ARE RESPECTED.

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SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	Dutch
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NATCOUR	*A9* Hof van cassatie (Belgie), 1e kamer, arrest van 14/06/1985 (4715) ; - Revue de droit international et de droit comparé 1987 p.310 (résumé) ; - Pasicrisie belge 1985 I p.1323-1328
NOTES	Ekelmans, Marc: Journal des tribunaux 1986 p.666-667 ; Huet, André: Chronique

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PROCEDU Reference for a preliminary ruling

ADVGEN Mancini

JUDGRAP Galmot

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Judgment of the Court (Fifth Chamber)
of 24 June 1986
Rudolf Anterist v Crédit lyonnais.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention of 27 Septembe 1968 - Article 17, third paragraph.
Case 22/85.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - PROROGATION OF JURISDICTION - AGREEMENT CONFERRING JURISDICTION ' CONCLUDED FOR THE BENEFIT OF ONLY ONE OF THE PARTIES ' - DEFINITION - CRITERIA

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 17 , THIRD PARAGRAPH)

SINCE ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 EMBODIES THE PRINCIPLE OF THE PARTIES ' AUTONOMY TO DETERMINE THE COURT OR COURTS WITH JURISDICTION , THE THIRD PARAGRAPH OF THAT PROVISION MUST BE INTERPRETED IN SUCH A WAY AS TO RESPECT THE PARTIES ' COMMON INTENTION WHEN THE CONTRACT WAS CONCLUDED. THEREFORE , IF AN AGREEMENT CONFERRING JURISDICTION IS TO BE REGARDED AS HAVING BEEN ' CONCLUDED FOR THE BENEFIT OF ONLY ONE OF THE PARTIES ' , THE COMMON INTENTION TO CONFER AN ADVANTAGE ON ONE OF THE PARTIES MUST BE CLEAR FROM THE TERMS OF THE JURISDICTION CLAUSE OR FROM ALL THE EVIDENCE TO BE FOUND THEREIN OR FROM THE CIRCUMSTANCES IN WHICH THE CONTRACT WAS CONCLUDED .

IT FOLLOWS THAT AN AGREEMENT CONFERRING JURISDICTION IS NOT TO BE REGARDED AS FALLING WITHIN THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION WHERE ALL THAT IS ESTABLISHED IS THAT THE PARTIES HAVE AGREED THAT A COURT OR THE COURTS OF THE CONTRACTING STATE IN WHICH THAT PARTY IS DOMICILED ARE TO HAVE JURISDICTION.

IN CASE 22/85

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 BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

RUDOLF ANTERIST

APPELLANT ,

AND

CREDIT LYONNAIS

RESPONDENT ,

ON THE INTERPRETATION OF THE THIRD PARAGRAPH OF ARTICLE 17 OF THAT CONVENTION ,

1 BY ORDER OF 20 DECEMBER 1984 , WHICH WAS RECEIVED AT THE COURT ON 24 JANUARY 1985 , THE BUNDESGERICHTSHOF 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 (HEREINAFTER REFERRED TO AS ' THE CONVENTION ') A QUESTION CONCERNING THE INTERPRETATION

OF THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION.

2 THE QUESTION AROSE IN A DISPUTE BETWEEN CREDIT LYONNAIS , A BANK , AND MR ANTERIST CONCERNING THE PERFORMANCE OF A CONTRACT OF GUARANTEE

3 BY AN AGREEMENT OF 16 MAY 1967 , MR ANTERIST , WHO RESIDES IN SAARBRUCKEN (FEDERAL REPUBLIC OF GERMANY), STOOD SURETY FOR THE LIABILITIES OF ANTERIST SCHNEIDER SARL , A COMPANY WITH LIMITED LIABILITY WHOSE REGISTERED OFFICE IS IN FRANCE , TO CREDIT LYONNAIS , WHICH WAS REPRESENTED BY ITS BRANCH IN FORBACH , WHICH IS WITHIN THE JURISDICTION OF THE COURT OF SARREGUEMINES (FRANCE). THE TERMS OF THAT AGREEMENT , WHICH WERE SET OUT ON A PRINTED FORM PROVIDED BY THE BANK , INCLUDED A CLAUSE PROVIDING THAT : ' THE COURT WITHIN WHOSE JURISDICTION THAT BRANCH IS SITUATED SHALL HAVE EXCLUSIVE JURISDICTION TO ADJUDICATE UPON ALL MATTERS CONCERNING THE PERFORMANCE OF THIS AGREEMENT , IRRESPECTIVE OF WHO IS THE DEFENDANT '.

4 SINCE ANTERIST SCHNEIDER WAS UNABLE TO PAY ITS DEBT TO THE BANK WHEN IT FELL DUE , CREDIT LYONNAIS BROUGHT AN ACTION AGAINST MR ANTERIST IN THE LANDGERICHT (REGIONAL COURT) SAARBRUCKEN FOR PERFORMANCE OF THE CONTRACT OF GUARANTEE. MR ANTERIST CHALLENGED THE JURISDICTION OF THE LANDGERICHT ON THE GROUND THAT THE GUARANTEE CONFERRED EXCLUSIVE JURISDICTION ON THE COURT OF SARREGUEMINES. THE LANDGERICHT UPHELD MR ANTERIST ' S ARGUMENTS. ON APPEAL BY CREDIT LYONNAIS , THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) TOOK THE VIEW THAT THE CLAUSE IN QUESTION WAS ADVANTAGEOUS ONLY TO CREDIT LYONNAIS AND WAS THEREFORE TO BE REGARDED AS HAVING BEEN AGREED FOR THE BENEFIT OF THAT PARTY ALONE WITHIN THE MEANING OF THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION. CONSEQUENTLY , THE OBERLANDESGERICHT QUASHED THE LANDGERICHT ' S JUDGMENT AND REMITTED THE CASE TO THAT COURT. MR ANTERIST THEN LODGED AN APPEAL ON A POINT OF LAW WITH THE BUNDESGERICHTSHOF IN WHICH HE SOUGHT TO HAVE THE LANDGERICHT ' S JUDGMENT RESTORED.

5 THE BUNDESGERICHTSHOF CONSIDERS THAT THE OBERLANDESGERICHT ' S DECISION IS BY IMPLICATION BASED ON THE VIEW THAT ANY AGREEMENT CONFERRING JURISDICTION ON THE COURTS OF THE STATE IN WHICH ONE OF THE PARTIES IS DOMICILED MUST BE REGARDED AS HAVING BEEN CONCLUDED FOR THE BENEFIT OF THAT PARTY ALONE WITHIN THE MEANING OF THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION.

6 SINCE AN INTERPRETATION OF THE CONVENTION IS NECESSARY IN ORDER TO DETERMINE WHETHER THAT CONCLUSION IS WELL FOUNDED , THE BUNDESGERICHTSHOF HAS REFERRED THE FOLLOWING QUESTION TO THE COURT FOR A PRELIMINARY RULING :

' IS AN AGREEMENT CONFERRING JURISDICTION TO BE REGARDED AS ' ' CONCLUDED FOR THE BENEFIT OF ONLY ONE OF THE PARTIES ' ' WITHIN THE MEANING OF THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION WHERE ALL THAT IS ESTABLISHED IS THAT THE PARTIES HAVE EFFECTIVELY AGREED , IN ACCORDANCE WITH THE FIRST PARAGRAPH OF ARTICLE 17 , THAT A COURT OR THE COURTS OF THE CONTRACTING STATE IN WHICH THAT PARTY IS DOMICILED ARE TO HAVE INTERNATIONAL JURISDICTION?

'

7 MR ANTERIST TAKES THE VIEW THAT THE QUESTION SUBMITTED FOR A PRELIMINARY RULING SHOULD BE ANSWERED IN THE NEGATIVE. IN ORDER TO DETERMINE WHETHER AN AGREEMENT CONFERRING JURISDICTION WAS CONCLUDED FOR THE BENEFIT OF ONLY ONE OF THE PARTIES , IT IS NECESSARY TO ASCERTAIN THE INTENTION OF

THE PARTIES. THAT INTENTION MUST BE REFLECTED IN THE WORDING OF THE CLAUSE. AS AN EXAMPLE OF THE KIND OF CLAUSE COVERED BY THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION , MR ANTERIST REFERS TO A CLAUSE ENTITLING ONE OF THE PARTIES TO SUE THE OTHER PARTY EITHER IN THE COURT OF THE LATTER ' S DOMICILE OR IN THE COURT OF HIS OWN DOMICILE WHEREAS HE HIMSELF MAY BE SUED ONLY IN THE COURT OF HIS OWN DOMICILE. MR ANTERIST THEN ARGUES THAT AN AFFIRMATIVE ANSWER TO THE QUESTION SUBMITTED WOULD BE CONTRARY TO THE SCHEME OF ARTICLE 17 OF THE CONVENTION. THE EXCEPTION PROVIDED FOR IN THE THIRD PARAGRAPH OF ARTICLE 17 WOULD THEN BECOME THE RULE SINCE IN PRACTICE MOST JURISDICTION CLAUSES CONFER JURISDICTION ON THE COURT OF THE DOMICILE OF ONE OF THE PARTIES. MOREOVER , SUCH A SOLUTION WOULD LEAD TO DISPUTES ARISING FROM THE SAME CONTRACTUAL RELATIONSHIP BEING SCATTERED BETWEEN THE COURTS OF DIFFERENT STATES , WHICH IS PRECISELY WHAT THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS MEANT TO AVOID . FINALLY , EVEN IF THE QUESTION SUBMITTED WERE GIVEN AN AFFIRMATIVE ANSWER IN PRINCIPLE , EXCEPTIONS WOULD HAVE TO BE PERMITTED SINCE THE ADVANTAGE REFERRED TO IN THE THIRD PARAGRAPH OF ARTICLE 17 MUST BE EXCLUSIVE. THE ADVANTAGES WHICH THE JURISDICTION CLAUSE MIGHT HAVE FOR THE OTHER PARTY WOULD HAVE TO BE ASSESSED WITH REFERENCE TO THE APPLICABLE NATIONAL LAW , WHICH WOULD CREATE CONSIDERABLE UNCERTAINTY WITH REGARD TO THE APPLICABILITY OF THE THIRD PARAGRAPH OF ARTICLE 17 IN EACH INDIVIDUAL CASE.

8 CREDIT LYONNAIS , WHICH CONFINED ITSELF TO SUBMITTING ORAL ARGUMENT , TAKES THE VIEW THAT THE QUESTION REFERRED TO THE COURT SHOULD BE ANSWERED IN THE AFFIRMATIVE. FROM THE CHOICE OF THE COURT OF THE DOMICILE OF ONE OF THE PARTIES IT WOULD ALWAYS BE POSSIBLE TO DRAW THE CONCLUSION THAT THE JURISDICTION AGREEMENT WAS CONCLUDED FOR THE BENEFIT OF THAT PARTY ALONE OWING TO THE PRACTICAL ADVANTAGES WHICH IT GAINED FROM THAT CHOICE (TIME SAVED , KNOWLEDGE OF NATIONAL LAW , LANGUAGE , CHOICE OF LAWYER).

9 THE UNITED KINGDOM CONSIDERS THAT THE QUESTION SUBMITTED FOR A PRELIMINARY RULING SHOULD BE ANSWERED IN THE NEGATIVE. THE OPPOSITE SOLUTION WOULD RENDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION WHOLLY INEFFECTIVE. THE MOST USUAL JURISDICTION CLAUSES CONFER EXCLUSIVE JURISDICTION ON THE COURTS OF THE STATE IN WHICH ONE PARTY , BUT NOT THE OTHER , IS DOMICILED. IF PROCEEDINGS ARE INSTITUTED BY THE PARTY DOMICILED IN THE STATE ON WHOSE COURTS THE JURISDICTION CLAUSE CONFERS JURISDICTION , THAT PARTY WOULD BE ABLE TO EVADE THE RULE CONCERNING EXCLUSIVE JURISDICTION LAID DOWN IN THE FIRST PARAGRAPH OF ARTICLE 17 BY RELYING ON THE THIRD PARAGRAPH THEREOF . IF IT IS THE OTHER PARTY WHO INSTITUTES PROCEEDINGS , THE FIRST PARAGRAPH OF ARTICLE 17 WOULD ADMITTEDLY REQUIRE IT TO COMMENCE THEM IN THE COURT OF THE DEFENDANT ' S DOMICILE BUT THE APPLICATION OF THE GENERAL RULE IN ARTICLE 2 OF THE CONVENTION WOULD LEAD TO THE SAME RESULT . IN SUCH CASES THE JURISDICTION CLAUSE WOULD BE OTIOSE , AS WOULD THE FIRST PARAGRAPH OF ARTICLE 17 , WHICH CONFERS EXCLUSIVE JURISDICTION ON THE COURT DESIGNATED IN THE CLAUSE.

10 THE UNITED KINGDOM THEREFORE SUGGESTS THAT THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION SHOULD BE INTERPRETED AS APPLYING ONLY TO CLAUSES INDICATING THE COURT OR COURTS IN WHICH ONE OF THE PARTIES MUST INSTITUTE PROCEEDINGS WITHOUT SPECIFYING THE COURT OR COURTS WITH JURISDICTION

TO HEAR AND DETERMINE PROCEEDINGS INSTITUTED BY THE OTHER PARTY . THE THIRD PARAGRAPH OF ARTICLE 17 IS PRECISELY INTENDED TO PREVENT PROCEEDINGS INSTITUTED BY THE LATTER PARTY FROM BEING REGARDED , AS A RESULT OF THE APPLICATION OF THE FIRST PARAGRAPH OF ARTICLE 17 , AS FALLING WITHIN THE EXCLUSIVE JURISDICTION OF THE COURT OR COURTS DESIGNATED TO HEAR AND DETERMINE PROCEEDINGS INSTITUTED BY THE OTHER PARTY .

11 THE GOVERNMENT OF THE ITALIAN REPUBLIC SUGGESTS THAT THE ANSWER TO THE QUESTION SUBMITTED FOR A PRELIMINARY RULING SHOULD BE THAT THE DESIGNATION OF THE COURT OF THE DOMICILE OF ONE OF THE PARTIES MAY BE EVIDENCE OF THAT PARTY ' S EXCLUSIVE INTEREST IN THE CLAUSE CONFERRING JURISDICTION BUT NOT NECESSARILY CONCLUSIVE EVIDENCE. THE NATIONAL COURT BEFORE WHICH THE CASE IS BROUGHT MUST DETERMINE , ON THE BASIS OF ALL THE INFORMATION AVAILABLE , WHETHER THE CLAUSE WAS ALSO AGREED IN THE INTERESTS OF THE OTHER PARTY , EVEN IF THEY ARE ONLY SECONDARY

12 IN THE COMMISSION ' S VIEW , THE QUESTION REFERRED TO THE COURT SHOULD BE ANSWERED IN THE AFFIRMATIVE. THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION SHOULD BE INTERPRETED SO AS TO RESTRICT THE SCOPE OF THE FIRST PARAGRAPH OF THAT ARTICLE , WHICH CONSTITUTES AN EXCEPTION TO THE GENERAL RULES ON JURISDICTION LAID DOWN IN ARTICLES 2 , 5 AND 6 OF THE CONVENTION. THE FACT THAT JURISDICTION IS CONFERRED ON THE COURTS OF THE PLACE WHERE ONE OF THE PARTIES IS DOMICILED ALLOWS THE PRESUMPTION TO BE MADE THAT THE JURISDICTION CLAUSE WAS AGREED FOR THE BENEFIT OF THAT PARTY ONLY , WITHIN THE MEANING OF THE THIRD PARAGRAPH OF ARTICLE 17. ANY JURISDICTION CLAUSE WHICH DEPARTS FROM THE GENERAL PRINCIPLE LAID DOWN IN ARTICLE 2 OF THE CONVENTION , WHICH FAVOURS THE DEFENDANT , SHOULD BE PRESUMED TO BE FOR THE BENEFIT OF THE PLAINTIFF WITHIN THE MEANING OF THE THIRD PARAGRAPH OF ARTICLE 17 .

13 IT SHOULD BE POINTED OUT IN THE FIRST PLACE THAT ARTICLE 17 OF THE CONVENTION , WHICH APPEARS IN SECTION 6 OF TITLE II HEADED ' PROROGATION OF JURISDICTION ' , ALLOWS THE PARTIES , WITHIN THE LIMITS LAID DOWN BY THE SECOND PARAGRAPH OF THAT PROVISION , TO CHOOSE BY MUTUAL AGREEMENT A COURT OR THE COURTS OF A CONTRACTING STATE. THE PARTIES MAY THUS CONFER JURISDICTION ON COURTS WHICH WOULD NOT HAVE JURISDICTION UNDER THE GENERAL OR SPECIAL PROVISIONS OF THE CONVENTION OR EXCLUDE THE JURISDICTION OF COURTS WHICH WOULD NORMALLY HAVE JURISDICTION UNDER THOSE RULES. ACCORDING TO THE FIRST PARAGRAPH OF ARTICLE 17 , THE JURISDICTION OF A COURT OR COURTS DESIGNATED BY A JURISDICTION CLAUSE IS EXCLUSIVE , WHILST THE THIRD PARAGRAPH OF THAT ARTICLE MAINTAINS THE RIGHT OF THE PARTY FOR WHOSE BENEFIT THE CLAUSE WAS AGREED TO INSTITUTE PROCEEDINGS IN ANY OTHER COURT HAVING JURISDICTION UNDER THE CONVENTION.

14 SINCE ARTICLE 17 OF THE CONVENTION EMBODIES THE PRINCIPLE OF THE PARTIES ' AUTONOMY TO DETERMINE THE COURT OR COURTS WITH JURISDICTION , THE THIRD PARAGRAPH OF THAT PROVISION MUST BE INTERPRETED IN SUCH A WAY AS TO RESPECT THE PARTIES ' COMMON INTENTION WHEN THE CONTRACT WAS CONCLUDED. THE COMMON INTENTION TO CONFER AN ADVANTAGE ON ONE OF THE PARTIES MUST THEREFORE BE CLEAR FROM THE TERMS OF THE JURISDICTION CLAUSE OR FROM ALL THE EVIDENCE TO BE FOUND THEREIN OR FROM THE CIRCUMSTANCES IN WHICH THE CONTRACT WAS CONCLUDED.

15 CLAUSES WHICH EXPRESSLY STATE THE NAME OF THE PARTY FOR WHOSE BENEFIT THEY WERE AGREED AND THOSE WHICH , WHILST SPECIFYING THE COURTS IN WHICH EITHER PARTY MAY SUE THE OTHER , GIVE ONE OF THEM A WIDER CHOICE OF COURTS MUST BE REGARDED AS CLAUSES WHOSE WORDING SHOWS THAT THEY WERE AGREED FOR THE EXCLUSIVE BENEFIT OF ONE OF THE PARTIES

16 THE DESIGNATION OF A COURT OR THE COURTS OF THE CONTRACTING STATE IN WHICH ONE OF THE PARTIES IS DOMICILED IS NOT SUFFICIENT IN ITSELF , HAVING REGARD TO THE WIDE VARIETY OF REASONS WHICH MAY HAVE LED TO THE CHOICE OF SUCH A CLAUSE , TO SUPPORT THE CONCLUSION THAT THE COMMON INTENTION OF THE PARTIES WAS TO CONFER AN ADVANTAGE ON THAT PARTY.

17 IT FOLLOWS FROM THOSE CONSIDERATIONS THAT THE ANSWER TO THE QUESTION SUBMITTED BY THE BUNDESGERICHTSHOF MUST BE THAT AN AGREEMENT CONFERRING JURISDICTION IS NOT TO BE REGARDED AS HAVING BEEN CONCLUDED FOR THE BENEFIT OF ONLY ONE OF THE PARTIES , WITHIN THE MEANING OF THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION , WHERE ALL THAT IS ESTABLISHED IS THAT THE PARTIES HAVE AGREED THAT A COURT OR THE COURTS OF THE CONTRACTING STATE IN WHICH THAT PARTY IS DOMICILED ARE TO HAVE JURISDICTION.

COSTS

18 THE COSTS INCURRED BY THE UNITED KINGDOM , THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF 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 (FIFTH CHAMBER),

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 20 DECEMBER 1984 HEREBY RULES :

AN AGREEMENT CONFERRING JURISDICTION IS NOT TO BE REGARDED AS HAVING BEEN CONCLUDED FOR THE BENEFIT OF ONLY ONE OF THE PARTIES , WITHIN THE MEANING OF THE THIRD PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , WHERE ALL THAT IS ESTABLISHED IS THAT THE PARTIES HAVE AGREED THAT A COURT OR THE COURTS OF THE CONTRACTING STATE IN WHICH THAT PARTY IS DOMICILED ARE TO HAVE JURISDICTION.

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NATIONA Federal Republic of Germany

NATCOUR *A7* Landgericht Saarbrücken, Urteil vom 06/05/82 (7 O 128/81 IV)
A8 Oberlandesgericht Saarbrücken, Urteil vom 26/01/84 (8 U 79/82)
- Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1984 p.478-479
ºNOTESº
- Tosi, Ugo ; Hesse, Christine: Recht der Internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1984 p.480-481
A9 Bundesgerichtshof, Vorlagebeschluß vom 20/12/84 (IX ZR 32/84)
- European Commercial Cases 1985 p.327-330
P1 Bundesgerichtshof, Urteil vom 18/09/86 (IX ZR 32/84)
- Der Betrieb 1986 p.2666
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- Gottwald, Peter: Praxis des internationalen Privat- und Verfahrensrechts 1987 p.81-83
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PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Joliet

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of application: 24/01/1985

Judgment of the Court (Fifth Chamber)
of 11 July 1985
F. Berghoefer GmbH Co. KG v ASA SA.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention - Interpretation of Article 17 - Validity of an oral jurisdiction agreement confirmed in writing by one party only.
Case 221/84.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROROGATION OF JURISDICTION - JURISDICTION AGREEMENT - ORAL AGREEMENT CONFIRMED IN WRITING - FORMAL REQUIREMENTS.

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 17 , FIRST PARA.)

THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT THE FORMAL REQUIREMENTS THEREIN LAID DOWN ARE SATISFIED IF IT IS ESTABLISHED THAT JURISDICTION WAS CONFERRED BY EXPRESS ORAL AGREEMENT , THAT WRITTEN CONFIRMATION OF THAT AGREEMENT BY ONE OF THE PARTIES WAS RECEIVED BY THE OTHER AND THAT THE LATTER RAISED NO OBJECTION.

IN CASE 221/84

REFERENCE TO THE COURT UNDER ARTICLE 3 OF THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , SIGNED AT BRUSSELS (HEREINAFTER REFERRED TO AS ' THE CONVENTION '), BY THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

F . BERGHOEFER GMBH CO. KG

AND

ASA SA ,

ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION ,

1 BY AN ORDER OF 28 JUNE 1984 , WHICH WAS RECEIVED AT THE COURT ON 18 AUGUST 1984 , 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 TWO QUESTIONS ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE THAT CONVENTION.

2 THOSE QUESTIONS WERE RAISED IN THE CONTEXT OF LITIGATION BETWEEN BERGHOEFER GMBH (THE PLAINTIFF), WHOSE REGISTERED OFFICE IS AT MONCHENBLADBACH (FEDERAL REPUBLIC OF GERMANY), AND ASA SA (THE DEFENDANT), WHOSE REGISTERED OFFICE IS AT VILLEURBANNE (FRANCE), ON THE VALIDITY OF A JURISDICTION CLAUSE INITIALLY AGREED IN WRITING AND SUBSEQUENTLY AMENDED ORALLY.

3 FOR ABOUT 20 YEARS , THE PLAINTIFF ACTED AS AGENT (' HANDELSVERTRETER ') FOR THE DEFENDANT. FOLLOWING THE TERMINATION OF THE AGENCY CONTRACT , THE PLAINTIFF SOUGHT COMPENSATION FROM THE DEFENDANT PURSUANT TO PARAGRAPH

89 (B) OF THE GERMAN COMMERCIAL CODE AND AN INDEMNITY IN RESPECT OF THE RESTRICTION IMPOSED ON ITS RIGHT TO COMPETE .

4 THE PARTIES TO THE MAIN PROCEEDINGS DISAGREED AS TO WHETHER THE LANDGERICHT (REGIONAL COURT) MONCHENGLADBACH , BEFORE WHICH THE PLAINTIFF HAD BROUGHT PROCEEDINGS , HAD JURISDICTION. ALTHOUGH THE PARTIES HAD AGREED IN THE AGENCY CONTRACT , CONCLUDED IN 1964 , THAT THE TRIBUNAL DE COMMERCE (COMMERCIAL COURT), ROANNE (FRANCE), WOULD HAVE JURISDICTION OVER ANY DISPUTE , THE PLAINTIFF CLAIMED THAT IT HAD AGREED ORALLY WITH THE DEFENDANT ON 8 OCTOBER 1975 TO MODIFY THE INITIAL JURISDICTION AGREEMENT AND TO CONFER JURISDICTION ON THE COURTS SITTING AT MONCHENBLADBACH , IN RETURN FOR WHICH THE PLAINTIFF , RATHER THAN THE DEFENDANT , WOULD THEREAFTER BEAR THE COSTS OF TRANSLATION ARISING FROM THEIR CORRESPONDENCE.

5 THE PLAINTIFF CLAIMED TO HAVE CONFIRMED THAT ORAL AGREEMENT BY A LETTER OF 27 OCTOBER 1975 ADDRESSED TO THE DEFENDANT. ACCORDING TO THE PLAINTIFF , THE DEFENDANT RECEIVED THAT LETTER AND EXPRESSED NO DISAGREEMENT WITH ITS CONTENTS. THE DEFENDANT , ON THE OTHER HAND , DENIED THAT THERE HAD BEEN ANY ORAL AGREEMENT AND CLAIMED THAT HE HAD NEVER RECEIVED THE LETTER WHICH WAS SUPPOSED TO HAVE CONFIRMED IT.

6 BY JUDGMENT OF 19 FEBRUARY 1981 , THE LANDGERICHT MONCHENGLADBACH DECLARED THAT IT HAD JURISDICTION TO SETTLE THE DISPUTE SINCE IT CONSIDERED THAT IT WAS PROVEN THAT THE PARTIES HAD IN FACT AGREED ORALLY TO CONFER JURISDICTION ON THE COURTS AT MONCHENGLADBACH AND THAT THE CONFIRMATION OF THAT AGREEMENT HAD BEEN RECEIVED BY THE DEFENDANT .

7 ON APPEAL , THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) DUSSELDORF DECIDED , IN A JUDGMENT OF 12 MARCH 1982 , THAT EVEN IF THE FACTS SET OUT BY THE PLAINTIFF WERE CORRECT THEY WOULD NOT CONSTITUTE SUFFICIENT GROUNDS FOR CONCLUDING THAT THE COURTS SITTING AT MONCHENGLADBACH HAD JURISDICTION SINCE THE WRITTEN CONFIRMATION WHICH THE PLAINTIFF CLAIMED TO HAVE SENT DID NOT MEET THE REQUIREMENTS OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION. IN THE VIEW OF THE OBERLANDESGERICHT , AN ORAL AGREEMENT CONFERRING JURISDICTION WAS ONLY VALID IF IT HAD BEEN CONFIRMED IN WRITING BY THE PARTY AGAINST WHOM IT WAS TO BE RAISED IN THE EVENT OF A DISPUTE. IN THIS CASE HOWEVER THE WRITTEN CONFIRMATION EMANATED FROM THE PLAINTIFF , THE PARTY FOR WHOSE BENEFIT THE AGREEMENT WAS MADE , AND NOT FROM THE DEFENDANT , AGAINST WHOM IT WAS BEING RAISED.

8 THE PLAINTIFF THEN BROUGHT AN APPEAL ON A POINT OF LAW BEFORE THE BUNDESGERICHTSHOF IN WHICH IT DISPUTED THE OBERLANDESGERICHT ' S CONCLUSION . IT CONTENDED FIRSTLY THAT , ACCORDING TO THE LETTER AND THE SPIRIT OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION , A JURISDICTION AGREEMENT COULD ALSO BE VALIDLY CONFIRMED BY THE PARTY FOR WHOSE BENEFIT IT HAD BEEN CONCLUDED. SECONDLY , IT PLEADED THE BAD FAITH OF THE DEFENDANT , WHICH WAS NOW RELYING ON THE ALLEGED FORMAL DEFECT IN THE JURISDICTION AGREEMENT EVEN THOUGH IT HAD PREVIOUSLY AVAILED ITSELF , WITHOUT CONTESTING THE AGREEMENT , OF THE PROVISION FAVOURABLE TO IT WHICH HAD BEEN AGREED ON IN CONSIDERATION OF THE ORAL MODIFICATION OF THE JURISDICTION CLAUSE.

9 IT WAS IN THOSE CIRCUMSTANCES THAT THE BUNDESGERICHTSHOF STAYED THE PROCEEDINGS AND REFERRED THE FOLLOWING TWO QUESTIONS TO THE COURT OF

JUSTICE FOR A PRELIMINARY RULING :

' (1) ARE THE REQUIREMENTS OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS RELATING TO THE FORMAL VALIDITY OF AN ORAL JURISDICTION AGREEMENT SATISFIED WHERE THE AGREEMENT HAS BEEN CONFIRMED IN WRITING BY THE PARTY FOR WHOSE BENEFIT IT WAS CONCLUDED?

IF QUESTION 1 IS ANSWERED IN THE NEGATIVE :

(2)IS THE PARTY AGAINST WHOM THE JURISDICTION AGREEMENT IS RAISED ESTOPPED FROM PLEADING ITS FORMAL INVALIDITY WHERE THAT PARTY DID NOT CONTRADICT THE WRITTEN CONFIRMATION OF THE AGREEMENT AND HAS ENJOYED THE CONSIDERATION GIVEN FOR IT , AND WHERE MOREOVER THE PARTIES , BOTH COMMERCIAL FIRMS , HAVE BEEN DOING BUSINESS WITH EACH OTHER CONTINUOUSLY FOR A PROLONGED PERIOD?

'

10 IN THEIR OBSERVATIONS TO THE COURT THE PLAINTIFF IN THE MAIN PROCEEDINGS , THE UNITED KINGDOM AND THE COMMISSION ALL AGREE THAT THE FIRST QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE. IN SUPPORT OF THAT PROPOSITION THE FOLLOWING ARGUMENTS WERE ADVANCED : FIRST , TEXTUAL ARGUMENTS BASED ON THE ACTUAL TERMS OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION , ON AN ANALYSIS A CONTRARIO OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE PROTOCOL ANNEXED TO THE SAID CONVENTION AND ON AN EXAMINATION OF 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 TO THE CONVENTION (OFFICIAL JOURNAL , L 304 OF 30 OCTOBER 1978); SECONDLY , ARGUMENTS BASED ON AN ANALYSIS OF THE WORKING DOCUMENTS WHICH PRECEDED THE ADOPTION OF THE CONVENTION , FROM WHICH IT APPEARS THAT IT IS NECESSARY TO AVOID EXCESSIVE FORMALITY INCOMPATIBLE WITH COMMERCIAL PRACTICE AND THAT IT IS OFTEN DIFFICULT TO DETERMINE FOR WHOSE BENEFIT A JURSISDICTION AGREEMENT HAS ACTUALLY BEEN CONCLUDED ; THIRDLY , ARGUMENTS BASED ON AN ANALYSIS OF THE COURT ' S CASE-LAW ON THE PURPOSES OF THE FORMAL REQUIREMENT LAID DOWN IN THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION.

11 ACCORDING TO THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION : ' IF THE PARTIES , ONE OR MORE OF WHOM IS DOMICILED IN A CONTRACTING STATE , HAVE , BY AGREEMENT IN WRITING OR BY AN ORAL AGREEMENT EVIDENCED IN WRITING , 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. '

12 THE COURT OBSERVES THAT IN ORDER TO GIVE FULL EFFECT TO THOSE PROVISIONS , REFERENCE SHOULD , IN APPLYING THEM , BE MADE PRINCIPALLY TO THE GENERAL SCHEME AND THE PURPOSES OF THE CONVENTION.

13 ACCORDING TO SETTLED CASE-LAW (JUDGMENT OF 14 DECEMBER 1976 IN CASE 24/76 , SALOTTI V RUWA , (1976) ECR 1831 ; JUDGMENT OF 14 DECEMBER 1976 IN CASE 25/76 , SEGOURA V BONAKDARIAN , (1976) ECR 1851 ; JUDGMENT OF 6 MAY 1980 IN CASE 784/79 , PORTA-LEASING V PRESTIGE INTERNATIONAL , (1980) ECR 1517 ; JUDGMENT OF 19 JUNE 1984 IN CASE 71/83 , TILLY RUSS V HAVEN EN VERVOERBEDRIJF NOVA (1984

) ECR 2417), THE REQUIREMENTS SET OUT IN ARTICLE 17 GOVERNING THE VALIDITY OF JURISDICTION CLAUSES MUST BE STRICTLY CONSTRUED SINCE THE PURPOSE OF ARTICLE 17 IS TO ENSURE THAT THE PARTIES HAVE ACTUALLY CONSENTED TO SUCH A CLAUSE AND THAT THEIR CONSENT IS CLEARLY AND PRECISELY DEMONSTRATED.

14 IT MUST BE POINTED OUT THAT , UNLIKE THE PROVISIONS CONCERNING PERSONS DOMICILED IN LUXEMBOURG CONTAINED IN THE SECOND PARAGRAPH OF ARTICLE 1 OF THE PROTOCOL ANNEXED TO THE CONVENTION , ARTICLE 17 OF THE CONVENTION DOES NOT EXPRESSLY REQUIRE THAT THE WRITTEN CONFIRMATION OF AN ORAL ARGUMENT SHOULD BE GIVEN BY THE PARTY WHO IS TO BE AFFECTED BY THE AGREEMENT. MOREOVER , AS THE VARIOUS OBSERVATIONS SUBMITTED TO THE COURT HAVE RIGHTLY EMPHASIZED , IT IS SOMETIMES DIFFICULT TO DETERMINE THE PARTY FOR WHOSE BENEFIT A JURISDICTION AGREEMENT HAS BEEN CONCLUDED BEFORE PROCEEDINGS HAVE ACTUALLY BEEN INSTITUTED.

15 IF IT IS ACTUALLY ESTABLISHED THAT JURISDICTION HAS BEEN CONFERRED BY EXPRESS ORAL AGREEMENT AND IF CONFIRMATION OF THAT ORAL AGREEMENT BY ONE OF THE PARTIES HAS BEEN RECEIVED BY THE OTHER AND THE LATTER HAS RAISED NO OBJECTION TO IT WITHIN A REASONABLE TIME THEREAFTER , THE AFORESAID LITERAL INTERPRETATION OF ARTICLE 17 WILL ALSO , AS THE COURT HAS ALREADY DECIDED IN ANOTHER CONTEXT (SEE JUDGMENT OF 19 JUNE 1984 , CITED ABOVE), BE IN ACCORDANCE WITH THE PURPOSE OF THAT ARTICLE , WHICH IS TO ENSURE THAT THE PARTIES HAVE ACTUALLY CONSENTED TO THE CLAUSE. IT WOULD THEREFORE BE A BREACH OF GOOD FAITH FOR A PARTY WHO DID NOT RAISE ANY OBJECTION SUBSEQUENTLY TO CONTEST THE APPLICATION OF THE ORAL AGREEMENT. IT IS NOT NECESSARY IN THIS CASE TO DECIDE THE QUESTION OF WHETHER AND TO WHAT EXTENT OBJECTIONS RAISED BY THE OTHER PARTY TO THE WRITTEN CONFIRMATION OF AN ORAL AGREEMENT COULD , IN AN APPROPRIATE CASE , BE TAKEN INTO CONSIDERATION.

16 THE REPLY TO THE QUESTION REFERRED TO THE COURT MUST THEREFORE BE THAT THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT THE FORMAL REQUIREMENTS THEREIN LAID DOWN ARE SATISFIED IF IT IS ESTABLISHED THAT JURISDICTION WAS CONFERRED BY EXPRESS ORAL AGREEMENT , THAT WRITTEN CONFIRMATION OF THAT AGREEMENT BY ONE OF THE PARTIES WAS RECEIVED BY THE OTHER AND THAT THE LATTER RAISED NO OBJECTION.

17 HAVING REGARD TO THE REPLY TO THE FIRST QUESTION SUBMITTED BY THE NATIONAL COURT , THE SECOND QUESTION NO LONGER HAS ANY PURPOSE.

COSTS

18 THE COSTS INCURRED BY THE UNITED KINGDOM AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF A STEP IN THE PROCEEDINGS PENDING BEFORE THE NATIONAL COURT , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT (FIFTH CHAMBER),

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESGERICHTSHOF (FIRST CIVIL CHAMBER) BY ORDER OF 28 JUNE 1984 , HEREBY RULES :

THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT THE FORMAL REQUIREMENTS THEREIN LAID DOWN ARE SATISFIED IF IT IS ESTABLISHED THAT JURISDICTION WAS CONFERRED BY EXPRESS ORAL AGREEMENT , THAT WRITTEN CONFIRMATION OF THAT AGREEMENT BY ONE OF THE PARTIES WAS RECEIVED BY THE OTHER AND THAT THE LATTER RAISED NO OBJECTION.

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- Praxis des internationalen Privat- und Verfahrensrechts 1985 p.280-281
P1 Bundesgerichtshof, Beschluß vom 05/12/1985 (I ZR 55/82)
- Neue Juristische Wochenschrift 1986 p.2196

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PROCEDU Reference for a preliminary ruling

ADVGEN Sir Gordon Slynn

JUDGRAP Galmot

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Judgment of the Court (Second Chamber)
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AS-Autoteile Service GmbH v Pierre Malhé. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Enforcement of judgments - Jurisdiction of the courts of the place of enforcement. Case 220/84.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - EXCLUSIVE JURISDICTION - PROCEEDINGS ' CONCERNED WITH THE ENFORCEMENT OF JUDGMENTS ' - MEANING - APPLICATIONS TO OPPOSE ENFORCEMENT UNDER GERMAN LAW - INCLUDED - CLAIMS WHICH MAY BE RAISED IN SUCH APPLICATIONS - LIMITS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 16 (5))

APPLICATIONS TO OPPOSE ENFORCEMENT , AS PROVIDED FOR UNDER PARAGRAPH 767 OF THE GERMAN CODE OF CIVIL PROCEDURE , FALL , AS SUCH , WITHIN THE JURISDICTION PROVISION CONTAINED IN ARTICLE 16 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ; THAT PROVISION DOES NOT HOWEVER MAKE IT POSSIBLE , IN AN APPLICATION TO OPPOSE ENFORCEMENT MADE TO THE COURTS OF THE CONTRACTING STATE IN WHICH ENFORCEMENT IS TO TAKE PLACE , TO PLEAD A SET-OFF BETWEEN THE RIGHT WHOSE ENFORCEMENT IS BEING SOUGHT AND A CLAIM OVER WHICH THE COURTS OF THAT STATE WOULD HAVE NO JURISDICTION IF IT WERE RAISED INDEPENDENTLY.

IN CASE 220/84

REFERENCE TO THE COURT BY THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE), 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 , FOR A PRELIMINARY RULING IN THE CASE PENDING BEFORE THAT COURT BETWEEN

AS-AUTOTEILE SERVICE GMBH , A COMPANY INCORPORATED UNDER GERMAN LAW , WHOSE REGISTERED OFFICE IS IN BUHL (FEDERAL REPUBLIC OF GERMANY),

AND

PIERRE MALHE , A BUSINESSMAN , WHO RESIDES AT SALEUX (FRANCE),

ON THE INTERPRETATION OF ARTICLE 16 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY AN ORDER OF 9 JULY 1984 , WHICH WAS RECEIVED AT THE COURT ON 28 AUGUST 1984 , THE BUNDESGERICHTSHOF REQUESTED 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 (HEREINAFTER REFERRED TO AS ' THE CONVENTION '), ON THREE QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 16 (5) OF THE CONVENTION.

2 ACCORDING TO THE DOCUMENTS BEFORE THE COURT , THE PLAINTIFF IN THE MAIN PROCEEDINGS , AS-AUTOTEILE , WHOSE REGISTERED OFFICE IS IN BUHL , IS IN THE BUSINESS OF RECONDITIONING USED MOTOR-VEHICLE PARTS ; IN THE COURSE OF ITS BUSINESS IT HAD DEALINGS WITH PAT GMBH , WHOSE REGISTERED OFFICE

WAS IN MECKENHEIM , NEAR BONN , AND ONE OF WHOSE SHAREHOLDERS WAS THE DEFENDANT IN THE MAIN PROCEEDINGS , PIERRE MALHE , WHO RESIDES IN SALEUX (FRANCE) AND IS THE OWNER OF SOCIETE DE RECUPERATION DE PIECES AUTOMOBILES. ON 5 APRIL 1978 AS-AUTOTEILE OBTAINED A DEFAULT JUDGMENT IN THE LANDGERICHT (REGIONAL COURT) BONN AGAINST PAT IN THE AMOUNT OF DM 1 001 476.95 , PLUS INTEREST , FOR THE SUPPLY OF DEFECTIVE GOODS.

3 WHEN AS-AUTOTEILE TRIED TO ENFORCE THAT JUDGMENT IT DISCOVERED THAT PAT WAS INSOLVENT. AS-AUTOTEILE CONSIDERS THAT THE INSOLVENCY IS DUE TO THE FACT THAT PAT ' S ASSETS WERE UNLAWFULLY TRANSFERRED TO MR MALHE , IN THE FORM OF FICTITIOUS PROFITS. AS-AUTOTEILE THEREFORE OBTAINED FROM THE AMTSGERICHT (LOCAL COURT) RHEINBACH , ON 6 MARCH 1980 , AN ORDER FOR THE ATTACHMENT AND TRANSFER TO IT OF THE CLAIM FOR UNJUST ENRICHMENT WHICH , IN ITS VIEW , PAT COULD MAKE AGAINST MR MALHE .

4 ON THE BASIS OF THAT ORDER AS-AUTOTEILE BROUGHT AN ACTION FOR PAYMENT AGAINST MR MALHE BEFORE THE LANDGERICHT (REGIONAL COURT) BADEN-BADEN . THE DOCUMENTS BEFORE THE COURT DO NOT REVEAL ON WHAT BASIS THE PROCEEDINGS WERE BROUGHT BEFORE THAT COURT. IN ANY EVENT , THE LANDGERICHT BADEN-BADEN HELD THAT IT HAD JURISDICTION , AND BY A JUDGMENT DATED 17 NOVEMBER 1981 IT ORDERED MR MALHE TO PAY TO AS-AUTOTEILE A SUM REPRESENTING HIS UNJUST ENRICHMENT AT THE EXPENSE OF PAT , IN AN AMOUNT NOT EXCEEDING THE DEBT OWED BY PAT TO AS-AUTOTEILE.

5 MR MALHE APPEALED AGAINST THAT JUDGMENT TO THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) KARLSRUHE , WHICH HELD ON 15 OCTOBER 1982 THAT UNDER ARTICLE 2 OF THE CONVENTION IT HAD NO JURISDICTION , SINCE THE ALLEGED DEBTOR WAS DOMICILED IN FRANCE. ACCORDING TO THE OBERLANDESGERICHT , THE FRENCH COURTS HAVE JURISDICTION IN SUCH A CASE . AS-AUTOTEILE ' S APPEAL TO THE BUNDESGERICHTSHOF AGAINST THAT JUDGMENT WAS DISMISSED BY AN ORDER OF 7 NOVEMBER 1983. THE QUESTION OF JURISDICTION OVER THE SUBSTANCE OF THE CASE HAS THEREFORE BEEN SETTLED .

6 ON 17 DECEMBER 1982 , WHILE THE PROCEEDINGS WERE STILL PENDING , THE LANDGERICHT BADEN-BADEN MADE AN ORDER FOR COSTS AGAINST AS-AUTOTEILE. SINCE THAT ORDER WAS IMMEDIATELY ENFORCEABLE , AS-AUTOTEILE GAVE MR MALHE A BANK GUARANTEE IN THE AMOUNT OF DM 40 000 , IN ORDER TO AVOID ENFORCEMENT PROCEEDINGS ; MR MALHE IS STILL IN POSSESSION OF THE INSTRUMENT OF GUARANTEE.

7 AS-AUTOTEILE THEREUPON LODGED AN APPLICATION TO OPPOSE ENFORCEMENT BEFORE THE SAME COURT , UNDER PARAGRAPH 767 OF THE GERMAN ZIVILPROZESSORDNUNG (CODE OF CIVIL PROCEDURE), WHICH PROVIDES AS FOLLOWS :

(1) OBJECTIONS AGAINST THE JUDGMENT DEBT ITSELF MUST BE RAISED BY THE DEBTOR BEFORE THE COURT WHICH HEARD THE MATTER AT FIRST INSTANCE.

(2)SUCH OBJECTIONS ARE ONLY ADMISSIBLE IN SO FAR AS THE GROUNDS ON WHICH THEY ARE BASED ARISE AFTER THE CLOSE OF THE ORAL PROCEDURE IN WHICH , UNDER THIS STATUTE , OBJECTIONS SHOULD AT THE LATEST HAVE BEEN MADE AND IN SO FAR AS SUCH MATTERS MAY NO LONGER BE RAISED BY WAY OF APPEAL .

(3)IN HIS APPLICATION THE DEBTOR MUST MAKE ALL THE OBJECTIONS WHICH HE WAS IN A POSITION TO MAKE AT THE TIME OF THE APPLICATION.

8 IN ITS APPLICATION AS-AUTOTEILE SEEKS TO SET OFF AGAINST THE ORDER FOR COSTS THE CLAIM RESULTING FROM MR MALHE ' S UNJUST ENRICHMENT AT THE EXPENSE OF PAT , WHICH HAD BEEN TRANSFERRED TO IT FOR THE PURPOSE OF RECOVERY . IN THE ALTERNATIVE , AS-AUTOTEILE SEEKS THE RETURN OF THE INSTRUMENT OF GUARANTEE.

9 BY A JUDGMENT OF 4 APRIL 1983 THE LANDGERICHT BADEN-BADEN DECLARED THAT IT HAD NO JURISDICTION , SINCE THE ACTION CONCERNED A CLAIM WHICH HAD ALREADY BEEN DECLARED NON-JUSTICIABLE IN GERMANY FOR WANT OF JURISDICTION.

10 AS-AUTOTEILE BROUGHT A DIRECT APPEAL TO THE BUNDESGERICHTSHOF AGAINST THE LANDGERICHT ' S DECISION THAT THE GERMAN COURTS LACKED JURISDICTION. IN THE COURSE OF THE PROCEEDINGS ON THAT APPEAL THE BUNDESGERICHTSHOF REFERRED THE FOLLOWING THREE QUESTIONS TO THE COURT

(1) DO APPLICATIONS TO OPPOSE ENFORCEMENT WITHIN THE MEANING OF PARAGRAPH 767 OF THE GERMAN CODE OF CIVIL PROCEDURE FALL WITHIN THE JURISDICTION PROVISION CONTAINED IN ARTICLE 16 (5) OF THE CONVENTION?

(2)PURSUANT TO ARTICLE 16 (5) OF THE CONVENTION , IN AN APPLICATION TO OPPOSE ENFORCEMENT BEFORE THE COURTS OF THE CONTRACTING STATE IN WHICH ENFORCEMENT IS TO TAKE PLACE , IS IT POSSIBLE TO RESIST ENFORCEMENT BY PLEADING A SET-OFF IN RESPECT OF A CLAIM OVER WHICH THE COURTS OF THAT STATE WOULD HAVE NO JURISDICTION IF IT WERE RAISED INDEPENDENTLY?

(3)DOES THE JURISDICTION RECOGNIZED BY ARTICLE 16 (5) OF THE CONVENTION COVER PROCEEDINGS IN WHICH THE DEBTOR , RELYING ON A SUBMISSION THAT THE CREDITOR ' S CLAIM CANNOT BE ENFORCED , DEMANDS THE RETURN OF THE INSTRUMENT OF GUARANTEE WHICH HE PROVIDED AS SECURITY TO AVOID ENFORCEMENT?

11 ARTICLE 16 (5) OF THE CONVENTION PROVIDES THAT ' IN PROCEEDINGS CONCERNED WITH THE ENFORCEMENT OF JUDGMENTS , THE COURTS OF THE CONTRACTING STATE IN WHICH THE JUDGMENT HAS BEEN OR IS TO BE ENFORCED ' SHALL HAVE EXCLUSIVE JURISDICTION , REGARDLESS OF DOMICILE.

12 IN REPLY TO THE FIRST QUESTION IT MUST BE HELD THAT PROCEEDINGS SUCH AS THOSE PROVIDED FOR UNDER PARAGRAPH 767 OF THE GERMAN CODE OF CIVIL PROCEDURE FALL , AS SUCH , WITHIN THE JURISDICTION PROVISION CONTAINED IN ARTICLE 16 (5) BY VIRTUE OF THEIR CLOSE LINK WITH THE ENFORCEMENT PROCEDURE. HOWEVER , THAT FINDING DOES NOT RESOLVE THE QUESTION OF WHAT OBJECTIONS A PARTY MAY RAISE IN SUCH PROCEEDINGS WITHOUT GOING BEYOND THE LIMITS OF ARTICLE 16 (5). THAT IS THE PROBLEM ADDRESSED BY THE SECOND QUESTION REFERRED BY THE BUNDESGERICHTSHOF.

13 THAT QUESTION CONCERNS THE POINT WHETHER , IN ENFORCEMENT PROCEEDINGS , A PARTY MAY RAISE AN OBJECTION BASED ON A DEBT OVER WHICH THE COURTS OF THE CONTRACTING STATE IN WHICH ENFORCEMENT IS TO TAKE PLACE WOULD HAVE NO JURISDICTION IF AN INDEPENDENT ACTION WERE BROUGHT ON THAT DEBT.

14 IN ORDER TO RESOLVE THAT QUESTION IT IS NECESSARY TO HAVE REGARD TO THE GENERAL SCHEME OF THE CONVENTION , PAYING PARTICULAR ATTENTION TO THE RELATIONSHIP BETWEEN ARTICLE 2 AND ARTICLE 16.

15 ACCORDING TO ARTICLE 2 , PERSONS DOMICILED IN A CONTRACTING STATE ARE TO BE SUED IN THE COURTS OF THAT STATE. THAT PROVISION IS INTENDED TO PROTECT

THE RIGHTS OF THE DEFENDANT ; IT SERVES AS A COUNTERPOISE TO THE FACILITIES PROVIDED BY THE CONVENTION WITH REGARD TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS. IN THIS CASE THE GERMAN COURTS HAVE ALREADY HELD THAT SINCE THE DEFENDANT IN THE MAIN PROCEEDINGS IS DOMICILED IN FRANCE THE DEBT RAISED BY THE PLAINTIFF IN THE MAIN PROCEEDINGS IS A MATTER FOR THE FRENCH COURTS.

16 ARTICLE 16 OF THE CONVENTION MAKES A NUMBER OF EXCEPTIONS TO THAT GENERAL RULE BY GRANTING EXCLUSIVE JURISDICTION TO THE COURTS OF A CONTRACTING STATE OTHER THAN THAT SPECIFIED UNDER ARTICLE 2 IN PROCEEDINGS WHICH HAVE A PARTICULAR CONNECTION WITH THAT OTHER STATE , ON THE BASIS OF THE LOCATION OF IMMOVABLE PROPERTY , THE SEAT OF A COMPANY , AN ENTRY IN A PUBLIC REGISTER OR , IN THE CASE OF PARAGRAPH (5), THE PLACE WHERE A JUDGMENT IS TO BE ENFORCED.

17 IT FOLLOWS FROM THE SPECIFICITY OF THE CONNECTION REQUIRED BY ARTICLE 16 THAT A PARTY CANNOT MAKE USE OF THE JURISDICTION CONFERRED BY ARTICLE 16 (5) ON THE COURTS OF THE PLACE OF ENFORCEMENT IN ORDER TO BRING BEFORE THOSE COURTS A DISPUTE WHICH FALLS WITHIN THE JURISDICTION OF THE COURTS OF ANOTHER CONTRACTING STATE UNDER ARTICLE 2 . THE USE FOR SUCH A PURPOSE OF THE APPLICATION TO OPPOSE ENFORCEMENT IS CONTRARY TO THE DIVISION OF JURISDICTION WHICH THE CONVENTION INTENDED TO ESTABLISH BETWEEN THE COURT OF THE DEFENDANT ' S DOMICILE AND THE COURT OF THE PLACE OF ENFORCEMENT.

18 IN THIS CASE , SINCE THE GERMAN COURTS HAVE ALREADY HELD THAT THEY HAVE NO JURISDICTION OVER THE CLAIM RELIED ON AS A SET-OFF , THE USE OF THAT CLAIM IN ORDER TO OPPOSE THE ENFORCEMENT OF AN ORDER FOR THE COSTS INCURRED IN THE SAME PROCEEDINGS AMOUNTS TO A CLEAR ABUSE OF THE PROCESS ON THE PART OF THE PLAINTIFF FOR THE PURPOSE OF OBTAINING INDIRECTLY FROM THE GERMAN COURTS A DECISION REGARDING A CLAIM OVER WHICH THOSE COURTS HAVE NO JURISDICTION UNDER THE CONVENTION.

19 THE ANSWER TO THE FIRST TWO QUESTIONS RAISED BY THE BUNDESGERICHTSHOF MUST THEREFORE BE THAT APPLICATIONS TO OPPOSE ENFORCEMENT , AS PROVIDED FOR UNDER PARAGRAPH 767 OF THE GERMAN CODE OF CIVIL PROCEDURE , FALL , AS SUCH , WITHIN THE JURISDICTION PROVISION CONTAINED IN ARTICLE 16 (5) OF THE CONVENTION , BUT THAT THAT PROVISION DOES NOT MAKE IT POSSIBLE , IN AN APPLICATION TO OPPOSE ENFORCEMENT MADE TO THE COURTS OF THE CONTRACTING STATE IN WHICH ENFORCEMENT IS TO TAKE PLACE , TO PLEAD A SET-OFF BETWEEN THE RIGHT WHOSE ENFORCEMENT IS BEING SOUGHT AND A CLAIM OVER WHICH THE COURTS OF THAT STATE WOULD HAVE NO JURISDICTION IF IT WERE RAISED INDEPENDENTLY

20 AS A RESULT OF THOSE REPLIES , THE THIRD QUESTION HAS BECOME OTIOSE .

COSTS

21 THE COSTS INCURRED BY THE GOVERNMENT OF THE UNITED KINGDOM AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF A STEP IN THE PROCEEDINGS BEFORE THE NATIONAL COURT , THE DECISION ON COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT (SECOND CHAMBER),

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 9 JULY 1984 , HEREBY RULES :

APPLICATIONS TO OPPOSE ENFORCEMENT , AS PROVIDED FOR UNDER PARAGRAPH 767 OF THE GERMAN CODE OF CIVIL PROCEDURE , FALL , AS SUCH , WITHIN THE JURISDICTION PROVISION CONTAINED IN ARTICLE 16 (5) OF THE CONVENTION ; THAT PROVISION DOES NOT HOWEVER MAKE IT POSSIBLE , IN AN APPLICATION TO OPPOSE ENFORCEMENT MADE TO THE COURTS OF THE CONTRACTING STATE IN WHICH ENFORCEMENT IS TO TAKE PLACE , TO PLEAD A SET-OFF BETWEEN THE RIGHT WHOSE ENFORCEMENT IS BEING SOUGHT AND A CLAIM OVER WHICH THE COURTS OF THAT STATE WOULD HAVE NO JURISDICTION IF IT WERE RAISED INDEPENDENTLY.

DOCNUM	61984J0220
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1985 Page 02267 Spanish special edition Page 00791
DOC	1985/07/04
LODGED	1984/08/28
JURCIT	41968A0927(01)-A16PT5 : N 1 10 11 12 14 17 19 41968A0927(01)-A02 : N 5 14 15 17 41968A0927(01)-A16 : N 16 17
CONCERNS	Interprets 41968A0927(01) -A16PT5
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A9* Bundesgerichtshof, Vorlagebeschluß vom 09/07/1984 (II ZR 287/83) ; *P1* Bundesgerichtshof, Schreiben vom 08/08/1985 (II ZR 287/83)

NOTES	Mauro, Jacques: Gazette du Palais 1985 I Jur. p.551 ; Mezger, Ernst: Revue critique de droit international privé 1986 p.147-153 ; Hartley, Trevor: Costs and Counterclaims, European Law Review 1986 p.98-99 ; Geimer, Reinhold: EuGVÜ und Aufrechnung : keine Erweiterung der internationalen Entscheidungszuständigkeit - Aufrechnungsverbot bei Abweisung der Klage wegen internationaler Unzuständigkeit, Praxis des internationalen Privat- und Verfahrensrechts 1986 p.208-216 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1986 no 509 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1988 p.a2 (PM)
PROCEDU	Reference for a preliminary ruling
ADVGEN	Lenz
JUDGRAP	Pescatore
DATES	of document: 04/07/1985 of application: 28/08/1984

Judgment of the Court (Fifth Chamber)
of 2 July 1985
Deutsche Genossenschaftsbank v SA Brasserie du Pêcheur. Reference for a preliminary ruling: Cour d'appel de Colmar - France. Convention of 27 September 1968, Article 36. Case 148/84.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - PROCEDURES FOR CHALLENGING AN ENFORCEMENT ORDER - AUTONOMOUS AND COMPLETE SYSTEM ESTABLISHED BY THE CONVENTION - PROCEDURES AVAILABLE TO INTERESTED THIRD PARTIES UNDER DOMESTIC LAW - EXCLUSION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 36)

THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ESTABLISHED AN ENFORCEMENT PROCEDURE WHICH CONSTITUTES AN AUTONOMOUS AND COMPLETE SYSTEM , INCLUDING THE MATTER OF APPEALS. IT FOLLOWS THAT ARTICLE 36 OF THE CONVENTION EXCLUDES PROCEDURES WHEREBY INTERESTED THIRD PARTIES MAY CHALLENGE AN ENFORCEMENT ORDER UNDER DOMESTIC LAW.

IN CASE 148/84

REFERENCE TO THE COURT UNDER THE PROTOCOL OF 3 JUNE 1971 BY THE COUR D ' APPEL (COURT OF APPEAL), COLMAR , FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

DEUTSCHE GENOSSENSCHAFTSBANK ,

AND

SA BRASSERIE DU PECHEUR ,

ON THE INTERPRETATION OF ARTICLE 36 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY A JUDGMENT OF 16 MAY 1984 , WHICH WAS RECEIVED AT THE COURT ON 14 JUNE 1984 , THE COUR D ' APPEL (COURT OF APPEAL), COLMAR , 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 (HEREINAFTER REFERRED TO AS ' THE CONVENTION '), A QUESTION CONCERNING THE INTERPRETATION OF ARTICLE 36 OF THAT CONVENTION.

2 THAT QUESTION WAS RAISED IN THE CONTEXT OF PROCEEDINGS BETWEEN DEUTSCHE GENOSSENSCHAFTSBANK , WHOSE REGISTERED OFFICE IS AT FRANKFURT AM MAIN (FEDERAL REPUBLIC OF GERMANY), AND BRASSERIE DU PECHEUR , WHOSE REGISTERED OFFICE IS AT SCHILTIGHEIM (FRANCE). THOSE PROCEEDINGS RELATE TO THE QUESTION WHETHER BRASSERIE DU PECHEUR , IN ITS CAPACITY AS AN INTERESTED THIRD PARTY , IS ENTITLED TO APPLY FOR THE SETTING ASIDE OF AN ORDER FOR THE ENFORCEMENT OF AN INSTRUMENT ATTESTED BY A GERMAN NOTARY. THE ENFORCEMENT ORDER WAS OBTAINED IN FRANCE BY DEUTSCHE GENOSSENSCHAFTSBANK AGAINST ITS DEBTOR , DEUTSCHE GETREIDEVERWERTUNG UND RHEINISCHE KRAFTFUTTERWERKE (HEREINAFTER REFERRED TO AS ' DGV '), WHOSE REGISTERED OFFICE IS AT FRANKFURT AM MAIN .

3 IT APPEARS FROM THE DOCUMENTS FORWARDED BY THE COUR D ' APPEL THAT , BY AN AUTHENTIC INSTRUMENT DRAWN UP BY A GERMAN NOTARY ON 5 APRIL 1972 , DGV CREATED AN EIGENTUMERGRUNDSCHULD (A LAND CHARGE REGISTERED IN THE NAME OF THE PROPERTY OWNER) IN THE SUM OF DM 2 000 000 PLUS INTEREST AT THE RATE OF 10% FROM THE DATE THE INSTRUMENT WAS DRAWN UP . DGV CONSENTED THEREBY TO IMMEDIATE ENFORCEMENT AGAINST THE LAND CHARGED BY FUTURE ASSIGNEES OF THE LAND CHARGE. IT ALSO CONSENTED TO IMMEDIATE ENFORCEMENT , IF NECESSARY , BY SUCH ASSIGNEES AGAINST ALL ITS PROPERTY. BY A DECLARATION DATED 11 JANUARY 1976 , ATTESTED BY A GERMAN NOTARY , DGV ASSIGNED THE LAND CHARGE AND THE ADDITIONAL GUARANTEE THEREIN CONTAINED TO DEUTSCHE GEWERBE- UND LANDKREDITBANK AG , WHOSE REGISTERED OFFICE IS AT FRANKFURT AM MAIN , AND WHOSE DIRECT SUCCESSOR IN TITLE IS DEUTSCHE GENOSSENSCHAFTSBANK.

4 ON 8 FEBRUARY 1982 DEUTSCHE GENOSSENSCHAFTSBANK GAVE INSTRUCTIONS FOR A COPY OF THE INSTRUMENT OF 5 APRIL 1972 TO BE DELIVERED TO IT FOR THE PURPOSE OF ENFORCEMENT IN THE FEDERAL REPUBLIC OF GERMANY. SINCE IT ALSO WISHED TO ENFORCE IT AGAINST DGV ' S ASSETS IN FRANCE , IT APPLIED TO THE PRESIDENT OF THE TRIBUNAL DE GRANDE INSTANCE (REGIONAL COURT), STRASBOURG , FOR AN ORDER FOR THE ENFORCEMENT OF THE TRANSLATION INTO FRENCH OF THE INSTRUMENT OF 5 APRIL 1972. BY AN ORDER DATED 24 MARCH 1982 THE PRESIDENT OF THE TRIBUNAL DE GRANDE INSTANCE GRANTED THE APPLICATION AND IN DOING SO RELIED , IN PARTICULAR , ON ARTICLE 50 OF THE CONVENTION.

5 BRASSERIE DU PECHEUR , ANOTHER OF DGV ' S CREDITORS , THEN ALSO APPLIED TO THE PRESIDENT OF THE TRIBUNAL DE GRANDE INSTANCE IN AN ATTEMPT TO HAVE THAT ORDER SET ASIDE. THE PROCEDURAL BASIS FOR ITS APPLICATION WAS ARTICLE 496 OF THE NEW FRENCH CODE OF CIVIL PROCEDURE , WHICH PERMITS ANY PERSON AFFECTED BY A JUDICIAL DECISION GIVEN EX PARTE TO MAKE AN APPLICATION TO THE COURT WHICH MADE THE DECISION.

6 AS REGARDS THE SUBSTANCE OF ITS APPLICATION , BRASSERIE DU PECHEUR CONTENDED , WITH REFERENCE TO ARTICLES 31 AND 50 OF THE CONVENTION , THAT THE ENFORCEMENT ORDER HAD WRONGLY BEEN GRANTED IN RESPECT OF A TRANSLATION OF THE AUTHENTIC INSTRUMENT IN QUESTION RATHER THAN THE INSTRUMENT ITSELF. THE PRESIDENT OF THE TRIBUNAL DE GRANDE INSTANCE UPHELD THAT ARGUMENT AND , BY AN ORDER DATED 13 OCTOBER 1983 , SET ASIDE HIS PREVIOUS ORDER.

7 DEUTSCHE GENOSSENSCHAFTSBANK APPEALED AGAINST THAT DECISION TO THE COUR D ' APPEL , COLMAR , ARGUING THAT ARTICLE 36 OF THE CONVENTION PROVIDED FOR NO APPEAL AGAINST AN ENFORCEMENT ORDER EXCEPT ON THE PART OF THE PARTY AGAINST WHOM ENFORCEMENT WAS SOUGHT.

8 THE COUR D ' APPEL STAYED THE PROCEEDINGS AND REQUESTED THE COURT OF JUSTICE TO GIVE A PRELIMINARY RULING ' ON THE INTERPRETATION OF ARTICLE 36 OF THE CONVENTION AND IN PARTICULAR ON THE QUESTION WHETHER ARTICLE 36 , WHICH , IN CASES WHERE ENFORCEMENT IS AUTHORIZED , PROVIDES FOR AN APPEAL ONLY BY THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT , THEREBY EXCLUDES ANY REDRESS FOR INTERESTED THIRD PARTIES , EVEN WHERE THE DOMESTIC LAW OF ONE OF THE CONTRACTING STATES ALLOWS SUCH PARTIES TO CHALLENGE AN ORDER FOR ENFORCEMENT '.

9 SINCE IT APPEARS FROM THE DOCUMENTS BEFORE THE COURT THAT THE AUTHENTIC INSTRUMENT IN RESPECT OF WHICH AN ENFORCEMENT ORDER WAS INITIALLY GRANTED

UNDER ARTICLE 50 OF THE CONVENTION WAS DRAWN UP BEFORE THE CONVENTION CAME INTO FORCE , IT IS NECESSARY TO STATE FIRST THAT THE COURT ' S REPLY TO THE QUESTION REFERRED TO IT BY THE COUR D ' APPEL IS WITHOUT PREJUDICE TO THE QUESTION WHETHER THE CONVENTION IS IN FACT APPLICABLE TO THAT AUTHENTIC INSTRUMENT IN VIEW OF THE TERMS OF ARTICLE 54 OF THE CONVENTION.

10 AS REGARDS THE QUESTION OF INTERPRETATION REFERRED TO THE COURT , THE PARTIES TO THE MAIN PROCEEDINGS , THE COMMISSION AND TWO MEMBER STATES ADOPTED THE FOLLOWING POSITIONS.

11 DEUTSCHE GENOSSENSCHAFTSBANK STATES THAT THE CONVENTION IS COMPLETE IN ITSELF AND MAY NOT BE SUPPLEMENTED BY PROVISIONS OF NATIONAL LAW. IN ITS OPINION , ARTICLE 36 ONLY MAKES PROVISION FOR AN APPEAL BY THE DEFENDANT AGAINST WHOM AN ORDER FOR ENFORCEMENT IS GRANTED . IT IS TRUE THAT THAT PROVISION DEROGATES FROM DOMESTIC PROVISIONS WHICH ALSO ALLOW INTERESTED THIRD PARTIES TO CONTEST SUCH AN ORDER . HOWEVER , THE CONVENTION GOVERNS THE ORDER FOR ENFORCEMENT , NOT EXECUTION ITSELF. THE INTERESTS OF THIRD PARTIES MAY BE SAFEGUARDED IN AN APPROPRIATE CASE AT THE LATTER STAGE OF THE PROCEDURE .

12 BRASSERIE DU PECHEUR CONTENDS THAT ARTICLE 36 OF THE CONVENTION PROVIDES FOR AN ORDINARY APPEAL BY THE PARTY AGAINST WHOM AN ORDER FOR ENFORCEMENT IS GRANTED. IT DOES NOT EXCLUDE THE POSSIBILITY THAT AN ENFORCEMENT ORDER MAY BE CHALLENGED UNDER DOMESTIC LAW BY MEANS OF EXCEPTIONAL PROCEDURES , SUCH AS AN OBJECTION RAISED BY A THIRD PARTY

13 THE COMMISSION CONSIDERS THAT THE CONVENTION CONSTITUTES A COMPLETE SYSTEM WHICH SEEKS TO PLACE A FOREIGN INSTRUMENT ON AN EQUAL FOOTING WITH A DOMESTIC INSTRUMENT IN ORDER THAT IT MAY BE EXECUTED IN THE SAME MANNER AS A DOMESTIC INSTRUMENT. THE ISSUE OF AN ENFORCEMENT ORDER IS GOVERNED DIRECTLY AND EXCLUSIVELY BY THE PROVISIONS OF THE CONVENTION , WHILST EXECUTION , IN THE NARROW SENSE , IS GOVERNED BY THE DOMESTIC LAW OF THE COURT WHERE EXECUTION IS SOUGHT. THE EFFECT OF ARTICLE 36 OF THE CONVENTION IS THAT DOMESTIC LAW MAY NOT BE RELIED UPON TO SUPPLEMENT THE RIGHT OF APPEAL PROVIDED FOR BY THAT PROVISION . ANY ACTION BY A THIRD PARTY WOULD ONLY PROLONG THE ENFORCEMENT PROCEDURE , WHICH WOULD BE CONTRARY TO THE SPIRIT OF THE CONVENTION.

14 THE GERMAN GOVERNMENT TAKES THE VIEW THAT THE EXCLUSIVE NATURE OF THE APPEALS PROVIDED FOR BY THE CONVENTION MAY BE INFERRED FROM THE OBJECTIVE OF ARTICLE 31 ET SEQ., WHICH IS TO ENSURE IN A SPEEDY , SIMPLE AND UNIFORM MANNER THAT FOREIGN ENFORCEABLE INSTRUMENTS ARE EQUATED WITH DOMESTIC ENFORCEABLE INSTRUMENTS. THERE IS NO MEANS OF CHALLENGING AN ENFORCEMENT ORDER APART FROM THE RIGHT OF APPEAL PROVIDED FOR BY ARTICLE 36 OF THE CONVENTION. NEVERTHELESS , THE GERMAN GOVERNMENT EMPHASIZES THAT ALL REMEDIES PROVIDED FOR BY DOMESTIC LAW REMAIN AVAILABLE IN RELATION TO THE MEASURES TO BE TAKEN BY THE COMPETENT AUTHORITY TO EXECUTE AN ENFORCEMENT ORDER , SINCE SUCH MEASURES ARE GOVERNED EXCLUSIVELY BY THE LAW OF THE STATE WHERE EXECUTION IS LEVIED.

15 THE ITALIAN GOVERNMENT STATES THAT THE WORDING OF ARTICLE 36 OF THE CONVENTION DOES NOT EXCLUDE PROCEDURES WHEREBY ENFORCEMENT ORDERS MAY BE CHALLENGED UNDER DOMESTIC LAW BY PERSONS OTHER THAN THE PARTY AGAINST

WHOM ENFORCEMENT IS ORDERED. IN ITS OPINION , THE CONVENTION COULD NOT LOGICALLY PROVIDE GUARANTEES SOLELY IN FAVOUR OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT WITHOUT TAKING ACCOUNT OF THE PROTECTION OF THE RIGHTS OF THIRD PARTIES WHO MIGHT BE AFFECTED.

16 IT IS APPROPRIATE TO RECALL FIRST THAT IN ITS JUDGMENT OF 27 NOVEMBER 1984 (CASE 258/83 , CALZATURIFICIO BRENNERO SAS V WENDEL GMBH SCHUHPRODUKTION INTERNATIONAL , (1984) ECR 3971) THE COURT STATED THAT THE CONVENTION ' PROVIDES FOR A VERY SIMPLE ENFORCEMENT PROCEDURE WHILST GIVING THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT AN OPPORTUNITY TO LODGE AN APPEAL '. IT ALSO STATED THAT THE PRINCIPAL OBJECTIVE OF THE CONVENTION ' IS TO SIMPLIFY PROCEDURES IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT '.

17 IN ORDER TO ATTAIN THAT OBJECTIVE THE CONVENTION ESTABLISHED AN ENFORCEMENT PROCEDURE WHICH CONSTITUTES AN AUTONOMOUS AND COMPLETE SYSTEM , INCLUDING THE MATTER OF APPEALS. IT FOLLOWS THAT ARTICLE 36 OF THE CONVENTION EXCLUDES PROCEDURES WHEREBY INTERESTED THIRD PARTIES MAY CHALLENGE AN ENFORCEMENT ORDER UNDER DOMESTIC LAW.

18 THE CONVENTION MERELY REGULATES THE PROCEDURE FOR OBTAINING AN ORDER FOR THE ENFORCEMENT OF FOREIGN ENFORCEABLE INSTRUMENTS AND DOES NOT DEAL WITH EXECUTION ITSELF , WHICH CONTINUES TO BE GOVERNED BY THE DOMESTIC LAW OF THE COURT IN WHICH EXECUTION IS SOUGHT , SO THAT INTERESTED THIRD PARTIES MAY CONTEST EXECUTION BY MEANS OF THE PROCEDURES AVAILABLE TO THEM UNDER THE LAW OF THE STATE IN WHICH EXECUTION IS LEVIED.

19 FOR THOSE REASONS , THE REPLY TO THE PRELIMINARY QUESTION RAISED BY THE COUR D ' APPEL , COLMAR , MUST BE THAT ARTICLE 36 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS EXCLUDES ANY PROCEDURE WHEREBY INTERESTED PARTIES MAY CHALLENGE AN ENFORCEMENT ORDER , EVEN WHERE SUCH A PROCEDURE IS AVAILABLE TO THIRD PARTIES UNDER THE DOMESTIC LAW OF THE STATE IN WHICH THE ENFORCEMENT ORDER IS GRANTED.

COSTS

20 THE COSTS INCURRED BY THE GOVERNMENTS OF THE FEDERAL REPUBLIC OF GERMANY AND OF THE ITALIAN REPUBLIC AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION 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 D ' APPEL , COLMAR , BY A JUDGMENT OF 16 MAY 1984 , HEREBY RULES :

ARTICLE 36 OF THE CONVENTION OF 27 SEPTEMBER 1986 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS EXCLUDES ANY PROCEDURE WHEREBY INTERESTED THIRD PARTIES MAY CHALLENGE AN ENFORCEMENT ORDER , EVEN WHERE SUCH A PROCEDURE IS AVAILABLE TO THIRD PARTIES UNDER

THE DOMESTIC LAW OF THE STATE IN WHICH THE ENFORCEMENT ORDER IS GRANTED.

DOCNUM	61984J0148
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1985 Page 01981 Spanish special edition Page 00755
DOC	1985/07/02
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JURCIT	41968A0927(01)-A36 : N 1 7 8 11 12 13 14 15 17 19 41968A0927(01)-A50 : N 4 6 9 41968A0927(01)-A31 : N 6 14 41968A0927(01)-A54 : N 9 61983J0258 : N 16
CONCERNS	Interprets 41968A0927(01) -A36
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	French
OBSERV	Federal Republic of Germany ; Italy ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*A9* Cour d'appel de Colmar, 1re chambre civile, arrêt du 16/05/1984 (I U 3239/83) ; *P1* Cour d'appel de Colmar, 1re chambre civile, arrêt du 04/06/1986 (I U 3239/83) ; - Gazette du Palais 1986 II Som. p.370-371 (résumé) ; *P2* Cour de cassation (France), 1re chambre civile, arrêt du 08/11/1988 (86-17.491 1197) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1988 I no 310 ; - Recueil Dalloz Sirey 1988 IR. p.275 (résumé) ; - Gazette du Palais 1989 II Rés. p.41 (résumé) ; - La Semaine juridique - édition générale 1989 IV p.12 (résumé) ; - Revue critique de droit international privé 1989 p.796 (résumé) ; - International Litigation Procedure 1991 p.167-169 ; - X: La Semaine juridique - édition générale 1989 II 21276
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H.: Revue critique de droit international privé 1986 p.345-348 ; Mori, Paola: Sulla impugnabilità del provvedimento che concede l'exequatur secondo la Convenzione di Bruxelles del 27 settembre 1968, Giustizia civile 1986 I p.3012-3013 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1988 p.a3

PROCEDU Reference for a preliminary ruling

ADVGEN Lenz

JUDGRAP Joliet

DATES of document: 02/07/1985
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Judgment of the Court (Fourth Chamber)
of 3 October 1985
P. Capelloni et F. Aquilini v J. C. J. Pelkmans. Reference for a preliminary ruling: Corte suprema di Cassazione - Italy. Brussels Convention - Appeal against a decision authorizing enforcement - Protective measures. Case 119/84.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - PROTECTIVE MEASURES AGAINST THE PROPERTY OF THE PERSON AGAINST WHOM ENFORCEMENT IS SOUGHT - APPLICATION OF SUCH MEASURES - RELEVANT LEGISLATION

CONVENTION OF 27 SEPTEMBER 1968 , ART. 39)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - PROTECTIVE MEASURES AGAINST THE PROPERTY OF THE PERSON AGAINST WHOM ENFORCEMENT IS SOUGHT - SPECIFIC AUTHORIZATION NOT REQUIRED - PERIOD WITHIN WHICH THE PROTECTIVE MEASURES MAY BE APPLIED - CONFIRMATORY JUDGMENT REQUIRED BY NATIONAL LAW - NOT OBLIGATORY

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS 36 AND 39)

1 . ARTICLE 39 OF THE CONVENTION OF 27 SEPTEMBER 1968 MERELY LAYS DOWN THE PRINCIPLE THAT THE PARTY WHO HAS APPLIED FOR ENFORCEMENT MAY , DURING THE PERIOD INDICATED IN THAT ARTICLE , PROCEED TO APPLY MEASURES TO PROTECT THE PROPERTY OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT . BY CONTRAST , THE CONVENTION LEAVES THE MATTER OF RESOLVING ANY QUESTION NOT COVERED BY SPECIFIC PROVISIONS OF THE TREATY TO THE PROCEDURAL LAW OF THE COURT HEARING THE PROCEEDINGS. IT MUST NEVERTHELESS BE MADE CLEAR THAT THE APPLICATION OF THE REQUIREMENTS OF THE NATIONAL PROCEDURAL LAW OF THE COURT HEARING THE PROCEEDINGS MUST NOT IN ANY CIRCUMSTANCES LEAD TO FRUSTRATION OF THE PRINCIPLES LAID DOWN IN THAT REGARD , WHETHER EXPRESSLY OR BY IMPLICATION , BY THE CONVENTION ITSELF AND BY ARTICLE 39 THEREOF IN PARTICULAR . ACCORDINGLY , THE QUESTION WHETHER ANY GIVEN PROVISION OF THE NATIONAL PROCEDURAL LAW OF THE COURT HEARING THE PROCEEDINGS IS APPLICABLE TO PROTECTIVE MEASURES TAKEN PURSUANT TO ARTICLE 39 DEPENDS UPON THE SCOPE OF EACH PROVISION OF NATIONAL LAW AND UPON THE EXTENT TO WHICH IT IS COMPATIBLE WITH THE PRINCIPLES LAID DOWN BY ARTICLE 39

2 . BY VIRTUE OF ARTICLE 39 OF THE CONVENTION A PARTY WHO HAS APPLIED FOR AND OBTAINED AUTHORIZATION FOR ENFORCEMENT MAY PROCEED DIRECTLY WITH PROTECTIVE MEASURE AGAINST THE PROPERTY OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT AND IS UNDER NO OBLIGATION TO OBTAIN SPECIFIC AUTHORIZATION. SUCH MEASURES MAY BE TAKEN UP TO THE EXPIRY OF THE PERIOD FOR LODGING AN APPEAL PRESCRIBED IN ARTICLE 36 AND , IF SUCH AN APPEAL IS LODGED , UNTIL A DECISION IS GIVEN THEREON

A PARTY WHO HAS PROCEEDED WITH THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 OF THE CONVENTION IS UNDER NO OBLIGATION TO OBTAIN IN RESPECT OF SUCH MEASURES ANY CONFIRMATORY JUDGMENT REQUIRED BY THE NATIONAL LAW OF THE COURT IN QUESTION. HOWEVER , ARTICLE 39 DOES NOT PREVENT THE PARTY AGAINST WHOM THOSE MEASURES HAVE BEEN APPLIED FROM TAKING LEGAL PROCEEDINGS IN ORDER TO SECURE , BY RECOURSE TO THE APPROPRIATE PROCEDURES LAID DOWN IN THE NATIONAL LAW OF THE COURT DEALING WITH THE MATTER , ADEQUATE PROTECTION OF THE RIGHTS WHICH HE ALLEGES TO HAVE BEEN INFRINGED BY THE MEASURES IN QUESTION.

IN CASE 119/84 ,

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 CORTE SUPREMA DI CASSAZIONE (SUPREME COURT OF CASSATION), FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

P . CAPELLONI AND F. AQUILINI

AND

J . C . J . PELKMANS

ON THE INTERPRETATION OF ARTICLE 39 OF THE ABOVEMENTIONED CONVENTION OF 27 SEPTEMBER 1968 ,

COSTS

38 THE COSTS INCURRED BY THE UNITED KINGDOM AND THE COMMISSION , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS 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 AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT (FOURTH CHAMBER),

IN REPLY TO THE QUESTIONS SUBMITTED TO IT BY THE CORTE SUPREMA DI CASSAZIONE BY ORDER OF 9 NOVEMBER 1983 , HEREBY RULES :

(1) BY VIRTUE OF ARTICLE 39 OF THE CONVENTION , A PARTY WHO HAS APPLIED FOR AND OBTAINED AUTHORIZATION FOR ENFORCEMENT MAY , WITHIN THE PERIOD MENTIONED IN THAT ARTICLE , PROCEED DIRECTLY WITH PROTECTIVE MEASURES AGAINST THE PROPERTY OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT AND IS UNDER NO OBLIGATION TO OBTAIN SPECIFIC AUTHORIZATION.

(2) A PARTY WHO HAS OBTAINED AUTHORIZATION FOR ENFORCEMENT MAY PROCEED WITH THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 UNTIL THE EXPIRY OF THE PERIOD PRESCRIBED IN ARTICLE 36 FOR LODGING AN APPEAL AND , IF SUCH AN APPEAL IS LODGED , UNTIL A DECISION IS GIVEN THEREON .

(3)A PARTY WHO HAS PROCEEDED WITH THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 OF THE CONVENTION IS UNDER NO OBLIGATION TO OBTAIN , IN RESPECT OF THOSE MEASURES , ANY CONFIRMATORY JUDGMENT REQUIRED BY THE NATIONAL LAW OF THE COURT IN QUESTION.

1 BY AN ORDER OF 9 NOVEMBER 1983 , WHICH WAS RECEIVED AT THE COURT ON 8 MAY 1984 , THE CORTE SUPREMA DI CASSAZIONE REFERRED 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 (HEREINAFTER REFERRED TO AS ' THE CONVENTION ') THREE QUESTIONS ON THE INTERPRETATION OF ARTICLE 39 OF THE CONVENTION.

2 THE QUESTIONS WERE RAISED IN PROCEEDINGS INSTITUTED BY MESSRS CAPELLONI AND AQUILINI AGAINST MR PELKMANS. IT IS APPARENT FROM THE DOCUMENTS BEFORE THE COURT THAT MR PELKMANS SECURED FROM THE CORTE D ' APPELLO (COURT OF APPEAL), BRESCIA , A DECISION DATED 19 DECEMBER 1980 WHEREBY , PURSUANT TO ARTICLE 31 ET SEQ. OF THE CONVENTION , THE ENFORCEMENT WAS AUTHORIZED IN ITALY OF A JUDGMENT DELIVERED ON 8 MAY 1979 BY A COURT IN BREDA (NETHERLANDS) ORDERING MESSRS CAPELLONI AND AQUILINI TO PAY MR PELKMANS THE SUM OF HFL 127 400 , TOGETHER WITH INTEREST AND COSTS.

3 MESSRS CAPELLONI AND AQUILINI APPEALED AGAINST THAT DECISION TO THE SAME CORTE D ' APPELLO PURSUANT TO ARTICLE 36 OF THE CONVENTION. ON 13 MARCH 1981 , BEFORE ANY DECISION HAD BEEN GIVEN ON THAT APPEAL , MR PELKMANS ARRANGED FOR PROTECTIVE SEQUESTRATION OF IMMOVABLE PROPERTY BELONGING TO MESSRS CAPELLONI AND AQUILINI UNDER ARTICLE 39 OF THE CONVENTION.

4 MR PELKMANS THEN REQUESTED THE CORTE D ' APPELLO , BRESCIA , TO CONFIRM THE SEQUESTRATION IN ACCORDANCE WITH ARTICLE 680 OF THE ITALIAN CODE OF CIVIL PROCEDURE. MESSRS CAPELLONI AND AQUILINI OBJECTED TO ANY SUCH CONFIRMATION , CLAIMING THAT CERTAIN PROVISIONS OF THAT CODE REGARDING PROTECTIVE SEQUESTRATION HAD NOT BEEN COMPLIED WITH , AND THE CORTE D ' APPELLO EXPRESSED THE VIEW , IN ITS JUDGMENT OF 14 JULY 1981 , THAT THE PROVISIONS OF THE ITALIAN CODE OF CIVIL PROCEDURE CITED ABOVE WERE NOT APPLICABLE TO A SEQUESTRATION CARRIED OUT UNDER ARTICLE 39 OF THE CONVENTION. FOR THE SAME REASON , THE CORTE D ' APPELLO ALSO HELD THAT MR PELKMANS ' APPLICATION FOR CONFIRMATION WAS UNACCEPTABLE ON THE GROUND THAT ARTICLE 680 OF THE ITALIAN CODE OF CIVIL PROCEDURE , WHICH PROVIDES FOR SUCH CONFIRMATION , DID NOT COVER SEQUESTRATIONS OF THE TYPE IN QUESTION.

5 THE CASE WAS BROUGHT BEFORE THE CORTE SUPREMA DI CASSAZIONE , WHICH STAYED THE PROCEEDINGS AND SUBMITTED THE FOLLOWING QUESTIONS TO THE COURT :

' (1) ARE THE PROTECTIVE MEASURES AGAINST THE PROPERTY OF THE DEBTOR WHICH MAY BE PROCEEDED WITH IN THE EVENT OF HIS APPEALING AGAINST AN ORDER FOR THE ENFORCEMENT OF DECISIONS GIVEN IN ANOTHER MEMBER STATE OF THE EUROPEAN COMMUNITY SUBJECT TO THE PROCEDURAL RULES OF MUNICIPAL LAW , AS REGARDS THE PROCEDURES FOR THEIR IMPLEMENTATION AND THE CONDITIONS FOR THEIR VALIDITY AND EFFECTIVENESS , OR DID THE STATES WHICH ACCEDED TO THE BRUSSELS CONVENTION INTEND TO ADOPT A SINGLE LEGAL INSTRUMENT , IDENTICAL IN ALL THE CONTRACTING STATES , WHOSE PURPOSE IS TO ENSURE THAT THE DEBTOR CANNOT DISPOSE OF HIS PROPERTY IN THE MEANTIME , THAT PURPOSE BEING SATISFIED ONCE EXECUTION IS LEVIED AFTER DISMISSAL OF AN APPEAL UNDER ARTICLE 37 OF THE BRUSSELS CONVENTION , WITHOUT THE NEED , IN PARTICULAR , FOR A COURT RULING TO CONFIRM THE PROTECTIVE MEASURE?

(2)NOTWITHSTANDING THAT AN ORDER HAS ALREADY BEEN MADE IN A CONTRACTING STATE DECLARING ENFORCEABLE A JUDGMENT GIVEN IN ANOTHER CONTRACTING STATE , IS AUTHORIZATION REQUIRED FROM THE SAME COURT TO ENABLE PROTECTIVE MEASURES TO BE TAKEN AGAINST THE PROPERTY OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT , OR MAY THE APPLICANT PROCEED DIRECTLY WITH THE PROTECTIVE MEASURES WITHOUT THE NEED FOR SPECIFIC AUTHORIZATION?

(3)ARE CASES GOVERNED BY ARTICLE 39 OF THE BRUSSELS CONVENTION ALSO SUBJECT TO THE PROCEDURAL RULES OF THE STATE IN WHICH PROTECTIVE MEASURES ARE

ADOPTED , WHICH RULES PRESCRIBE A NON-EXTENDABLE PERIOD , RUNNING FROM THE DATE ON WHICH THE PARTY APPLYING FOR THOSE MEASURES IS IN A POSITION TO PROCEED WITH THEM , WITHIN WHICH PROTECTIVE MEASURES AGAINST PROPERTY MUST BE COMMENCED OR COMPLETED , OR MAY THAT PARTY PROCEED WITH SUCH MEASURES , WITHOUT LIMITATION AS TO TIME , UNTIL SUCH TIME AS THE COMPETENT JUDICIAL AUTHORITY HAS ADJUDICATED ON THE APPEAL REFERRED TO IN ARTICLE 37 OF THE CONVENTION?

'

6 THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES HAVE SUBMITTED OBSERVATIONS ON THOSE QUESTIONS PURSUANT TO ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT.

7 BY ORDER OF THE COURT OF 12 DECEMBER 1984 , THE CASE WAS ASSIGNED TO THE FOURTH CHAMBER.

8 ARTICLE 39 OF THE CONVENTION PROVIDES AS FOLLOWS :

' DURING THE TIME SPECIFIED FOR AN APPEAL PURSUANT TO ARTICLE 36 AND UNTIL ANY SUCH APPEAL HAS BEEN DETERMINED , NO MEASURES OF ENFORCEMENT MAY BE TAKEN OTHER THAN PROTECTIVE MEASURES TAKEN AGAINST THE PROPERTY OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT.

THE DECISION AUTHORIZING ENFORCEMENT SHALL CARRY WITH IT THE POWER TO PROCEED TO ANY SUCH PROTECTIVE MEASURES. '

9 IN THE FIRST PART OF ITS FIRST QUESTION , THE NATIONAL COURT SEEKS , IN SUBSTANCE , TO ESTABLISH WHETHER , AND IF SO TO WHAT EXTENT , IT IS NECESSARY , IN ORDER TO DETERMINE WHAT RULES GOVERN THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 , TO REFER TO THE PROVISIONS OF THE VARIOUS NATIONAL LAWS APPLICABLE TO SIMILAR MEASURES.

10 IN THE OTHER QUESTIONS SUBMITTED TO THE COURT , THE NATIONAL COURT IS CONCERNED MORE PARTICULARLY WITH THE APPLICABILITY TO THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 OF THE PROVISIONS OF THE ITALIAN CODE OF CIVIL PROCEDURE WHICH APPLY THE FOLLOWING PRINCIPLES TO PROTECTIVE SEQUESTRATION :

(I) ANY SEQUESTRATION OF THAT KIND MUST BE AUTHORIZED BY A DECISION OF THE COMPETENT COURT AND THEREFORE THE DEBTOR MAY NOT PROCEED WITH IT DIRECTLY ;

(II)PROTECTIVE SEQUESTRATION MUST BE CARRIED OUT WITHIN A NON-EXTENDABLE PERIOD WHICH COMMENCES ON THE DATE ON WHICH THE PARTY APPLYING FOR THE MEASURE IS IN A POSITION TO PROCEED WITH IT ;

(III)ANY SUCH SEQUESTRATION MUST , AFTER BEING CARRIED OUT , BE THE SUBJECT OF PROCEEDINGS FOR CONFIRMATION THEREOF.

APPLICABILITY TO THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 OF THE NATIONAL PROVISIONS APPLICABLE TO SIMILAR MEASURES

11 WITH RESPECT TO THE QUESTION WHETHER IN GENERAL THE COURT TO WHICH APPLICATION IS MADE MAY REFER TO ITS OWN INTERNAL PROCEDURAL LAW IN ORDER TO DETERMINE THE RULES APPLICABLE TO THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 , THE COMMISSION STATES THAT THE REQUIREMENTS LAID DOWN IN THAT ARTICLE

ARE NOT COMPLETE. MORE SPECIFICALLY , ACCORDING TO THE COMMISSION , NEITHER ARTICLE 39 NOR ANY OTHER PROVISION OF THE CONVENTION GIVES A LIST OF THE MEASURES IN QUESTION , THE TYPE AND VALUE OF THE GOODS IN RESPECT OF WHICH THEY MAY BE ADOPTED , THE CONDITIONS TO BE SATISFIED FOR SUCH MEASURES TO BE VALID OR THE DETAILED PROVISIONS FOR IMPLEMENTING THEM AND ENSURING THAT THEY ARE PROPER. AS REGARDS THOSE MATTERS AND ANY OTHER MATTER NOT DEALT WITH IN A UNIFORM MANNER BY THE CONVENTION ITSELF , THE COMMISSION CONSIDERS THAT THE NATIONAL COURT HAS NO ALTERNATIVE BUT TO APPLY THE RELEVANT PROVISIONS OF ITS NATIONAL CODE OF PROCEDURE , TO WHICH THE CONVENTION REFERS BY IMPLICATION.

12 THE UNITED KINGDOM SHARES THE COMMISSION ' S VIEW AND CONSIDERS THAT THE QUESTION OF HOW A NATIONAL COURT MUST EXERCISE THE POWER TO GRANT PROTECTIVE MEASURES PROVIDED FOR IN ARTICLE 39 IS A MATTER FALLING WHOLLY WITHIN THE DOMAIN OF ITS NATIONAL PROCEDURAL LAW. THE UNITED KINGDOM CONSIDERS THAT ALL THE QUESTIONS RAISED BY THE NATIONAL COURT SHOULD BE RESOLVED BY APPLICATION OF ITALIAN PROCEDURAL LAW , SINCE THE CONVENTION DOES NOT LAY DOWN SPECIFIC RULES.

13 BEFORE A REPLY IS GIVEN TO THE QUESTION SUBMITTED ON THAT POINT BY THE NATIONAL COURT , IT IS NECESSARY TO EXAMINE THE CONTEXT OF ARTICLE 39 AND THE AIM WHICH IT PURSUES.

14 ARTICLE 39 APPEARS IN SECTION 2 OF TITLE III OF THE CONVENTION , WHICH IS CONCERNED WITH THE ENFORCEMENT IN ONE CONTRACTING STATE OF DECISIONS GIVEN IN ANOTHER CONTRACTING STATE.

15 AS THE COURT HAS ALREADY INDICATED IN ITS JUDGMENT OF 27 NOVEMBER 1984 (CASE 258/83 BRENNERO (1984) ECR 3971), THE CONVENTION IS INTENDED TO LIMIT THE REQUIREMENTS TO WHICH THE ENFORCEMENT OF A JUDICIAL DECISION MAY BE MADE SUBJECT IN ANOTHER CONTRACTING STATE AND FOR THAT PURPOSE LAYS DOWN A VERY SUMMARY PROCEDURE FOR OBTAINING AUTHORIZATION FOR ENFORCEMENT , WHILST AT THE SAME TIME GIVING THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT AN OPPORTUNITY TO APPEAL AGAINST THAT DECISION.

16 HOWEVER , THE CONVENTION CONFINES ITSELF TO GOVERNING THE PROCEDURE FOR OBTAINING AUTHORIZATION FOR ENFORCEMENT , AND DOES NOT CONTAIN ANY PROVISIONS CONCERNING ENFORCEMENT PROPERLY SO CALLED , WHICH , AS STATED IN THE JUDGMENT OF 2 JULY 1985 (CASE 148/84 DEUTSCHE GENOSSENSCHAFTSBANK (1985) ECR 1987), IS SUBJECT TO THE NATIONAL LAW OF THE COURT HEARING THE PROCEEDINGS.

17 IN THAT CONTEXT , ARTICLE 39 GOVERNS , DURING THE PERIOD LAID DOWN IN ARTICLE 36 WITHIN WHICH AN APPEAL MAY BE LODGED AND UNTIL THAT APPEAL HAS BEEN DETERMINED , THE RIGHTS OF THE PARTY WHO HAS APPLIED FOR AND OBTAINED AUTHORIZATION FOR ENFORCEMENT.

18 AS IS APPARENT FROM THE FIRST PARAGRAPH OF ARTICLE 39 , THE PARTY IN QUESTION MAY NOT , DURING THAT TIME , TAKE ANY MEASURES OF ENFORCEMENT PROPERLY SO CALLED BUT MUST CONFINE ITSELF TO TAKING , IF IT CONSIDERS THAT THERE IS A NEED FOR THEM , PROTECTIVE MEASURES AGAINST THE PROPERTYOF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT. THE AUTHORIZATION TO TAKE SUCH PROTECTIVE MEASURES FLOWS , AS INDICATED IN THE SECOND PARAGRAPH

, FROM THE DECISION AUTHORIZING ENFORCEMENT .

19 THE OBVIOUS PURPOSE OF THAT PROVISION IS TO OFFER THE PARTY WHO HAS OBTAINED AUTHORIZATION FOR ENFORCEMENT , BUT WHO CANNOT YET PROCEED WITH MEASURES OF ENFORCEMENT , A MEANS OF PREVENTING THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT FROM DISPOSING OF HIS PROPERTY IN THE MEANTIME SO AS TO RENDER FUTURE ENFORCEMENT FRUITLESS OR INDEED IMPOSSIBLE .

20 HOWEVER , AS IN THE CASE OF ENFORCEMENT PROPERLY SO CALLED , THE CONVENTION CONFINES ITSELF , WITH RESPECT TO THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 , TO LAYING DOWN THE PRINCIPLE THAT THE PARTY WHO HAS APPLIED FOR ENFORCEMENT MAY , DURING THE PERIOD INDICATED IN THAT ARTICLE , PROCEED WITH SUCH MEASURES. BY CONTRAST , THE CONVENTION LEAVES THE MATTER OF RESOLVING ANY QUESTION NOT COVERED BY SPECIFIC PROVISIONS OF THE TREATY TO THE PROCEDURAL LAW OF THE COURT HEARING THE PROCEEDINGS.

21 IT MUST NEVERTHELESS BE MADE CLEAR THAT THE APPLICATION OF THE REQUIREMENTS OF THE NATIONAL PROCEDURAL LAW OF THE COURT HEARING THE PROCEEDINGS MUST NOT IN ANY CIRCUMSTANCES LEAD TO FRUSTRATION OF THE PRINCIPLES LAID DOWN IN THAT REGARD , WHETHER EXPRESSLY OR BY IMPLICATION , BY THE CONVENTION ITSELF AND BY ARTICLE 39 THEREOF IN PARTICULAR . ACCORDINGLY , THE QUESTION WHETHER ANY GIVEN PROVISION OF THE NATIONAL PROCEDURAL LAW OF THE COURT HEARING THE PROCEEDINGS IS APPLICABLE TO PROTECTIVE MEASURES TAKEN PURSUANT TO ARTICLE 39 DEPENDS UPON THE SCOPE OF EACH PROVISION OF NATIONAL LAW AND UPON THE EXTENT TO WHICH IT IS COMPATIBLE WITH THE PRINCIPLES LAID DOWN BY ARTICLE 39

22 CONSEQUENTLY , IT IS IMPOSSIBLE TO REPLY IN GENERAL TERMS TO THE QUESTIONS SUBMITTED BY THE NATIONAL COURT : IT IS NECESSARY TO CONSIDER IN EACH INDIVIDUAL CASE WHETHER THE NATIONAL PROVISIONS MENTIONED BY THE ITALIAN COURT IN ITS OTHER QUESTIONS ARE COMPATIBLE WITH ARTICLE 39.

THE NEED TO OBTAIN A SPECIFIC DECISION AUTHORIZING THE PROTECTIVE MEASURES

23 IN ITS SECOND QUESTION THE NATIONAL COURT ASKS WHETHER THERE APPLIES TO PROTECTIVE MEASURES TAKEN PURSUANT TO ARTICLE 39 THE PRINCIPLE EMBODIED IN ITS OWN NATIONAL LAW WHEREBY A PERSON SEEKING TO PROCEED WITH PROTECTIVE SEQUESTRATION MUST FIRST BE AUTHORIZED TO DO SO BY A SPECIFIC DECISION OF THE COURT OF COMPETENT JURISDICTION.

24 AS THE COMMISSION HAS CORRECTLY STATED , THE EFFECT OF ARTICLE 39 IS THAT A PARTY WHO HAS OBTAINED AUTHORIZATION FOR ENFORCEMENT IS UNDER NO OBLIGATION TO OBTAIN SPECIFIC AND SEPARATE JUDICIAL AUTHORIZATION IN ORDER TO PROCEED WITH PROTECTIVE MEASURES DURING THE PERIOD MENTIONED IN THAT ARTICLE , EVEN THOUGH SUCH AUTHORIZATION MAY NORMALLY BE REQUIRED BY THE NATIONAL PROCEDURAL LAW OF THE COURT IN QUESTION .

25 THAT CONCLUSION FOLLOWS FROM THE VERY WORDING OF THE SECOND PARAGRAPH OF ARTICLE 39 WHICH STATES THAT THE DECISION AUTHORIZING ENFORCEMENT ' SHALL CARRY WITH IT ' THE POWER TO PROCEED WITH PROTECTIVE MEASURES. THAT EXPRESSION INDICATES THAT THE RIGHT TO PROCEED WITH SUCH MEASURES DERIVES FROM THE DECISION ALLOWING ENFORCEMENT AND THEREFORE THAT A SECOND DECISION , WHICH COULD NOT IN ANY EVENT UNDERMINE THAT RIGHT , WOULD NOT BE JUSTIFIED.

26 IT MUST THEREFORE BE STATED IN REPLY TO THE SECOND QUESTION SUBMITTED BY THE NATIONAL COURT THAT BY VIRTUE OF ARTICLE 39 OF THE CONVENTION A PARTY WHO HAS APPLIED FOR AND OBTAINED AUTHORIZATION FOR ENFORCEMENT MAY , BY VIRTUE OF THAT ARTICLE AND DURING THE PERIOD MENTIONED THEREIN , PROCEED DIRECTLY WITH PROTECTIVE MEASURES AGAINST THE PROPERTY OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT AND IS UNDER NO OBLIGATION TO OBTAIN SPECIFIC AUTHORIZATION.

THE PERIOD DURING WHICH MEASURES OF ENFORCEMENT MAY BE TAKEN

27 IN ITS THIRD QUESTION , THE NATIONAL COURT ASKS WHETHER THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 ARE SUBJECT TO THE RULE EMBODIED IN ITS NATIONAL LAW WHEREBY A PROTECTIVE MEASURE MUST BE TAKEN WITHIN A NON-EXTENDABLE PERIOD RUNNING FROM THE DATE ON WHICH THE PARTY APPLYING FOR THOSE MEASURES IS IN A POSITION TO PROCEED WITH THEM .

28 IT MUST BE STATED , IN CONFORMITY WITH THE VIEW PUT FORWARD BY THE COMMISSION , THAT THE REPLY TO THAT QUESTION IS TO BE INFERRED FROM THE VERY WORDING OF THE FIRST PARAGRAPH OF ARTICLE 39. SINCE THE CONVENTION PROVIDES THAT ' DURING THE TIME SPECIFIED FOR AN APPEAL PURSUANT TO ARTICLE 36 AND UNTIL ANY SUCH APPEAL HAS BEEN DETERMINED , NO MEASURES OF ENFORCEMENT MAY BE TAKEN OTHER THAN PROTECTIVE MEASURES ' , THE RIGHT TO PROCEED WITH THE MEASURES IN QUESTION CANNOT BE RESTRICTED IN TIME BY THE APPLICATION OF NATIONAL MEASURES PRESCRIBING A SHORTER PERIOD.

29 CONSEQUENTLY , SUCH PROVISIONS ARE NOT APPLICABLE TO THE CASES GOVERNED BY ARTICLE 39.

30 IT MUST THEREFORE BE STATED IN REPLY TO THE THIRD QUESTION SUBMITTED BY THE NATIONAL COURT THAT A PARTY WHO HAS OBTAINED AUTHORIZATION FOR ENFORCEMENT MAY PROCEED WITH THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 UNTIL THE EXPIRY OF THE PERIOD FOR LODGING AN APPEAL PRESCRIBED IN ARTICLE 36 AND , IF SUCH AN APPEAL IS LODGED , UNTIL A DECISION IS GIVEN THEREON.

THE NEED FOR A JUDGMENT CONFIRMING THE PROTECTIVE MEASURES

31 IN THE SECOND PART OF ITS FIRST QUESTION THE NATIONAL COURT ASKS WHETHER A PARTY WHO HAS PROCEEDED WITH PROTECTIVE MEASURES UNDER ARTICLE 39 MUST OBTAIN IN RESPECT OF SUCH MEASURES ANY CONFIRMATORY JUDGMENT REQUIRED BY ITS NATIONAL PROCEDURAL LAW.

32 THE COMMISSION CONSIDERS THAT NEITHER THE WORDING NOR THE PURPOSE OF THE ARTICLE IN QUESTION PREVENTS THE REQUIREMENT OF SUCH A CONFIRMATORY JUDGMENT FROM EXTENDING TO PROTECTIVE MEASURES ADOPTED UNDER ARTICLE 39. ACCORDING TO THE COMMISSION , PROVIDED THAT SUCH MEASURES ARE ALLOWED AUTOMATICALLY AND WITHOUT PRIOR EXAMINATION BY THE JUDICIAL AUTHORITY , A PROCEDURE FOR EXAMINATION OF THE MEASURES EX POST FACTO , SUCH AS THE CONFIRMATORY PROCEDURE REQUIRED BY ITALIAN LAW , CONSTITUTES THE ONLY WAY OF AVERTING THE RISK THAT IRRELEVANT OR VEXATIOUS PROTECTIVE MEASURES MIGHT BE ADOPTED.

33 IT MUST BE NOTED IN THAT CONNECTION THAT THE CONFIRMATORY PROCEDURES LAID DOWN BY THE LAW IN SEVERAL CONTRACTING STATES ARE INTENDED TO ENSURE EX POST FACTO THAT THE DECISION AUTHORIZING THE PROTECTIVE MEASURES IS

SUBJECT TO EXAMINATION IN ORDER TO ESTABLISH WHETHER IT WAS WELL FOUNDED , IN VIEW OF THE FACT THAT THE PROCEDURE PRECEDING THE ADOPTION OF SUCH DECISIONS IS NORMALLY SUMMARY IN CHARACTER .

34 AN EXAMINATION OF THAT KIND IS UNJUSTIFIED AND EVEN SUPERFLUOUS IN THE CASE OF PROTECTIVE MEASURES ADOPTED UNDER ARTICLE 39. THOSE MEASURES ARE GRANTED NOT ON THE BASIS OF A SUMMARY PROCEDURE FOR AUTHORIZATION BUT RATHER ON THE BASIS OF THE LEGAL EFFECT WITH WHICH A DECISION ADOPTED IN ANOTHER CONTRACTING STATE IS ENDOWED BY THE CONVENTION .

35 IT IS TO BE NOTED IN THAT CONNECTION THAT THE ONLY MEANS OF CHALLENGING THE DECISION AUTHORIZING ENFORCEMENT AFFORDED BY THE COMMISSION IS THE APPEAL REFERRED TO IN ARTICLE 36. CONSEQUENTLY , ANYOTHER REMEDY PROVIDED FOR BY THE NATIONAL LAW OF THE COURT IN QUESTION , EVEN IF LIMITED TO THE PART OF THE DECISION WHICH IMPLICITLY AUTHORIZES THE PROTECTIVE MEASURES , IS EXCLUDED.

36 AS REGARDS THE ARGUMENT PUT FORWARD BY THE COMMISSION TO THE EFFECT THAT THE PROCEDURE OF SUBSEQUENT EXAMINATION ENABLES ANY IRREGULARITIES OR ABUSES COMMITTED IN THE APPLICATION OF THE PROTECTIVE MEASURES IN QUESTION TO BE RECTIFIED , IT MUST BE OBSERVED THAT ARTICLE 39 DOES NOT PREVENT THE PARTY AGAINST WHOM THOSE MEASURES HAVE BEEN APPLIED FROM TAKING LEGAL PROCEEDINGS IN ORDER TO SECURE , BY RECOURSE TO THE APPROPRIATE PROCEDURES LAID DOWN IN THE NATIONAL LAW OF THE COURT DEALING WITH THE MATTER , ADEQUATE PROTECTION OF THE RIGHTS WHICH HE ALLEGES TO HAVE BEEN INFRINGED BY THE MEASURES IN QUESTION .

37 IT MUST THEREFORE BE STATED IN REPLY TO THE SECOND PART OF THE FIRST QUESTION SUBMITTED BY THE NATIONAL COURT THAT A PARTY WHO HAS PROCEEDED WITH THE PROTECTIVE MEASURES REFERRED TO IN ARTICLE 39 OF THE CONVENTION IS UNDER NO OBLIGATION TO OBTAIN IN RESPECT OF SUCH MEASURES ANY CONFIRMATORY JUDGMENT REQUIRED BY THE NATIONAL LAW OF THE COURT IN QUESTION.

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SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

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NATCOUR *A6* Arrondissementsrechtbank Breda, incidentele vonnis van 21/11/1978 (133/77) ; *A7* Arrondissementsrechtbank Breda, vonnis van 08/05/1979 (133/77) ; *A8* Corte d'Appello di Brescia, Sezione II civile, sentenza dell'01/07/81 16/07/1981 (346 - RG 166/81) ; *A9* Corte di Cassazione, Sezione III civile, ordinanza del 09/11/1983 14/03/1984 (155 - RG 7415/81) ; - Il massimario del Foro italiano 1984 Col.329 (résumé) ; *P1* Corte di Cassazione, Sezione III civile, sentenza del 17/12/1986 16/11/1987 (8380 - RG 7415/81) ; - Il massimario del Foro italiano 1987 Col.1386-1387 (résumé) ; - Giustizia civile 1988 I p.705-709 ; - La nuova giurisprudenza civile commentata 1988 I p.293-297 ; - Rivista di diritto internazionale privato e processuale 1989 p.129-136 ; - Campeis, Giuseppe ; De Pauli, Arrigo: La nuova giurisprudenza civile commentata 1988 I p.298-301

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PROCEDU Reference for a preliminary ruling

ADVGEN Sir Gordon Slynn

JUDGRAP Bosco

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**Order of the Court
of 28 March 1984
Christoph von Gallera v Gisèle Maitre. Reference for a preliminary ruling: Tribunal de grande instance de Versailles - France. Case 56/84.**

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROTOCOL ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION - NATIONAL COURTS ENTITLED TO REQUEST THE COURT OF JUSTICE TO GIVE PRELIMINARY RULINGS - COURT TO WHICH APPLICATION HAS BEEN MADE FOR ENFORCEMENT - NOT ENTITLED

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 32 ; PROTOCOL OF 3 JUNE 1971 , ART . 2 ; RULES OF PROCEDURE , ARTS 92 (1) AND 103 (2))

IN CASE 56/84

REFERENCE TO THE COURT BY THE TRIBUNAL DE GRANDE INSTANCE (REGIONAL COURT) VERSAILLES , FOR A PRELIMINARY RULING IN THE CASE PENDING BEFORE THAT COURT BETWEEN

CHRISTOPH VON GALLERA

AND

GISELE MAITRE

ON THE INTERPRETATION OF ARTICLE 32 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY ORDER OF 17 JANUARY 1984 , RECEIVED AT THE COURT ON 1 MARCH 1984 , THE FIRST CHAMBER OF THE TRIBUNAL DE GRANDE INSTANCE , VERSAILLES , REFERRED TO THE COURT FOR A PRELIMINARY RULING A QUESTION ON THE INTERPRETATION OF ARTICLE 32 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 ' ').

2 ARTICLE 32 OF THE CONVENTION , WHICH DEALS COMPREHENSIVELY WITH THE POWER TO GRANT AN ORDER FOR ENFORCEMENT IN RESPECT OF DECISIONS OF THE TYPE COVERED BY THE CONVENTION GIVEN IN A CONTRACTING STATE , PROVIDES THAT APPLICATION MUST BE MADE , ' ' IN FRANCE , TO THE PRESIDING JUDGE OF THE TRIBUNAL DE GRANDE INSTANCE ' ' , WHICH , IN ACCORDANCE WITH ARTICLE 34 OF THE CONVENTION , MUST GIVE ITS DECISION WITHOUT DELAY AND WITHOUT THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT BEING ENTITLED , AT THAT STAGE OF THE PROCEEDINGS , TO MAKE ANY SUBMISSIONS ON THE APPLICATION.

3 IN THE MAIN PROCEEDINGS THE FIRST CHAMBER OF THE TRIBUNAL DE GRANDE INSTANCE , VERSAILLES , HAS BEFORE IT AN APPLICATION FOR AN ORDER FOR THE ENFORCEMENT OF A DECISION , DATED 26 MARCH 1979 , OF A COURT IN LAUTERBACH , FEDERAL REPUBLIC OF GERMANY , ORDERING GISELE MAITRE TO PAY , AS A CONSEQUENCE OF HER DIVORCE , MAINTENANCE IN RESPECT OF HER SON CHRISTOPH VON GALLERA. DURING THE PROCEEDINGS BEFORE THE AFOREMENTIONED CHAMBER , NO OBJECTION WAS RAISED AS TO ITS JURISDICTION ; HOWEVER , THE CHAMBER ADDRESSED ITSELF TO THE QUESTION WHETHER

' ' ARTICLE 32 OF THE CONVENTION CONFERS EXCLUSIVE JURISDICTION ON THE

COURT WHICH IT DESIGNATES IN A CONTRACTING STATE TO HEAR APPLICATIONS FOR ORDERS FOR THE ENFORCEMENT OF JUDGMENTS GIVEN IN OTHER CONTRACTING STATES ' '

AND WHETHER IT SHOULD THEREFORE RAISE THE MATTER OF ITS LACK OF JURISDICTION OF ITS OWN MOTION. REFERRING TO ARTICLE 177 OF THE EEC TREATY , THE TRIBUNAL DE GRANDE INSTANCE , VERSAILLES , SUBMITTED THAT QUESTION OF INTERPRETATION TO THE COURT OF JUSTICE.

4 UNLIKE ARTICLE 177 OF THE EEC TREATY , WHICH IS NOT APPLICABLE IN THIS CASE , ARTICLE 2 (1) AND (2) OF THE PROTOCOL CONCERNING THE INTERPRETATION OF THE CONVENTION BY THE COURT OF JUSTICE SIGNED ON 3 JUNE 1971 , RESERVES THE POWER TO REQUEST THE COURT OF JUSTICE TO GIVE PRELIMINARY RULINGS ON QUESTIONS OF INTERPRETATION TO THE COURTS DESIGNATED BY NAME THEREIN AND TO THE ' ' COURTS OF THE CONTRACTING STATES WHEN THEY ARE SITTING IN AN APPELLATE CAPACITY ' '.

5 THE TRIBUNAL DE GRANDE INSTANCE , VERSAILLES , IS NOT ONE OF THE COURTS SET OUT IN ARTICLE 2 , AND IT IS NOT SITTING IN AN APPELLATE CAPACITY IN THE MAIN PROCEEDINGS. THUS , THE COURT OF JUSTICE MANIFESTLY HAS NO JURISDICTION TO TAKE COGNIZANCE OF THE PRESENT REQUEST FOR A PRELIMINARY RULING ; CONSEQUENTLY , IT MUST AVAIL ITSELF OF THE POSSIBILITY , PROVIDED FOR IN ARTICLE 92 (1) OF THE RULES OF PROCEDURE , READ TOGETHER WITH ARTICLE 103 (2), OF DECLARING THE REQUEST INADMISSIBLE BY ORDER.

ON THOSE GROUNDS ,

THE COURT ,

HAVING HEARD THE VIEWS OF THE ADVOCATE GENERAL ,

HEREBY RULES :

THE REQUEST FOR A PRELIMINARY RULING MADE BY THE TRIBUNAL DE GRANDE INSTANCE , VERSAILLES , BY JUDGMENT OF 17 JANUARY 1984 IS INADMISSIBLE

DOCNUM	61984O0056
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 1984 Page 01769 Spanish special edition Page 00487
DOC	1984/03/28
LODGED	1984/03/01

JURCIT	41971A0603(02)-A02 : N 4 5 41968A0927(01)-A32 : N 2 3 11957E177 : N 4 31959Q0301-A92P1 : N 5 31959Q0301-A103P2 : N 5
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	French
NATIONA	France
NATCOUR	*A9* Tribunal de grande instance de Versailles, 1re chambre, jugement du 17/01/1984 (5706/80) ; - Gazette du Palais 1984 I Jur. p.363-365 ; - Payre, J.-M.: Gazette du Palais 1984 I Jur. p.365-366 ; - Payre, J.-M.: Gazette du Palais 1984 I Jur. p.365-366
NOTES	Huet, André: Journal du droit international 1985 p.183-184 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1985 p.a13 (PM)
PROCEDU	Reference for a preliminary ruling - inadmissible
ADVGEN	Sir Gordon Slynn
JUDGRAP	Everling
DATES	of document: 28/03/1984 of application: 01/03/1984

Judgment of the Court (Fourth Chamber)
of 11 June 1985
Leon Emile Gaston Carlos Debaecker and Berthe Plouvier v Cornelis Gerrit Bouwman. Reference for a preliminary ruling: Hoge Raad - Netherlands. Brussels Convention - Article 27(2) - Service of the document which instituted the proceedings in sufficient time. Case 49/84.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT OF JUDGMENTS - GROUNDS FOR REFUSAL - THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS NOT SERVED IN SUFFICIENT TIME ON A DEFENDANT IN DEFAULT OF APPEARANCE - SERVICE IN SUFFICIENT TIME - REVIEW BY THE COURT IN WHICH ENFORCEMENT IS SOUGHT - SCOPE - EXCEPTIONAL CIRCUMSTANCES - TAKEN INTO ACCOUNT - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 27 (2))

THE REQUIREMENT , LAID DOWN IN ARTICLE 27 (2) OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , THAT SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS SHOULD HAVE BEEN EFFECTED IN SUFFICIENT TIME IS APPLICABLE WHERE SERVICE WAS EFFECTED WITHIN A PERIOD PRESCRIBED BY THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN OR WHERE THE DEFENDANT RESIDED , EXCLUSIVELY OR OTHERWISE , WITHIN THE JURISDICTION OF THAT COURT OR IN THE SAME COUNTRY AS THAT COURT.

IN EXAMINING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME , THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY TAKE ACCOUNT OF EXCEPTIONAL CIRCUMSTANCES WHICH AROSE AFTER SERVICE WAS DULY EFFECTED.

THE FACT THAT THE PLAINTIFF WAS APPRISED OF THE DEFENDANT ' S NEW ADDRESS , AFTER SERVICE WAS EFFECTED , AND THE FACT THAT THE DEFENDANT WAS RESPONSIBLE FOR THE FAILURE OF THE DULY SERVED DOCUMENT TO REACH HIM ARE MATTERS WHICH THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY TAKE INTO ACCOUNT IN ASSESSING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME.

IN CASE 49/84

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 HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

(1) LEON EMILE GASTON CARLOS DEBAECKER

AND

(2) BERTHE PLOUVIER , HIS WIFE , BOTH RESIDING IN MONACO ,

AND

CORNELIUS GERRIT BOUWMAN , RESIDING IN ESSEN , BELGIUM ,

ON THE INTERPRETATION OF ARTICLE 27 (2) OF THE CONVENTION

COSTS

34 THE COSTS INCURRED BY THE FEDERAL REPUBLIC OF GERMANY , THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED

OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT , COSTS ARE A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT (FOURTH CHAMBER),

IN ANSWER TO THE QUESTIONS SUBMITTED TO IT BY THE HOGE RAAD DER NEDERLANDEN BY JUDGMENT OF 17 FEBRUARY 1984 , HEREBY RULES :

(1) THE REQUIREMENT , LAID DOWN IN ARTICLE 27 (2) OF THE CONVENTION ON JURISIDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , THAT SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS SHOULD HAVE BEEN EFFECTED IN SUFFICIENT TIME IS APPLICABLE WHERE SERVICE WAS EFFECTED WITHIN A PERIOD PRESCRIBED BY THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN OR WHERE THE DEFENDANT RESIDED , EXCLUSIVELY OR OTHERWISE , WITHIN THE JURISDICTION OF THAT COURT OR IN THE SAME COUNTRY AS THAT COURT.

(2) IN EXAMINING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME , THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY TAKE ACCOUNT OF EXCEPTIONAL CIRCUMSTANCES WHICH AROSE AFTER SERVICE WAS DULY EFFECTED

(3) THE FACT THAT THE PLAINTIFF WAS APPRISED OF THE DEFENDANT ' S NEW ADDRESS , AFTER SERVICE WAS EFFECTED , AND THE FACT THAT THE DEFENDANT WAS RESPONSIBLE FOR THE FAILURE OF THE DULY SERVED DOCUMENT TO REACH HIM ARE MATTERS WHICH THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY TAKE INTO ACCOUNT IN ASSESSING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME.

1 BY A JUDGMENT DATED 17 FEBRUARY 1984 , WHICH WAS RECEIVED AT THE COURT ON 24 FEBRUARY 1984 , THE HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) REQUESTED 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 (HEREINAFTER REFERRED TO AS ' THE CONVENTION '), ON SEVERAL QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 27 (2) OF THE CONVENTION.

2 THOSE QUESTIONS WERE RAISED IN THE COURSE OF PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN MR AND MRS DEBAECKER ON THE ONE HAND , AND MR BOUWMAN ON THE OTHER HAND.

3 MR AND MRS DEBAECKER HAD LET COMMERCIAL PREMISES IN ANTWERP TO MR BOUWMAN , A NATIONAL OF THE NETHERLANDS , FOR A PERIOD OF NINE YEARS FROM 15 OCTOBER 1980. ON 21 SEPTEMBER 1981 MR BOUWMAN LEFT THE PREMISES (IN WHICH HE HAD ESTABLISHED HIS RESIDENCE), WITHOUT GIVING PRIOR NOTICE AND WITHOUT LEAVING ANY FORWARDING ADDRESS. ON 24 SEPTEMBER 1981 HE WAS SUMMONED TO APPEAR ON 1 OCTOBER 1981 BEFORE THE VREDERECHTER (CANTONAL JUDGE), ANTWERP , BY A WRIT WHICH WAS SERVED ON HIM , PURSUANT TO ARTICLE 37 OF THE BELGIAN JUDICIAL CODE , AT THE POLITIECOMMISSARIAT (POLICE STATION), ANTWERP , SINCE HE WAS STILL REGISTERED AS A RESIDENT OF ANTWERP. IN A LETTER DATED 25 SEPTEMBER 1981 AND RECEIVED BY THE PLAINTIFFS ' LAWYER ON 28 SEPTEMBER 1981 , MR BOUWMAN TERMINATED THE TENANCY , RETURNED THE KEYS OF THE PREMISES AND STATED

THAT HIS NEW ADDRESS WAS A POST OFFICE BOX NUMBER IN ESSEN , BELGIUM . THE PLAINTIFFS ' LAWYER MADE NO ATTEMPT TO INFORM THE DEFENDANT AT THAT NEW ADDRESS THAT HE HAD BEEN SUMMONED TO APPEAR ON 1 OCTOBER BEFORE THE VREDERECHTER IN ANTWERP , AND ON THAT DATE THE DEFENDANT WAS ORDERED , BY JUDGMENT IN DEFAULT OF APPEARANCE , TO PAY TO MR AND MRS DEBAECKER DAMAGES OF BFR 1 072 900.

4 ON 30 NOVEMBER 1981 THE PRESIDENT OF THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT) IN BREDA (THE NETHERLANDS) MADE AN ORDER , ON AN APPLICATION BY MR AND MRS DEBAECKER , FOR THE ENFORCEMENT OF THE JUDGMENT IN DEFAULT GIVEN BY THE VREDERECHTER IN ANTWERP. MR BOUWMAN APPEALED AGAINST THAT ORDER ON 6 JANUARY 1982 AND IT WAS SET ASIDE BY THE ARRONDISSEMENTSRECHTBANK ON 12 OCTOBER 1982.

5 MR AND MRS DEBAECKER APPEALED TO THE HOGE RAAD , WHICH STAYED THE PROCEEDINGS AND REFERRED TO THE COURT THE FOLLOWING QUESTIONS FOR A PRELIMINARY RULING :

' 1 . IS THE REQUIREMENT , LAID DOWN IN ARTICLE 27 (2) OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , THAT SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS SHOULD HAVE BEEN EFFECTED IN SUFFICIENT TIME INAPPLICABLE IF SERVICE WAS EFFECTED WITHIN A PERIOD PRESCRIBED BY THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN AND/OR THE DEFENDANT RESIDED , EXCLUSIVELY OR OTHERWISE , WITHIN THE JURISDICTION OF THAT COURT OR IN THE SAME COUNTRY AS THAT COURT?

IF QUESTION 1 IS ANSWERED IN THE NEGATIVE :

2 (A) IN RELATION TO THE QUESTION WHETHER , IN A PARTICULAR CASE , THERE ARE EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT THE CONCLUSION THAT , ALTHOUGH DUE SERVICE WAS EFFECTED , AS PROVIDED FOR IN ARTICLE 27 (2), IT WAS NONE THE LESS INADEQUATE FOR THE PURPOSE OF CAUSING THE TIME REQUIRED IN THAT PROVISION TO BEGIN TO RUN , IS ACCOUNT TO BE TAKEN ONLY OF CIRCUMSTANCES WHICH EXISTED AT THE TIME OF SERVICE AND WHICH THE PLAINTIFF COULD TAKE INTO CONSIDERATION AT THAT TIME?

IF QUESTION 2 (A) IS ANSWERED IN THE NEGATIVE :

2 (B) CAN THE PLAINTIFF BE REQUIRED AS A RESULT OF CIRCUMSTANCES WHICH AROSE AFTER SERVICE WAS EFFECTED , IN PARTICULAR NOTIFICATION TO THE PLAINTIFF OF THE DEFENDANT ' S ADDRESS , TO TAKE FURTHER STEPS TO INFORM THE DEFENDANT OF THE IMPENDING ACTION , SO THAT IF SUCH STEPS ARE NOT TAKEN THE TIME REQUIRED BY ARTICLE 27 (2) DOES NOT BEGIN TO RUN?

IF QUESTION 2 (B) IS ANSWERED IN THE AFFIRMATIVE :

2 (C) WHAT CRITERION MUST BE APPLIED IN THAT REGARD? IN PARTICULAR , DOES THE FACT THAT THE DEFENDANT WAS RESPONSIBLE FOR THE FAILURE OF THE DULY SERVED DOCUMENT TO REACH HIM PREVENT THE COURT , WHERE , FOR EXAMPLE , THE PLAINTIFF WAS AWARE THAT THE DEFENDANT HAD LEFT THE ADDRESS STATED TO BE HIS PLACE OF RESIDENCE , FROM CONSIDERING THAT FURTHER STEPS AS REFERRED TO ABOVE WERE REQUIRED? '

6 WRITTEN OBSERVATIONS WERE SUBMITTED BY THE PARTIES TO THE MAIN PROCEEDINGS

, THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES.

7 IN QUESTION 1 THE HOGE RAAD ASKS WHETHER THE REQUIREMENT , LAID DOWN IN ARTICLE 27 (2) OF THE CONVENTION , THAT SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS SHOULD HAVE BEEN EFFECTED IN SUFFICIENT TIME IS INAPPLICABLE IF SERVICE WAS EFFECTED WITHIN A PERIOD PRESCRIBED BY THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN AND/OR THE DEFENDANT RESIDED IN THAT STATE.

8 THE PLAINTIFFS IN THE MAIN PROCEEDINGS CONSIDER THAT THE ANSWER TO THE FIRST QUESTION SHOULD BE THAT ARTICLE 27 (2) OF THE CONVENTION IS INAPPLICABLE WHERE , AT THE TIME OF SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS , THE DEFENDANT WAS RESIDENT WITHIN THE JURISDICTION OF THE ADJUDICATING COURT OR AT LEAST WHERE (AS IN THE PRESENT CASE) HE HAD HIS SOLE RESIDENCE THERE.

9 THE DEFENDANT IN THE MAIN PROCEEDINGS DISPUTES THAT INTERPRETATION , CONTENDING THAT THERE IS NOTHING IN THE WORDING OF ARTICLE 27 (2) TO SUGGEST THAT THE RULES LAID DOWN BY THE CONVENTION IN ORDER TO GUARANTEE THE DEFENDANT ' S RIGHT TO A FAIR HEARING SHOULD BE APPLIED SOLELY WHERE THE DEFENDANT IS RESIDENT IN A CONTRACTING STATE OTHER THAN THAT OF THE ADJUDICATING COURT. IF THAT WERE SO , THE COURT IN WHICH ENFORCEMENT WAS SOUGHT WOULD HAVE NO DISCRETION TO DECIDE WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME WHERE BOTH PARTIES RESIDED IN THE SAME CONTRACTING STATE. THE DEFENDANT ' S VIEW IS SHARED BY THE COMMISSION , THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM , WHICH STRESSES THAT IN ITS JUDGMENT OF 16 JUNE 1981 IN CASE 166/80 (KLOMPS V MICHEL (1981) ECR 1593) THE COURT HAS ALREADY BY IMPLICATION ACKNOWLEDGED THAT ARTICLE 27 (2) APPLIES REGARDLESS OF WHETHER THE PARTIES RESIDE IN DIFFERENT STATES OR IN THE SAME STATE .

10 FIRST OF ALL , IT SHOULD BE STATED THAT THERE IS NOTHING IN THE WORDING OF ARTICLE 27 (2) - WHICH DOES NOT LAY DOWN ANY CONDITION AS REGARDS THE DEFENDANT ' S PLACE OF RESIDENCE - TO SUGGEST THAT THE QUESTION ASKED BY THE HOGE RAAD SHOULD BE ANSWERED IN THE AFFIRMATIVE . ALTHOUGH THE CONVENTION IS , AS IS CLEAR FROM THE PREAMBLE , INTENDED TO ' SECURE THE SIMPLIFICATION OF FORMALITIES GOVERNING THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS OF COURTS OR TRIBUNALS ' , THAT AIM CANNOT , ACCORDING TO A SERIES OF DECISIONS OF THE COURT , BE ATTAINED BY UNDERMINING IN ANY WAY THE RIGHT TO A FAIR HEARING .

11 IT FOLLOWS FROM THE WORDING OF ARTICLE 27 THAT THE COURTS OF A CONTRACTING STATE MAY REFUSE TO RECOGNIZE A JUDGMENT ONLY ON ONE OF THE GROUNDS EXPRESSLY MENTIONED IN THAT PROVISION. ONE OF THOSE GROUNDS IS THAT LAID DOWN IN PARAGRAPH (2), IN ORDER TO ENSURE THE ADEQUATE PROTECTION OF THE RIGHTS OF A DEFENDANT AGAINST WHOM JUDGMENT IS GIVEN IN DEFAULT OF APPEARANCE ABROAD. ARTICLE 27 (2) PROVIDES THAT A JUDGMENT SHALL NOT BE RECOGNIZED '... IF THE DEFENDANT WAS NOT DULY SERVED WITH THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE '. THAT PROVISION TAKES ACCOUNT OF THE FACT THAT CERTAIN CONTRACTING STATES MAKE PROVISION FOR THE FICTITIOUS SERVICE OF PROCESS WHERE THE DEFENDANT HAS NO KNOWN PLACE OF RESIDENCE. THE EFFECTS THAT ARE DEEMED TO FOLLOW

FROM SUCH FICTITIOUS SERVICE VARY AND THE PROBABILITY OF THE DEFENDANT ' S ACTUALLY BEING INFORMED OF SERVICE , SO AS TO GIVE HIM SUFFICIENT TIME TO PREPARE HIS DEFENCE , MAY VARY CONSIDERABLY , DEPENDING ON THE TYPE OF FICTITIOUS SERVICE PROVIDED FOR IN EACH LEGAL SYSTEM.

12 FOR THAT REASON ARTICLE 27 (2) MUST BE INTERPRETED AS BEING INTENDED TO PROTECT THE RIGHT OF A DEFENDANT TO DEFEND HIMSELF WHEN RECOGNITION OF JUDGMENT GIVEN IN DEFAULT IN ANOTHER CONTRACTING STATE IS SOUGHT , EVEN IF THE RULES ON SERVICE LAID DOWN IN THAT CONTRACTING STATE WERE COMPLIED WITH.

13 THE ANSWER TO THE FIRST QUESTION MUST THEREFORE BE THAT THE REQUIREMENT , LAID DOWN IN ARTICLE 27 (2) OF THE CONVENTION , THAT SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS SHOULD HAVE BEEN EFFECTED IN SUFFICIENT TIME IS APPLICABLE EVEN WHERE SERVICE WAS EFFECTED WITHIN A PERIOD PRESCRIBED BY THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN OR WHERE THE DEFENDANT RESIDED , EXCLUSIVELY OR OTHERWISE , WITHIN THE JURISDICTION OF THAT COURT OR IN THE SAME COUNTRY AS THAT COURT.

14 IN QUESTION 2 (A) THE HOGE RAAD ASKS WHETHER , IN ASSESSING WHETHER THERE ARE EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT THE CONCLUSION THAT , ALTHOUGH DUE SERVICE WAS EFFECTED AS PROVIDED FOR IN ARTICLE 27 (2), IT WAS NONE THE LESS INADEQUATE FOR THE PURPOSE OF CAUSING THE TIME REQUIRED IN THAT PROVISION TO BEGIN TO RUN , ACCOUNT IS TO BE TAKEN ONLY OF CIRCUMSTANCES WHICH EXISTED AT THE TIME OF SERVICE AND WHICH THE PLAINTIFF COULD TAKE INTO CONSIDERATION AT THAT TIME .

15 THE PARTIES WHO HAVE SUBMITTED OBSERVATIONS TO THE COURT REFER ON THIS POINT TO THE JUDGMENT IN KLOMPS V MICHEL (CITED ABOVE) IN WHICH THE COURT RULED THAT , ALTHOUGH THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY AS A GENERAL RULE CONFINE ITSELF TO EXAMINING WHETHER THE PERIOD RECKONED FROM THE DATE ON WHICH SERVICE WAS DULY EFFECTED ALLOWED THE DEFENDANT SUFFICIENT TIME FOR HIS DEFENCE , IT IS NONE THE LESS ALSO REQUIRED TO CONSIDER WHETHER , IN A PARTICULAR CASE , THERE ARE EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT THE CONCLUSION THAT , ALTHOUGH SERVICE WAS DULY EFFECTED , IT WAS INADEQUATE FOR THE PURPOSES OF ENABLING THE DEFENDANT TO TAKE STEPS TO ARRANGE FOR HIS DEFENCE AND , ACCORDINGLY , COULD NOT CAUSE THE TIME STIPULATED BY ARTICLE 27 (2) TO BEGIN TO RUN.

16 THE PLAINTIFFS IN THE MAIN PROCEEDINGS INTERPRET THAT RULING AS MEANING THAT NO ACCOUNT MAY BE TAKEN OF CIRCUMSTANCES WHICH DID NOT BECOME APPARENT UNTIL AFTER SERVICE WAS EFFECTED , AND THAT DUE SERVICE WHICH AT THE DATE ON WHICH IT WAS EFFECTED WAS CONSIDERED ADEQUATE , IN THE LIGHT OF THE CIRCUMSTANCES EXISTING AT THAT TIME , FOR THE PURPOSE OF CAUSING THE TIME STIPULATED BY ARTICLE 27 (2) TO BEGIN TO RUN , MAY NOT BE INVALIDATED AS A RESULT OF CIRCUMSTANCES WHICH SUBSEQUENTLY SUPERVENE. THE SERIOUS CONSEQUENCES OF DECIDING OTHERWISE WOULD BE EXACERBATED BY THE FACT THAT THE DEFENCE PROVIDED FOR UNDER ARTICLE 27 (2) MAY BE PLEADED NOT ONLY IN PROCEEDINGS FOR ENFORCEMENT BUT ALSO IN PROCEEDINGS IN WHICH THE RECOGNITION OF A JUDGMENT IS SOUGHT.

17 THE OPINION OF THE PLAINTIFFS IN THE MAIN PROCEEDINGS IS IN PART SHARED BY THE COMMISSION , ON GROUNDS RELATING TO LEGAL CERTAINTY , TO THE NEED

FOR A RESTRICTIVE INTERPRETATION OF ARTICLE 27 (2) - SINCE IT IS AN EXCEPTION TO THE GENERAL RULE PROHIBITING ANY FRESH ASSESSMENT OF THE FACTS AT THE ENFORCEMENT STAGE - AND TO THE FACT THAT GUARANTEES ARE ALREADY PROVIDED IN THE NATIONAL RULES ON THE SERVICE OF PROCESS. THE COMMISSION CONCEDES , HOWEVER , THAT IT MAY BE POSSIBLE TO TAKE INTO ACCOUNT CERTAIN WHOLLY EXCEPTIONAL CIRCUMSTANCES WHICH OCCUR AFTER SERVICE AND FOR WHICH THE DEFENDANT CANNOT BE HELD RESPONSIBLE.

18 THE DEFENDANT IN THE MAIN PROCEEDINGS , THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM ALL PROPOSE THAT THE QUESTION SHOULD BE ANSWERED IN THE NEGATIVE , STRESSING IN PARTICULAR THAT ARTICLE 27 (2) CAN ONLY PROVIDE COMPLETE PROTECTION FOR A DEFENDANT IF ALL THE CIRCUMSTANCES , INCLUDING THOSE OCCURRING AFTER SERVICE , ARE TAKEN INTO ACCOUNT.

19 WITH REGARD TO THIS QUESTION , IT SHOULD BE POINTED OUT FIRST THAT , IF THE CIRCUMSTANCES TO BE TAKEN INTO ACCOUNT WERE CONFINED TO THOSE WHICH WERE KNOWN AT THE TIME OF SERVICE , THERE WOULD BE A DANGER OF INTERPRETING THE REQUIREMENT OF SERVICE IN SUFFICIENT TIME IN SUCH A RESTRICTIVE AND FORMALISTIC MANNER THAT IT WOULD IN FACT COINCIDE WITH THE REQUIREMENT OF DUE SERVICE , THUS NEGATING ONE OF THE SAFEGUARDS LAID DOWN BY THE CONVENTION FOR THE PROTECTION OF THE DEFENDANT .

20 ACCORDINGLY , IN ORDER TO ASCERTAIN WHETHER THE REQUIREMENT OF SERVICE IN SUFFICIENT TIME WAS FULFILLED - THAT REQUIREMENT BEING LAID DOWN PRECISELY IN ORDER TO ENSURE THAT THE DEFENDANT ' S RIGHTS ARE EFFECTIVELY PROTECTED - REGARD MUST BE HAD TO FACTS WHICH , ALTHOUGH OCCURRING AFTER SERVICE WAS EFFECTED , MAY NONE THE LESS HAVE HAD THE EFFECT THAT SERVICE DID NOT IN FACT ENABLE THE DEFENDANT TO ARRANGE FOR HIS DEFENCE.

21 THAT VIEW FINDS FURTHER SUPPORT IN KLOMPS V MICHEL , WHERE THE COURT RULED THAT , IN ASCERTAINING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME , A COURT MIGHT TAKE ACCOUNT ' OF ALL THE CIRCUMSTANCES OF THE CASE IN POINT , INCLUDING THE MEANS EMPLOYED FOR EFFECTING SERVICE , THE RELATIONS BETWEEN THE PLAINTIFF AND THE DEFENDANT OR THE NATURE OF THE STEPS WHICH HAD TO BE TAKEN IN ORDER TO PREVENT JUDGMENT FROM BEING GIVEN IN DEFAULT '. AN APPRAISAL OF THE STEPS WHICH HAD TO BE TAKEN IN ORDER TO PREVENT JUDGMENT FROM BEING GIVEN IN DEFAULT IS BOUND TO CONCERN FACTORS ARISING AFTER SERVICE WAS EFFECTED .

22 THE ANSWER TO QUESTION 2 (A) MUST THEREFORE BE THAT THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY , IN EXAMINING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME , TAKE ACCOUNT OF EXCEPTIONAL CIRCUMSTANCES WHICH AROSE AFTER SERVICE WAS DULY EFFECTED.

23 IN QUESTION 2 (B) THE HOGE RAAD ASKS WHETHER THE PLAINTIFF CAN BE REQUIRED , AS A RESULT OF CIRCUMSTANCES WHICH AROSE AFTER SERVICE WAS EFFECTED , TO TAKE FURTHER STEPS TO INFORM THE DEFENDANT OF THE IMPENDING ACTION , SO THAT IF SUCH STEPS ARE NOT TAKEN THE TIME REQUIRED BY ARTICLE 27 (2) DOES NOT BEGIN TO RUN. QUESTION 2 (C) ASKS WHETHER THE FACT THAT THE DEFENDANT WAS RESPONSIBLE FOR THE FAILURE OF THE DULY SERVED DOCUMENT TO REACH HIM PREVENTS THE COURT , WHERE , FOR EXAMPLE , THE PLAINTIFF WAS AWARE THAT THE DEFENDANT HAD LEFT THE ADDRESS STATED TO BE HIS PLACE OF RESIDENCE , FROM CONSIDERING THAT FURTHER STEPS AS REFERRED TO IN QUESTION 2 (B)

SHOULD HAVE BEEN TAKEN.

24 WITH REGARD TO QUESTION 2 (B), THE PLAINTIFFS IN THE MAIN PROCEEDINGS OBSERVE THAT NO SUCH OBLIGATION IS PROVIDED FOR IN THE APPLICABLE NATIONAL LAW OR IN THE CONVENTION ITSELF AND CONSIDER THAT A RULE OF THAT KIND WOULD IMPAIR LEGAL CERTAINTY IN THE FIELD OF PROCEDURAL LAW. IN ADDITION , THEY ARGUE THAT THERE IS NO UNIFORM PRACTICE IN THE LEGAL SYSTEMS OF THE CONTRACTING STATES , SOME OF WHICH ARE MORE FORMALISTIC THAN OTHERS AND THUS LESS INCLINED TO REQUIRE ANY STEPS TO BE TAKEN WHICH ARE NOT PRESCRIBED BY THE LAW OR THE CONVENTION. IN ANY EVENT , SAY THE PLAINTIFFS , ALTHOUGH IT MAY BE EXPECTED THAT A LAWYER MIGHT NOTIFY THE OPPOSITE PARTY OR REQUEST AN ADJOURNMENT IN A CASE SUCH AS THIS , A LAWYER CANNOT BE REPROACHED FOR FAILING TO DO SO.

25 THE COMMISSION ALSO CONSIDERS THAT SUCH AN OBLIGATION WOULD SERIOUSLY JEOPARDIZE LEGAL CERTAINTY. IN ITS VIEW , NO CONSEQUENCE UNDER PROCEDURAL LAW SHOULD FLOW FROM THE FACT THAT THE PLAINTIFF DOES NOT NOTIFY THE DEFENDANT WHEN HE LEARNS AFTER SERVICE THAT THE DEFENDANT MAY BE CONTACTED AT ANOTHER ADDRESS.

26 THE DEFENDANT IN THE MAIN PROCEEDINGS , THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM , ON THE OTHER HAND , PROPOSE AN AFFIRMATIVE ANSWER , STRESSING INTER ALIA THAT THE PURPOSE OF ARTICLE 27 (2) IS TO GUARANTEE NOT MERELY FORMAL SERVICE BUT THE RIGHT TO BE HEARD AND THUS THE OPPORTUNITY OF PRESENTING A DEFENCE. THEY THEREFORE CONSIDER THAT EVERY EFFORT MUST BE MADE TO PREVENT JUDGMENT FROM BEING GIVEN AGAINST A DEFENDANT WITHOUT HIS HAVING HAD AN OPPORTUNITY OF DEFENDING HIMSELF.

27 ON THAT POINT IT MUST BE BORNE IN MIND THAT THE QUESTION WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME IS A QUESTION OF FACT AND THEREFORE CANNOT BE DETERMINED ON THE BASIS OF THE DOMESTIC LAW OF THE ADJUDICATING COURT OR ON THE BASIS OF THE DOMESTIC LAW OF THE COURT IN WHICH ENFORCEMENT IS SOUGHT. HOWEVER , THE CONVENTION DOES NOT IMPOSE ON THE PLAINTIFF ANY OBLIGATION TO TAKE STEPS SUCH AS THOSE REFERRED TO IN QUESTION 2 (B). THE FAILURE TO TAKE SUCH STEPS IS IN REALITY MERELY A FACTOR WHICH MUST BE TAKEN INTO ACCOUNT IN ORDER TO ESTABLISH WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME.

28 SEEN IN THAT LIGHT , THE FACT THAT THE PLAINTIFF , AFTER SERVICE , LEARNS OF THE DEFENDANT ' S NEW ADDRESS DOES NOT COMPEL HIM TO TAKE ANY FURTHER STEPS , BUT RENDERS HIS SUBSEQUENT BEHAVIOUR IMPORTANT FOR THE PURPOSE OF DETERMINING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME . BY NOTIFYING THE DEFENDANT AT HIS NEW ADDRESS , THE PLAINTIFF ENSURES THAT THE COURT IN WHICH ENFORCEMENT IS SOUGHT CANNOT DECIDE THAT THE DEFENDANT ' S CHANGE OF ADDRESS IS AN EXCEPTIONAL CIRCUMSTANCE WHICH PREVENTS THE SERVICE EFFECTED AT HIS FORMER ADDRESS FROM BEING REGARDED AS HAVING BEEN EFFECTED IN SUFFICIENT TIME.

29 AS REGARDS QUESTION 2 (C), THE PLAINTIFFS IN THE MAIN PROCEEDINGS CONSIDER THAT , EVEN IF THE PLAINTIFF IS BOUND TO TAKE FURTHER STEPS TO NOTIFY THE DEFENDANT , FAILURE TO DO SO DOES NOT NECESSARILY RESULT IN THE REFUSAL OF RECOGNITION OR ENFORCEMENT OF THE JUDGMENT IF IT IS THE DEFENDANT ' S FAULT THAT THE PLAINTIFF WAS UNAWARE AT THE TIME OF SERVICE OF THE ADDRESS

AT WHICH THE DEFENDANT COULD HAVE BEEN CONTACTED. THEY ARGUE THAT IT IS NOT ENOUGH FOR THE DEFENDANT TO GIVE A POST OFFICE BOX NUMBER. THE COMMISSION SHARES THAT VIEW AND CONSIDERS THAT , IF THE DEFENDANT IS RESPONSIBLE FOR THE FACT THAT HE DID NOT RECEIVE THE DOCUMENT WHICH WAS DULY SERVED , THE PLAINTIFF IS UNDER NO OBLIGATION TO TAKE FURTHER STEPS , EVEN IF HE SUBSEQUENTLY DISCOVERS THE DEFENDANT ' S NEW ADDRESS.

30 THE DEFENDANT IN THE MAIN PROCEEDINGS , THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM CONSIDER THAT THE DEFENDANT ' S BEHAVIOUR IS ONE OF THE CIRCUMSTANCES WHICH THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY TAKE INTO ACCOUNT IN ASSESSING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME , AND ITS EFFECT MUST BE EVALUATED BY THAT COURT IN THE LIGHT OF THE REQUIREMENT THAT THE DEFENDANT ' S RIGHTS SHOULD BE EFFECTIVELY PROTECTED.

31 IN VIEW OF THE FACT THAT ARTICLE 27 (2), AS HAS ALREADY BEEN STATED , SEEKS TO ENABLE A DEFENDANT TO DEFEND HIMSELF EFFECTIVELY , THE DEFENDANT ' S BEHAVIOUR MAY NOT BE USED AS A BASIS FOR CONSIDERING THAT SERVICE WAS EFFECTED IN SUFFICIENT TIME EVEN THOUGH THE PLAINTIFF SUBSEQUENTLY BECAME AWARE THAT THE DEFENDANT COULD BE REACHED AT A NEW ADDRESS . TO ADMIT SUCH A PROPOSITION WOULD BE TANTAMOUNT TO ACKNOWLEDGING THE EXISTENCE OF A PRESUMPTION THAT SERVICE WAS EFFECTED IN SUFFICIENT TIME. ALTHOUGH IT MAY RIGHTLY BE PRESUMED THAT SERVICE WAS EFFECTED IN SUFFICIENT TIME WHERE THE PLAINTIFF DID NOT KNOW WHERE TO REACH THE DEFENDANT , SUCH A PRESUMPTION WOULD CLEARLY BE CONTRARY TO THE PRINCIPLE THAT THE DEFENDANT ' S RIGHTS SHOULD BE PROTECTED IF , AFTER SERVICE , THE PLAINTIFF LEARNED WHERE THE DEFENDANT COULD BE REACHED .

32 THUS THE DEFENDANT ' S BEHAVIOUR CANNOT AUTOMATICALLY RULE OUT THE POSSIBILITY OF TAKING INTO ACCOUNT EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT THE CONCLUSION THAT SERVICE WAS NOT EFFECTED IN SUFFICIENT TIME . INSTEAD , SUCH BEHAVIOUR MAY BE ASSESSED BY THE COURT IN WHICH ENFORCEMENT IS SOUGHT AS ONE OF THE MATTERS IN THE LIGHT OF WHICH IT DETERMINES WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME. IT WILL THEREFORE BE FOR THAT COURT TO ASSESS , IN A CASE SUCH AS THE PRESENT , TO WHAT EXTENT THE DEFENDANT ' S BEHAVIOUR IS CAPABLE OF OUTWEIGHING THE FACT THAT THE PLAINTIFF WAS APPRISED AFTER SERVICE OF THE DEFENDANT ' S NEW ADDRESS.

33 IN VIEW OF THE FOREGOING CONSIDERATIONS , THE ANSWER TO QUESTIONS 2 (B) AND 2 (C) MUST BE THAT THE FACT THAT THE PLAINTIFF WAS APPRISED OF THE DEFENDANT ' S NEW ADDRESS , AFTER SERVICE WAS EFFECTED , AND THE FACT THAT THE DEFENDANT WAS RESPONSIBLE FOR THE FAILURE OF THE DULY SERVED DOCUMENT TO REACH HIM ARE MATTERS WHICH THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY TAKE INTO ACCOUNT IN ASSESSING WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME.

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FORM	Judgment

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CONCERNS	Interprets 41968A0927(01) -A27PT2
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NATCOUR	*A8* Arrondissementsrechtbank Breda, vonnis van 12/10/1982 (3102/82) ; - Nederlands Internationaal Privaatrecht 1983 no 242 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1986 no 289 ; *A9* Hoge Raad, 1e kamer, arrest van 17/02/1984 (12.206) ; - Nederlands Internationaal Privaatrecht 1984 no 220 ; - Rechtspraak van de week 1984 no 54 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1986 no 289 ; *P1* Hoge Raad, 1e kamer, arrest van 05/06/1987 (12.206) ; - Nederlands Internationaal Privaatrecht 1987 no 467 ; - Nederlands juristenblad 1987 p.826 (résumé) ; - Rechtspraak van de week 1987 no 132 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1988 no 37 ; - European Commercial Cases 1989 p.10-15
NOTES	Ekelmans, Marc: Journal des tribunaux 1986 p.159-161 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1986 no 290 ; Hartley, Trevor: The Enforcement of Judgments and the Requirement of Proper Service under Article 27(2), European Law Review 1987 p.220-221 (PM) ; Borras Rodríguez, Alegría: Jurisprudència del Tribunal de Justícia de les Comunitats Europees, Revista Jurídica de Catalunya 1987 p.259-260 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions relating to the Judgments Convention, The Scots Law Times 1988 p.a8-a9
PROCEDU	Reference for a preliminary ruling
ADVGEN	VerLoren van Themaat
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Judgment of the Court (First Chamber)
of 7 March 1985
Hannelore Spitzley v Sommer Exploitation SA. Reference for a preliminary ruling: Oberlandesgericht Koblenz - Germany. Brussels Convention - Implied prorogation of jurisdiction.
Case 48/84.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROROGATION OF JURISDICTION - ENTERING AN APPEARANCE WITHOUT CONTESTING THE JURISDICTION OF THE COURT SEISED OF THE PROCEEDINGS - CLAIM FOR A SET-OFF MADE BY THE DEFENDANT - DISPUTE ON THE SUBSTANCE OF THE CASE ENTERED INTO BY THE APPLICANT - APPLICATION OF ARTICLE 18 - CLAUSE CONFERRING JURISDICTION ON ANOTHER COURT - NO EFFECT

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS 17 AND 18)

THE COURT OF A CONTRACTING STATE BEFORE WHICH THE APPLICANT , WITHOUT RAISING ANY OBJECTION AS TO THE COURT ' S JURISDICTION , ENTERS AN APPEARANCE IN PROCEEDINGS RELATING TO A CLAIM FOR A SET-OFF WHICH IS NOT BASED ON THE SAME CONTRACT OR SUBJECT-MATTER AS THE CLAIMS IN HIS APPLICATION AND IN RESPECT OF WHICH THERE IS A VALID AGREEMENT CONFERRING EXCLUSIVE JURISDICTION ON THE COURTS OF ANOTHER CONTRACTING STATE WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS HAS JURISDICTION BY VIRTUE OF ARTICLE 18 OF THAT CONVENTION.

IN CASE 48/84

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 OBERLANDESGERICHT (HIGHER REGIONAL COURT) KOBLENZ FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

HANNELORE SPITZLEY

AND

SOMMER EXPLOITATION SA ,

ON THE INTERPRETATION OF ARTICLES 17 AND 18 OF THE AFOREMENTIONED CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY AN ORDER OF 3 FEBRUARY 1984 , WHICH WAS RECEIVED AT THE COURT ON 24 FEBRUARY 1984 , THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) KOBLENZ 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 SEVERAL QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLES 17 AND 18 OF THAT CONVENTION .

2 THOSE QUESTIONS WERE RAISED IN THE CONTEXT OF AN ACTION BETWEEN SOMMER EXPLOITATION SA (HEREINAFTER REFERRED TO AS ' SOMMER '), A MANUFACTURER OF FELT CLOTH , WHOSE REGISTERED OFFICE IS AT NEUILLY (FRANCE), AND HANNELORE SPITZLEY , THE OWNER OF AN UNDERTAKING ESTABLISHED IN THE FEDERAL REPUBLIC OF GERMANY , RELATING TO PAYMENT FOR FELT CLOTH PURCHASED FROM SOMMER

BY MRS SPITZLEY.

3 IN PROCEEDINGS BEFORE THE LANDGERICHT (REGIONAL COURT) KOBLENZ MRS SPITZLEY DID NOT DISPUTE THAT SOMMER ' S APPLICATION WAS WELL FOUNDED . HOWEVER , SHE CLAIMED A RIGHT TO SET OFF SUMS OWED BY SOMMER TO HER HUSBAND , WOLFGANG SPITZLEY.

4 SHE CLAIMED THAT THOSE SUMS WERE OWED BY SOMMER TO MR SPITZLEY IN RESPECT OF COMMISSION UNDER A COMMERCIAL AGENCY CONTRACT CONCLUDED IN 1976 AND HAD SUBSEQUENTLY BEEN ASSIGNED TO MRS SPITZLEY.

5 IN THE PROCEEDINGS BEFORE THE LANDGERICHT , SOMMER CONTESTED THE SUBSTANCE OF THE CLAIM FOR A SET-OFF MADE BY MRS SPITZLEY. THE LANDGERICHT , GIVING JUDGMENT ON THE MERITS OF THE CASE , ALLOWED A SET-OFF ONLY IN RESPECT OF A LIMITED AMOUNT AND ORDERED MRS SPITZLEY TO PAY THE REMAINDER OF THE SUM CLAIMED BY SOMMER.

6 BOTH MRS SPITZLEY AND SOMMER APPEALED TO THE OBERLANDESGERICHT KOBLENZ WHICH CONSIDERED THE QUESTION WHETHER THE GERMAN COURTS HAD JURISDICTION TO HEAR MRS SPITZLEY ' S CLAIM FOR A SET-OFF. IN THAT RESPECT IT NOTED THAT CLAUSE VII OF THE COMMERCIAL AGENCY CONTRACT MADE BETWEEN MR SPITZLEY AND SOMMER CONFERRED JURISDICTION ON THE COURTS OF THE PLACE WHERE SOMMER HAD ITS REGISTERED OFFICE , THAT IS TO SAY THE FRENCH COURTS , IN ALL DISPUTES ARISING OUT OF THE CONTRACT

7 IN THE ORDER FOR REFERENCE THE OBERLANDESGERICHT STATES THAT WHILE THE PRESENCE AND INTERPRETATION OF THAT CLAUSE WOULD SEEM TO MEAN THAT THE GERMAN COURTS DO NOT HAVE JURISDICTION , THE CONDUCT OF SOMMER , WHICH HAS NOT RELIED ON THAT CLAUSE AT ALL BUT HAS INSTEAD SUBMITTED ARGUMENTS RELATING TO THE SUBSTANCE OF THE ACTION , MAY HAVE AMOUNTED TO THE CONFERRING OF JURISDICTION ON THE GERMAN COURTS BY VIRTUE OF THE PRINCIPLE LAID DOWN IN ARTICLE 18 OF THE CONVENTION.

8 CONSEQUENTLY THE OBERLANDESGERICHT CONSIDERED IT NECESSARY TO REFER THE FOLLOWING QUESTIONS TO THE COURT :

' (1) IF A PLAINTIFF , WITHOUT RAISING ANY OBJECTION , ENTERS AN APPEARANCE IN PROCEEDINGS RELATING TO A CLAIM FOR A SET-OFF WHICH IS NOT BASED ON THE SAME CONTRACT OR SUBJECT MATTER AS HIS APPLICATION AND IN RESPECT OF WHICH THERE IS A VALID AGREEMENT CONFERRING EXCLUSIVE JURISDICTION WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION , DOES SUCH AN APPEARANCE SET ASIDE ANY PROCEDURAL PROHIBITION AGAINST SETTING-OFF ARISING FROM THAT AGREEMENT CONFERRING JURISDICTION OR ITS INTERPRETATION (JUDGMENT OF THE COURT OF JUSTICE OF 9 NOVEMBER 1978 IN CASE 23/78 MEETH V GLACETAL)?

(2)OR IS THE COURT PREVENTED IN SUCH A CASE FROM GIVING JUDGMENT IN RESPECT OF THE CLAIM FOR A SET-OFF BY THE AGREEMENT CONFERRING JURISDICTION AND THE PROHIBITION AGAINST SETTING-OFF CONTAINED THEREIN NOTWITHSTANDING THE FACT THAT THE PLAINTIFF HAS ENTERED AN APPEARANCE TO THE SET-OFF WITHOUT RAISING ANY OBJECTION?

'

9 PURSUANT TO ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE OBSERVATIONS WERE LODGED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC

OF GERMANY , THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH ALL TOOK THE VIEW THAT THE QUESTIONS MUST BE ANSWERED BY AFFIRMING THE FIRST MEANING PROPOSED BY THE OBERLANDESGERICHT.

10 BY THE QUESTIONS IT REFERRED TO THE COURT THE OBERLANDESGERICHT SEEKS TO KNOW , IN SUBSTANCE , WHETHER THE PROROGATION OF JURISDICTION ARISING , ACCORDING TO THE TERMS OF ARTICLE 18 OF THE CONVENTION , WHEN A DEFENDANT ENTERS AN APPEARANCE BEFORE A COURT WITHOUT CONTESTING THE JURISDICTION OF THAT COURT OCCURS IN THE FOLLOWING CIRCUMSTANCES :

WHEN THE LACK OF JURISDICTION OF THE COURT SEISED OF THE PROCEEDINGS DOES NOT RELATE TO THE APPLICATION MADE BY THE PLAINTIFF BUT TO THE CLAIM FOR A SET-OFF MADE BY THE DEFENDANT ;

WHEN THE LACK OF JURISDICTION OF THE COURT SEISED OF THE PROCEEDINGS ARISES FROM A CLAUSE CONFERRING JURISDICTION IN ACCORDANCE WITH THE REQUIREMENTS LAID DOWN BY ARTICLE 17 OF THE CONVENTION.

11 ARTICLE 18 OF THE CONVENTION STATES AS FOLLOWS :

' APART FROM JURISDICTION DERIVED FROM OTHER PROVISIONS OF THIS CONVENTION , A COURT OF A CONTRACTING STATE BEFORE WHOM A DEFENDANT ENTERS AN APPEARANCE SHALL HAVE JURISDICTION. THIS RULE SHALL NOT APPLY WHERE APPEARANCE WAS ENTERED SOLELY TO CONTEST THE JURISDICTION , OR WHERE ANOTHER COURT HAS EXCLUSIVE JURISDICTION BY VIRTUE OF ARTICLE 16 . '

12 ARTICLE 17 PROVIDES AS FOLLOWS :

' IF THE PARTIES , ONE OR MORE OF WHOM IS DOMICILED IN A CONTRACTING STATE , HAVE , BY AGREEMENT IN WRITING OR BY AN ORAL AGREEMENT EVIDENCED IN WRITING , 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.

AGREEMENTS CONFERRING JURISDICTION SHALL HAVE NO LEGAL FORCE IF THEY ARE CONTRARY TO THE PROVISIONS OF ARTICLE 12 OR 15 , OR IF THE COURTS WHOSE JURISDICTION THEY PURPORT TO EXCLUDE HAVE EXCLUSIVE JURISDICTION BY VIRTUE OF ARTICLE 16.

IF THE 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. '

13 THOSE TWO PROVISIONS FORM SECTION 6 - HEADED ' PROROGATION OF JURISDICTION ' - OF TITLE II OF THE CONVENTION. WHEREAS ARTICLE 17 IS CONCERNED WITH PROROGATION OF JURISDICTION BY AGREEMENT , ARTICLE 18 DEALS WITH IMPLIED PROROGATION RESULTING FROM A DEFENDANT ' S ENTERING AN APPEARANCE WITHOUT CONTESTING THE JURISDICTION OF THE COURT SEISED OF THE PROCEEDINGS.

14 THE INCLUSION OF THOSE TWO PROVISIONS INDICATES THAT THE CONVENTION ALLOWS THE PARTIES , SO FAR AS IS POSSIBLE AND SUBJECT TO THE LIMITS LAID DOWN IN THE SECOND PARAGRAPH OF ARTICLE 17 AND IN THE SECOND SENTENCE OF ARTICLE 18 , TO CHOOSE THE COURT TO WHICH THEY INTEND TO SUBMIT THE SETTLEMENT OF THEIR DISPUTES.

15 ARTICLE 18 IN PARTICULAR IS BASED ON THE IDEA THAT , BY ENTERING AN APPEARANCE BEFORE THE COURT SEISED OF THE PROCEEDINGS BY THE PLAINTIFF , WITHOUT CONTESTING THAT COURT ' S JURISDICTION , THE DEFENDANT IS BY IMPLICATION SIGNIFYING HIS CONSENT TO THE HEARING OF THE CASE BY A COURT OTHER THAN THAT DESIGNATED BY THE OTHER PROVISIONS OF THE CONVENTION.

16 THE OBERLANDESGERICHT ASKS FIRST WHETHER ARTICLE 18 IS APPLICABLE TO A CASE SUCH AS THAT BEFORE IT , WHERE IT IS THE PLAINTIFF WHO ENTERS INTO A DISPUTE ON THE SUBSTANCE OF THE CASE BEFORE THE COURT SEISED OF AN ACTION BY THE PLAINTIFF HIMSELF IN RELATION TO A CLAIM FOR A SET-OFF MADE BY THE DEFENDANT AND IN RESPECT OF WHICH THE SAID COURT WOULD OTHERWISE HAVE NO JURISDICTION.

17 THE DOUBTS EXPRESSED IN THAT CONNECTION BY THE OBERLANDESGERICHT ARISE FROM THE WORDING OF ARTICLE 18. THAT PROVISION ONLY REFERS EXPRESSLY TO THE PROROGATION OF JURISDICTION AS A CONSEQUENCE OF THE DEFENDANT ' S ENTERING AN APPEARANCE BEFORE THE COURT SEISED OF THE PROCEEDINGS BY THE PLAINTIFF.

18 NEVERTHELESS , FROM AN INTERPRETATION OF ARTICLE 18 IN THE LIGHT OF ITS PURPOSE AND CONTEXT , AS ALREADY DEFINED , IT MAY BE CONCLUDED THAT A CASE SUCH AS THAT REFERRED TO BY THE OBERLANDESGERICHT ALSO FALLS WITHIN THE SCOPE OF APPLICATION OF ARTICLE 18.

19 A PLAINTIFF WHO , WHEN FACED WITH A CLAIM FOR A SET-OFF MADE BY THE DEFENDANT AND IN RESPECT OF WHICH THE COURT SEISED OF THE PROCEEDINGS DOES NOT HAVE JURISDICTION , SUBMITS ARGUMENTS RELATING TO THE SUBSTANCE OF THAT CLAIM WITHOUT CONTESTING THE JURISDICTION OF THE SAID COURT IS IN A SIMILAR POSITION TO THAT EXPRESSLY REFERRED TO IN ARTICLE 18 OF A DEFENDANT WHO ENTERS AN APPEARANCE BEFORE THE COURT SEISED OF THE PROCEEDINGS BY THE PLAINTIFF WITHOUT CONTESTING THAT COURT ' S JURISDICTION.

20 CONSEQUENTLY , IN A CASE SUCH AS THAT CONSIDERED BY THE OBERLANDESGERICHT , THE PLAINTIFF ' S CONDUCT SHOULD BE HELD TO CONSTITUTE THE PROROGATION OF JURISDICTION , PURSUANT TO ARTICLE 18 OF THE CONVENTION , IN FAVOUR OF THE COURT SEISED OF THE PROCEEDINGS IN SO FAR AS THE OTHER CONDITIONS FOR THE APPLICATION OF THAT PROVISION AS DEFINED IN PARTICULAR IN THE COURT ' S JUDGMENT OF 24 JUNE 1981 (CASE 150/80 ELEFANTEN SCHUH V JACQMAIN (1981) ECR 1671) ARE FULFILLED .

21 AS THE UNITED KINGDOM RIGHTLY POINTS OUT THAT INTERPRETATION CORRESPONDS , MOREOVER , TO THE NEED TO AVOID SUPERFLUOUS PROCEDURE WHICH , AS THE COURT RECOGNIZED IN ITS JUDGMENT OF 9 NOVEMBER 1978 (CASE 23/78 MEETH V GLACETAL (1978) ECR 2133), FORMS THE BASIS OF THE CONVENTION AS A WHOLE OF WHICH ARTICLE 18 IS PART.

22 THE AFOREMENTIONED CONCLUSION IS NOT AFFECTED BY THE FACT , EMPHASIZED IN THE ORDER FOR REFERENCE , THAT THE DEFENDANT ' S CLAIM FOR A SET-OFF IS NOT BASED ON THE SAME CONTRACT OR SUBJECT-MATTER AS THE MAIN APPLICATION. THAT FACT RELATES TO THE ADMISSIBILITY OF A CLAIM FOR A SET-OFF WHICH DEPENDS ON THE LAW OF THE STATE IN WHICH THE COURT SEISED OF THE PROCEEDINGS IS SITUATED.

23 THE SECOND QUESTION CONSIDERED BY THE OBERLANDESGERICHT IS WHETHER

ARTICLE 18 IS APPLICABLE WHEN THE LACK OF JURISDICTION OF THE COURT SEISED OF THE PROCEEDINGS STEMS FROM THE FACT THAT THERE IS , IN RELATION TO THE SUBJECT-MATTER OF THE CLAIM FOR A SET-OFF , AN AGREEMENT CONFERRING JURISDICTION ON THE COURTS OF A CONTRACTING STATE OTHER THAN THAT IN WHICH THE COURT SEISED OF THE PROCEEDINGS IS SITUATED .

24 IT SHOULD BE RECALLED THAT , ACCORDING TO THE SECOND SENTENCE OF ARTICLE 18 , THE RULE IN THE FIRST SENTENCE DOES NOT APPLY WHERE ANOTHER COURT HAS EXCLUSIVE JURISDICTION BY VIRTUE OF ARTICLE 16 OF THE CONVENTION. THE CASE ENVISAGED IN ARTICLE 17 IS NOT THEREFORE ONE OF THE EXCEPTIONS WHICH ARTICLE 18 ALLOWS TO THE RULE WHICH IT LAYS DOWN .

25 AS THE COURT HAS ALREADY STATED IN THE SAID JUDGMENT OF 24 JUNE 1981 NEITHER THE GENERAL SCHEME NOR THE OBJECTIVES OF THE CONVENTION PROVIDE GROUNDS FOR THE VIEW THAT THE PARTIES TO AN AGREEMENT CONFERRING JURISDICTION WITHIN THE MEANING OF ARTICLE 17 ARE PREVENTED FROM VOLUNTARILY SUBMITTING THEIR DISPUTE TO A COURT OTHER THAN THAT STIPULATED IN THE AGREEMENT.

26 IT FOLLOWS THAT THE FACT THAT AN AGREEMENT CONFERRING JURISDICTION WITHIN THE MEANING OF ARTICLE 17 DESIGNATES THE COURT WHICH IS TO HAVE JURISDICTION DOES NOT PRECLUDE THE APPLICATION , WHERE APPROPRIATE , OF ARTICLE 18 WHERE ANOTHER COURT IS SEISED OF THE PROCEEDINGS .

27 CONSEQUENTLY THE REPLY TO THE QUESTIONS REFERRED TO THE COURT BY THE OBERLANDESGERICHT KOBLENZ MUST BE THAT THE COURT OF A CONTRACTING STATE BEFORE WHICH THE APPLICANT , WITHOUT RAISING ANY OBJECTION AS TO THE COURT ' S JURISDICTION , ENTERS AN APPEARANCE IN PROCEEDINGS RELATING TO A CLAIM FOR A SET-OFF WHICH IS NOT BASED ON THE SAME CONTACT OR SUBJECT-MATTER AS THE CLAIMS IN HIS APPLICATION AND IN RESPECT OF WHICH THERE IS A VALID AGREEMENT CONFERRING EXCLUSIVE JURISDICTION ON THE COURTS OF ANOTHER CONTRACTING STATE WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION , HAS JURISDICTION BY VIRTUE OF ARTICLE 18 OF THE CONVENTION.

COSTS

28 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , BY THE UNITED KINGDOM AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF A STEP IN THE PROCEEDINGS BEFORE THE NATIONAL COURT , THE DECISION ON COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT (FIRST CHAMBER)

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE OBERLANDESGERICHT KOBLENZ , BY ORDER OF 3 FEBRUARY 1984 , HEREBY RULES :

THE COURT OF A CONTRACTING STATE BEFORE WHICH THE APPLICANT , WITHOUT RAISING ANY OBJECTION AS TO THE COURT ' S JURISDICTION , ENTERS AN APPEARANCE IN PROCEEDINGS RELATING TO A CLAIM FOR A SET-OFF WHICH IS NOT BASED ON THE SAME CONTRACT OR SUBJECT-MATTER AS THE CLAIMS IN HIS APPLICATION AND IN RESPECT OF WHICH THERE IS A VALID AGREEMENT CONFERRING EXCLUSIVE JURISDICTION

ON THE COURTS OF ANOTHER CONTRACTING STATE WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS HAS JURISDICTION BY VIRTUE OF ARTICLE 18 OF THAT CONVENTION.

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CONCERNS	Interprets 41968A0927(01) -A17 Interprets 41968A0927(01) -A18
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Federal Republic of Germany ; United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A8* Landgericht Koblenz, Urteil vom 18/10/1982 (11 O 98/81) ; *A9* Oberlandesgericht Koblenz, Vorlagebeschluß vom 03/02/1984 (2 U 1481/82) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1987 no 123 ; *P1* Oberlandesgericht Koblenz, Urteil vom 27/02/1987 (2 U 1481/82) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1987 no 123 ; - Praxis des internationalen Privat- und Verfahrensrechts 1987 p.381 (résumé) ; - Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1987 p.629-632

NOTES Rauscher, Thomas: Zuständigkeitsvereinbarung und rügelose Einlassung nach dem EuGÜbk, Recht der Internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1985 p.887-890 ; Gaudemet-Tallon, H.: Communautés européennes, Revue critique de droit international privé 1985 p.687-688 ; Mauro, Jacques: Gazette du Palais 1985 II Som. p.211-212 ; Gottwald, Peter: Die Prozeßaufrechnung im europäischen Zivilprozeß, Praxis des internationalen Privat- und Verfahrensrechts 1986 p.10-13 ; Hartley, Trevor: Submission to Jurisdiction: Counterclaims, European Law Review 1986 p.98 ; Anton, A.E. ; Beaumont, P.R.: Case Notes on European Court Decisions relating to the Judgments Convention, The Scots Law Times 1988 p.a7

PROCEDU Reference for a preliminary ruling

ADVGEN Sir Gordon Slynn

JUDGRAP Bosco

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Judgment of the Court (Fourth Chamber)
of 27 November 1984
Calzaturificio Brennero sas v Wendel GmbH Schuhproduktion International. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Enforcement of judgments - Security. Case 258/83.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - APPEAL AGAINST A DECISION AUTHORIZING ENFORCEMET - POSSIBILITY FOR THE COURT WITH WHICH AN APPEAL HAS BEEN LODGED OF MAKING ENFORCEMENT CONDITIONAL ON THE PROVISION OF SECURITY - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 38 , SECOND PARAGRAPH)

2.CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - REMEDIES - APPEAL IN CASSATION AND RECHTSBESCHWERDE - JUDGMENTS CONTESTABLE BY AN APPEAL IN CASSATION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 37 , SECOND PARAGRAPH)

1 . THE SECOND PARAGRAPH OF ARTICLE 38 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT A COURT WITH WHICH AN APPEAL HAS BEEN LODGED AGAINST A DECISION AUTHORIZING ENFORCEMNT , GIVEN PURSUANT TO THE CONVENTION , MAY MAKE ENFORCEMENT CONDITIONAL ON THE PROVISION OF SECURITY ONLY WHEN IT GIVES JUDGMENT ON THE APPEAL.

2 . THE SECOND PARAGRAPH OF ARTICLE 37 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT AN APPEAL IN CASSATION AND , IN THE FEDERAL REPUBLIC OF GERMANY , A RECHTSBESCHWERDE MAY BE LODGED ONLY AGAINST THE JUDGMENT GIVEN ON THE APPEAL LODGED PURSUANT TO ARTICLE 36.

IN CASE 258/83

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 BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

CALZATURIFICIO BRENNERO SAS , PASTRENGO , VERONA (ITALY),

AND

WENDEL GMBH SCHUHPRODUKTION INTERNATIONAL , DETMOLD (FEDERAL REPUBLIC OF GERMANY)

ON THE INTERPRETATION OF THE SECOND PARAGRAPH OF ARTICLE 37 AND THE SECOND PARAGRAPH OF ARTICLE 38 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY ORDER OF 12 OCTOBER 1983 , WHICH WAS RECEIVED AT THE COURT REGISTRY ON 18 NOVEMBER 1983 , THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) REFERRED TO THE COURT OF JUSTICE 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION

' ') TWO QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLES 37 AND 38 OF THE CONVENTION

2 THOSE QUESTIONS AROSE IN A DISPUTE BETWEEN TWO SHOE MANUFACTURERS , BRENNERO AND WENDEL , WHICH HAVE THEIR REGISTERED OFFICES IN ITALY AND THE FEDERAL REPUBLIC OF GERMANY RESPECTIVELY. BRENNERO OBTAINED JUDGMENT AGAINST WENDEL IN AN ITALIAN COURT AND IS NOW SEEKING TO HAVE THAT JUDGMENT ENFORCED IN THE TERRITORY OF THE FEDERAL REPUBLIC OF GERMANY , IN ACCORDANCE WITH THE PROVISIONS OF THE CONVENTION.

3 THE PRESIDENT OF THE FOURTH CIVIL CHAMBER OF THE LANDGERICHT (REGIONAL COURT), DETMOLD , ISSUED AN ORDER FOR THE ENFORCEMENT OF THE JUDGMENT IN QUESTION AND , AT THE SAME TIME , AUTHORIZED THE ADOPTION OF PROTECTIVE MEASURES COVERING THE ASSETS OF THE GERMAN UNDERTAKING . WENDEL APPEALED AGAINST THAT DECISION UNDER THE FIRST PARAGRAPH OF ARTICLE 36 OF THE CONVENTION WHEREUPON THE OBERLANDESGERICHT (HIGHER REGIONAL COURT), HAMM , BEFORE GIVING JUDGMENT ON THE APPEAL , MADE ENFORCEMENT OF THE ITALIAN JUDGMENT CONDITIONAL ON BRENNERO PROVIDING SECURITY EVEN IF ENFORCEMENT WAS RESTRICTED TO THE ADOPTION OF PROTECTIVE MEASURES.

4 BRENNERO LODGED A RECHTSBESCHWERDE (APPEAL ON A POINT OF LAW) AGAINST THE OBERLANDESGERICHT ' S ORDER UNDER THE SECOND PARAGRAPH OF ARTICLE 37 OF THE CONVENTION. IT CONTENDED THAT A COURT WITH WHICH AN APPEAL HAS BEEN LODGED AGAINST A DECISION AUTHORIZING ENFORCEMENT CANNOT REQUIRE SECURITY TO BE PROVIDED WITHOUT AT THE SAME TIME GIVING JUDGMENT ON THE APPEAL.

5 THE BUNDESGERICHTSHOF , BEFORE WHICH THE RECHTSBESCHWERDE WAS BROUGHT , HELD THAT THE OBERLANDESGERICHT HAD NOT GIVEN JUDGMENT ON THE APPEAL AGAINST THE DECISION AUTHORIZING ENFORCEMENT BUT HAD INSTEAD , IN ACCORDANCE WITH WENDEL ' S SUGGESTION , GIVEN A PRELIMINARY DECISION CONCERNING THE PROVISION OF SECURITY. SINCE , IN THOSE CIRCUMSTANCES , THE DECISION GIVEN BY THE OBERLANDESGERICHT WAS AN INTERIM ORDER , IT WAS UNCERTAIN WHETHER IT COULD BE CONTESTED BY A RECHTSBESCHWERDE. UNDER THE GERMAN LAW OF CIVIL PROCEDURE , AN APPEAL OF THAT KIND IS INADMISSIBLE IF ITS PURPOSE IS TO CHALLENGE AN INTERIM ORDER ISSUED BY AN OBERLANDESGERICHT. IT CAN THEREFORE BE REVIEWED BY THE BUNDESGERICHTSHOF ONLY IF THE CONVENTION PROVIDES FOR SUCH AN APPEAL .

6 TAKING THE VIEW THAT IN THAT REGARD AN INTERPRETATION OF ARTICLES 37 AND 38 OF THE CONVENTION WAS NECESSARY TO ENABLE IT TO GIVE JUDGMENT , THE BUNDESGERICHTSHOF REFERRED THE FOLLOWING QUESTIONS TO THE COURT FOR A PRELIMINARY RULING :

' ' 1 . MAY THE OBERLANDESGERICHT IN THE FEDERAL REPUBLIC OF GERMANY WITH WHICH AN APPEAL AGAINST A DECISION AUTHORIZING ENFORCEMENT HAS BEEN LODGED BY A DEBTOR UNDER ARTICLES 36 AND 37 OF THE CONVENTION ISSUE AN ORDER UNDER THE SECOND PARAGRAPH OF ARTICLE 38 OF THE CONVENTION MAKING ENFORCEMENT CONDITIONAL ON THE PROVISION OF SECURITY ONLY AS PART OF ITS FINAL JUDGMENT ON THE APPEAL OR MAY IT ALSO ISSUE THE ORDER AS AN INTERIM MEASURE DURING THE APPEAL PROCEEDINGS?

2.MAY A RECHTSBESCHWERDE (APPEAL ON A POINT OF LAW) BE LODGED WITH THE

BUNDESGERICHTSHOF EITHER DIRECTLY UNDER THE SECOND PARAGRAPH OF ARTICLE 37 OF THE CONVENTION , OR BY ANALOGY THEREWITH , AGAINST AN ORDER CONCERNING THE PROVISION OF SECURITY ISSUED BY THE OBERLANDESGERICHT ON THE BASIS OF THE SECOND PARAGRAPH OF ARTICLE 38 OF THE CONVENTION AS AN INTERIM MEASURE DURING THE APPEAL PROCEEDINGS?

' '

FIRST QUESTION (ARTICLE 38)

7 BRENNERO , THE ITALIAN GOVERNMENT AND THE COMMISSION OF THE EUROPEAN COMMUNITIES CONSIDER THAT UNDER ARTICLE 38 OF THE CONVENTION A COURT WITH WHICH AN APPEAL HAS BEEN LODGED AGAINST A DECISION AUTHORIZING ENFORCEMENT COULD NOT MAKE AN INTERIM ORDER REQUIRING SECURITY TO BE PROVIDED WITHOUT GIVING JUDGMENT ON THE APPEAL. THE POWER TO MAKE AN ORDER OF THAT KIND EXCLUDED BY THE WORDING OF ARTICLE 38 WHICH STATES THAT THE COURT WITH WHICH THE APPEAL WAS LODGED COULD MAKE ' ' ENFORCEMENT ' ' CONDITIONAL ON THE PROVISION OF SECURITY , SUCH ENFORCEMENT BEING POSSIBLE ONLY AFTER THE DISMISSAL OF THE APPEAL . MOREOVER , IN THEIR VIEW , THE EXERCISE BY THE COURT WITH WHICH THE APPEAL HAD BEEN LODGED OF THE POWER TO MAKE AN INTERIM ORDER REQUIRING SECURITY TO BE PROVIDED IS CONTRARY TO ONE OF THE OBJECTIVES OF THE CONVENTION WHICH IS INTENDED PRECISELY TO RENDER THE PROCEDURE FOR THE ENFORCEMENT OF A JUDGMENT GIVEN IN ANOTHER CONTRACTING STATE AS STRAIGHTFORWARD AND AS RAPID AS POSSIBLE.

8 THE GERMAN GOVERNMENT CONSIDERS THAT THE POWER OF THE COURT WITH WHICH THE APPEAL HAD BEEN LODGED TO MAKE AN ORDER FOR THE PROVISION OF SECURITY DURING THE APPEAL PROCEEDINGS WAS SUCH AS TO PREVENT THE DEBTOR FROM BEING EXPOSED TO RISKS INHERENT IN THE UNCERTAINTY SURROUNDING THE OUTCOME OF THE PROCEEDINGS IN THE STATE IN WHICH THE ORIGINAL JUDGMENT WAS GIVEN , SINCE ARTICLE 38 APPLIED ONLY WHERE THE JUDGMENT TO BE ENFORCED DID NOT YET HAVE THE FORCE OF RES JUDICATA IN THE STATE IN WHICH IT WAS GIVEN.

9 AT THE HEARING , WENDEL EXPRESSED ITS AGREEMENT WITH THAT VIEW PARTICULARLY ON THE GROUND THAT ALTHOUGH ARTICLE 38 APPLIES TO CASES WHERE THE JUDGMENT TO BE ENFORCED COULD STILL BE CONTESTED BY AN APPEAL IN THE STATE IN WHICH THAT JUDGMENT WAS GIVEN , ARTICLE 39 , WHICH AUTHORIZES THE ADOPTION OF INTERIM PROTECTIVE MEASURES , APPLIES ONLY IN CASES WHERE THAT JUDGMENT HAD BECOME FINAL UNDER THE LAW OF THE STATE IN WHICH IT WAS GIVEN. IN CASES SUCH AS THE PRESENT , THEREFORE , ONLY ARTICLE 38 IS RELEVANT WHILST ARTICLE 39 IS INAPPLICABLE.

10 IT IS APPROPRIATE TO RECALL IN THE FIRST PLACE THAT THE PURPOSE OF THE CONVENTION IS TO LIMIT THE NUMBER OF REQUIREMENTS TO WHICH THE ENFORCEMENT OF A JUDGMENT MAY BE SUBJECTED IN ANOTHER CONTRACTING STATE . THE CONVENTION ACCORDINGLY PROVIDES FOR A VERY SIMPLE ENFORCEMENT PROCEDURE WHILST GIVING THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT AN OPPORTUNITY TO LODGE AN APPEAL. UNLIKE THE INITIAL PROCEEDINGS CONCERNING THE DECISION AUTHORIZING ENFORCEMENT , THE PROCEEDINGS ON THE APPEAL ARE ADVERSARY PROCEEDINGS.

11 ARTICLE 39 OF THE CONVENTION GOVERNS THE RIGHTS OF THE PARTY WHO OBTAINED THE DECISION AUTHORIZING ENFORCEMENT WHICH IS CONTESTED BY THE APPEAL . UNTIL JUDGMENT IS GIVEN ON THAT APPEAL , THAT PARTY MAY , ACCORDING TO

THAT PROVISION , TAKE ONLY ' ' PROTECTIVE MEASURES... AGAINST THE PROPERTY OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT. ' ' IT FOLLOWS THAT NO ENFORCEMENT MEASURES MAY BE TAKEN UNTIL THE COURT WITH WHICH THE APPEAL HAS BEEN LODGED GIVES JUDGMENT THEREON.

12 THAT IS THE CONTEXT IN WHICH THE SECOND PARAGRAPH OF ARTICLE 38 OF THE CONVENTION , UNDER WHICH THE COURT WITH WHICH THE APPEAL HAS BEEN LODGED MAY ' ' MAKE ENFORCEMENT CONDITIONAL ON THE PROVISION OF SUCH SECURITY AS IT SHALL DETERMINE ' ' , MUST BE SET. THE WHOLE SIGNIFICANCE OF THAT PROVISION LIES IN THE FACT THAT , AS SOON AS THE COURT GIVES JUDGMENT ON THE APPEAL , THE RESTRICTIONS PROVIDED FOR BY ARTICLE 39 CEASE TO BE APPLICABLE. ENFORCEMENT MEASURES MAY THEREFORE BE TAKEN WHILE THAT JUDGMENT CAN STILL BE CONTESTED BY AN APPEAL IN CASSATION OR BY A RECHTSBESCHWERDE , IN ACCORDANCE WITH THE SECOND PARAGRAPH OF ARTICLE 37 , AND WHILE EVEN THE ORIGINAL JUDGMENT GIVEN IN THE FIRST STATE CAN STILL BE CONTESTED BY AN APPEAL , WHICH IS A POSSIBILITY EXPRESSLY PROVIDED FOR BY ARTICLE 38. THAT IS THE TIME WHEN THE PROTECTION OF THE DEBTOR ' S INTERESTS MAY REQUIRE ENFORCEMENT TO BE MADE CONDITIONAL ON THE PROVISION OF SECURITY.

13 IT FOLLOWS THAT THE SECOND PARAGRAPH OF ARTICLE 38 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT A COURT WITH WHICH AN APPEAL HAS BEEN LODGED AGAINST A DECISION AUTHORIZING ENFORCEMENT , GIVEN PURSUANT TO THE CONVENTION , MAY MAKE ENFORCEMENT CONDITIONAL ON THE PROVISION OF SECURITY ONLY WHEN IT GIVES JUDGMENT ON THE APPEAL.

SECOND QUESTION (ARTICLE 37)

14 BRENNERO OBSERVES THAT THE UNIFORM INTERPRETATION OF THE CONVENTION WOULD BE JEOPARDIZED IF AN INTERIM OR INTERLOCUTORY ORDER ISSUED BY THE COURT WITH WHICH THE APPEAL HAS BEEN LODGED COULD NOT BE CONTESTED BY AN APPEAL IN CASSATION OR BY A RECHTSBESCHWERDE. HOWEVER , ACCORDING TO THE COMMISSION AND THE GERMAN GOVERNMENT , THE SECOND PARAGRAPH OF ARTICLE 37 OF THE CONVENTION STATES CATEGORICALLY THAT A RECHTSBESCHWERDE CAN BE LODGED ONLY AGAINST THE FINAL JUDGMENT GIVEN ON THE APPEAL.

15 THE SECOND PARAGRAPH OF ARTICLE 37 PROVIDES THAT THE JUDGMENT GIVEN ON THE APPEAL MAY BE CONTESTED ONLY BY AN APPEAL IN CASSATION AND , IN THE FEDERAL REPUBLIC OF GERMANY , BY A RECHTSBESCHWERDE. UNDER THE GENERAL SCHEME OF THE CONVENTION , AND IN THE LIGHT OF ONE OF ITS PRINCIPAL OBJECTIVES WHICH IS TO SIMPLIFY PROCEDURES IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT , THAT PROVISION CANNOT BE EXTENDED SO AS TO ENABLE AN APPEAL IN CASSATION TO BE LODGED AGAINST A JUDGMENT OTHER THAN THAT GIVEN ON THE APPEAL , FOR INSTANCE AGAINST A PRELIMINARY OR INTERLOCUTORY ORDER REQUIRING PRELIMINARY INQUIRIES TO BE MADE .

16 THEREFORE , THE ANSWER TO THE SECOND QUESTION MUST BE THAT THE SECOND PARAGRAPH OF ARTICLE 37 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT AN APPEAL IN CASSATION AND , IN THE FEDERAL REPUBLIC OF GERMANY , A RECHTSBESCHWERDE MAY BE LODGED ONLY AGAINST THE JUDGMENT GIVEN ON THE APPEAL.

17 IF , IN THE PRESENT CASE , THE ANSWER TO THE SECOND QUESTION SHOULD LEAD THE BUNDESGERICHTSHOF TO DECLARE THE RECHTSBESCHWERDE LODGED AGAINST

THE OBERLANDESGERICHT ' S ORDER INADMISSIBLE , WHILE THE ORDER SHOULD BE REGARDED AS UNLAWFUL IN THE LIGHT OF THE ANSWER TO THE FIRST QUESTION , IT IS FOR THE OBERLANDESGERICHT , WHEN THE CASE AGAIN COMES BEFORE IT , TO REVOKE THE INTERIM ORDER IN SO FAR AS IT REQUIRED SECURITY TO BE PROVIDED WITHOUT GIVING JUDGMENT ON THE APPEAL

COSTS

18 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE COMMISSION OF THE EURO PEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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 (FOURTH CHAMBER)

IN REPLY TO THE QUESTIONS SUBMITTED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 12 OCTOBER 1983 HEREBY RULES :

1 . THE SECOND PARAGRAPH OF ARTICLE 38 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT A COURT WITH WHICH AN APPEAL HAS BEEN LODGED AGAINST A DECISION AUTHORIZING ENFORCEMENT , GIVEN PURSUANT TO THE CONVENTION , MAY MAKE ENFORCEMENT CONDITIONAL ON THE PROVISION OF SECURITY ONLY WHEN IT GIVES JUDGMENT ON THE APPEAL ;

2.THE SECOND PARAGRAPH OF ARTICLE 37 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT AN APPEAL IN CASSATION AND , IN THE FEDERAL REPUBLIC OF GERMANY , A RECHTSBESCHWERDE MAY BE LODGED ONLY AGAINST THE JUDGMENT GIVEN ON THE APPEAL .

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NOTES	Linke, Hartmut: Rechtsbehelf gegen die Zulassung der Zwangsvollstreckung nach dem EuGÜbk und Sicherheitsleistung, Recht der Internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1985 p.237-238 ; Huet, André: Journal du droit international 1985 p.173-178 ; Grabandt, E.: De procesrechtelijke toverdoos van het Hof van Justitie van de Europese Gemeenschappen, Nederlands juristenblad 1985 p.449-451 ; Schlosser, Peter: Grenzüberschreitende Vollstreckung von Maßnahmen des einstweiligen Rechtsschutzes im EuGVÜ-Bereich, Praxis des internationalen Privat- und Verfahrensrechts 1985 p.321-322 ; Hartley, Trevor: Enforcement Procedure: Provision of Security, European Law Review 1986 p.95-96 ; Di Blase, Antonietta: Esecuzione di sentenze straniere e provvedimenti provvisori in base alla Convenzione di Bruxelles 27 settembre 1968, Giustizia civile 1986 I p.319-320
PROCEDU	Reference for a preliminary ruling
ADVGEN	Sir Gordon Slynn
JUDGRAP	Koopmans
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Judgment of the Court (Fourth Chamber)
of 15 January 1985
Erich Rösler v Horst Rottwinkel.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention, Article 16(1) - Exclusive jurisdiction - Tenancies of immovable property.
Case 241/83.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - EXCLUSIVE JURISDICTION - DISPUTES CONCERNING TENANCIES OF IMMOVABLE PROPERTY - CONCEPT - SHORT LETTING OF A HOLIDAY HOME - INCLUDED - OBLIGATIONS OF THE PARTIES UNDER THE TENANCY AGREEMENT - OBLIGATIONS IN RESPECT OF WHICH COURTS HAVE EXCLUSIVE JURISDICTION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 16 (1))

1 . ARTICLE 16 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 APPLIES TO ALL LETTINGS OF IMMOVABLE PROPERTY , EVEN FOR A SHORT TERM , AND EVEN WHERE THEY RELATE ONLY TO THE USE AND OCCUPATION OF A HOLIDAY HOME.

2 . ALL DISPUTES CONCERNING THE OBLIGATIONS OF THE LANDLORD OR OF THE TENANT UNDER A TENANCY , IN PARTICULAR THOSE CONCERNING THE EXISTENCE OF TENANCIES OR THE INTERPRETATION OF THE TERMS THEREOF , THEIR DURATION , THE GIVING UP OF POSSESSION TO THE LANDLORD , THE REPAIRING OF DAMAGE CAUSED BY THE TENANT OR THE RECOVERY OF RENT AND OF INCIDENTAL CHARGES PAYABLE BY THE TENANT , SUCH AS CHARGES FOR THE CONSUMPTION OF WATER , GAS AND ELECTRICITY , FALL WITHIN THE EXCLUSIVE JURISDICTION CONFERRED BY ARTICLE 16 (1) OF THE CONVENTION ON THE COURTS OF THE STATE IN WHICH THE PROPERTY IS SITUATED. ON THE OTHER HAND , DISPUTES WHICH ARE ONLY INDIRECTLY RELATED TO THE USE OF THE PROPERTY LET , SUCH AS THOSE CONCERNING THE LOSS OF HOLIDAY ENJOYMENT AND TRAVEL EXPENSES , DO NOT FALL WITHIN THAT EXCLUSIVE JURISDICTION.

IN CASE 241/83

REFERENCE TO THE COURT UNDER THE PROTOCOL OF 3 JUNE 1973 TO 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 ACTION PENDING BEFORE THAT COURT BETWEEN

ERICH ROSLER , BERLIN ,

AND

HORST ROTTWINKEL , BIELEFELD ,

ON THE INTERPRETATION OF ARTICLE 16 (1) OF THAT CONVENTION CONCERNING THE EXCLUSIVE JURISDICTION IN PROCEEDINGS WHICH HAVE AS THEIR OBJECT RIGHTS IN REM IN , OR TENANCIES OF , IMMOVABLE PROPERTY OF THE COURTS OF THE CONTRACTING STATE IN WHICH THE PROPERTY IS SITUATED ,

COSTS

30 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , THE GOVERNMENT OF THE ITALIAN REPUBLIC , THE UNITED KINGDOM , AND 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 (FOURTH CHAMBER)

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESGERICHTSHOF , BY ORDER OF 3 OCTOBER 1983 , HEREBY RULES :

1 . ARTICLE 16 (1) OF THE CONVENTION APPLIES TO ALL LETTINGS OF IMMOVABLE PROPERTY , EVEN FOR A SHORT TERM AND EVEN WHERE THEY RELATE ONLY TO THE USE AND OCCUPATION OF A HOLIDAY HOME.

2.ALL DISPUTES CONCERNING THE OBLIGATIONS OF THE LANDLORD OR OF THE TENANT UNDER A TENANCY , IN PARTICULAR THOSE CONCERNING THE EXISTENCE OF TENANCIES OR THE INTERPRETATION OF THE TERMS THEREOF , THEIR DURATION , THE GIVING UP OF POSSESSION TO THE LANDLORD , THE REPAIRING OF DAMAGE CAUSED BY THE TENANT OR THE RECOVERY OF RENT AND OF INCIDENTAL CHARGES PAYABLE BY THE TENANT , SUCH AS CHARGES FOR THE CONSUMPTION OF WATER , GAS AND ELECTRICITY , FALL WITHIN THE EXCLUSIVE JURISDICTION CONFERRED BY ARTICLE 16 (1) OF THE CONVENTION ON THE COURTS OF THE STATE IN WHICH THE PROPERTY IS SITUATED. ON THE OTHER HAND , DISPUTES WHICH ARE ONLY INDIRECTLY RELATED TO THE USE OF THE PROPERTY LET , SUCH AS THOSE CONCERNING THE LOSS OF HOLIDAY ENJOYMENT AND TRAVEL EXPENSES , DO NOT FALL WITHIN THE EXCLUSIVE JURISDICTION CONFERRED BY THAT ARTICLE.

1 BY ORDER OF 5 OCTOBER 1983 , WHICH WAS RECEIVED AT THE COURT ON 24 OCTOBER 1983 , THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER THE PROTOCOL OF 3 JUNE 1971 TO 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 ARTICLE 16 (1) OF THAT CONVENTION.

2 BY A WRITTEN AGREEMENT DATED 19 JANUARY 1980 , HORST ROTTWINKEL , THE PLAINTIFF IN THE MAIN PROCEEDINGS , LET A FLAT IN HIS HOLIDAY VILLA AT CANNOBIO IN ITALY TO ERICH ROSLER , THE DEFENDANT IN THE MAIN PROCEEDINGS , FOR THE PERIOD FROM 12 JULY TO 2 AUGUST 1980. THE RENT AGREED FOR FOUR PERSONS WAS DM 2 625. BY THE TERMS OF THE AGREEMENT VISITORS WERE NOT ALLOWED TO STAY OVERNIGHT. THE INCIDENTAL CHARGES FOR GAS , WATER AND ELECTRICITY HAD TO BE CALCULATED ACCORDING TO THE QUANTITIES CONSUMED AND THERE WAS ALSO AN EXTRA CHARGE FOR CLEANING AT THE END OF THE LETTING. THE PARTIES FURTHER AGREED THAT THE AGREEMENT WAS TO BE GOVERNED BY GERMAN LAW , THAT BIELEFELD WAS TO BE THE PLACE OF PERFORMANCE AND THAT ITS COURTS WERE TO HAVE JURISDICTION.

3 THE PLAINTIFF IN THE MAIN PROCEEDINGS SPENT HIS HOLIDAY IN THE HOLIDAY VILLA AT THE SAME TIME AS THE DEFENDANT.

4 ON 7 JANUARY 1981 THE PLAINTIFF SUED THE DEFENDANT IN THE LANDGERICHT (REGIONAL COURT) BERLIN , FOR DAMAGES AND FOR THE PAYMENT OF OUTSTANDING INCIDENTAL CHARGES. HE CLAIMED THAT THROUGHOUT THE HOLIDAY THE DEFENDANT HAD ACCOMMODATED MORE THAN FOUR PERSONS IN THE HOLIDAY HOME WHICH CAUSED THE CESSPOOL CONSTANTLY TO OVERFLOW , CREATING AN INTOLERABLE SMELL ,

AND WAS A CONSIDERABLE NUISANCE OWING TO THE NOISE.

5 ACCORDING TO THE PLAINTIFF , HIS AND HIS FAMILY ' S REST AND QUIET HAD BEEN CONSIDERABLY DISTURBED. HE CLAIMED DAMAGES FROM THE DEFENDANT FOR LOSS OF HOLIDAY ENJOYMENT , FOUNDING HIS CLAIM ON A BREACH OF THE LEASE , AND SOUGHT REIMBURSEMENT OF THE COSTS OF TRAVELLING TO THE HOLIDAY RESORT. HE ALSO CLAIMED , UNDER THE TERMS OF THE LEASE , PAYMENT OF INCIDENTAL CHARGES IN RESPECT OF GAS , ELECTRICITY AND WATER AND OF CLEANING AT THE END OF THE LETTING.

6 THE LANDGERICHT BERLIN DISMISSED THE ACTION AS INADMISSIBLE ON THE GROUND THAT , ACCORDING TO ARTICLE 16 (1) OF THE CONVENTION , THE COURTS OF THE CONTRACTING STATE IN WHICH THE PROPERTY WAS SITUATED , NAMELY ITALY , HAD EXCLUSIVE JURISDICTION TO ENTERTAIN THE PLAINTIFF ' S CLAIMS . THE KAMMERGERICHT (HIGHER REGIONAL COURT) IN BERLIN QUASHED THE JUDGMENT OF THE LANDGERICHT AND REFERRED THE CASE BACK TO THAT COURT FOR RE-HEARING AND JUDGMENT.

7 THE DEFENDANT APPEALED AGAINST THE JUDGMENT OF THE KAMMERGERICHT TO THE BUNDESGERICHTSHOF ON A POINT OF LAW.

8 CONSIDERING THAT THE DISPUTE RAISED QUESTIONS AS TO THE INTERPRETATION OF THE CONVENTION , THE BUNDESGERICHTSHOF , BY ORDER OF 5 OCTOBER 1983 , STAYED THE PROCEEDINGS AND SUBMITTED THE FOLLOWING QUESTIONS TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING :

' (1) IS ARTICLE 16 (1) OF THE CONVENTION APPLICABLE IF A LEASE CONCLUDED BETWEEN PERSONS RESIDENT IN THE FEDERAL REPUBLIC OF GERMANY IS FOR THE SHORT LETTING ONLY OF A HOLIDAY HOME LOCATED IN ITALY AND THE PARTIES TO THE LEASE HAVE AGREED THAT GERMAN LAW IS TO APPLY?

(2)IF ARTICLE 16 (1) IS APPLICABLE , DOES IT APPLY TO ACTIONS FOR DAMAGES FOR BREACH OF THE LEASE , PARTICULARLY FOR COMPENSATION FOR LOSS OF HOLIDAY ENJOYMENT AND FOR THE RECOVERY OF INCIDENTAL CHARGES PAYABLE UNDER THE LEASE?

'

9 THE PLAINTIFF SUBMITS THAT ARTICLE 16 (1) OF THE CONVENTION IS NOT APPLICABLE TO THIS CASE. IN HIS VIEW , THE AGREEMENT IN QUESTION IS FOR THE SHORT LETTING OF A HOLIDAY HOME WHICH , ON AN ECONOMIC VIEW , IS MORE AKIN TO A LODGING AGREEMENT THAN TO A LEASE IN THE PROPER MEANING OF THE WORD. THE CLAIMS INVOLVED ARE PRIMARILY FOR COMPENSATION FOR THE LOSS OF HOLIDAY ENJOYMENT AND FOR DAMAGE TO , OR LOSS OF , MOVABLE PROPERTY. FURTHERMORE , THE PLACE OF PERFORMANCE IS IN THE FEDERAL REPUBLIC OF GERMANY. THE AGREEMENT PROVIDED THAT MONIES DUE , INCLUDING THE RENT , HAD TO BE PAID IN THE FEDERAL REPUBLIC AND THE KEYS ALSO HAD TO BE RETURNED THERE. A COURT INSPECTION OF THE PREMISES IS OUT OF THE QUESTION AS A MEANS OF RESOLVING THE DISPUTE.

10 THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY TAKES THE VIEW THAT IT WOULD BE CONTRARY TO THE SPIRIT OF ARTICLE 16 (1) OF THE CONVENTION TO APPLY IT TO CLAIMS ARISING FROM SHORT-TERM LEASES. IT POINTS OUT IN THIS REGARD THAT IN ITS JUDGMENT OF 14 DECEMBER 1977 IN CASE 73/77 , SANDERS V VAN DER PUTTE , (1977) ECR 2383 THE COURT STATED THAT ARTICLE 16 (1) MUST

NOT BE GIVEN A WIDER INTERPRETATION THAN ITS OBJECTIVE REQUIRES. THE RATIO LEGIS OF ARTICLE 16 (1) IS THAT TENANCIES OF IMMOVABLE PROPERTY , ESPECIALLY OF DWELLINGS , ARE GENERALLY GOVERNED BY COMPLEX LEGISLATION WHICH IS STRONGLY INFLUENCED BY SOCIAL CONSIDERATIONS AND WHICH IS BEST APPLIED BY THE COURTS OF THE COUNTRY IN WHICH IT IS IN FORCE. HOWEVER , THAT SITUATION DOES NOT ARISE IN THE CASE OF AGREEMENTS WHICH RELATE ONLY TO THE SHORT-TERM LETTING OF HOLIDAY HOMES SITUATED ABROAD. IN SUCH CASES THE INTERESTS INVOLVED DO NOT REQUIRE THE APPLICATION OF SOCIAL LEGISLATION IN THE MATTER OF TENANCIES. IN GERMAN LEGISLATION , FOR EXAMPLE , SHORT-TERM LETTINGS OF HOUSING ACCOMMODATION , WHICH COVER LETTINGS OF HOLIDAY HOMES , ARE EXPRESSLY EXCLUDED FROM THE AMBIT OF SOCIAL LEGISLATION ON TENANCIES.

11 THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY ALSO CONSIDERS THAT THE INEXPEDIENCY OF APPLYING ARTICLE 16 (1) OF THE CONVENTION TO THE LETTING OF HOLIDAY HOMES BECOMES PARTICULARLY CLEAR IF , AS IN THIS CASE , THE PARTIES HAVE MADE THEIR CONTRACT SUBJECT EXCLUSIVELY TO GERMAN LAW AND TO THE JURISDICTION OF THE GERMAN COURTS. THE PRIMARY PURPOSE OF ENTRUSTING THE PROCEEDINGS TO THE COURTS OF THE PLACE WHERE THE PROPERTY IS SITUATED , WHICH IS TO ENABLE THE MANDATORY PROVISIONS OF THE LAW OF THAT PLACE TO APPLY BY MAKING THE FORUM AND APPLICABLE LAW COINCIDE AND , GENERALLY , TO SIMPLIFY THE PROCEEDINGS , IS IRRELEVANT IN THIS CASE.

12 A FURTHER AIM OF ARTICLE 16 (1) IS THAT THE TENANT OF A DWELLING , WHO AS A GENERAL RULE IS SOCIALLY IN A COMPARATIVELY WEAK POSITION , SHOULD NOT BE PUT AT ANY FURTHER DISADVANTAGE BY THE FACT THAT THE TRIAL TAKES PLACE BEFORE A COURT FAR AWAY FROM HIS PLACE OF RESIDENCE . THAT AIM IS ALSO IRRELEVANT AS FAR AS LEASES OF HOLIDAY HOMES ARE CONCERNED BECAUSE THE LESSEE DOES NOT NORMALLY RESIDE AT THE PLACE WHERE THE HOLIDAY HOME IS SITUATED OR REQUIRE ANY SPECIAL SOCIAL CONSIDERATION.

13 WITH REGARD TO THE SECOND QUESTION , THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY POINTS OUT THAT IN ITS JUDGMENT IN SANDERS V VAN DER PUTTE , CITED ABOVE , THE COURT STATED THAT THE SPECIAL CONSIDERATIONS RELATING TO TENANCIES OF IMMOVABLE PROPERTY EXPLAINED WHY EXCLUSIVE JURISDICTION WAS CONFERRED ON THE COURTS OF THE STATE IN WHICH THE IMMOVABLE PROPERTY WAS SITUATED IN THE CASE OF DISPUTES RELATING TO TENANCIES OF IMMOVABLE PROPERTY PROPERLY SO-CALLED , THAT IS TO SAY , IN PARTICULAR , DISPUTES BETWEEN LANDLORDS AND TENANTS AS TO THE EXISTENCE OR INTERPRETATION OF LEASES OR TO COMPENSATION FOR DAMAGE CAUSED BY THE TENANT AND TO THE GIVING UP OF POSSESSION OF THE PREMISES . ACCORDING TO THE RAPPORTEUR OF THE COMMITTEE OF EXPERTS ON THE CONVENTION (OFFICIAL JOURNAL , 1979 C 59 , P. 1), THE RULE CONFERRING EXCLUSIVE JURISDICTION DOES NOT APPLY TO PROCEEDINGS CONCERNED ONLY WITH THE RECOVERY OF RENT , SINCE SUCH PROCEEDINGS CAN BE CONSIDERED TO RELATE TO A SUBJECT-MATTER WHICH IS QUITE DISTINCT FROM THE RENTED PROPERTY ITSELF. THAT VIEW MUST APPLY A FORTIORI TO ACTIONS FOR COMPENSATION FOR INDIRECT DAMAGE ARISING FROM A BREACH OF THE LEASE BY ONE PARTY AND UNRELATED TO THE RENTED PROPERTY ITSELF. THEREFORE , THE PLAINTIFF ' S CLAIMS FOR COMPENSATION FOR LOSS OF HOLIDAY ENJOYMENT AND UNNECESSARILY INCURRED TRAVEL EXPENSES DO NOT FALL UNDER ARTICLE 16 (1). NOR CAN THERE BE ANY EXCLUSIVE JURISDICTION UNDER THAT PROVISION IN RESPECT OF CLAIMS FOR THE PAYMENT OF INCIDENTAL CHARGES WHICH FORM

AN INTEGRAL PART OF THE TOTAL RENT.

14 THE UNITED KINGDOM CONSIDERS THAT THE SCOPE OF ARTICLE 16 (1) IS TO BE DETERMINED BY REFERENCE TO THE TYPE OF PROCEEDINGS AFFECTING THE IMMOVABLE PROPERTY RATHER THAN TO THE NATURE OF THE LEASE OR OTHER INTEREST IN THAT PROPERTY. IN THIS CASE , THE PLAINTIFF IS NOT MAKING ANY CLAIM FOR RENT BUT IS CLAIMING DAMAGES FOR BREACHES OF THE LEASE AND CONSEQUENTIAL LOSS FLOWING THEREFROM. THE PLAINTIFF ' S CLAIMS DO NOT FALL WITHIN THE CLASS OF DISPUTES MENTIONED BY THE COURT IN SANDERS V VAN DER PUTTE. THE NEED FOR THE PROPER ADMINISTRATION OF JUSTICE DOES NOT REQUIRE CLAIMS , SUCH AS THOSE IN THIS CASE FOR BREACH OF TERMS OF A LEASE AND FOR CONSEQUENTIAL LOSS , TO BE ASSIGNED TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF THE STATE IN WHICH THE PROPERTY IS SITUATED. SIMILAR ARGUMENTS APPLY TO THE CLAIM BY THE PLAINTIFF FOR INCIDENTAL CHARGES , NAMELY THOSE RELATING TO THE CONSUMPTION OF GAS , ELECTRICITY AND WATER AND FOR CLEANING. THE CLAIMS CONCERNING THE LOSS OF , OR DAMAGE TO , ARTICLES LISTED IN THE INVENTORY DO NOT AFFECT THE RENTED PROPERTY AND OUGHT NOT TO BE REGARDED AS DISPUTES WHICH HAVE AS THEIR OBJECT TENANCIES OF IMMOVABLE PROPERTY FOR THE PURPOSES OF ARTICLE 16 (1) OF THE CONVENTION. FOR THAT PROVISION TO APPLY , THE OBJECTIVE OF THE PROCEEDINGS MUST BE THE DETERMINATION , ENFORCEMENT OR GIVING EFFECT TO , OR THE TERMINATION OF , RIGHTS OF POSSESSION.

15 THE GOVERNMENT OF THE ITALIAN REPUBLIC TAKES THE VIEW THAT THE REASONS GIVEN BY THE NATIONAL COURT FOR ITS DECISION , NAMELY THAT CONSIDERATIONS OF EXPEDIENCY SUGGEST THAT ARTICLE 16 (1) SHOULD NOT BE APPLIED TO CASES IN WHICH THE LEASE IS ONLY FOR THE SHORT-TERM LETTING OF A HOLIDAY HOME , BOTH PARTIES HABITUALLY RESIDE IN A COUNTRY OTHER THAN THE ONE IN WHICH THE PROPERTY IS SITUATED AND HAVE AGREED TO APPLY THE SUBSTANTIVE LAW OF THE STATE IN WHICH THEY HABITUALLY RESIDE , ARE NOT OF SUCH A NATURE AS TO EXCLUDE THE APPLICATION OF THAT PROVISION. THE RULE LAID DOWN IN ARTICLE 16 (1) DOES NOT DISTINGUISH BETWEEN SHORT-TERM AND LONG-TERM LETTINGS OR BETWEEN THE DIFFERENT USES TO WHICH THE PROPERTY IS PUT : IT MAY BE USED FOR PROFESSIONAL , COMMERCIAL OR AGRICULTURAL PURPOSES , AS A DWELLING , FOR HOLIDAYS AND SO FORTH. THE FACT THAT NEITHER CONTRACTING PARTY RESIDES IN ITALY IS IMMATERIAL. THE ARGUMENT BASED ON THE CLAUSE CONCERNING THE APPLICATION OF THE LAW OF A MEMBER STATE OTHER THAN THAT IN WHICH THE PROPERTY IS SITUATED IS UNACCEPTABLE. IN ANY EVENT , IN SOME CIRCUMSTANCES AT LEAST , THE CLAUSE WOULD NOT BE VALID , FOR EXAMPLE IF IT WERE MEANT TO DEFEAT THE APPLICATION OF THE ' FAIR RENT ' LEGISLATION IN ITALY. IF IT WERE ACCEPTED THAT AN AGREEMENT OF THAT KIND , INCORPORATED INTO THE CONTRACT BY MEANS OF A JURISDICTION CLAUSE , MIGHT EVEN DEPRIVE THE COURTS OF THE STATE IN WHICH THE PROPERTY IS SITUATED OF JURISDICTION , THE WAY WOULD BE OPEN TO THE POSSIBILITY OF EVADING MANDATORY RULES OF THAT STATE.

16 WITH REGARD TO THE INCIDENTAL CHARGES , THERE CAN BE NO DOUBT , IN THE VIEW OF THE GOVERNMENT OF THE ITALIAN REPUBLIC , THAT THEY ARE RELATED TO THE LEASE ITSELF SINCE THEIR PAYMENT IS A CONTRACTUAL OBLIGATION UNDERTAKEN BY THE TENANT. A DISPUTE OVER SUCH CHARGES MUST CLEARLY FALL WITHIN THE EXCLUSIVE JURISDICTION CONFERRED BY ARTICLE 16 (1). THE POSSIBILITY OF DEPRIVING THE COURTS OF THE STATE IN WHICH THE PROPERTY IS SITUATED OF JURISDICTION IN SUCH DISPUTES MIGHT ENABLE MANDATORY RULES TO BE EVADED

BY MEANS OF CLEVERLY DRAFTED AGREEMENTS.

17 THE COMMISSION STATES THAT IN SOME CONTRACTING STATES FURNISHED ACCOMMODATION IN GENERAL AND FURNISHED HOLIDAY ACCOMMODATION IN PARTICULAR ARE EXPRESSLY OR IMPLIEDLY EXCLUDED FROM THE MATTERS COVERED BY SPECIAL LEGISLATION FOR THE PROTECTION OF TENANTS. FOR THOSE REASONS IT CONSIDERS THAT THE LETTING FOR CONSIDERATION OF FURNISHED ACCOMMODATION , PARTICULARLY FURNISHED HOLIDAY ACCOMMODATION , DOES NOT COME WITHIN THE SCOPE OF APPLICATION OF ARTICLE 16 (1).

18 ARTICLE 16 OF THE CONVENTION PROVIDES AS FOLLOWS :

' THE FOLLOWING COURTS SHALL HAVE EXCLUSIVE JURISDICTION , REGARDLESS OF DOMICILE :

(1) IN PROCEEDINGS WHICH HAVE AS THEIR OBJECT RIGHTS IN REM IN , OR TENANCIES OF , IMMOVABLE PROPERTY , THE COURTS OF THE CONTRACTING STATE IN WHICH THE PROPERTY IS SITUATED ;

. . . '

19 THE RAISON D ' ETRE OF THE EXCLUSIVE JURISDICTION CONFERRED BY ARTICLE 16 (1) ON THE COURTS OF THE CONTRACTING STATE IN WHICH THE PROPERTY IS SITUATED IS THE FACT THAT TENANCIES ARE CLOSELY BOUND UP WITH THE LAW OF IMMOVABLE PROPERTY AND WITH THE PROVISIONS , GENERALLY OF A MANDATORY CHARACTER , GOVERNING ITS USE , SUCH AS LEGISLATION CONTROLLING THE LEVEL OF RENTS AND PROTECTING THE RIGHTS OF TENANTS , INCLUDING TENANT FARMERS.

20 ARTICLE 16 (1) SEEKS TO ENSURE A RATIONAL ALLOCATION OF JURISDICTION BY OPTING FOR A SOLUTION WHEREBY THE COURT HAVING JURISDICTION IS DETERMINED ON THE BASIS OF ITS PROXIMITY TO THE PROPERTY SINCE THAT COURT IS IN A BETTER POSITION TO OBTAIN FIRST-HAND KNOWLEDGE OF THE FACTS RELATING TO THE CREATION OF TENANCIES AND TO THE PERFORMANCE OF THE TERMS THEREOF.

21 THE QUESTION SUBMITTED BY THE BUNDESGERICHTSHOF IS DESIGNED TO ASCERTAIN WHETHER EXCEPTIONS MAY BE MADE TO THE GENERAL RULE LAID DOWN IN ARTICLE 16 OWING TO THE SPECIAL CHARACTER OF CERTAIN TENANCIES , SUCH AS SHORT-TERM LETTINGS OF HOLIDAY HOMES , EVEN THOUGH THE WORDING OF THAT ARTICLE PROVIDES NO INDICATION IN THAT RESPECT.

22 IT MUST BE EMPHASIZED IN THIS REGARD THAT , AS THE ITALIAN GOVERNMENT HAS RIGHTLY POINTED OUT , INHERENT IN ANY EXCEPTION TO THE GENERAL RULE LAID DOWN IN ARTICLE 16 (1) IS THE RISK OF FURTHER EXTENSIONS WHICH MIGHT CALL IN QUESTION THE APPLICATION OF NATIONAL LEGISLATION GOVERNING THE USE OF IMMOVABLE PROPERTY.

23 ACCOUNT MUST ALSO BE TAKEN OF THE UNCERTAINTY WHICH WOULD BE CREATED IF THE COURTS ALLOWED EXCEPTIONS TO BE MADE TO THE GENERAL RULE LAID DOWN IN ARTICLE 16 (1), WHICH HAS THE ADVANTAGE OF PROVIDING FOR A CLEAR AND CERTAIN ATTRIBUTION OF JURISDICTION COVERING ALL CIRCUMSTANCES , THUS FULFILLING THE PURPOSE OF THE CONVENTION , WHICH IS TO ASSIGN JURISDICTION IN A CERTAIN AND PREDICTABLE WAY.

24 IT FOLLOWS THAT THE PROVISION IN QUESTION APPLIES TO ALL TENANCIES OF IMMOVABLE PROPERTY IRRESPECTIVE OF THEIR SPECIAL CHARACTERISTICS.

25 THE REPLY TO THE FIRST QUESTION MUST THEREFORE BE THAT ARTICLE 16 (1) OF THE CONVENTION APPLIES TO ALL LETTINGS OF IMMOVABLE PROPERTY , EVEN FOR A SHORT TERM AND EVEN WHERE THEY RELATE ONLY TO THE USE AND OCCUPATION OF A HOLIDAY HOME.

26 WITH REGARD TO THE SECOND QUESTION , IT MUST BE NOTED THAT THE CONVENTION GRANTS EXCLUSIVE JURISDICTION ' IN PROCEEDINGS WHICH HAVE AS THEIR OBJECT... TENANCIES OF IMMOVABLE PROPERTY '. IN ITS JUDGMENT IN SANDERS V VAN DER PUTTE , CITED ABOVE , THE COURT CONSIDERED THAT THAT EXPRESSION COVERS DISPUTES BETWEEN LANDLORDS AND TENANTS AS TO THE EXISTENCE OR THE INTERPRETATION OF LEASES OR TO COMPENSATION FOR DAMAGE CAUSED BY THE TENANT. THE COURT MUST POINT OUT THAT THAT LIST IS NOT EXHAUSTIVE. THE GOVERNMENT OF THE ITALIAN REPUBLIC IS RIGHT IN ARGUING THAT DISPUTES CONCERNING THE PAYMENT OF RENT FALL UNDER THAT EXCLUSIVE JURISDICTION. IT WOULD IN FACT BE CONTRARY TO ONE OF THE AIMS OF THE PROVISION IN QUESTION , NAMELY THE CORRECT APPLICATION OF NATIONAL LEGISLATION ON TENANCIES , TO EXCLUDE FROM THAT EXCLUSIVE JURISDICTION DISPUTES WHICH ARE , IN SOME MEMBER STATES AT LEAST , GOVERNED BY SPECIAL LEGISLATION , SUCH AS THE ITALIAN ' FAIR RENT ' LEGISLATION.

27 LEASES GENERALLY CONTAIN TERMS CONCERNING ENTRY INTO POSSESSION BY THE TENANT , THE USE TO WHICH THE PROPERTY IS TO BE PUT , THE OBLIGATIONS OF THE LANDLORD AND TENANT REGARDING THE MAINTENANCE OF THE PROPERTY , THE DURATION OF THE LEASE AND THE GIVING UP OF POSSESSION TO THE LANDLORD , THE RENT AND THE INCIDENTAL CHARGES TO BE PAID BY THE TENANT , SUCH AS WATER , GAS AND ELECTRICITY CHARGES.

28 DISPUTES CONCERNING THE OBLIGATIONS OF THE LANDLORD OR OF THE TENANT UNDER THE LEASE COME WITHIN THE AMBIT OF ARTICLE 16 (1) OF THE CONVENTION , BEING ' PROCEEDINGS WHICH HAVE AS THEIR OBJECT... TENANCIES OF IMMOVABLE PROPERTY '. ON THE OTHER HAND , DISPUTES WHICH ARE ONLY INDIRECTLY RELATED TO THE USE OF THE PROPERTY LET , SUCH AS THOSE CONCERNING THE LOSS OF HOLIDAY ENJOYMENT AND TRAVEL EXPENSES , DO NOT FALL WITHIN THE EXCLUSIVE JURISDICTION CONFERRED BY THAT ARTICLE .

29 THE REPLY TO THE SECOND QUESTION MUST THEREFORE BE THAT ANY DISPUTE CONCERNING THE EXISTENCE OF TENANCIES OR THE INTERPRETATION OF THE TERMS THEREOF , THEIR DURATION , THE GIVING UP OF POSSESSION TO THE LANDLORD , THE REPAIRING OF DAMAGE CAUSED BY THE TENANT OR THE RECOVERY OF RENT AND OF INCIDENTAL CHARGES PAYABLE BY THE TENANT , SUCH AS CHARGES FOR THE CONSUMPTION OF WATER , GAS AND ELECTRICITY , FALLS WITHIN THE EXCLUSIVE JURISDICTION CONFERRED BY ARTICLE 16 (1) OF THE CONVENTION ON THE COURTS OF THE STATE IN WHICH THE PROPERTY IS SITUATED . DISPUTES CONCERNING THE OBLIGATIONS OF THE LANDLORD OR OF THE TENANT UNDER THE TERMS OF THE TENANCY FALL WITHIN THAT EXCLUSIVE JURISDICTION. ON THE OTHER HAND , DISPUTES WHICH ARE ONLY INDIRECTLY RELATED TO THE USE OF THE PROPERTY LET , SUCH AS THOSE CONCERNING THE LOSS OF HOLIDAY ENJOYMENT AND TRAVEL EXPENSES , DO NOT FALL WITHIN THE EXCLUSIVE JURISDICTION CONFERRED BY THAT ARTICLE.

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PROCEDU	Reference for a preliminary ruling
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Judgment of the Court (Second Chamber)
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Firma P v Firma K. Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany. Brussels Convention du 27 September 1968 - Issue of an order for enforcement. Case 178/83.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - ENFORCEMENT - APPEAL AGAINST DISMISSAL OF AN APPLICATION FOR ENFORCEMENT - OBLIGATION TO HEAR THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT - SCOPE

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 40 , SECOND PARAGRAPH)

THE COURT HEARING AN APPEAL BY THE PARTY SEEKING ENFORCEMENT IS REQUIRED TO HEAR THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT , PURSUANT TO THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 40 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , EVEN THOUGH (A) THE APPLICATION FOR AN ENFORCEMENT ORDER WAS DISMISSED SIMPLY BECAUSE DOCUMENTS WERE NOT PRODUCED AT THE APPROPRIATE TIME AND (B) THE ENFORCEMENT ORDER IS APPLIED FOR IN A STATE WHICH IS NOT THE STATE OF RESIDENCE OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT.

IN CASE 178/83

REFERENCE TO THE COURT , UNDER ARTICLE 1 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 , FROM THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) FRANKFURT AM MAIN FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

FIRMA P .

AND

FIRMA K .

ON THE INTERPRETATION OF ARTICLE 40 OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY AN ORDER OF 12 AUGUST 1983 , WHICH WAS RECEIVED AT THE COURT REGISTRY ON 18 AUGUST 1983 , THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) FRANKFURT AM MAIN REFERRED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING UNDER ARTICLES 2 (2) AND 3 (2) 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 ' ') A QUESTION ON THE INTERPRETATION OF THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 40 OF THE CONVENTION.

2 THAT QUESTION WAS RAISED IN THE COURSE OF LITIGATION BETWEEN FIRMA P . (HEREINAFTER REFERRED TO AS ' ' THE PLAINTIFF ' ') AND FIRMA K. (HEREINAFTER REFERRED TO AS ' ' THE DEFENDANT ' '); IT CONCERNS THE NECESSITY OR OTHERWISE OF SUMMONING THE DEFENDANT TO APPEAR BEFORE THE OBERLANDESGERICHT IN PROCEEDINGS FOR THE ENFORCEMENT OF A DEFAULT JUDGMENT GIVEN ON 20 JANUARY 1982 BY THE ARRONDISSEMENTSRECHTBANK , ROTTERDAM .

3 BY THAT JUDGMENT THE DEFENDANT WAS ORDERED TO PAY TO THE PLAINTIFF THE SUM OF 678 095 SAUDI RIYALS OR THE EQUIVALENT OF THAT SUM IN US DOLLARS , TOGETHER WITH INTEREST AS REQUIRED BY LAW. ON THE GROUND THAT THE DEFENDANT HAD A BANK ACCOUNT IN FRANKFURT AM MAIN , THE PLAINTIFF APPLIED TO THE LANDGERICHT (REGIONAL COURT) FRANKFURT AM MAIN FOR AN ORDER FOR THE ENFORCEMENT OF THE JUDGMENT.

4 BY AN ORDER MADE ON 10 JANUARY 1983 WITHOUT THE DEFENDANT ' S HAVING BEEN SUMMONED TO APPEAR , THE PRESIDENT OF THE THIRD CIVIL DIVISION OF THAT COURT DISMISSED THE APPLICATION ON THE GROUND THAT THE PLAINTIFF HAD FAILED TO PRODUCE THE DOCUMENTS REQUIRED BY ARTICLE 46 (2), NAMELY :

' ' THE ORIGINAL OR A CERTIFIED TRUE COPY OF THE DOCUMENT WHICH ESTABLISHES THAT THE PARTY IN DEFAULT WAS SERVED WITH THE DOCUMENT INSTITUTING THE PROCEEDINGS , ' '

AND BY ARTICLE 47 (1) OF THE CONVENTION , NAMELY :

' ' DOCUMENTS WHICH ESTABLISH THAT , ACCORDING TO THE LAW OF STATE IN WHICH IT HAS BEEN GIVEN , THE JUDGMENT IS ENFORCEABLE AND HAS BEEN SERVED . ' '

5 THE PLAINTIFF APPEALED AGAINST THAT ORDER TO THE OBERLANDESGERICHT ; IN SUPPORT OF ITS APPEAL IT PRODUCED SUPPLEMENTARY DOCUMENTS WHICH , IN ITS VIEW , SHOWED THAT THE STATEMENT OF CLAIM AND THE DEFAULT JUDGMENT HAD BEEN PROPERLY SERVED.

6 CONSIDERING THAT THE RESULT OF THE PROCEEDINGS BEFORE IT DEPENDED ON THE INTERPRETATION OF ARTICLE 40 OF THE CONVENTION , THE OBERLANDESGERICHT STAYED THE PROCEEDINGS AND REFERRED THE FOLLOWING QUESTION TO THE COURT OF JUSTICE :

' ' IS THE APPELLATE COURT REQUIRED TO HEAR THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT UNDER THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 40 OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IF (A) THE APPLICATION FOR AN ENFORCEMENT ORDER WAS DISMISSED SIMPLY BECAUSE DOCUMENTS WERE NOT PRODUCED AT THE APPROPRIATE TIME AND (B) THE ENFORCEMENT ORDER IS APPLIED FOR IN A STATE WHICH IS NOT THE STATE OF RESIDENCE OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT , SO THAT THE LATTER PERSON WILL NORMALLY BE ABLE TO ESTABLISH AGAINST WHICH ASSET (IN THE PRESENT CASE : A CLAIM AGAINST A BANK) ENFORCEMENT IS TO TAKE PLACE IN THAT STATE AND THUS BE IN A POSITION TO DISPOSE OF THAT ASSET BEFORE EXECUTION IS LEVIED?

' '

7 ARTICLE 40 OF THE CONVENTION PROVIDES THAT :

' ' THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT SHALL BE SUMMONED TO APPEAR BEFORE THE APPELLATE COURT. IF HE FAILS TO APPEAR , THE PROVISIONS OF THE SECOND AND THIRD PARAGRAPHS OF ARTICLE 20 SHALL APPLY EVEN WHERE HE IS NOT DOMICILED IN ANY OF THE CONTRACTING STATES . ' '

8 IT SHOULD BE NOTED THAT THE WORDING OF THAT ARTICLE DOES NOT PROVIDE FOR ANY EXCEPTION.

9 THE OBERLANDESGERICHT NONE THE LESS ASKS WHETHER SUCH AN EXCEPTION SHOULD BE ACKNOWLEDGED TO EXIST BY REASON OF THE FACT THAT , ON THE ONE HAND , THE LANDGERICHT DISMISSED THE APPLICATION FOR AN ENFORCEMENT ORDER FOR THE SOLE REASON THAT THE DOCUMENTS WERE NOT PRODUCED BY THE PLAINTIFF AT THE PROPER TIME AND , ON THE OTHER HAND , THE SYSTEM POSTULATED BY ARTICLE 40 IS UNSUITED TO THIS CASE SINCE ENFORCEMENT IS TO TAKE PLACE IN A STATE WHICH IS NOT THE STATE OF DOMICILE OF THE PARTY AGAINST WHOM IT IS SOUGHT.

10 IN THE CONTEXT OF THIS CASE , THE POSITION TAKEN BY THE OBERLANDESGERICHT MAY BE EXPLAINED BY THE FACT THAT , IN ORDER TO FULLY SAFEGUARD THE SURPRISE EFFECT OF THE ENFORCEMENT PROCEEDINGS AT THAT LEVEL , THE LANDGERICHT COULD HAVE GONE FURTHER IN ITS EXAMINATION OF THE CASE AND SOUGHT TO OBTAIN THE INFORMATION WHICH WAS LACKING IN ORDER TO ARRIVE AT A DECISION ON THE SUBSTANCE OF THE CASE

11 IT IS NONETHELESS TRUE THAT THE CONVENTION FORMALLY REQUIRES THAT BOTH PARTIES SHOULD BE GIVEN A HEARING AT THE APPELLATE LEVEL , WITHOUT REGARD TO THE SCOPE OF THE DECISION IN THE LOWER COURT. THAT PROVISION IS IN ACCORDANCE WITH THE SPIRIT OF THE CONVENTION , WHICH SEEKS TO RECONCILE THE NECESSARY SURPRISE EFFECT IN PROCEEDINGS OF THIS NATURE WITH RESPECT FOR THE DEFENDANT ' S RIGHT TO A FAIR HEARING (SEE THE JUDGMENT OF THE COURT OF 21. 5. 1980 , CASE 125/79 , DENILAULER V COUCHET FRERES , (1980) ECR 1553). THAT IS WHY THE DEFENDANT IS NOT ENTITLED TO BE HEARD IN THE LOWER COURT , WHEREAS ON APPEAL HE MUST BE GIVEN A HEARING. THERE CAN BE NO EXCEPTION TO THAT RULE IN A SITUATION WHERE , FOR REASONS WHICH MAY BE ASCRIBED TO THE PLAINTIFF , THE LOWER COURT HAS DISMISSED AN APPLICATION FOR ENFORCEMENT ON PURELY FORMAL GROUNDS. THERE IS NO GROUND FOR APPROACHING THIS MATTER DIFFERENTLY ACCORDING TO WHETHER THE DEFENDANT ' S HABITUAL RESIDENCE OR REGISTERED OFFICE IS IN THE STATE WHERE ENFORCEMENT IS SOUGHT OR IN ANOTHER STATE.

12 AS A RESULT , THE REPLY TO THE QUESTION REFERRED BY THE NATIONAL COURT SHOULD BE THAT THE COURT HEARING AN APPEAL BY A PARTY SEEKING ENFORCEMENT IS REQUIRED TO HEAR THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT , PURSUANT TO THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 40 OF THE CONVENTION , EVEN THOUGH THE APPLICATION FOR AN ENFORCEMENT ORDER WAS DISMISSED SIMPLY BECAUSE DOCUMENTS WERE NOT PRODUCED AT THE APPROPRIATE TIME AND THE ENFORCEMENT ORDER IS APPLIED FOR IN A STATE WHICH IS NOT THE STATE OF RESIDENCE OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT.

COSTS

13 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS 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 (SECOND CHAMBER),

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE OBERLANDESGERICHT FRANKFURT

AM MAIN BY ORDER OF 12 AUGUST 1983 , HEREBY RULES :

THE COURT HEARING AN APPEAL BY THE PARTY SEEKING ENFORCEMENT IS REQUIRED TO HEAR THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT , PURSUANT TO THE FIRST SENTENCE OF THE SECOND PARAGRAPH OF ARTICLE 40 OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , EVEN THOUGH THE APPLICATION FOR AN ENFORCEMENT ORDER WAS DISMISSED SIMPLY BECAUSE DOCUMENTS WERE NOT PRODUCED AT THE APPROPRIATE TIME AND THE ENFORCEMENT ORDER IS APPLIED FOR IN A STATE WHICH IS NOT THE STATE OF RESIDENCE OF THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT.

DOCNUM	61983J0178
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1984 Page 03033 Spanish special edition Page 00705
DOC	1984/07/12
LODGED	1983/08/18
JURCIT	41968A0927(01)-A40L2 : N 1 6 7 12 61979J0125 : N 11
CONCERNS	Interprets 41968A0927(01) -A40L2
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	German
OBSERV	Federal Republic of Germany ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A7* Arrondissementsrechtbank Rotterdam, vonnis van 20/01/1982 (7811/81) ; *A8* Landgericht Frankfurt/Main, Beschluß vom 10/01/1983 (2/3 O 282/82) ; *A9* Oberlandesgericht Frankfurt/Main, Vorlagebeschluß vom 12/08/1983 (20 W 97/83) ; *P1* Oberlandesgericht Frankfurt/Main, Schreiben vom 06/12/1984 (20 W 97/84)
NOTES	Huet, André: Journal du droit international 1985 p.178-183 ; Hartley, Trevor: Procedure on Appeal, European Law Review 1985 p.233-234 ; Stürner,

Rolf: Rechtliches Gehör und Klauselerteilung im europäischen Vollstreckungsverfahren, Praxis des internationalen Privat- und Verfahrensrechts 1985 p.254-256 ; Lagarde, Paul: Communautés européennes, Revue critique de droit international privé 1985 p.569-570

PROCEDU Reference for a preliminary ruling

ADVGEN Darmon

JUDGRAP Bahlmann

DATES of document: 12/07/1984
of application: 18/08/1983

Judgment of the Court (Fourth Chamber)
of 7 June 1984
Siegfried Zelger v Sebastiano Salinitri.
Reference for a preliminary ruling: Oberlandesgericht München - Germany.
Brussels Convention: Article 21, Bringing of proceedings before a court.
Case 129/83.

CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS - LIS PENDENS - PROCEEDINGS BROUGHT IN THE COURTS OF DIFFERENT CONTRACTING STATES - COURT ' ' FIRST SEISED ' ' - CONCEPT

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 21)

ARTICLE 21 OF THE CONVENTION OF 28 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT THE COURT ' ' FIRST SEISED ' ' IS THE ONE BEFORE WHICH THE REQUIREMENTS FOR PROCEEDINGS TO BECOME DEFINITIVELY PENDING ARE FIRST FULFILLED , SUCH REQUIREMENTS TO BE DETERMINED IN ACCORDANCE WITH THE NATIONAL LAW OF EACH OF THE COURTS CONCERNED.

IN CASE 129/83

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 ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BY THE OBERLANDESGERICHT MUNCHEN (HIGHER REGIONAL COURT , MUNICH) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

SIEGFRIED ZELGER , MUNICH ,

AND

SEBASTIANO SALINITRI , MASCALI (ITALY),

ON THE INTERPRETATION OF ARTICLE 21 OF THE CONVENTION CONCERNING THE BRINGING OF PROCEEDINGS BEFORE A COURT ,

1 BY AN ORDER OF 22 JUNE 1983 , RECEIVED AT THE COURT ON 8 JULY 1983 , THE OBERLANDESGERICHT MUNCHEN 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 ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') A QUESTION ON THE INTERPRETATION OF ARTICLE 21 OF THAT CONVENTION.

2 THE TWO PARTIES IN THE MAIN ACTION ARE MERCHANTS , ONE OF WHOM HAS HIS PLACE OF BUSINESS IN MUNICH IN THE FEDERAL REPUBLIC OF GERMANY AND THE OTHER IN MASCALI IN SICILY. THE PLAINTIFF IN THE MAIN ACTION BROUGHT PROCEEDINGS AGAINST THE DEFENDANT FOR REPAYMENT OF AN AMOUNT OUTSTANDING ON A LOAN DATING BACK TO 1975 AND 1976. THE APPLICATION WHICH IS THE SUBJECT OF THE DISPUTE WAS LODGED AT THE REGISTRY OF THE LANDGERICHT MUNCHEN I ON 5 AUGUST 1976 AND SERVED ON THE DEFENDANT IN THE MAIN ACTION ON 13 JANUARY 1977. IN ADDITION , THE PLAINTIFF IN THE MAIN ACTION BROUGHT FURTHER PROCEEDINGS WITH THE SAME PURPOSE AND INVOLVING THE SAME CAUSE OF ACTION BEFORE THE TRIBUNALE CIVILE IN CATANIA , ITALY , BY AN APPLICATION WHICH WAS LODGED WITH THAT COURT ON 22 OR 23 SEPTEMBER 1976 AND SERVED ON THE DEFENDANT ON 23 SEPTEMBER 1976 .

3 THE LANDGERICHT DISMISSED THE PROCEEDINGS ON THE GROUND THAT IT LACKED

INTERNATIONAL JURISDICTION. BEFORE THE LANDGERICHT THE PROCEEDINGS WERE DEFINITIVELY INSTITUTED ONLY ON 13 JANUARY 1977 , BY SERVICE OF THE DOCUMENT INITIATING THEM (PARAGRAPHS 261 (1) AND 253 (1) OF THE ZIVILPROZESSORDNUNG (CODE OF CIVIL PROCEDURE)) WHEREAS THEY HAD BEEN DEFINITIVELY INSTITUTED BEFORE THE COURT IN CATANIA BY SERVICE OF AN EQUIVALENT DOCUMENT ON 23 SEPTEMBER 1976. IN THE OPINION OF THE LANDGERICHT MUNCHEN THE COURT IN CATANIA HAD JURISDICTION BY VIRTUE OF ARTICLE 21 OF THE CONVENTION.

4 THE PLAINTIFF APPEALED TO THE OBERLANDESGERICHT CONTENDING THAT THE DECISIVE TIME WAS NOT THE MOMENT AT WHICH THE DOCUMENT INITIATING THE PROCEEDINGS WAS SERVED BUT THE MOMENT AT WHICH THE COURT WAS SEISED OF THE PROCEEDINGS.

5 THE OBERLANDESGERICHT MUNCHEN CONSIDERED THAT THE DISPUTE RAISED QUESTIONS CONCERNING THE INTERPRETATION OF THE AFORESAID CONVENTION. IT THEREFORE STAYED THE PROCEEDINGS AND BY ORDER OF 22 JUNE 1983 REFERRED THE FOLLOWING QUESTION TO THE COURT FOR A PRELIMINARY RULING

' ' FOR THE PURPOSE OF RESOLVING THE QUESTION WHICH COURT OF A CONTRACTING STATE WAS FIRST SEISED OF PROCEEDINGS (ARTICLE 21 OF THE CONVENTION) IS IT THE MOMENT AT WHICH THE DOCUMENT INITIATING THEM WAS LODGED WITH THE COURT (' ' ANHANGIGKEIT ' ') THAT IS DECISIVE OR THE MOMENT AT WHICH - BY SERVICE OF THAT DOCUMENT ON THE DEFENDANT - THE PROCEEDINGS HAVE BECOME FULLY INSTITUTED (' ' RECHTSHANGIGKEIT ' ') ?

' '

6 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. ' '

7 THE PLAINTIFF IN THE MAIN ACTION CONSIDERS THAT ARTICLE 21 OF THE CONVENTION ADOPTS AS THE MOMENT AT WHICH THE PROCEEDINGS ARE BROUGHT THE DATE ON WHICH THE APPLICATION IS LODGED AT THE COURT. THE GERMAN TEXT OF THE CONVENTION USES THE WORD ' ' ANHANGIG ' ' AS BEING EQUIVALENT TO THE WORD ' ' FORMEES ' ' (' ' BROUGHT ' ') IN THE FRENCH VERSION. AN ACTION IS ' ' ANHANGIG ' ' IN GERMAN LAW AS SOON AS THE DOCUMENT INITIATING THE PROCEEDINGS IS LODGED AT THE REGISTRY OF THE COURT. ON THE OTHER HAND , THE WORD ' ' FORMEES ' ' IN THE FRENCH TEXT OF ARTICLE 22 OF THE CONVENTION HAS BEEN TRANSLATED AS ' ' ERHOBEN ' ' IN THE GERMAN TEXT. THE PLAINTIFF IN THE MAIN ACTION CONCLUDES THAT THE CONVENTION INTENDED TO DISTINGUISH BETWEEN THE CONCEPT OF THE BRINGING OF PROCEEDINGS WITHIN THE MEANING OF ARTICLE 21 , IN WHICH CASE THE MERE LODGING OF THE DOCUMENT INITIATING THE PROCEEDINGS IS SUFFICIENT , AND THE CONCEPT OF BRINGING AN ACTION WITHIN THE MEANING OF ARTICLE 22 , FOR WHICH THE ACTION MUST BE DEFINITIVELY PENDING ACCORDING TO THE NATIONAL LAW OF THE MEMBER STATE CONCERNED .

8 IN THE VIEW OF THE PLAINTIFF IN THE MAIN ACTION , SERVICE OF THE PROCEEDINGS

IS , IN GERMAN LAW , A MATTER FOR THE COURT AND NOT FOR THE PARTIES . THE JURISDICTION OF THE COURT SEISED THUS CANNOT DEPEND ON DELAYS IN SERVICE EFFECTED BY THE COURT ITSELF.

9 THE DEFENDANT IN THE MAIN ACTION CONSIDERS THAT THE DIFFERENCE BETWEEN THE GERMAN WORDS USED IN ARTICLES 21 AND 22 OF THE CONVENTION AS BEING EQUIVALENT TO ' ' FORMEES ' ' IN THE FRENCH VERSION CANNOT HAVE ANY EFFECT ON THE INTERPRETATION OF THE CONVENTION. HE CONTENDS THAT THE CONCEPT OF BRINGING PROCEEDINGS WITHIN THE MEANING OF ARTICLE 21 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THE DEFINITIVE INITIATION OF THE ACTION AND THAT THAT CONCEPT MUST BE DETERMINED BY REFERENCE TO THE LEX FORI OF THE COURT SEISED.

10 IT SHOULD BE POINTED OUT THAT THE RULES OF PROCEDURE OF THE VARIOUS CONTRACTING STATES ARE NOT IDENTICAL AS REGARDS DETERMINING THE DATE AT WHICH THE COURTS ARE SEISED.

11 IT APPEARS FROM INFORMATION ON COMPARATIVE LAW PLACED BEFORE THE COURT THAT IN FRANCE , ITALY , LUXEMBOURG AND THE NETHERLANDS THE ACTION IS CONSIDERED TO BE PENDING BEFORE THE COURT FROM THE MOMENT AT WHICH THE DOCUMENT INITIATING THE PROCEEDINGS IS SERVED UPON THE DEFENDANT . IN BELGIUM THE COURT IS SEISED WHEN THE ACTION IS REGISTERED ON ITS GENERAL ROLL , SUCH REGISTRATION IMPLYING IN PRINCIPLE PRIOR SERVICE OF THE WRIT OF SUMMONS ON THE DEFENDANT.

12 IN THE FEDERAL REPUBLIC OF GERMANY THE ACTION IS BROUGHT , ACCORDING TO PARAGRAPH 253 (1) OF THE ZIVILPROZESSORDNUNG , WHEN THE DOCUMENT INITIATING THE PROCEEDINGS HAS BEEN SERVED ON THE DEFENDANT. SERVICE IS EFFECTED OF ITS OWN MOTION BY THE COURT TO WHICH THE DOCUMENT HAS BEEN SUBMITTED. THE PROCEDURAL STAGE BETWEEN THE LODGING OF THE DOCUMENT AT THE REGISTRY OF THE COURT AND SERVICE IS CALLED ' ' ANHANGIGKEIT ' '. THE LODGING OF THE DOCUMENT INITIATING THE PROCEEDINGS PLAYS A ROLE AS REGARDS LIMITATION PERIODS AND COMPLIANCE WITH PROCEDURAL TIME-LIMITS BUT IN NO WAY DETERMINES THE MOMENT AT WHICH THE ACTION BECOMES PENDING. IT IS CLEAR FROM THE AFOREMENTIONED PARAGRAPH 253 , READ TOGETHER WITH PARAGRAPH 261 (1) OF THE ZIVILPROZESSORDNUNG , THAT AN ACTION BECOMES PENDING ONCE THE DOCUMENT INITIATING THE PROCEEDINGS HAS BEEN SERVED ON THE DEFENDANT.

13 IT FOLLOWS FROM THE COMPARISON OF THE LEGISLATION MENTIONED ABOVE THAT A COMMON CONCEPT OF LIS PENDENS CANNOT BE ARRIVED AT BY A RAPPROCHEMENT OF THE VARIOUS RELEVANT NATIONAL PROVISIONS. A FORTIORI , THEREFORE , IT IS NOT POSSIBLE TO EXTEND TO ALL THE CONTRACTING PARTIES , AS IS PROPOSED BY THE PLAINTIFF IN THE MAIN ACTION , A CONCEPT WHICH IS PECULIAR TO GERMAN LAW AND WHICH , BECAUSE OF ITS CHARACTERISTICS , CANNOT BE TRANSPOSED TO THE OTHER LEGAL SYSTEMS CONCERNED .

14 IT MAY PROPERLY BE INFERRED FROM ARTICLE 21 , READ AS A WHOLE , THAT A COURT ' S OBLIGATION TO DECLINE JURISDICTION IN FAVOUR OF ANOTHER COURT ONLY COMES INTO EXISTENCE IF IT IS ESTABLISHED THAT PROCEEDINGS HAVE BEEN DEFINITIVELY BROUGHT BEFORE A COURT IN ANOTHER STATE INVOLVING THE SAME CAUSE OF ACTION AND BETWEEN THE SAME PARTIES . BEYOND THAT , ARTICLE 21 GIVES NO INDICATION OF THE NATURE OF THE PROCEDURAL FORMALITIES WHICH MUST BE TAKEN INTO ACCOUNT FOR THE PURPOSES OF CONSIDERING WHETHER OR NOT TO RECOGNIZE THE EXISTENCE OF SUCH AN EFFECT. IN PARTICULAR , IT GIVES

NO INDICATION AS TO THE ANSWER TO THE QUESTION WHETHER A LIS PENDENS COMES INTO BEING UPON THE RECEIPT BY A COURT OF AN APPLICATION OR UPON SERVICE OR NOTIFICAITON OF THAT APPLICATION ON OR TO THE PARTY CONCERNED.

15 SINCE THE OBJECT OF THE CONVENTION IS NOT TO UNIFY THOSE FORMALITIES , WHICH ARE CLOSELY LINKED TO THE ORGANIZATION OF JUDICIAL PROCEDURE IN THE VARIOUS STATES , THE QUESTION AS TO THE MOMENT AT WHICH THE CONDITIONS FOR DEFINITIVE SEISIN FOR THE PURPOSES OF ARTICLE 21 ARE MET MUST BE APPRAISED AND RESOLVED , IN THE CASE OF EACH COURT , ACCORDING TO THE RULES OF ITS OWN NATIONAL LAW. THAT METHOD ALLOWS EACH COURT TO ESTABLISH WITH A SUFFICIENT DEGREE OF CERTAINTY , BY REFERENCE TO ITS OWN NATIONAL LAW , AS REGARDS ITSELF , AND BY REFERENCE TO THE NATIONAL LAW OF ANY OTHER COURT WHICH HAS BEEN SEISED , AS REGARDS THAT COURT , THE ORDER OR PRIORITY IN TIME OF SEVERAL ACTIONS BROUGHT WITHIN THE CONDITIONS LAID DOWN BY THE CONVENTION.

16 THE ANSWER TO THE QUESTION RAISED BY THE OBERLANDESGERICHT MUNCHEN IS THEREFORE THAT ARTICLE 21 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT THE COURT ' ' FIRST SEISED ' ' IS THE ONE BEFORE WHICH THE REQUIREMENTS FOR PROCEEDINGS TO BECOME DEFINITIVELY PENDING ARE FIRST FULFILLED , SUCH REQUIREMENTS TO BE DETERMINED IN ACCORDANCE WITH THE NATIONAL LAW OF EACH OF THE COURTS CONCERNED.

COSTS

17 THE COSTS INCURRED BY THE ITALIAN GOVERNMENT AND BY THE COMMISSION , WHICH SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT (FOURTH CHAMBER)

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE OBERLANDESGERICHT MUNCHEN , BY ORDER OF 22 JUNE 1983 , HEREBY RULES :

ARTICLE 21 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT THE COURT ' ' FIRST SEISED ' ' IS THE ONE BEFORE WHICH THE REQUIREMENTS FOR PROCEEDINGS TO BECOME DEFINITIVELY PENDING ARE FIRST FULFILLED , SUCH REQUIREMENTS TO BE DETERMINED IN ACCORDANCE WITH THE NATIONAL LAW OF EACH OF THE COURTS CONCERNED .

DOCNUM	61983J0129
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

TYPDOC 6 ; CJUS ; cases ; 1983 ; J ; judgment

PUBREF European Court reports 1984 Page 02397
Spanish special edition 1983 Page 00561
Swedish special edition VII Page 00601
Finnish special edition VII Page 00583

DOC 1984/06/07

LODGED 1983/07/08

JURCIT 41968A0927(01)-A21 : N 3 5 7 9 14
41968A0927(01)-A22 : N 7 9

CONCERNS Interprets 41968A0927(01)-A21

SUB Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG German

OBSERV Italy ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR *A9* Oberlandesgericht München, Vorlagebeschluß vom 22/06/1983 (7 U 1937/83)
P1 Oberlandesgericht München, Urteil vom 31/10/1984 (7 U 1937/83)
- Praxis des internationalen Privat- und Verfahrensrechts 1985 p.338-339
- Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1986 p.815-816
- Rauscher, Thomas: Praxis des internationalen Privat- und Verfahrensrechts 1985 p.317-321
P2 Bundesgerichtshof, Beschluß vom 28/11/1985 (III ZR 3/85)
- Praxis des internationalen Privat- und Verfahrensrechts 1986 p.293-294
- Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1986 p.217-218
- European Law Digest 1986 p.306 (résumé)
- European Commercial Cases 1987 p.273-275
- Rauscher, Thomas: Praxis des internationalen Privat- und Verfahrensrechts 1986 p.274-277

NOTES Linke, Hartmut: Recht der Internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1984 p.739-740
Rauscher, Thomas: Praxis des internationalen Privat- und Verfahrensrechts 1985 p.317-321
Ballarino, Tito: Il Foro padano 1985 I Col.145-150
Holleaux, Dominique: Revue critique de droit international privé 1985 p.378-384
Hartley, Trevor: European Law Review 1985 p.56-59
Audit, Bernard: Recueil Dalloz Sirey 1985 IR. p.177
Huet, André: Journal du droit international 1985 p.165-173
Scarpa, Riccardo: Giustizia civile 1985 I p.5-7
Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1986 p.a3 (PM)
Verheul, Hans: Netherlands International Law Review 1987 p.107-108

PROCEDU	Reference for a preliminary ruling
ADVGEN	Mancini
JUDGRAP	O'Keeffe
DATES	of document: 07/06/1984 of application: 08/07/1983

**Order of the Court
of 9 November 1983
Habourdin International SA and Banque nationale de Paris v SpA Italocremona. Reference for a preliminary ruling: Tribunale civile e penale di Varese - Italy. Case 80/83.**

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - PROTOCOL ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION - NATIONAL COURTS WHICH MAY REQUEST THE COURT OF JUSTICE TO GIVE A PRELIMINARY RULING - COURTS SITTING ' ' IN AN APPELLATE CAPACITY ' ' - CONCEPT - ITALIAN COURT SITTING IN PROCEEDINGS AT FIRST INSTANCE BROUGHT AGAINST A PAYMENT ORDER MADE UNDER A SUMMARY PROCEDURE - EXCLUSION

(PROTOCOL OF 3 JUNE 1971 , ART. 2 (2))

IN CASE 80/83

REFERENCE TO THE COURT BY ORDER OF THE PRESIDENT OF THE TRIBUNALE DI VARESE (DISTRICT COURT , VARESE) OF 23 APRIL 1983 FOR A PRELIMINARY RULING IN THE JOINED PROCEEDINGS

HABOURDIN INTERNATIONAL SA , PARIS ,

AND

BANQUE NATIONALE DE PARIS , PARIS AND MILAN ,

V

SPA ITALOCREMONA,VARESE-GAZZADA ,

ON THE INTERPRETATION OF CERTAIN PROVISIONS OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

BY ORDER OF 23 APRIL 1983 , RECEIVED AT THE COURT ON 6 MAY 1983 , THE PRESIDENT OF THE TRIBUNALE DI VARESE , 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 (HEREINAFTER REFERRED TO AS ' ' THE BRUSSELS CONVENTION ' ') SUBMITTED A QUESTION FOR A PRELIMINARY RULING ON THE INTERPRETATION OF CERTAIN PROVISIONS OF THAT CONVENTION .

THAT PROTOCOL PROVIDES THAT ONLY CERTAIN COURTS , REFERRED TO IN ARTICLE 2 THEREOF , MAY REQUEST THE COURT OF JUSTICE TO GIVE PRELIMINARY RULINGS ON THE INTERPRETATION OF THE BRUSSELS CONVENTION , SO THAT , IN THIS INSTANCE , IT IS NECESSARY TO CONSIDER WHETHER THE COURT OF JUSTICE HAS JURISDICTION TO REPLY TO THE QUESTION SUBMITTED TO IT .

INDENTS 1 AND 3 OF THE ABOVE-MENTIONED ARTICLE 2 - THE FIRST DIRECTLY AND THE SECOND BY REFERENCE TO ARTICLE 37 OF THE BRUSSELS CONVENTION - LIST , EXPRESSLY AND EXHAUSTIVELY , THE COURTS WHICH MAY REQUEST THE COURT OF JUSTICE TO GIVE A PRELIMINARY RULING. ARTICLE 2 (2) STATES IN ADDITION THAT ' ' THE COURTS OF THE CONTRACTING STATES WHEN THEY ARE SITTING IN AN APPELLATE CAPACITY ' ' MAY ALSO REQUEST PRELIMINARY RULINGS.

ARTICLE 3 OF THE PROTOCOL PROVIDES THAT :

' ' 1 . WHERE A QUESTION OF INTERPRETATION OF THE CONVENTION OR OF ONE OF THE OTHER INSTRUMENTS REFERRED TO IN ARTICLE 1 IS RAISED IN A CASE PENDING BEFORE ONE OF THE COURTS LISTED IN ARTICLE 2 (1), THAT COURT SHALL , IF IT CONSIDERS THAT A DECISION ON THE QUESTION IS NECESSARY TO ENABLE IT TO GIVE JUDGMENT , REQUEST THE COURT OF JUSTICE TO GIVE A RULING THEREON.

2.WHERE SUCH A QUESTION IS RAISED BEFORE ANY COURT REFERRED TO IN ARTICLE 2 (2) OR (3), THAT COURT MAY , UNDER THE CONDITIONS LAID DOWN IN PARAGRAPH 1 , REQUEST THE COURT OF JUSTICE TO GIVE A RULING THEREON . ' '

SINCE THE ITALIAN TRIBUNALI (DISTRICT COURTS) ARE NOT REFERRED TO EITHER IN ARTICLE 2 (1) OF THE PROTOCOL OR IN ARTICLE 37 OF THE BRUSSELS CONVENTION , THEY MAY REQUEST THE COURT OF JUSTICE TO GIVE A PRELIMINARY RULING ON A QUESTION OF INTERPRETATION ONLY WHEN THEY ARE ' ' SITTING IN AN APPELLATE CAPACITY ' '.

IT IS APPARENT FROM THE PAPERS IN THE CASE THAT THE ORDER REQUESTING A PRELIMINARY RULING WAS MADE IN THE COURSE OF PROCEEDINGS AT FIRST INSTANCE ON AN ACTION BROUGHT PURSUANT TO ARTICLE 645 OF THE ITALIAN CODE OF CIVIL PROCEDURE AGAINST A PAYMENT ORDER MADE UNDER THE SUMMARY PROCEDURE PROVIDED FOR IN ARTICLES 633 ET SEQ. OF THE CODE OF CIVIL PROCEDURE . IT MUST THEREFORE BE STATED THAT THE ORDER OF THE NATIONAL COURT WAS NOT MADE IN THE CIRCUMSTANCES PROVIDED FOR IN ARTICLE 2 (2) OF THE PROTOCOL ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION OF 27 SEPTEMBER 1968.

CONSEQUENTLY , IT IS CLEAR THAT THE COURT HAS NO JURISDICTION TO TAKE COGNIZANCE OF THE REFERENCE FOR A PRELIMINARY RULING WHICH MUST THEREFORE BE DECLARED INADMISSIBLE WITHIN THE MEANING OF ARTICLE 92 (1) TOGETHER WITH ARTICLE 103 (2) OF THE RULES OF PROCEDURE.

ON THOSE GROUNDS ,

THE COURT

HEREBY ORDERS AS FOLLOWS :

THE REQUEST FOR A PRELIMINARY RULING MADE BY THE PRESIDENT OF THE TRIBUNALE DI VARESE BY ORDER OF 23 APRIL 1983 IS INADMISSIBLE.

DOCNUM	61983O0080
AUTHOR	Court of Justice of the European Communities
FORM	Order
TREATY	European Economic Community
PUBREF	European Court reports 1983 Page 03639 Spanish special edition Page 00999

DOC	1983/11/09
LODGED	1983/05/06
JURCIT	41971A0603(02)-A02PT1 : N 1 41971A0603(02)-A02PT2 : N 1 41971A0603(02)-A02PT3 : N 1 41971A0603(02)-A03 : N 1 41968A0927(01)-A37 : N 1 31959Q0301-A92P1 : N 1 31959Q0301-A103P2 : N 1
SUB	Brussels Convention of 27 September 1968
AUTLANG	Italian
NATIONA	Italy
NATCOUR	*P2* Corte d'Appello di Milano, sentenza del 16/10/1992 ; - Rivista di diritto internazionale privato e processuale 1992 p.988-995 ; - Rivista di diritto europeo 1994 p.550 p.557 (résumé) ; *A9* Tribunale di Varese, ordinanza del 23/04/1983 (RG 2133/81, 2510/81, 244/82 E 602/82) ; *P1* Tribunale di Varese, sentenza del 27/12/1985 (RG 2133/81, 2510/81, 244/82 E 602/82) ; - Rivista di diritto internazionale privato e processuale 1987 p.521-538
NOTES	Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1985 p.a11 (PM)
PROCEDU	Reference for a preliminary ruling - inadmissible
ADVGEN	Sir Gordon Slynn
JUDGRAP	Bosco
DATES	of document: 09/11/1983 of application: 06/05/1983

Judgment of the Court
of 19 June 1984
Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- Vervoerbedrijf Nova and NV Goeminne Hout.
Reference for a preliminary ruling: Hof van Cassatie - Belgium.
Brussels Convention of 27 September 1968 - Article 17 - Jurisdiction clause in a bill of lading.
Case 71/83.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - JURISDICTION AGREEMENT - JURISDICTION CLAUSE IN A BILL OF LADING - VALIDITY - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 17)

A JURISDICTION CLAUSE CONTAINED IN THE PRINTED CONDITIONS ON A BILL OF LADING SATISFIES THE CONDITIONS LAID DOWN BY ARTICLE 17 OF THE CONVENTION :

IF THE AGREEMENT OF BOTH PARTIES TO THE CONDITIONS CONTAINING THAT CLAUSE HAS BEEN EXPRESSED IN WRITING ; OR

IF THE JURISDICTION CLAUSE HAS BEEN THE SUBJECT-MATTER OF A PRIOR ORAL AGREEMENT BETWEEN THE PARTIES EXPRESSLY RELATING TO THAT CLAUSE , IN WHICH CASE THE BILL OF LADING , SIGNED BY THE CARRIER , MUST BE REGARDED AS CONFIRMATION IN WRITING OF THE ORAL AGREEMENT ; OR

IF THE BILL OF LADING COMES WITHIN THE FRAMEWORK OF A CONTINUING BUSINESS RELATIONSHIP BETWEEN THE PARTIES , IN SO FAR AS IT IS THEREBY ESTABLISHED THAT THE RELATIONSHIP IS GOVERNED BY GENERAL CONDITIONS CONTAINING THE JURISDICTION CLAUSE.

AS REGARDS THE RELATIONSHIP BETWEEN THE CARRIER AND A THIRD PARTY HOLDING THE BILL OF LADING , THE CONDITIONS LAID DOWN BY ARTICLE 17 OF THE CONVENTION ARE SATISFIED IF THE JURISDICTION CLAUSE HAS BEEN ADJUDGED VALID AS BETWEEN THE CARRIER AND THE SHIPPER AND IF , BY VIRTUE OF THE RELEVANT NATIONAL LAW , THE THIRD PARTY , UPON ACQUIRING THE BILL OF LADING , SUCCEEDED TO THE SHIPPER ' S RIGHTS AND OBLIGATIONS .

IN CASE 71/83 ,

REFERENCE TO THE COURT UNDER ARTICLE 1 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 FROM THE HOF VAN CASSATIE (COURT OF CASSATION), BELGIUM , FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

1 . PARTENREEDEREI MS TILLY RUSS ,

2 . ERNEST RUSS ,

AND

1 . NV HAVEN- VERVOERBEDRIJF NOVA ,

2 . NV GOEMINNE HOUT ,

ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY AN ORDER DATED 8 APRIL 1983 , WHICH WAS RECEIVED AT THE COURT ON 28 APRIL

1983 , THE HOF VAN CASSATIE (COURT OF CASSATION), BELGIUM , SUBMITTED , IN ACCORDANCE WITH 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 ' '), A QUESTION FOR A PRELIMINARY RULING ON THE INTERPRETATION OF ARTICLE 17 OF THAT CONVENTION.

2 THE QUESTION WAS RAISED IN PROCEEDINGS BROUGHT BY THE BELGIAN LIMITED COMPANY ' ' NV GOEMINNE HOUT ' ' AGAINST THE GERMAN SHIPOWNER ' ' PARTENREEDEREI MS TILLY RUSS ' ' AND MR ERNEST RUSS , BOTH OF HAMBURG , CONCERNING THE VALIDITY OF A JURISDICTION CLAUSE CONTAINED IN BILLS OF LADING NOS CT 108 AND CT 118 DATED 16 AUGUST 1976. IT APPEARS FROM THE DOCUMENTS BEFORE THE COURT THAT THOSE BILLS OF LADING WERE DRAWN UP FOR THE CARRIER BY TOLMAR INTERNATIONAL INC., CLEVELAND , AS AGENT FOR EUROPE CANADA LAKES LINE , ERNEST RUSS - NORTH AMERICA , INC ., CHICAGO , TO THE ORDER OF THE SHIPPER , AMERICAN LUMBER INTERNATIONAL INC., UNION CITY , PENNSYLVANIA , GOEMINNE HOUT BEING INDICATED AS ' ' NOTIFY PARTY ' ' AND TILLY RUSS AS ' ' EXPORTING CARRIER ' ' .

3 WHEN THE CARGO WAS DELIVERED IN ANTWERP ON 7 SEPTEMBER 1976 THE PACKAGING OF TWO LOTS WAS FOUND TO BE DAMAGED AND ABOUT 10 PLANKS WERE MISSING . GOEMINNE HOUT THEREFORE CLAIMED USD 304 IN DAMAGES BEFORE THE RECHTBANK VAN KOOPHANDEL (COMMERCIAL COURT), ANTWERP.

4 TILLY RUSS OBJECTED TO THE JURISDICTION OF THE ANTWERP COURT , RELYING ON A JURISDICTION CLAUSE APPEARING ON THE REVERSE OF EACH OF THE BILLS OF LADING WHICH STATED AS FOLLOWS : ' ' ANY DISPUTE ARISING UNDER THIS BILL OF LADING SHALL BE DECIDED BY THE HAMBURG COURTS. ' '

5 NEVERTHELESS , BY JUDGMENT OF 31 OCTOBER 1978 , THE ANTWERP COURT HELD THAT IT HAD JURISDICTION AND GAVE JUDGMENT IN FAVOUR OF GOEMINNE HOUT ; THAT JUDGMENT WAS CONFIRMED BY THE HOF VAN BEROEP (COURT OF APPEAL), ANTWERP , BY JUDGMENT OF 7 OCTOBER 1981 AND , ON 1 MARCH 1982 , TILLY RUSS APPEALED TO THE HOF VAN CASSATIE.

6 THE HOF VAN CASSATIE SUBMITTED THE FOLLOWING QUESTION FOR A PRELIMINARY RULING :

' ' CAN THE BILL OF LADING ISSUED BY THE CARRIER TO THE SHIPPER BE CONSIDERED , HAVING REGARD TO THE RELEVANT GENERALLY ACCEPTED PRACTICES , TO BE AN ' AGREEMENT IN WRITING ' OR AN ' AGREEMENT EVIDENCED BY WRITING ' BETWEEN THE PARTIES WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENT IN CIVIL AND COMMERCIAL MATTERS AND , IF SO , DOES THAT ALSO APPLY IN RELATION TO A THIRD PARTY HOLDING THE BILL OF LADING?

' '

7 THAT QUESTION MUST BE CONSTRUED AS ASKING WHETHER THE JURISDICTION CLAUSE CONTAINED IN THE BILLS OF LADING SATISFIES THE CONDITIONS LAID DOWN IN ARTICLE 17 OF THE CONVENTION AS REGARDS , FIRST , THE RELATIONSHIP BETWEEN THE SHIPPER AND THE CARRIER AND , SECONDLY , THE RELATIONSHIP BETWEEN THE CARRIER AND A THIRD PARTY HOLDING THE BILL.

THE FIRST PART OF THE QUESTION

8 ACCORDING TO GOEMINNE HOUT AND THE COMMISISON OF THE EUROPEAN COMMUNITIES , ARTICLE 17 OF THE CONVENTION SHOULD BE INTERPRETED AS MEANING THAT WHERE A JURISDICTION CLAUSE IS NOT EXPRESSLY ACCEPTED BY THE SHIPPER AND THE CARRIER IT IS NOT VALID WITHIN THE MEANING OF THAT PROVISION .

9 THE COMMISSION ADDS , HOWEVER , THAT EVEN IF IT WAS NOT SIGNED BY THE SHIPPER SUCH A CLAUSE MAY NEVERTHELESS BE VALID UNDER ARTICLE 17 OF THE CONVENTION , PROVIDED THAT THERE IS A CONTINUING TRADING RELATIONSHIP BETWEEN THE PARTIES.

10 THE ITALIAN GOVERNMENT CONSIDERS THAT A BILL OF LADING IS A DOCUMENT PROVING THE EXISTENCE OF THE CONTRACT OF CARRIAGE AND THAT THE JURISDICTION CLAUSE THEREFORE CONSTITUTES AN ORAL AGREEMENT EVIDENCED IN WRITING. IF IT IS SIGNED BY THE PARTY AGAINST WHOM IT IS INVOKED AND FORMS PART OF THE GENERAL CONDITIONS OF THE CONTRACT , THEN IT MAY BE IN CONFORMITY WITH ARTICLE 17 OF THE CONVENTION. HOWEVER , ACCORDING TO THE ITALIAN GOVERNMENT , IT IS FOR THE NATIONAL COURT TO ASCERTAIN WHETHER THERE IS A SIGNATURE IN THE SENSE INDICATED ABOVE AND IN WHAT CIRCUMSTANCES THE JURISDICTION CLAUSE WAS INCORPORATED IN THE BILL OF LADING.

11 AT THE HEARING , THE UNITED KINGDOM EMPHASIZED THE IMPORTANCE OF THE ISSUE RAISED AND SUGGESTED THAT THE QUESTION SUBMITTED BY THE NATIONAL COURT SHOULD BE REFORMULATED AS FOLLOWS : WAS THE JURISDICTION CLAUSE INCORPORATED IN THE BILL OF LADING IN A MANNER ENABLING IT TO BE SHOWN THAT THERE WAS A GENUINE AGREEMENT BETWEEN THE PARTIES , ACCOUNT BEING TAKEN OF THE PRINCIPLE OF GOOD FAITH? A REPLY TO THAT QUESTION IS POSSIBLE , ACCORDING TO THE UNITED KINGDOM , ONLY IF THE PRECISE FACTS OF THE CASE ARE KNOWN ; HOWEVER , SINCE IN THIS INSTANCE THEY HAVE NOT BEEN ESTABLISHED NO GENERAL REPLY SHOULD BE GIVEN TO THE FIRST QUESTION , ON THE GROUND THAT THERE ARE SEVERAL POSSIBILITIES , AND THE NATIONAL COURT SHOULD BE LEFT TO DETERMINE THE PRECISE NATURE OF THE BILL OF LADING.

12 THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION , AS NOW IN FORCE , STATES : ' ' IF THE PARTIES , ONE OR MORE OF WHOM IS DOMICILED IN A CONTRACTING STATE , HAVE , BY AGREEMENT IN WRITING OR BY AN ORAL AGREEMENT EVIDENCED IN WRITING , 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. ' '

13 IT MAY BE OBSERVED THAT FOR ARTICLE 17 OF THE CONVENTION TO APPLY AT LEAST ONE OF THE PARTIES MUST BE DOMICILED IN A CONTRACTING STATE , THAT BEING A MATTER FOR THE NATIONAL COURT TO DETERMINE.

14 AS THE COURT HELD IN ITS JUDGMENTS OF 14 DECEMBER 1976 (CASE 24/76 , SALOTTI V RUWA , (1976) ECR 1831 , AND CASE 25/76 , SEGOURA V BONAKDARIAN , (1976) ECR 1851) AND OF 6 MAY 1980 (CASE 784/79 , PORTA-LEASING V PRESTIGE INTERNATIONAL , (1980) ECR 1517), THE REQUIREMENTS SET OUT IN ARTICLE 17 GOVERNING THE VALIDITY OF JURISDICTION CLAUSES MUST BE STRICTLY CONSTRUED SINCE THE PURPOSE OF ARTICLE 17 IS TO ENSURE THAT THE PARTIES HAVE ACTUALLY CONSENTED TO SUCH A CLAUSE , WHICH DEROGATES FROM THE ORDINARY JURISDICTION RULES

LAID DOWN IN ARTICLES 2 , 5 AND 6 OF THE CONVENTION , AND THAT THEIR CONSENT IS CLEARLY AND PRECISELY DEMONSTRATED.

15 IN ORDER TO DECIDE WHETHER THE CONDITIONS LAID DOWN IN ARTICLE 17 ARE SATISFIED , IT IS NECESSARY TO CONSIDER SEPARATELY WHETHER THE AGREEMENT OF THE PARTIES TO THE CHOICE OF JURISDICTION WAS EXPRESSED IN THE FORM OF A WRITTEN AGREEMENT OR IN THE FORM OF AN ORAL AGREEMENT EVIDENCED IN WRITING.

16 IN THE FIRST PLACE , IT MUST BE OBSERVED THAT , WHERE A JURISDICTION CLAUSE APPEARS IN THE CONDITIONS PRINTED ON A BILL OF LADING SIGNED BY THE CARRIER , THE REQUIREMENT OF AN ' ' AGREEMENT IN WRITING ' ' WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION IS SATISFIED ONLY IF THE SHIPPER HAS EXPRESSED IN WRITING HIS CONSENT TO THE CONDITIONS CONTAINING THAT CLAUSE , EITHER IN THE DOCUMENT IN QUESTION ITSELF OR IN A SEPARATE DOCUMENT. IT MUST BE ADDED THAT THE MERE PRINTING OF A JURISDICTION CLAUSE ON THE REVERSE OF THE BILL OF LADING DOES NOT SATISFY THE REQUIREMENTS OF ARTICLE 17 OF THE CONVENTION , SINCE SUCH A PROCEDURE GIVES NO GUARANTEE THAT THE OTHER PARTY HAS ACTUALLY CONSENTED TO THE CLAUSE DEROGATING FROM THE ORDINARY JURISDICTION RULES OF THE CONVENTION.

17 SECONDLY , IF IT WAS ESTABLISHED THAT THE JURISDICTION CLAUSE CONTAINED IN THE CONDITIONS PRINTED ON A BILL OF LADING WAS THE SUBJECT OF A PRIOR ORAL AGREEMENT BETWEEN THE PARTIES EXPRESSLY RELATING TO THE JURISDICTION CLAUSE AND THAT THE BILL OF LADING , SIGNED BY THE CARRIER , WAS TO BE REGARDED AS THE WRITTEN CONFORMATION OF THAT ORAL AGREEMENT , SUCH A CLAUSE WOULD SATISFY THE CONDITIONS LAID DOWN IN ARTICLE 17 OF THE CONVENTION , EVEN IF IT WAS NOT SIGNED BY THE SHIPPER AND THEREFORE BORE ONLY THE SIGNATURE OF THE CARRIER. IN FACT , NOT ONLY IS THE LETTER OF ARTICLE 17 , WHICH EXPRESSLY PROVIDES FOR THE POSSIBILITY OF AN ORAL AGREEMENT EVIDENCED IN WRITING , THEREBY OBSERVED BUT IN ADDITION ITS FUNCTION , WHICH IS TO ENSURE THAT THE AGREEMENT OF THE PARTIES IS CLEARLY ESTABLISHED , IS ALSO FULFILLED .

18 FINALLY , SUCH A JURISDICTION CLAUSE NOT SIGNED BY THE SHIPPER MAY STILL SATISFY THE REQUIREMENTS LAID DOWN IN ARTICLE 17 OF THE CONVENTION , EVEN IN THE ABSENCE OF A PRIOR ORAL AGREEMENT RELATING TO THAT CLAUSE , PROVIDED THAT THE BILL OF LADING COMES WITHIN THE FRAMEWORK OF A CONTINUING BUSINESS RELATIONSHIP BETWEEN THE SHIPPER AND THE CARRIER , IN SO FAR AS IT IS THEREBY ESTABLISHED THAT THAT RELATIONSHIP IS GOVERNED AS A WHOLE BY GENERAL CONDITIONS CONTAINING THE JURISDICTION CLAUSE DRAWN UP BY THE AUTHOR OF THE WRITTEN CONFIRMATION , IN THIS CASE THE CARRIER (SEE THE SEGOURA JUDGMENT , CITED ABOVE), AND PROVIDED THAT THE BILLS OF LADING ARE ALL ISSUED ON PRE-PRINTED FORMS SYSTEMATICALLY CONTAINING SUCH A JURISDICTION CLAUSE . IN THOSE CIRCUMSTANCES , IT WOULD BE CONTRARY TO GOOD FAITH TO DENY THE EXISTENCE OF A JURISDICTION AGREEMENT.

19 CONSEQUENTLY , THE REPLY TO THE FIRST PART OF THE QUESTION SUBMITTED MUST BE THAT A JURISDICTION CLAUSE CONTAINED IN THE PRINTED CONDITIONS ON A BILL OF LADING SATISFIES THE CONDITIONS LAID DOWN BY ARTICLE 17 OF THE CONVENTION :

IF THE AGREEMENT OF BOTH PARTIES TO THE CONDITIONS OF THE BILL OF LADING

CONTAINING THAT CLAUSE HAS BEEN EXPRESSED IN WRITING ; OR

IF THE JURISDICTION CLAUSE HAS BEEN THE SUBJECT OF A PRIOR ORAL AGREEMENT BETWEEN THE PARTIES EXPRESSLY RELATING TO THAT CLAUSE , IN WHICH CASE THE BILL OF LADING , SIGNED BY THE CARRIER , MUST BE REGARDED AS CONFIRMATION IN WRITING OF THE ORAL AGREEMENT ; OR

IF THE BILL OF LADING COMES WITHIN THE FRAMEWORK OF A CONTINUING BUSINESS RELATIONSHIP BETWEEN THE PARTIES , IN SO FAR AS IT IS THEREBY ESTABLISHED THAT THAT RELATIONSHIP IS GOVERNED BY GENERAL CONDITIONS CONTAINING THE JURISDICTION CLAUSE.

THE SECOND PART OF THE QUESTION

20 AS REGARDS THE VALIDITY OF THE JURISDICTION CLAUSE AS BETWEEN THE CARRIER AND A THIRD PARTY HOLDING THE BILL OF LADING , GOEMINNE HOUT AND THE COMMISSION ARE OF THE OPINION THAT IF THE THIRD PARTY HAS NOT SIGNED THE BILL OF LADING THE JURISDICTION CLAUSE APPEARING ON IT IS NOT ENFORCEABLE AGAINST HIM SINCE THE AGREEMENT BETWEEN THE PARTIES IS NOT ESTABLISHED.

21 ACCORDING TO THE COMMISSION , AN EXCEPTION MAY BE MADE TO THAT RULE ONLY IF THE NATIONAL LEGAL ORDER IN QUESTION EMBODIES A THEORY OF ASSIGNMENT WHEREBY THE SHIPPER ASSIGNS HIS RIGHTS AND OBLIGATIONS TO THE THIRD PARTY.

22 THE GOVERNMENTS OF THE ITALIAN REPUBLIC AND THE UNITED KINGDOM CONSIDER THAT , IN SO FAR AS THE JURISDICTION CLAUSE IS VALID AS BETWEEN THE SHIPPER AND THE CARRIER , IT SHOULD ALSO BE VALID AS AGAINST A THIRD PARTY HOLDING THE BILL OF LADING , ON THE GROUND THAT IF , BY ACQUIRING THE BILL OF LADING , SUCH A THIRD PARTY BECOMES ENTITLED TO EXERCISE THE RIGHTS MENTIONED THEREIN HE MUST AT THE SAME TIME ALSO BECOME SUBJECT TO THE OBLIGATIONS AND LIMITATIONS DERIVING THEREFORM ; BOTH GOVERNMENTS BASE THEIR VIEW ON THE JUDGMENT OF THE COURT OF 14 JULY 1983 IN CASE 201/82 (GERLING V AMMINISTRAZIONE DEL TESORO DELLO STATO , (1983) ECR 2503).

23 IN THIS REGARD , IT MUST BE NOTED THAT THE GERLING DECISION CONCERNED A CASE IN WHICH A THIRD PARTY TO AN INSURANCE CONTRACT , CONTAINING A STIPULATION MADE FOR HIS BENEFIT BY THE INSURED , RELIED UPON A JURISDICTION CLAUSE AS AGAINST THE INSURER , THE CLAUSE BEING INSPIRED , AS THE COURT POINTED OUT BY A CONCERN TO PROTECT THE INSURED , WHO ' ' IS IN A WEAKER ECONOMIC POSITION ' '. THE SAME CONSIDERATIONS ARE NOT NECESSARILY RELEVANT TO THE CARRIAGE OF GOODS BY SEA .

24 IN SO FAR AS A JURISDICTION CLAUSE INCORPORATED IN A BILL OF LADING IS VALID UNDER ARTICLE 17 OF THE CONVENTION AS BETWEEN THE SHIPPER AND THE CARRIER , AND IN SO FAR AS A THIRD PARTY , BY ACQUIRING THE BILL OF LADING , HAS SUCCEEDED TO THE SHIPPER ' S RIGHTS AND OBLIGATIONS UNDER THE RELEVANT NATIONAL LAW , THE FACT OF ALLOWING THE THIRD PARTY TO REMOVE HIMSELF FROM THE COMPULSORY JURISDICTION PROVIDED FOR IN THE BILL OF LADING ON THE GROUND THAT HE DID NOT SIGNIFY HIS CONSENT THERETO WOULD BE ALIEN TO THE PURPOSE OF ARTICLE 17 , WHICH IS TO NEUTRALIZE THE EFFECT OF JURISDICTION CLAUSES THAT MIGHT PASS UNNOTICED IN CONTRACTS.

25 IN FACT , IN THE CIRCUMSTANCES OUTLINED ABOVE , ACQUISITION OF THE BILL OF LADING COULD NOT CONFER UPON THE THIRD PARTY MORE RIGHTS THAN THOSE

ATTACHING TO THE SHIPPER UNDER IT. THE THIRD PARTY HOLDING THE BILL OF LADING THUS BECOMES VESTED WITH ALL THE RIGHTS , AND AT THE SAME TIME BECOMES SUBJECT TO ALL THE OBLIGATIONS , MENTIONED IN THE BILL OF LADING , INCLUDING THOSE RELATING TO THE AGREEMENT ON JURISDICTION.

26 IT IS APPARENT FROM ALL THE FOREGOING CONSIDERATIONS THAT THE REPLY TO THE SECOND PART OF THE QUESTION SUBMITTED MUST BE THAT THE CONDITIONS LAID DOWN IN ARTICLE 17 OF THE CONVENTION ARE SATISFIED IN THE CASE OF A JURISDICTION CLAUSE CONTAINED IN A BILL OF LADING , PROVIDED THAT THE CLAUSE HAS BEEN ADJUDGED VALID AS BETWEEN THE CARRIER AND THE SHIPPER AND PROVIDED THAT , BY VIRTUE OF THE RELEVANT NATIONAL LAW , THE THIRD PARTY , UPON ACQUIRING THE BILL OF LADING , SUCCEEDED TO THE SHIPPER ' S RIGHTS AND OBLIGATIONS.

COSTS

27 THE COSTS INCURRED BY THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE UNITED KINGDOM AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS 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

IN REPLY TO THE QUESTION SUBMITTED TO IT BY THE BELGIAN HOF VAN CASSATIE BY ORDER OF 8 APRIL 1983 , HEREBY RULES :

1 . A JURISDICTION CLAUSE CONTAINED IN THE PRINTED CONDITIONS ON A BILL OF LADING SATISFIES THE CONDITIONS LAID DOWN BY ARTICLE 17 OF THE CONVENTION :

IF THE AGREEMENT OF BOTH PARTIES TO THE CONDITIONS CONTAINING THAT CLAUSE HAS BEEN EXPRESSED IN WRITING , OR

IF THE JURISDICTION CLAUSE HAS BEEN THE SUBJECT-MATTER OF A PRIOR ORAL AGREEMENT BETWEEN THE PARTIES EXPRESSLY RELATING TO THAT CLAUSE , IN WHICH CASE THE BILL OF LADING , SIGNED BY THE CARRIER , MUST BE REGARDED AS CONFIRMATION IN WRITING OF THE ORAL AGREEMENT , OR

IF THE BILL OF LADING COMES WITHIN THE FRAMEWORK OF A CONTINUING BUSINESS RELATIONSHIP BETWEEN THE PARTIES , IN SO FAR AS IT IS THEREBY ESTABLISHED THAT THAT RELATIONSHIP IS GOVERNED BY GENERAL CONDITIONS CONTAINING THE JURISDICTION CLAUSE ;

2.AS REGARDS THE RELATIONSHIP BETWEEN THE CARRIER AND A THIRD PARTY HOLDING THE BILL OF LADING , THE CONDITIONS LAID DOWN BY ARTICLE 17 OF THE CONVENTION ARE SATISFIED IF THE JURISDICTION CLAUSE HAS BEEN ADJUDGED VALID AS BETWEEN THE CARRIER AND THE SHIPPER AND IF , BY VIRTUE OF THE RELEVANT NATIONAL LAW , THE THIRD PARTY , UPON ACQUIRING THE BILL OF LADING , SUCCEEDED TO THE SHIPPER ' S RIGHTS AND OBLIGATIONS .

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PROCEDU Reference for a preliminary ruling

ADVGEN Sir Gordon Slynn

JUDGRAP Bahlmann

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Judgment of the Court (Fourth Chamber)
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Ferdinand M.J.J. Duijnstee v Lodewijk Goderbauer. Reference for a preliminary ruling: Hoge Raad - Netherlands. Brussels Convention. Case 288/82.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - OBJECT - PRIMACY OVER DOMESTIC LAW

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - REVIEW OF JURISDICTION AND OF ADMISSIBILITY - EXCLUSIVE JURISDICTION OF THE COURTS OF A CONTRACTING STATE - OBLIGATION ON A COURT IN ANOTHER CONTRACTING STATE TO DECLARE OF ITS OWN MOTION THAT IT HAS NO JURISDICTION - SCOPE

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS 16 AND 19)

3 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - EXCLUSIVE JURISDICTION - PROCEEDINGS ' ' CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' - MEANING - INDEPENDENT INTERPRETATION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 16 (4))

4 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - EXCLUSIVE JURISDICTION - PROCEEDINGS ' ' CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' - MEANING - LIMITS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 16 (4))

1 . THE CONVENTION OF 27 SEPTEMBER 1968 , WHICH SEEKS TO DETERMINE THE JURISDICTION OF THE COURTS OF THE CONTRACTING STATES IN CIVIL MATTERS , MUST OVERRIDE NATIONAL PROVISIONS WHICH ARE INCOMPATIBLE WITH IT .

2 . ARTICLE 19 OF THE CONVENTION OF 27 SEPTEMBER 1968 REQUIRES THE NATIONAL COURT TO DECLARE OF ITS OWN MOTION THAT IT HAS NO JURISDICTION WHENEVER IT FINDS THAT A COURT OF ANOTHER CONTRACTING STATE HAS EXCLUSIVE JURISDICTION UNDER ARTICLE 16 OF THE CONVENTION , EVEN IN AN APPEAL IN CASSATION WHERE THE NATIONAL RULES OF PROCEDURE LIMIT THE COURT ' S REVIEWAL TO THE GROUNDS RAISED BY THE PARTIES .

3 . THE TERM ' ' PROCEEDINGS CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' CONTAINED IN ARTICLE 16 (4) OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE REGARDED AS AN INDEPENDENT CONCEPT INTENDED TO HAVE UNIFORM APPLICATION IN ALL THE CONTRACTING STATES .

4 . THE TERM ' ' PROCEEDINGS CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' DOES NOT INCLUDE A DISPUTE BETWEEN AN EMPLOYEE FOR WHOSE INVENTION A PATENT HAS BEEN APPLIED FOR OR OBTAINED AND HIS EMPLOYER , WHERE THE DISPUTE RELATES TO THEIR RESPECTIVE RIGHTS IN THAT PATENT ARISING OUT OF THE CONTRACT OF EMPLOYMENT.

IN CASE 288/82

REFERENCE TO THE COURT UNDER THE PROTOCOL OF 31 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 FROM THE HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) FOR A PRELIMINARY RULING IN THE APPEAL IN CASSATION PENDING BEFORE THAT COURT

BETWEEN

FERDINAND M. J. J. DUIJNSTEE , LIQUIDATOR IN THE WINDING-UP OF BV SCHROEFBOUTENFABRIEK ,

AND

LODEWIJK GODERBAUER ,

ON THE INTERPRETATION OF ARTICLES 19 AND 16 (4) OF THE CONVENTION ,

1 BY A JUDGMENT OF 29 OCTOBER 1982 , WHICH WAS RECEIVED AT THE COURT REGISTRY ON 3 NOVEMBER 1982 , THE HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' '), THREE QUESTIONS ON THE INTERPRETATION OF ARTICLES 16 (4) AND 19 OF THE CONVENTION .

2 THOSE QUESTIONS AROSE IN AN APPEAL IN CASSATION BY FERDINAND M. J . J . DUIJNSTEE AGAINST A JUDGMENT DELIVERED ON 20 MAY 1981 BY THE GERECHTSHOF (REGIONAL COURT OF APPEAL), ' S-HERTOGENBOSCH , CONFIRMING A JUDGMENT OF THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT), MAASTRICHT.

3 ON 28 NOVEMBER 1979 , MR DUIJNSTEE HAD , IN HIS CAPACITY AS THE LIQUIDATOR IN THE WINDING-UP OF BV SCHROEFBOUTENFABRIEK , APPLIED TO THE ARRONDISSEMENTSRECHTBANK , MAASTRICHT , FOR AN INTERLOCUTORY INJUNCTION REQUIRING LODEWIJK GODERBAUER , THE FORMER MANAGER OF THAT COMPANY , TO TRANSFER TO IT THE PATENTS APPLIED FOR OR GRANTED IN 22 COUNTRIES , INCLUDING SOME WHICH HAVE ACCEDED TO THE CONVENTION , IN RESPECT OF AN INVENTION WHICH MR GODERBAUER HAD MADE WHILE EMPLOYED BY THAT COMPANY. MR DUIJNSTEE ' S CLAIM , WHICH WAS BASED ON THE FACT THAT THE NETHERLANDS PATENT OFFICE HAD DECIDED THAT BV SCHROEFBOUTENFABRIEK WAS ENTITLED TO THE NETHERLANDS PATENT FOR MR GODERBAUER ' S INVENTION , WAS DISMISSED ON 19 DECEMBER 1979.

4 ON 21 DECEMBER 1979 , MR GODERBAUER IN TURN BROUGHT AN ACTION AGAINST THE LIQUIDATOR IN THE ARRONDISSEMENTSRECHTBANK , MAASTRICHT , CLAIMING THAT , IF AND IN SO FAR AS THE PATENTS AND APPLICATIONS FOR PATENTS REFERRED TO IN THE WRIT WERE THE PROPERTY OF THE INSOLVENT COMPANY , MR GODERBAUER HAD A LIEN OVER THEM AS AGAINST THE LIQUIDATOR . MR DUIJNSTEE THEN PLEADED A COUNTERCLAIM IN THE SAME TERMS AS HIS APPLICATION FOR AN INTERLOCUTORY INJUNCTION OF 28 NOVEMBER 1979.

5 BY JUDGMENT OF 24 APRIL 1980 , THE ARRONDISSEMENTSRECHTBANK , MAASTRICHT , DISMISSED BOTH MR GODERBAUER ' S CLAIM AND MR DUIJNSTEE ' S COUNTERCLAIM. THAT JUDGMENT WAS CONFIRMED ON APPEAL BY THE GERECHTSHOF , ' S-HERTOGENBOSCH , BY JUDGMENT OF 20 MAY 1981.

6 MR DUIJNSTEE APPEALED AGAINST THAT JUDGMENT TO THE HOGE RAAD ON THE GROUND THAT IT WAS CONTRARY TO THE OCTROOIWET (NETHERLANDS PATENTS LAW).

7 ALTHOUGH THE ONLY GROUND OF APPEAL WAS THE ALLEGED INFRINGEMENT OF THE NETHERLANDS PATENTS LAW , THE HOGE RAAD NONE THE LESS EXPRESSED DOUBT OVER ITS OWN JURISDICTION ON THE GROUND THAT CERTAIN FACTORS INVOLVING

THE LAW OF OTHER STATES MIGHT , BY VIRTUE OF ARTICLE 16 (4) OF THE CONVENTION , MEAN THAT THE COURTS OF OTHER CONTRACTING STATES HAD EXCLUSIVE JURISDICTION.

8 IN THE FIRST PLACE , THE HOGE RAAD RAISED THE QUESTION WHETHER , ON THE ASSUMPTION THAT THE COURTS OF ANOTHER CONTRACTING STATE HAD EXCLUSIVE JURISDICTION , THAT JURISDICTION SHOULD BE RECOGNIZED EVEN THOUGH THE POINT HAD NOT BEEN PLEADED BY ANY OF THE PARTIES. ARTICLE 419 (1) OF THE NETHERLANDS CODE OF CIVIL PROCEDURE PROVIDES THAT THE HOGE RAAD IS TO CONFINE ITS CONSIDERATION OF THE CASE ' ' TO THE GROUNDS ON WHICH THE APPEAL IS BASED ' ' , WHEREAS ARTICLE 19 OF THE CONVENTION PROVIDES THAT ' ' WHERE A COURT OF A CONTRACTING STATE IS SEISED OF A CLAIM WHICH IS PRINCIPALLY CONCERNED WITH A MATTER OVER WHICH THE COURTS OF ANOTHER CONTRACTING STATE HAVE EXCLUSIVE JURISDICTION BY VIRTUE OF ARTICLE 16 , IT SHALL DECLARE OF ITS OWN MOTION THAT IT HAS NO JURISDICTION ' '.

9 IN ITS FIRST QUESTION , THE HOGE RAAD THEREFORE ASKS THE COURT WHETHER THE OBLIGATION IMPOSED BY ARTICLE 19 ON THE COURT OF A CONTRACTING STATE TO DECLARE OF ITS OWN MOTION THAT IT HAS NO JURISDICTION IMPLIES THAT A PROVISION SUCH AS ARTICLE 419 (1) OF THE NETHERLANDS CODE OF CIVIL PROCEDURE HAS NO EFFECT , INASMUCH AS A COURT OF CASSATION MUST INCLUDE IN ITS CONSIDERATION OF THE CASE THE QUESTION COVERED BY ARTICLE 19 AND , IF THAT QUESTION IS ANSWERED IN THE AFFIRMATIVE , MUST QUASH THE JUDGMENT APPEALED AGAINST , EVEN IF THE QUESTION HAS NOT BEEN RAISED IN THE GROUNDS OF APPEAL.

10 IN ORDER TO REPLY TO THAT QUESTION , IT IS NECESSARY TO CONSIDER THE AIMS OF THE CONVENTION.

11 ACCORDING TO THE PREAMBLE TO THE CONVENTION , THE CONTRACTING STATES , ANXIOUS TO ' ' STRENGTHEN IN THE COMMUNITY THE LEGAL PROTECTION OF PERSONS THEREIN ESTABLISHED ' ' , CONSIDERED THAT IT WAS NECESSARY FOR THAT PURPOSE ' ' TO DETERMINE THE INTERNATIONAL JURISDICTION OF THEIR COURTS , TO FACILITATE RECOGNITION AND TO INTRODUCE AN EXPEDITIOUS PROCEDURE FOR SECURING THE ENFORCEMENT OF JUDGMENTS , AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS ' '.

12 BOTH THE PROVISIONS ON JURISDICTION AND THOSE ON THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS ARE THEREFORE AIMED AT STRENGTHENING THE LEGAL PROTECTION OF PERSONS ESTABLISHED IN THE COMMUNITY.

13 THE PRINCIPLE OF LEGAL CERTAINTY IN THE COMMUNITY LEGAL ORDER AND THE AIMS PURSUED BY THE CONVENTION IN ACCORDANCE WITH ARTICLE 220 OF THE TREATY , ON WHICH IT IS BASED , REQUIRE THAT THE EQUALITY AND UNIFORMITY OF RIGHTS AND OBLIGATIONS ARISING FROM THE CONVENTION FOR THE CONTRACTING STATES AND THE PERSONS CONCERNED MUST BE ENSURED , REGARDLESS OF THE RULES LAID DOWN IN THAT REGARD IN THE LAWS OF THOSE STATES .

14 IT MUST BE CONCLUDED THAT THE CONVENTION , WHICH SEEKS TO DETERMINE THE JURISDICTION OF THE COURTS OF THE CONTRACTING STATES IN CIVIL MATTERS , MUST OVERRIDE NATIONAL PROVISIONS WHICH ARE INCOMPATIBLE WITH IT.

15 THE REPLY TO THE FIRST QUESTION MUST THEREFORE BE THAT ARTICLE 19 OF THE CONVENTION REQUIRES THE NATIONAL COURT TO DECLARE OF ITS OWN MOTION THAT IT HAS NO JURISDICTION WHENEVER IT FINDS THAT A COURT OF ANOTHER CONTRACTING STATE HAS EXCLUSIVE JURISDICTION UNDER ARTICLE 16 OF THE CONVENTION

, EVEN IN AN APPEAL IN CASSATION WHERE THE NATIONAL RULES OF PROCEDURE LIMIT THE COURT ' S REVIEWAL TO THE GROUNDS RAISED BY THE PARTIES.

16 IN ITS SECOND QUESTION THE HOGE RAAD ASKS WHETHER THE CONCEPT OF PROCEEDINGS ' ' CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' WITHIN THE MEANING OF ARTICLE 16 (4) OF THE CONVENTION , WHICH ATTRIBUTES EXCLUSIVE JURISDICTION TO THE COURTS OF THE CONTRACTING STATE COMPETENT TO GRANT THE PATENT , MUST BE DEFINED ON THE BASIS OF THE LAW OF THE CONTRACTING STATE WHOSE COURTS ARE REFERRED TO IN THAT PROVISION , OR ACCORDING TO THE LEX FORI , OR ON THE BASIS OF AN INDEPENDENT INTERPRETATION OF THE SAID PROVISION.

17 THE COURT HAS SEVERAL TIMES HAD OCCASION TO CONSIDER THE CRITERIA TO BE USED FOR THE DEFINITION OF THE CONCEPTS APPEARING IN THE CONVENTION . THUS , IN ITS JUDGMENT OF 22 FEBRUARY 1979 IN CASE 133/78 (GOURDAIN V NADLER (1979) ECR 743), IT STATED THAT ' ' IN ORDER TO ENSURE , AS FAR AS POSSIBLE , THAT THE RIGHTS AND OBLIGATIONS WHICH DERIVE FROM (THE CONVENTION) FOR THE CONTRACTING STATES AND THE PERSONS TO WHOM IT APPLIES ARE EQUAL AND UNIFORM ' ' , IT IS NECESSARY THAT THE TERMS OF ARTICLE 1 OF THE CONVENTION SHOULD NOT BE INTERPRETED ' ' AS A MERE REFERENCE TO THE INTERNAL LAW OF ONE OR OTHER OF THE STATES CONCERNED ' ' , AND ' ' THE CONCEPTS USED IN ARTICLE 1 MUST BE REGARDED AS INDEPENDENT CONCEPTS WHICH MUST BE INTERPRETED BY REFERENCE , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS ' '. THE COURT ALSO STRESSED THE NEED FOR AN INDEPENDENT INTERPRETATION IN ITS JUDGMENT OF 21 JUNE 1978 IN CASE 150/77 (BERTRAND V OTT (1978) ECR 1432), IN RELATION TO THE TERMS USED IN ARTICLE 13 AND IN THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION , AND IN ITS JUDGMENT OF 22 MARCH 1983 IN CASE 34/82 (MARTIN PETERS BAUUNTERNEHMUNG V ZUID NEDERLANDSE AANNEMERS VERENIGING (1983) ECR 987), IN RELATION TO THE TERMS USED IN ARTICLE 5 (1) OF THE CONVENTION.

18 IN THE PRESENT CASE , BOTH AN INTERPRETATION ACCORDING TO THE LAW OF THE CONTRACTING STATE WHOSE COURTS HAVE JURISDICTION UNDER ARTICLE 16 (4) AND AN INTERPRETATION ACCORDING TO THE LEX FORI WOULD BE LIABLE TO PRODUCE DIVERGENT SOLUTIONS , WHICH WOULD BE PREJUDICIAL TO THE PRINCIPLE THAT THE RIGHTS AND OBLIGATIONS WHICH THE PERSONS CONCERNED DERIVE FROM THE CONVENTION SHOULD BE EQUAL AND UNIFORM.

19 THUS THE TERM ' ' PROCEEDINGS CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' CONTAINED IN ARTICLE 16 (4) MUST BE REGARDED AS AN INDEPENDENT CONCEPT INTENDED TO HAVE UNIFORM APPLICATION IN ALL THE CONTRACTING STATES.

20 THIS REPLY TO THE SECOND QUESTION COMPELS THE COURT TO DEFINE THE TERM ' ' PROCEEDINGS CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' , SINCE THE HOGE RAAD HAS ASKED IN ITS THIRD QUESTION WHETHER THAT CONCEPT MAY COVER A DISPUTE SUCH AS THAT CONCERNED IN THE MAIN ACTION .

21 IN ORDER TO REPLY TO THE THIRD QUESTION , REFERENCE MUST AGAIN BE MADE TO THE OBJECTIVES AND SCHEME OF THE CONVENTION.

22 IN THAT REGARD , IT MUST BE NOTED THAT THE EXCLUSIVE JURISDICTION IN

PROCEEDINGS CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS CONFERRED UPON THE COURTS OF THE CONTRACTING STATE IN WHICH THE DEPOSIT OR REGISTRATION HAS BEEN APPLIED FOR IS JUSTIFIED BY THE FACT THAT THOSE COURTS ARE BEST PLACED TO ADJUDICATE UPON CASES IN WHICH THE DISPUTE ITSELF CONCERNS THE VALIDITY OF THE PATENT OR THE EXISTENCE OF THE DEPOSIT OR REGISTRATION.

23 ON THE OTHER HAND , AS IS EXPRESSLY STATED IN THE REPORT ON THE CONVENTION (OFFICIAL JOURNAL 1979 , C 59 , P. 1 , AT P. 36), ' ' OTHER ACTIONS , INCLUDING THOSE FOR INFRINGEMENT OF PATENTS , ARE GOVERNED BY THE GENERAL RULES OF THE CONVENTION ' '. THAT STATEMENT CONFIRMS THE RESTRICTIVE NATURE OF THE PROVISION CONTAINED IN ARTICLE 16 (4).

24 IT FOLLOWS THAT PROCEEDINGS ' ' CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' MUST BE REGARDED AS PROCEEDINGS IN WHICH THE CONFERRING OF EXCLUSIVE JURISDICTION ON THE COURTS OF THE PLACE IN WHICH THE PATENT WAS GRANTED IS JUSTIFIED IN THE LIGHT OF THE FACTORS MENTIONED ABOVE , SUCH AS PROCEEDINGS RELATING TO THE VALIDITY , EXISTENCE OR LAPSE OF A PATENT OR AN ALLEGED RIGHT OF PRIORITY BY REASON OF AN EARLIER DEPOSIT.

25 IF , ON THE OTHER HAND , THE DISPUTE DOES NOT ITSELF CONCERN THE VALIDITY OF THE PATENT OR THE EXISTENCE OF THE DEPOSIT OR REGISTRATION , THERE IS NO SPECIAL REASON TO CONFER EXCLUSIVE JURISDICTION ON THE COURTS OF THE CONTRACTING STATE IN WHICH THE PATENT WAS APPLIED FOR OR GRANTED AND CONSEQUENTLY SUCH A DISPUTE IS NOT COVERED BY ARTICLE 16 (4).

26 IN A CASE SUCH AS THE PRESENT , NEITHER THE VALIDITY OF THE PATENTS NOR THE LEGALITY OF THEIR REGISTRATION IN THE VARIOUS COUNTRIES IS DISPUTED BY THE PARTIES TO THE MAIN ACTION. THE OUTCOME OF THE CASE IN FACT DEPENDS EXCLUSIVELY ON THE QUESTION WHETHER MR GODERBAUER OR THE INSOLVENT COMPANY BV SCHROEFBOUTENFABRIEK IS ENTITLED TO THE PATENT , WHICH MUST BE DETERMINED ON THE BASIS OF THE LEGAL RELATIONSHIP WHICH EXISTED BETWEEN THE PARTIES CONCERNED. THEREFORE THE SPECIAL JURISDICTION RULE CONTAINED IN ARTICLE 16 (4) SHOULD NOT BE APPLIED.

27 IN THAT REGARD , IT SHOULD BE POINTED OUT THAT A VERY CLEAR DISTINCTION BETWEEN JURISDICTION IN DISPUTES CONCERNING THE RIGHT TO THE PATENT , ESPECIALLY WHERE THE PATENT CONCERNS THE INVENTION OF AN EMPLOYEE , AND JURISDICTION IN DISPUTES CONCERNING THE REGISTRATION OR VALIDITY OF A PATENT WAS MADE BOTH IN THE EUROPEAN PATENT CONVENTION SIGNED IN MUNICH ON 5 OCTOBER 1973 AND IN THE COMMUNITY PATENT CONVENTION SIGNED IN LUXEMBOURG ON 15 DECEMBER 1975 (OFFICIAL JOURNAL 1976 , L 17), WHICH HAS NOT YET ENTERED INTO FORCE. ALTHOUGH THOSE TWO CONVENTIONS ARE NOT APPLICABLE IN THIS CASE , THE FACT THAT THEY EXPRESSLY ACCEPT SUCH A DISTINCTION CONFIRMS THE INTERPRETATION GIVEN BY THE COURT TO THE CORRESPONDING PROVISIONS OF THE BRUSSELS CONVENTION .

28 THE REPLY TO THE THIRD QUESTION SHOULD THEREFORE BE THAT THE TERM ' ' PROCEEDINGS CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' DOES NOT INCLUDE A DISPUTE BETWEEN AN EMPLOYEE FOR WHOSE INVENTION A PATENT HAS BEEN APPLIED FOR OR OBTAINED AND HIS EMPLOYER , WHERE THE DISPUTE RELATES TO THEIR RESPECTIVE RIGHTS IN THAT PATENT ARISING OUT OF THE CONTRACT OF EMPLOYMENT.

COSTS

29 THE COSTS INCURRED BY THE GOVERNMENTS OF THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED KINGDOM AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION BEFORE THE NATIONAL COURT , COSTS ARE A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT (FOURTH CHAMBER),

IN ANSWER TO THE QUESTIONS SUBMITTED TO IT BY THE HOGE RAAD DER NEDERLANDEN BY JUDGMENT OF 29 OCTOBER 1982 , HEREBY RULES :

1 . ARTICLE 19 OF THE CONVENTION REQUIRES THE NATIONAL COURT TO DECLARE OF ITS OWN MOTION THAT IT HAS NO JURISDICTION WHENEVER IT FINDS THAT A COURT OF ANOTHER CONTRACTING STATE HAS EXCLUSIVE JURISDICTION UNDER ARTICLE 16 OF THE CONVENTION , EVEN IN AN APPEAL IN CASSATION WHERE THE NATIONAL RULES OF PROCEDURE LIMIT THE COURT ' S REVIEWAL TO THE GROUNDS RAISED BY THE PARTIES.

2.THE TERM ' ' PROCEEDINGS CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' CONTAINED IN ARTICLE 16 (4) MUST BE REGARDED AS AN INDEPENDENT CONCEPT INTENDED TO HAVE UNIFORM APPLICATION IN ALL THE CONTRACTING STATES.

3.THE TERM ' ' PROCEEDINGS CONCERNED WITH THE REGISTRATION OR VALIDITY OF PATENTS ' ' DOES NOT INCLUDE A DISPUTE BETWEEN AN EMPLOYEE FOR WHOSE INVENTION A PATENT HAS BEEN APPLIED FOR OR OBTAINED AND HIS EMPLOYER , WHERE THE DISPUTE RELATES TO THEIR RESPECTIVE RIGHTS IN THAT PATENT ARISING OUT OF THE CONTRACT OF EMPLOYMENT.

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SUB Brussels Convention of 27 September 1968 ; Jurisdiction

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NATCOUR *A8* Gerechtshof 's-Hertogenbosch, 4e kamer, arrest van 20/05/1981 (353/80/MA) ; *A9* Hoge Raad, 1e kamer, arrest van 29/10/1982 (11.924) ; - Rechtspraak van de week 1982 no 186 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1984 no 694 ; *P1* Hoge Raad, 1e kamer, arrest van 06/01/1984 (brief van 16/04/84)

NOTES Bonet, Georges ; Blaise, Jean-Bernard: Droit européen des affaires, La Semaine juridique - édition entreprise 1984 I 13389 ; Bonet, Georges: Revue critique de droit international privé 1984 p.366-372 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1984 no 695 ; Wichers Hoeth, L.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1984 no 695 ; Stauder, Dieter: Gewerblicher Rechtsschutz und Urheberrecht / Auslands- und Internationaler Teil 1984 p.697-698 ; Bonet, Georges: Revue trimestrielle de droit européen 1984 p.316 (PM) ; Hartley, Trevor: Exclusive Jurisdiction: Patents, European Law Review 1984 p.64-66 ; Stauder, Dieter: Die ausschließliche internationale gerichtliche Zuständigkeit in Patentstreitsachen nach dem Brüsseler Übereinkommen - Art.16 Nr.4 EuGVÜ, Art.19 EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 1985 p.76-79 ; Stauder, Dieter: The Significance of the Brussels Convention for Actions in the Field of Industrial Property, International Review of Industrial Property and Copyright Law 1985 p.593-598 ; Margellos, Th.M.: I diethnis dikaiodosia se themata chorigisis diplomaton evresitechnias kata ti Symvasi ton Vryxellon tou 1968 gia ti diethni dikaiodosia kai tin ektelesi apofaseon, Elliniki Epitheorisi Evropaïkou Dikaiou 1985 p.400-409 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1985 p.a12 (PM) ; Mousseron, Jean-Marc ; Schmidt, Joanna: Recueil Dalloz Sirey 1986 IR. p.138 (PM) ; Rimmelspacher, Bruno: Die internationale Zuständigkeit in den zivilprozessualen Rechtsmittelinstanzen, Juristenzeitung 2004 p.894-900

PROCEDU	Reference for a preliminary ruling
ADVGEN	Rozès
JUDGRAP	Bosco
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Judgment of the Court (Third Chamber)
of 14 July 1983
Gerling Konzern Speziale Kreditversicherungs-AG and others v Amministrazione del Tesoro dello Stato.
Reference for a preliminary ruling: Corte suprema di Cassazione - Italy.
Interpretation of Articles 17 and 18 of the Brussels Conventionof 27 September 1968 - Insurance contract containing a stipulation in favour of a third party.
Case 201/82.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - JURISDICTION BY CONSENT - AGREEMENT CONFERRING JURISDICTION - CONTRACT OF INSURANCE - JURISDICTION CLAUSE FOR THE BENEFIT OF THIRD PARTIES WHO HAVE NOT SIGNED THE CLAUSE - RIGHT OF THIRD PARTIES TO AVAIL THEMSELVES OF THE SAID CLAUSE - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 17)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - JURISDICTION BY CONSENT - APPEARANCE OF THE DEFENDANT BEFORE THE COURT SEISED OF THE MATTER - APPEARANCE NOT ONLY TO CONTEST JURISDICTION BUT ALSO TO PLEAD AS TO THE SUBSTANCE - APPEARANCE NOT CONFERRING JURISDICTION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 18)

1 . THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT WHERE A CONTRACT OF INSURANCE , ENTERED INTO BETWEEN AN INSURER AND A POLICY-HOLDER AND STIPULATED BY THE LATTER TO BE FOR HIS BENEFIT AND TO ENURE FOR THE BENEFIT OF THIRD PARTIES TO SUCH A CONTRACT , CONTAINS A CLAUSE CONFERRING JURISDICTION RELATING TO PROCEEDINGS WHICH MIGHT BE BROUGHT BY SUCH THIRD PARTIES , THE LATTER , EVEN IF THEY HAVE NOT EXPRESSLY SIGNED THE SAID CLAUSE , MAY RELY UPON IT PROVIDED THAT , AS BETWEEN THE INSURER AND THE POLICY-HOLDER , THE CONDITION AS TO WRITING LAID DOWN BY ARTICLE 17 OF THE CONVENTION HAS BEEN SATISFIED AND PROVIDED THAT THE CONSENT OF THE INSURER IN THAT RESPECT HAS BEEN CLEARLY MANIFESTED.

2 . ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT IT ALLOWS A DEFENDANT NOT MERELY TO CONTEST JURISDICTION BUT AT THE SAME TIME TO SUBMIT , IN THE ALTERNATIVE , A DEFENCE ON THE SUBSTANCE OF THE CASE WITHOUT THEREBY LOSING THE RIGHT TO RAISE AN OBJECTION OF WANT OF JURISDICTION.

IN CASE 201/92

REFERENCE TO THE COURT IN PURSUANCE 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 CORTE SUPREMA DI CASSAZIONE , SEZIONI UNITE CIVILI (SUPREME COURT OF CASSATION , COMBINED CIVIL SECTIONS), GIVING ITS PRELIMINARY DECISION ON A QUESTION OF JURISDICTION UNDER ARTICLE 41 OF THE ITALIAN CODE OF CIVIL PROCEDURE , IN THE PROCEEDINGS PENDING BETWEEN

GERLING KONZERN SPEZIALE KREDITVERSICHERUNGS-AG , HAVING ITS REGISTERED OFFICE IN COLOGNE , AND OTHERS ,

AND

AMMINISTRAZIONE DEL TESORO DELLO STATO (TREASURY ADMINISTRATION) (CENTRAL STATE ACCOUNTING DEPARTMENT , OFFICE FOR WINDING-UP COMPANIES , ENTE AUTOTRASPORTI MERCI), IN THE PERSON OF THE MINISTER FOR THE TREASURY FOR THE TIME BEING ,

ON THE INTERPRETATION OF ARTICLES 17 AND 18 OF THE AFOREMENTIONED CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY ORDER OF 28 JULY 1982 , RECEIVED AT THE COURT REGISTRY ON 6 AUGUST 1982 , THE CORTE SUPREMA DI CASSAZIONE , SEZIONI UNITE CIVILI (SUPREME COURT OF CASSATION , COMBINED CIVIL SECTIONS) 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' '), REFERRED TO THE COURT FOR A PRELIMINARY RULING TWO QUESTIONS ON THE INTERPRETATION OF ARTICLES 17 AND 18 OF THE CONVENTION.

2 THOSE QUESTIONS AROSE IN PROCEEDINGS BETWEEN THE AMMINISTRAZIONE DEL TESORO DELLO STATO (TREASURY ADMINISTRATION) AND GERLING KONZERN SPEZIALE KREDITVERSICHERUNGS-AG AND OTHERS (HEREINAFTER REFERRED TO AS ' ' GERLING ' '), WHOSE REGISTERED OFFICE IS IN COLOGNE , IN WHICH THE PLAINTIFF SOUGHT TO RECOVER A SUM REPRESENTING PECUNIARY PENALTIES , TAXES , DUTIES AND SUPPLEMENTARY CHARGES IN CONNECTION WITH A SERIES OF TRANSPORT OPERATIONS UNDER THE TIR SYSTEM , WHICH IT SUBSEQUENTLY APPEARED WERE ILLEGAL UNDER ITALIAN LAW AND AS SUCH BECAME LIABLE FOR THE ABOVE-MENTIONED CHARGES AND TAXES.

3 TO ENJOY THE FACILITIES PROVIDED FOR BY THE CUSTOMS CONVENTION ON THE INTERNATIONAL TRANSPORT OF GOODS UNDER COVER OF TIR CARNETS ADOPTED IN GENEVA ON 15 JANUARY 1959 , TRANSPORT MUST IN PARTICULAR BE EFFECTED UNDER A TIR CARNET ISSUED BY THE AUTHORIZED ASSOCIATION IN EACH COUNTRY SIGNATORY TO THE CUSTOMS CONVENTION AND THE CARRIAGE TAKES PLACE UNDER ITS GUARANTEE. THE NATIONAL ASSOCIATION WHICH GIVES THE GUARANTEE IS LIABLE FOR PAYMENT OF THE DUTIES AND TAXES HELD TO BE PAYABLE AND FOR PENALTIES INCURRED BY THE HOLDER OF THE TIR CARNET.

4 THE AUTHORIZED NATIONAL ASSOCIATION IN ITALY AT THE MATERIAL TIME WAS THE ENTE AUTOTRASPORTI MERCI. SINCE IT HAS BEEN WOUND UP ITS RIGHTS HAVE BEEN VESTED IN THE ITALIAN MINISTRY OF THE TREASURY PURSUANT TO THE COMBINED PROVISIONS OF LAW NO 1404 OF 4 DECEMBER 1956 , LAW NO 413 OF 18 MARCH 1968 AND LAW NO 1139 OF 23 DECEMBER 1970.

5 THE NATIONAL ASSOCIATIONS ARE AFFILIATED TO THE INTERNATIONAL ROAD TRANSPORT UNION. EACH OF THOSE NATIONAL ASSOCIATIONS ENJOYS IN TURN INSURANCE COVER FROM AN INTERNATIONAL GROUP OF INSURERS REPRESENTED BY GERLING PURSUANT TO A CONTRACT MADE IN 1961 BY THE INTERNATIONAL ROAD TRANSPORT UNION ON ITS OWN BEHALF AND ON BEHALF OF EACH OF THE NATIONAL ASSOCIATIONS ON THE ONE HAND AND BY THE AFORESAID INTERNATIONAL GROUP OF INSURERS ON THE OTHER.

6 ARTICLE 8 OF THE CONTRACT OF INSURANCE PROVIDES : ' ' IN CASE OF A DISPUTE BETWEEN THE POOL AND ONE OF THE NATIONAL ASSOCIATIONS THE LATTER SHALL

BE ENTITLED TO INSIST ON PROCEEDINGS BEFORE THE COURT HAVING JURISDICTION IN THE COUNTRY IN WHICH IT HAS ITS REGISTERED OFFICE , FOR THE APPLICATION OF THE LAW OF THAT COUNTRY. ' '

7 SINCE THE ITALIAN CUSTOMS ADMINISTRATION CLAIMED PAYMENT OF A SERIES OF PENALTIES , CHARGES AND DUTIES CONNECTED WITH ROAD TRANSPORT UNDER THE TIR SYSTEM IN ITALY THE MINISTRY OF THE TREASURY BROUGHT AN ACTION BEFORE THE TRIBUNALE DI ROMA (DISTRICT COURT , ROME) AGAINST THE AFORESAID GROUP OF INSURERS CLAIMING PAYMENT OF A TOTAL SUM OF LIT 812 134 310 .

8 DURING THE PROCEEDINGS THE GROUP OF INSURERS BROUGHT AN INTERLOCUTORY ACTION BEFORE A SECTION OF THE CORTE DI CASSAZIONE PURSUANT TO ARTICLE 41 OF THE ITALIAN CODE OF CIVIL PROCEDURE FOR A PRELIMINARY RULING ON JURISDICTION. THE INSURERS DENY THAT THE AFORESAID CLAUSE CONFERRING JURISDICTION MAY BE RELIED UPON INASMUCH AS IT WAS NOT SIGNED BY THE ENTE AUTOTRASPORTI MERCI (OR BY THE TREASURY ADMINISTRATION) WHEREAS ARTICLE 17 OF THE CONVENTION REQUIRED SUCH A CLAUSE CONFERRING JURISDICTION TO BE IN WRITING AND SIGNED BY THE PARTIES.

9 IT IS AGAINST THAT BACKGROUND THAT THE CORTE DI CASSAZIONE HAS REFERRED THE FOLLOWING TWO QUESTIONS TO THE COURT FOR A PRELIMINARY RULING :

' ' 1 . WHERE A CONTRACT HAS BEEN DULY SIGNED BY THE CONTRACTING PARTIES AND THERE HAS BEEN INCLUDED BY ONE OF THOSE PARTIES , ON ITS OWN BEHALF AND IN THE INTERESTS OF OTHER BENEFICIARIES UNDER THE CONTRACT , THE JURISDICTION CLAUSE AGREED UPON THEREIN WITH REFERENCE TO PROCEEDINGS WHICH MAY BE BROUGHT BY THE SAID BENEFICIARIES , DOES THE REQUIREMENT AS TO WRITTEN FORM LAID DOWN BY ARTICLE 17 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ALSO APPLY IN FAVOUR OF THOSE BENEFICIARIES?

2.IS THE EFFECT OF CONFIRMING THE JURISDICTION OF THE COURT BEFORE WHICH AN ACTION IS BROUGHT - WHICH COMES ABOUT , UNDER ARTICLE 18 OF THE SAID CONVENTION , AS A RESULT OF THE ENTRY OF AN APPEARANCE BY THE DEFENDANT - ALSO PRODUCED WHEN THE DEFENDANT , IN ENTERING AN APPEARANCE , BESIDES LODGING A PRELIMINARY OBJECTION TO THE COURT ' S JURISDICTION , SETS OUT , PURELY IN THE ALTERNATIVE , A DEFENCE ON THE SUBSTANCE OF THE CASE?

' '

1 . FIRST QUESTION

10 THE CORTE DI CASSAZIONE IS ASKING THE COURT BASICALLY TO CLARIFY WHETHER THE CONVENTION , AND IN PARTICULAR ARTICLE 17 THEREOF , MAY BE INTERPRETED AS MEANING THAT UNDER A CONTRACT OF INSURANCE A PERSON IN WHOSE FAVOUR THE CONTRACT IS MADE BUT WHO IS NOT A PARTY TO THE CONTRACT AND IS SEPARATE FROM THE INSURED , IS ENTITLED TO RELY ON A CLAUSE EXTENDING JURISDICTION INSERTED FOR HIS BENEFIT ALTHOUGH HE HAS NOT HIMSELF SIGNED IT , ALBEIT THE INSURER AND INSURED HAVE DULY DONE SO .

11 IN APPLYING THE CONVENTION IT IS NECESSARY TO INTERPRET IT BY REFERENCE MAINLY TO ITS STRUCTURE AND OBJECTIVES IN ORDER TO MAKE IT FULLY EFFECTIVE.

12 THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION PROVIDES :

' ' IF THE PARTIES , ONE OR MORE OF WHOM IS DOMICILED IN A CONTRACTING STATE

, HAVE , BY AGREEMENT IN WRITING OR BY AN ORAL AGREEMENT EVIDENCED IN WRITING , 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. ' '

13 AS THE COURT HAS REPEATEDLY HELD IN PARTICULAR IN ITS JUDGMENTS OF 14 DECEMBER 1976 IN CASE 24/76 ESTASIS SALOTTI (1976) ECR 1831 AND CASE 25/76 SEGOURA (1976) ECR 1851 AND OF 6 MAY 1980 IN CASE 784/79 , PORTA LEASING (1980) ECR 1517 , THE PURPOSE OF THE REQUIREMENT OF WRITING UNDER ARTICLE 17 OF THE CONVENTION IS TO ENSURE THAT THE CONSENT OF THE PARTIES , WHO , BY AN AGREEMENT CONFERRING JURISDICTION , DEPART FROM THE GENERAL RULES FOR DETERMINING JURISDICTION LAID DOWN IN ARTICLES 2 , 5 AND 6 OF THE CONVENTION , IS CLEARLY AND PRECISELY DEMONSTRATED AND IS ACTUALLY ESTABLISHED.

14 MOREOVER , ARTICLE 17 OF THE CONVENTION IN REQUIRING WRITING BETWEEN THE PARTIES DOES NOT HAVE EITHER THE OBJECT OR THE EFFECT OF SUBJECTING A THIRD PARTY BENEFITING FROM THE REQUIREMENT IMPOSED ON OTHERS TO THE SAME REQUIREMENT OF WRITING WHERE THE CLAUSE CONFERRING JURISDICTION IS MADE FOR HIS BENEFIT AND HE SEEKS TO RELY ON IT IN PROCEEDINGS BETWEEN HIM AND THE INSURER.

15 IN SUCH CIRCUMSTANCES IT APPEARS TO THE COURT THAT THE INSURER , IF HIS ORIGINAL CONSENT HAS BEEN MADE CLEAR IN THE PROVISIONS OF THE CONTRACT , CANNOT OBJECT TO SUCH AN EXCLUSION OF JURISDICTION ON THE SOLE GROUND THAT THE PARTY BENEFITING FROM THE REQUIREMENT IMPOSED ON OTHERS , NOT BEING A PARTY TO THE CONTRACT , HAS NOT HIMSELF SATISFIED THE REQUIREMENT OF WRITING PRESCRIBED BY ARTICLE 17 OF THE CONVENTION

16 CONSIDERATION OF THE PROVISIONS OF SECTION 3 OF THE CONVENTION RELATING TO JURISDICTION IN MATTERS RELATING TO INSURANCE CONFIRMS THAT VIEW .

17 IT IS APPARENT FROM A CONSIDERATION OF THE PROVISIONS OF THAT SECTION IN THE LIGHT OF THE DOCUMENTS LEADING TO THEIR ENACTMENT THAT IN AFFORDING THE INSURED A WIDER RANGE OF JURISDICTION THAN THAT AVAILABLE TO THE INSURER AND IN EXCLUDING ANY POSSIBILITY OF A CLAUSE CONFERRING JURISDICTION FOR THE BENEFIT OF THE INSURER THEIR PURPOSE WAS TO PROTECT THE INSURED WHO IS MOST FREQUENTLY FACED WITH A PREDETERMINED CONTRACT THE CLAUSES OF WHICH ARE NO LONGER NEGOTIABLE AND WHO IS IN A WEAKER ECONOMIC POSITION.

18 MOREOVER , ARTICLE 12 OF THE CONVENTION ALLOWS THE PARTIES TO DEPART FROM THE PROVISIONS OF SECTION 3 ' ' BY AN AGREEMENT... (2) WHICH ALLOWS THE POLICY-HOLDER , THE INSURED OR A BENEFICIARY TO BRING PROCEEDINGS IN COURTS OTHER THAN THOSE INDICATED IN THIS SECTION ' '. IT IS THUS CLEAR THAT THE CONVENTION HAS EXPRESSLY PROVIDED FOR THE POSSIBILITY OF STIPULATING CLAUSES CONFERRING JURISDICTION NOT ONLY IN FAVOUR OF THE POLICY-HOLDER , BEING A PARTY TO THE CONTRACT , BUT ALSO IN FAVOUR OF THE INSURED AND THE BENEFICIARY WHO MAY NOT BE PARTIES TO THE CONTRACT WHEN , AS IN THE PRESENT CASE , THEY ARE DIFFERENT PERSONS WHOSE IDENTITY MAY EVEN BE UNKNOWN WHEN THE CONTRACT IS SIGNED

19 CONSEQUENTLY IF THE REQUIREMENT AS TO FORM REFERRED TO IN ARTICLE 17 WERE TO BE REGARDED AS REQUIRING THE INSURED OR BENEFICIARY , NOT BEING

A PARTY TO THE CONTRACT BUT A PERSON FOR WHOSE BENEFIT THE CLAUSE CONFERRING JURISDICTION IS MADE , EXPRESSLY TO SIGN THE SAID CLAUSE SO AS TO VALIDATE IT AND TO ENTITLE HIM TO RELY ON IT , THE EFFECT OF SUCH AN INTERPRETATION WOULD BE TO PLACE ON THE LATTER , IN VIEW OF THE FACT THAT ORIGINALLY THE INSURER HAS UNEQUIVOCALLY GIVEN HIS CONSENT TO AN OPEN AND GENERAL SYSTEM OF EXTENSION OF JURISDICTION , A POINTLESS RESTRICTION AMOUNTING EVEN , IT MAY BE , TO A FORMALITY WITH WHICH IT WOULD BE DIFFICULT TO COMPLY IF , BEFORE ANY PROCEEDINGS , THE INSURED HAS NOT BEEN INFORMED BY THE POLICY-HOLDER OF THE EXISTENCE OF A CLAUSE CONFERRING JURISDICTION WHICH HAS BEEN MADE FOR HIS BENEFIT.

20 IT FOLLOWS FROM ALL THE FOREGOING THAT THE ANSWER SHOULD BE THAT WHERE IN A CONTRACT OF INSURANCE A CLAUSE CONFERRING JURISDICTION IS INSERTED FOR THE BENEFIT OF THE INSURED WHO IS NOT A PARTY TO THE CONTRACT BUT A PERSON DISTINCT FROM THE POLICY-HOLDER , IT MUST BE REGARDED AS VALID WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION PROVIDED THAT , AS BETWEEN THE INSURER AND THE POLICY-HOLDER , THE CONDITION AS TO WRITING LAID DOWN THEREIN HAS BEEN SATISFIED AND PROVIDED THAT THE CONSENT OF THE INSURER IN THAT RESPECT HAS BEEN CLEARLY AND PRECISELY MANIFESTED.

2 . SECOND QUESTION

21 AS REGARDS THIS QUESTION IT IS SUFFICIENT TO RECALL THAT THE COURT IN ITS JUDGMENTS OF 24 JUNE 1981 IN CASE 150/80 ELEFANTEN SCHUH GMBH (1981) ECR 1671 , OF 22 OCTOBER 1981 IN CASE 27/81 ROHR (1981) ECR 2431 AND OF 31 MARCH 1982 IN CASE 25/81 CHW (1982) ECR 1189 HAS RECOGNIZED THAT ARTICLE 18 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT IT ALLOWS A DEFENDANT NOT MERELY TO CONTEST JURISDICTION BUT AT THE SAME TIME TO SUBMIT , IN THE ALTERNATIVE , A DEFENCE ON THE SUBSTANCE OF THE CASE WITHOUT THEREBY LOSING THE RIGHT TO RAISE AN OBJECTION OF WANT OF JURISDICTION.

COSTS

22 THE COSTS INCURRED BY THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHO HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. SINCE THE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , 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 (THIRD CHAMBER)

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE CORTE SUPREMA DI CASSAZIONE (SEZIONI UNITE CIVILI), BY ORDER OF 28 JULY 1982 , HEREBY RULES :

1 . THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT WHERE A CONTRACT OF INSURANCE , ENTERED INTO BETWEEN AN INSURER AND A POLICY-HOLDER AND STIPULATED BY THE LATTER TO BE FOR HIS BENEFIT AND TO ENURE FOR THE BENEFIT OF THIRD PARTIES TO SUCH A CONTRACT , CONTAINS A CLAUSE CONFERRING JURISDICTION RELATING TO PROCEEDINGS WHICH MIGHT BE BROUGHT BY SUCH THIRD PARTIES

, THE LATTER , EVEN IF THEY HAVE NOT EXPRESSLY SIGNED THE SAID CLAUSE , MAY RELY UPON IT PROVIDED THAT , AS BETWEEN THE INSURER AND THE POLICY-HOLDER , THE CONDITION AS TO WRITING LAID DOWN BY ARTICLE 17 OF THE CONVENTION HAS BEEN SATISFIED AND PROVIDED THAT THE CONSENT OF THE INSURER IN THAT RESPECT HAS BEEN CLEARLY MANIFESTED.

2.ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT IT ALLOWS A DEFENDANT NOT MERELY TO CONTEST JURISDICTION BUT AT THE SAME TIME TO SUBMIT , IN THE ALTERNATIVE , A DEFENCE ON THE SUBSTANCE OF THE CASE WITHOUT THEREBY LOSING THE RIGHT TO RAISE AN OBJECTION OF WANT OF JURISDICTION.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
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SUB	Brussels Convention of 27 September 1968 ; Jurisdiction

AUTLANG Italian

OBSERV Italy ; Commission ; Member States ; Institutions

NATIONA Italy

NATCOUR *A9* Corte di Cassazione, ordinanza del 22/04/1982 22/07/1982 (671 - RG 6731/76)
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PROCEDU Reference for a preliminary ruling

ADVGEN Mancini

JUDGRAP Galmot

DATES of document: 14/07/1983
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Judgment of the Court
of 22 March 1983
Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging.
Reference for a preliminary ruling: Hoge Raad - Netherlands.
Article 5(1) of the Brussels Convention of 27 September 1968.
Case 34/82.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPECIAL JURISDICTION - JURISDICTION IN MATTERS RELATING TO A CONTRACT - INDEPENDENT CONCEPT

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 5 (1))

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPECIAL JURISDICTION - JURISDICTION IN MATTERS RELATING TO A CONTRACT - CONCEPT OF MATTERS RELATING TO A CONTRACT - OBLIGATIONS TO PAY MONEY HAVING THEIR BASIS IN THE RELATIONSHIP BETWEEN AN ASSOCIATION AND ITS MEMBERS BY VIRTUE OF MEMBERSHIP - INCLUSION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 5 (1))

1 . THE CONCEPT OF MATTERS RELATING TO A CONTRACT IN ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS SHOULD NOT BE INTERPRETED SIMPLY AS REFERRING TO THE NATIONAL LAW OF ONE OR OTHER OF THE MEMBER STATES CONCERNED , BUT SHOULD BE REGARDED AS AN INDEPENDENT CONCEPT WHICH , FOR THE PURPOSES OF THE APPLICATION OF THE CONVENTION , MUST BE INTERPRETED BY REFERENCE CHIEFLY TO THE SYSTEM AND OBJECTIVES OF THE CONVENTION , IN ORDER TO ENSURE THAT IT IS FULLY EFFECTIVE .

2 . OBLIGATIONS IN REGARD TO THE PAYMENT OF A SUM OF MONEY WHICH HAVE THEIR BASIS IN THE RELATIONSHIP EXISTING BETWEEN AN ASSOCIATION AND ITS MEMBERS BY VIRTUE OF MEMBERSHIP ARE ' ' MATTERS RELATING TO A CONTRACT ' ' WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION , WHETHER THE OBLIGATIONS IN QUESTION ARISE SIMPLY FROM THE ACT OF BECOMING A MEMBER OR FROM THAT ACT IN CONJUNCTION WITH ONE OR MORE DECISIONS MADE BY ORGANS OF THE ASSOCIATION.

IN CASE 34/82

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 HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) FOR A PRELIMINARY RULING IN THE APPEAL ON A POINT OF LAW PENDING BEFORE IT BETWEEN

MARTIN PETERS BAUUNTERNEHMUNG GMBH , A LIMITED LIABILITY COMPANY INCORPORATED UNDER GERMAN LAW AND HAVING ITS REGISTERED OFFICE IN AACHEN , FEDERAL REPUBLIC OF GERMANY ,

AND

ZUID NEDERLANDSE AANNEMERS VERENIGING (SOUTH NETHERLANDS CONTRACTORS ' ASSOCIATION), AN ASSOCIATION ENDOWED WITH LEGAL PERSONALITY AND HAVING ITS REGISTERED OFFICE IN MAASTRICHT AND ITS ADMINISTRATIVE OFFICE AT HEEZE , IN THE PROVINCE OF NORTH BRABANT , THE NETHERLANDS ,

ON THE INTERPRETATION OF ARTICLE 5 (1) OF THE CONVENTION ,

1 BY A JUDGMENT DATED 15 JANUARY 1982 WHICH WAS RECEIVED AT THE COURT ON 21 JANUARY 1982 , THE HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) REFERRED TO THE COURT OF JUSTICE 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') TWO QUESTIONS ON THE INTERPRETATION OF ARTICLE 5 (1) OF THE CONVENTION.

2 THOSE QUESTIONS AROSE IN THE COURSE OF A DISPUTE BETWEEN ZUID NEDERLANDSE AANNEMERS VERENIGING (SOUTH NETHERLANDS CONTRACTORS ' ASSOCIATION), HEREINAFTER REFERRED TO AS ' ' THE ASSOCIATION ' ' , AN ASSOCIATION UNDER NETHERLANDS LAW , HAVING ITS REGISTERED OFFICE IN MAASTRICHT AND ITS ADMINISTRATIVE OFFICE AT HEEZE (NORTH BRABANT) AND ONE OF ITS MEMBERS , MARTIN PETERS BAUUNTERNEHMUNG GMBH (HEREINAFTER REFERRED TO AS ' ' PETERS ' '), A COMPANY INCORPORATED UNDER GERMAN LAW HAVING ITS REGISTERED OFFICE IN AACHEN , IN THE FEDERAL REPUBLIC OF GERMANY , CONCERNING THE RECOVERY OF SUMS PAYABLE BY THE LATTER BY VIRTUE OF AN INTERNAL RULE ADOPTED BY THE ORGANS OF THE ASSOCIATION AND BINDING ON ITS MEMBERS.

3 THE ASSOCIATION BROUGHT A CLAIM BEFORE THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT), ' S-HERTOGENBOSCH , WHICH DISMISSED THE OBJECTION OF LACK OF JURISDICTION RAISED BY PETERS. IT RULED THAT IT HAD JURISDICTION ON THE GROUND THAT IN ITS VIEW THE DISPUTE AROSE OUT OF A CONTRACT AND THAT IT THEREFORE HAD JURISDICTION UNDER ARTICLE 5 (1) OF THE CONVENTION , WHICH PROVIDES THAT A PERSON , IN THIS CASE PETERS , DOMICILED IN A CONTRACTING STATE MAY , IN ANOTHER CONTRACTING STATE , BE SUED IN MATTERS RELATING TO A CONTRACT IN THE COURTS FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION .

4 PETERS APPEALED AGAINST THAT DECISION TO THE GERECHTSHOF (REGIONAL COURT OF APPEAL), ' S-HERTOGENBOSCH , WHICH CONFIRMED THE JUDGMENT AT FIRST INSTANCE ON THE GROUND THAT THE OBLIGATION TO PAY THE AMOUNTS CLAIMED BY THE ASSOCIATION FROM PETERS SHOULD BE REGARDED AS A CONTRACTUAL OBLIGATION FOR THE PURPOSES OF ARTICLE 5 (1) OF THE CONVENTION .

5 PETERS BROUGHT AN APPEAL ON A POINT OF LAW AGAINST THAT DECISION BEFORE THE HOGE RAAD DER NEDERLANDEN CHALLENGING THE ANALYSIS MADE BY THE GERECHTSHOF , S ' -HERTOGENBOSCH , IN RELATION TO THE NATURE OF THE RELATIONSHIP BETWEEN IT AND THE ASSOCIATION.

6 THE HOGE RAAD DECIDED , BEFORE GIVING A DECISION , TO REFER TO THE COURT OF JUSTICE THE FOLLOWING TWO QUESTIONS ON THE INTERPRETATION OF THE BRUSSELS CONVENTION :

' ' 1 . DOES ARTICLE 5 (1) OF THE CONVENTION APPLY TO CLAIMS WHICH ARE MADE BY AN ASSOCIATION CONSTITUTED UNDER PRIVATE LAW POSSESSING LEGAL PERSONALITY AGAINST ONE OF ITS MEMBERS IN A MATTER RELATING TO OBLIGATIONS IN REGARD TO THE PAYMENT OF A SUM OF MONEY AND WHICH HAVE THEIR BASIS IN THE RELATIONSHIP BETWEEN THE PARTIES BY VIRTUE OF MEMBERSHIP , SUCH RELATIONSHIP ARISING FROM THE DEFENDANT PARTY ' S JOINING THE ASSOCIATION AS A MEMBER BY VIRTUE

OF A LEGAL TRANSACTION ENTERED INTO FOR THAT PURPOSE?

2.DOES IT MAKE ANY DIFFERENCE WHETHER THE OBLIGATIONS IN QUESTION ARISE SIMPLY FROM THE ACT OF BECOMING A MEMBER , OR FROM THAT ACT IN CONJUNCTION WITH ONE OR MORE DECISIONS MADE BY ORGANS OF THE ASSOCIATION?

' '

1 . FIRST QUESTION

7 ARTICLE 5 OF THE CONVENTION MAKES PROVISION IN A NUMBER OF CASES FOR A SPECIAL JURISDICTION WHICH THE PLAINTIFF MAY CHOOSE , IN DEROGATION FROM THE GENERAL JURISDICTION PROVIDED FOR IN ARTICLE 2 (1) OF THE CONVENTION.

8 ACCORDING TO ARTICLE 5 (1) OF THE 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. ' '

9 THUS THE CONCEPT OF MATTERS RELATING TO A CONTRACT SERVES AS A CRITERION TO DEFINE THE SCOPE OF ONE OF THE RULES OF SPECIAL JURISDICTION AVAILABLE TO THE PLAINTIFF. HAVING REGARD TO THE OBJECTIVES AND THE GENERAL SCHEME OF THE CONVENTION , THAT 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.

10 THEREFORE , AND AS THE COURT RULED ON SIMILAR GROUNDS IN RELATION TO THE WORDS ' ' THE OPERATION OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT ' ' REFERRED TO IN ARTICLE 5 (5) OF THE CONVENTION (JUDGMENT OF 22. 11. 1978 IN CASE 33/78 SOMAFER V SAAR-FERNGAS AG (1978) ECR 2183), THE CONCEPT OF MATTERS RELATING TO A CONTRACT SHOULD BE REGARDED AS AN INDEPENDENT CONCEPT WHICH , FOR THE PURPOSE OF THE APPLICATION OF THE CONVENTION , MUST BE INTERPRETED BY REFERENCE CHIEFLY TO THE SYSTEM AND OBJECTIVES OF THE CONVENTION , IN ORDER TO ENSURE THAT IT IS FULLY EFFECTIVE.

11 IN THIS REGARD IT SHOULD BE POINTED OUT THAT ALTHOUGH ARTICLE 5 MAKES PROVISION IN A NUMBER OF CASES FOR A SPECIAL JURISDICTION WHICH THE PLAINTIFF MAY CHOOSE , THIS IS BECAUSE OF THE EXISTENCE , IN CERTAIN CLEARLY-DEFINED SITUATIONS , OF A PARTICULARLY CLOSE CONNECTING FACTOR BETWEEN A DISPUTE AND THE COURT WHICH MAY BE CALLED UPON TO HEAR IT , WITH A VIEW TO THE EFFICACIOUS CONDUCT OF THE PROCEEDINGS .

12 IN THAT CONTEXT , THE DESIGNATION BY ARTICLE 5 (1) OF THE CONVENTION OF THE COURTS FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION EXPRESSES THE CONCERN THAT , BECAUSE OF THE CLOSE LINKS CREATED BY A CONTRACT BETWEEN THE PARTIES THERETO , IT SHOULD BE POSSIBLE FOR ALL THE DIFFICULTIES WHICH MAY ARISE ON THE OCCASION OF THE PERFORMANCE OF A CONTRACTUAL OBLIGATION TO BE BROUGHT BEFORE THE SAME COURT : THAT FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION .

13 IN THAT REGARD IT APPEARS THAT MEMBERSHIP OF AN ASSOCIATION CREATES BETWEEN THE MEMBERS CLOSE LINKS OF THE SAME KIND AS THOSE WHICH ARE CREATED BETWEEN THE PARTIES TO A CONTRACT AND THAT CONSEQUENTLY THE OBLIGATIONS

TO WHICH THE NATIONAL COURT REFERS MAY BE REGARDED AS CONTRACTUAL FOR THE PURPOSE OF THE APPLICATION OF ARTICLE 5 (1) OF THE CONVENTION.

14 SINCE UNDER NATIONAL LEGAL SYSTEMS IT IS USUALLY STIPULATED THAT THE PLACE IN WHICH THE ASSOCIATION IS ESTABLISHED IS TO BE THE PLACE OF PERFORMANCE OF OBLIGATIONS ARISING OUT OF THE ACT OF BECOMING A MEMBER , THE APPLICATION OF ARTICLE 5 (1) OF THE CONVENTION ALSO HAS PRACTICAL ADVANTAGES : THE COURT FOR THE PLACE IN WHICH THE ASSOCIATION HAS ITS SEAT IS IN FACT USUALLY THE BEST FITTED TO UNDERSTAND THE DOCUMENTS OF CONSTITUTION , RULES AND DECISIONS OF THE ASSOCIATION , AND ALSO THE CIRCUMSTANCES OUT OF WHICH THE DISPUTE AROSE .

15 UNDER THOSE CIRCUMSTANCES THE ANSWER TO THE FIRST QUESTION SHOULD BE THAT THE OBLIGATIONS IN REGARD TO THE PAYMENT OF A SUM OF MONEY WHICH HAVE THEIR BASIS IN THE RELATIONSHIP BETWEEN AN ASSOCIATION AND ITS MEMBERS BY VIRTUE OF MEMBERSHIP MUST BE REGARDED AS ' ' MATTERS RELATING TO A CONTRACT ' ' WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION.

2 . SECOND QUESTION

16 THE NATIONAL COURT ASKS THE COURT OF JUSTICE TO STATE WHETHER , IN ORDER TO DETERMINE WHETHER OR NOT AN OBLIGATION OF A MEMBER TOWARDS AN ASSOCIATION FALLS WITHIN ' ' MATTERS RELATING TO A CONTRACT ' ' , A DISTINCTION SHOULD BE DRAWN ACCORDING TO WHETHER THE OBLIGATION IN QUESTION ARISES SIMPLY FROM THE ACT OF BECOMING A MEMBER OR RESULTS FROM THAT ACT IN CONJUNCTION WITH A DECISION MADE BY AN ORGAN OF THE ASSOCIATION .

17 IT SHOULD BE NOTED THAT MULTIPLICATION OF THE BASES OF JURISDICTION IN ONE AND THE SAME TYPE OF CASE IS NOT LIKELY TO ENCOURAGE LEGAL CERTAINTY AND EFFECTIVE LEGAL PROTECTION THROUGHOUT THE TERRITORY OF THE COMMUNITY. THE PROVISIONS OF THE CONVENTION SHOULD THEREFORE BE INTERPRETED IN SUCH A WAY THAT THE COURT SEISED IS NOT REQUIRED TO DECLARE THAT IT HAS JURISDICTION TO ADJUDICATE UPON CERTAIN APPLICATIONS BUT HAS NO JURISDICTION TO HEAR CERTAIN OTHER APPLICATIONS , EVEN THOUGH THEY ARE CLOSELY RELATED. MOREOVER , RESPECT FOR THE PURPOSES AND SPIRIT OF THE CONVENTION REQUIRES AN INTERPRETATION OF ARTICLE 5 WHICH ENABLES THE NATIONAL COURT TO RULE ON ITS OWN JURISDICTION WITHOUT BEING COMPELLED TO CONSIDER THE SUBSTANCE OF THE CASE.

18 ON THOSE GROUNDS , THE ANSWER SHOULD BE THAT THE FACT THAT THE OBLIGATION IN QUESTION ARISES SIMPLY FROM THE ACT OF BECOMING A MEMBER OR RESULTS FROM THAT ACT IN CONJUNCTION WITH A DECISION OF AN ORGAN OF THE ASSOCIATION HAS NO EFFECT ON THE APPLICATION OF THE PROVISIONS OF ARTICLE 5 (1) OF THE CONVENTION TO A DISPUTE CONCERNING THAT OBLIGATION .

COSTS

19 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , THE ITALIAN GOVERNMENT AND THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION BEFORE THE NATIONAL COURT , COSTS ARE A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS SUBMITTED TO IT BY THE HOGE RAAD DER NEDERLANDEN BY JUDGMENT OF 15 JANUARY 1982 , HEREBY RULES :

1 . OBLIGATIONS IN REGARD TO THE PAYMENT OF A SUM OF MONEY WHICH HAVE THEIR BASIS IN THE RELATIONSHIP EXISTING BETWEEN AN ASSOCIATION AND ITS MEMBERS BY VIRTUE OF MEMBERSHIP ARE ' ' MATTERS RELATING TO A CONTRACT ' ' WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS.

2 . IT MAKES NO DIFFERENCE IN THAT REGARD WHETHER THE OBLIGATIONS IN QUESTION ARISE SIMPLY FROM THE ACT OF BECOMING A MEMBER OR FROM THAT ACT IN CONJUNCTION WITH ONE OR MORE DECISIONS MADE BY ORGANS OF THE ASSOCIATION .

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CONCERNS	Interprets 41968A0927(01)-A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
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NATIONA Netherlands

NATCOUR
A7 Arrondissementsrechtbank 's-Hertogenbosch, vonnis van 02/03/1979 (1389/78)
A8 Gerechtshof 's-Hertogenbosch, arrest van 07/05/1980 (244/79/HE)
A9 Hoge Raad, arrest van 15/01/1982 (11.725)
- Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1983 no 643
- Rechtspraak van de week 1983 no 115
P1 Hoge Raad, 1e kamer, arrest van 10/06/1983 (11.725)
- Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1983 no 645
- Rechtspraak van de week 1983 no 115

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PROCEDU Reference for a preliminary ruling

ADVGEN Mancini

JUDGRAP Galmot

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Judgment of the Court (Second Chamber)
of 15 July 1982
Pendy Plastic Products BV v Pluspunkt Handelsgesellschaft mbH.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Reference for a preliminary ruling - Convention of 27 September 1968.
Case 228/81.

CONVENTION OF JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT OF JUDGMENTS - GROUNDS FOR REFUSAL - DEFENDANT IN DEFAULT OF APPEARANCE NOT DULY SERVED WITH THE DOCUMENT INSTITUTING THE PROCEEDINGS IN SUFFICIENT TIME - REVIEW BY THE COURT IN WHICH ENFORCEMENT IS SOUGHT - SCOPE - JUDGMENT OF THE COURT OF THE ORIGINAL STATE ESTABLISHING THAT SERVICE WAS EFFECTED PROPERLY AND IN SUFFICIENT TIME - NO EFFECT

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS 27 (2) AND 20 , THIRD PARAGRAPH ; HAGUE CONVENTION OF 15 NOVEMBER 1965 , ART. 15)

THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT MAY , IF IT CONSIDERS THAT THE CONDITIONS LAID DOWN BY ARTICLE 27 (2) OF THE CONVENTION OF 27 SEPTEMBER 1968 ARE FULFILLED , REFUSE TO GRANT RECOGNITION AND ENFORCEMENT OF A JUDGMENT EVEN THOUGH THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN REGARDED IT AS PROVEN , IN ACCORDANCE WITH THE THIRD PARAGRAPH OF ARTICLE 20 OF THAT CONVENTION IN CONJUNCTION WITH ARTICLE 15 OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 , THAT THE DEFENDANT , WHO FAILED TO ENTER AN APPEARANCE , HAD AN OPPORTUNITY TO RECEIVE SERVICE OF THE DOCUMENT INSTITUTING THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO MAKE ARRANGEMENTS FOR HIS DEFENCE .

IN CASE 228/81

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 BUNDESGERICHTHOF (FEDERAL COURT OF JUSTICE) OF THE FEDERAL REPUBLIC OF GERMANY FOR A PRELIMINARY RULING IN THE APPEAL ON A POINT OF LAW LODGED WITH THAT COURT BY

PENDY PLASTIC PRODUCTS BV , WHOSE REGISTERED OFFICE IS IN HELMOND (THE NETHERLANDS),

PLAINTIFF IN PROCEEDINGS FOR THE ENFORCEMENT OF A FOREIGN JUDGMENT

AND APPELLANT ON A POINT OF LAW ,

AGAINST A DECISION OF THE OBERLANDESGERICHT (HIGHER COURT) DUSSELDORF REJECTING ITS APPLICATION FOR THE ISSUE OF AN ORDER FOR THE ENFORCEMENT OF A JUDGMENT BY DEFAULT DELIVERED BY THE NETHERLANDS COURT IN ' S-HERTOGENBOSCH AGAINST

PLUSPUNKT HANDELSGESELLSCHAFT MBH , WHOSE REGISTERED OFFICE IS IN NEUSS (FEDERAL REPUBLIC OF GERMANY),

DEFENDANT IN PROCEEDINGS FOR THE ENFORCEMENT OF A FOREIGN JUDGMENT

AND RESPONDENT IN THE APPEAL ON A POINT OF LAW ,

ON THE INTERPRETATION OF ARTICLE 27 (2) OF THE BRUSSELS CONVENTION AND THE PROVISIONS OF THE THIRD PARAGRAPH OF ARTICLE 20 OF THE BRUSSELS CONVENTION

IN CONJUNCTION WITH THOSE OF ARTICLE 15 OF THE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS , SIGNED AT THE HAGUE ON 15 NOVEMBER 1965 (TRACTATENBLAD 1966 , NO 91),

1 BY ORDER OF 8 JULY 1981 , WHICH WAS RECEIVED AT THE COURT REGISTRY ON 6 AUGUST 1981 , THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) 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 BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS A QUESTION ON THE INTERPRETATION OF ARTICLE 27 (2) OF THAT CONVENTION , HAVING REGARD TO THE PROVISIONS OF THE THIRD PARAGRAPH OF ARTICLE 20 THEREOF IN CONJUNCTION WITH THOSE OF ARTICLE 15 OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (TRACTATENBLAD 1966 , NO 91).

2 THAT QUESTION WAS RAISED IN AN APPEAL ON A POINT OF LAW LODGED BY PENDY PLASTIC PRODUCTS (BV) (HEREINAFTER REFERRED TO AS ' ' PENDY ' '), WHOSE REGISTERED OFFICE IS IN HELMOND IN THE NETHERLANDS , AGAINST A DECISION OF THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) DUSSELDORF DISMISSING ITS APPLICATION FOR THE ISSUE OF AN ORDER FOR THE ENFORCEMENT OF A JUDGMENT GIVEN IN DEFAULT BY THE NETHERLANDS COURT IN ' S-HERTOGENBOSCH ON 14 SEPTEMBER 1979 ORDERING PLUSPUNKT HANDELSGESELLSCHAFT MBH (HEREINAFTER REFERRED TO AS ' ' PLUSPUNKT ' '), WHOSE REGISTERED OFFICE IS IN NEUSS IN THE FEDERAL REPUBLIC OF GERMANY , TO PAY PENDY THE SUM OF HFL 29 979.25 , PLUS INTEREST CALCULATED FROM 6 DECEMBER 1978 AND THE COSTS OF THE PROCEEDINGS UNTIL THE DATE OF THAT JUDGMENT , AMOUNTING TO HFL 1 042.15.

3 IT APPEARS THAT THE DOCUMENT INSTITUTING THE PROCEEDINGS WHICH CULMINATED IN THE JUDGMENT BY DEFAULT OF THE NETHERLANDS COURT WAS TRANSMITTED ON 26 MARCH 1979 TO THE NETHERLANDS OFFICIER VAN JUSTITIE FOR THE PURPOSE OF SERVICE. THAT DOCUMENT , TOGETHER WITH THE SUMMONS TO APPEAR AT THE HEARING ON 27 APRIL 1979 , WAS TO BE SERVED ON THE DEFENDANT AT 36 KAARSTER STRASSE , NEUSS. ON 17 MAY 1979 , THE AMTSGERICHT (LOCAL COURT) NEUSS ISSUED A CERTIFICATE , IN ACCORDANCE WITH ARTICLE 6 (2) OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 , RATIFIED BY THE KINGDOM OF THE NETHERLANDS AND BY THE FEDERAL REPUBLIC OF GERMANY , INDICATING THAT IT HAD NOT BEEN POSSIBLE TO SERVE THE DOCUMENTS IN QUESTION.

4 THE DEFENDANT , PLUSPUNKT , FAILED TO ENTER AN APPEARANCE AND THE COURT IN ' S-HERTOGENBOSCH ENJOINED THE PLAINTIFF , PENDY , BY AN INTERLOCUTORY JUDGMENT DATED 8 JUNE 1979 , TO PROVE THAT THE DEFENDANT HAD BEEN ABLE TO RECEIVE THE SUMMONS IN SUFFICIENT TIME OR THAT ALL NECESSARY STEPS HAD BEEN TAKEN IN THAT RESPECT TO ENABLE IT TO MAKE ARRANGEMENTS FOR ITS DEFENCE. AT THE HEARING ON 20 JULY 1979 , THE PLAINTIFF LODGED AN EXTRACT FROM THE COMMERCIAL REGISTER AND A COMMUNICATION FROM THE AMTSGERICHT NEUSS TO THE EFFECT THAT THE FILES IN ITS POSSESSION SHOWED THE DEFENDANT ' S ADDRESS AS 36 KAARSTER STRASSE .

5 ON THE BASIS OF THAT INFORMATION , THE COURT IN ' S-HERTOGENBOSCH CONSIDERED THAT TRANSMISSION OF THE DOCUMENT INSTITUTING THE PROCEEDINGS TO THE

OFFICIER VAN JUSTITIE , AS EVIDENCED BY THE DOCUMENT ISSUED ON 26 MARCH 1979 , WAS SUFFICIENT AND DELIVERED A JUDGMENT IN DEFAULT ON 14 SEPTEMBER 1979 , IN RESPECT OF WHICH PENDY APPLIED TO THE GERMAN COURTS FOR THE ISSUE OF AN ENFORCEMENT ORDER.

6 IN ITS ORDER OF 8 JULY 1981 THE BUNDESGERICHTSHOF RESTATED THE FINDINGS OF THE OBERLANDESGERICHT DUSSELDORF. ACCORDING TO THE LATTER COURT , THE MEASURES TAKEN BY THE PLAINTIFF TO DISCOVER THE DEFENDANT ' S BUSINESS ADDRESS AND TO GIVE PROOF THEREOF TO THE NETHERLANDS COURT WERE INAPPROPRIATE , IN VIEW OF THE FACT THAT THE COMMERCIAL REGISTER MERELY MENTIONS THE TOWN WHERE A COMPANY HAS ITS REGISTERED OFFICE , IN THIS INSTANCE NEUSS , A FACTOR WHICH HAD NOT CHANGED IN THE CASE OF THE DEFENDANT. THEREFORE , THE PROCEDURAL PRINCIPLE OF THE RIGHT TO A PROPER HEARING WAS HELD TO HAVE BEEN CONTRAVENED WITH REGARD TO THE DEFENDANT. IN THE OPINION OF THE OBERLANDESGERICHT , THE FACT THAT THE NETHERLANDS COURT CONSIDERED SERVICE TO HAVE BEEN PROPERLY EFFECTED WAS NOT SUFFICIENT TO JUSTIFY THE ISSUE OF AN ENFORCEMENT ORDER UNDER THE BRUSSELS CONVENTION.

7 THOSE ARE THE CIRCUMSTANCES IN WHICH THE BUNDESGERICHTSHOF DECIDED TO STAY THE PROCEEDINGS AND TO REQUEST THE COURT OF JUSTICE TO GIVE A PRELIMINARY RULING ON THE FOLLOWING QUESTION :

' ' MAY RECOGNITION OF A JUDGMENT BE REFUSED IN ACCORDANCE WITH ARTICLE 27 (2) OF THE BRUSSELS CONVENTION WHERE THE DEFENDANT DID NOT ENTER AN APPEARANCE IN THE PROCEEDINGS IN THE ADJUDICATING STATE AND HE WAS NOT DULY SERVED WITH THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE , EVEN WHERE THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN ESTABLISHED , IN ACCORDANCE WITH THE THIRD PARAGRAPH OF ARTICLE 20 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 15 OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS , THAT THE DEFENDANT HAD AN OPPORTUNITY TO RECEIVE THE WRIT IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE?

' '

8 IT MUST BE OBSERVED IN LIMINE THAT , ACCORDING TO THE GROUNDS OF THE ORDER MAKING THE REFERENCE , THE DISPUTE WHICH THE BUNDESGERICHTSHOF SEEKS TO RESOLVE BY WAY OF A REFERENCE FOR A PRELIMINARY RULING RELATES NOT ONLY TO THE RECOGNITION BUT ALSO TO THE ENFORCEMENT IN THE FEDERAL REPUBLIC OF GERMANY OF A JUDGMENT GIVEN BY A NETHERLANDS COURT. IN THE PRESENT CASE , HOWEVER , THAT NECESSARY FINDING IS OF VERY LIMITED SCOPE. THE RECOGNITION AND ENFORCEMENT OF JUDICIAL DECISIONS ARE BOTH GOVERNED BY TITLE III OF THE BRUSSELS CONVENTION. ARTICLE 34 , WHICH IS CONCERNED WITH ENFORCEMENT , PROVIDES THAT AN APPLICATION FOR THE ISSUE OF AN ENFORCEMENT ORDER MAY BE REFUSED ONLY FOR ONE OF THE REASONS SPECIFIED IN ARTICLES 27 AND 28 , WHICH ARE CONCERNED WITH THE RECOGNITION OF JUDICIAL DECISIONS.

9 THUS THE QUESTION RAISED BY THE BUNDESGERICHTSHOF SEEKS IN SUBSTANCE TO ASCERTAIN WHETHER , UNDER THE BRUSSELS CONVENTION , THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT MAY RELY ON ARTICLE 27 (2) OF THE CONVENTION IN ORDER TO JUSTIFY A REFUSAL TO RECOGNIZE OR ENFORCE A JUDGMENT

GIVEN BY THE COURT OF ANOTHER STATE WHICH HAS ACCEDED TO THE CONVENTION , OR WHETHER IT IS BOUND BY THE CONCLUSIONS WHICH THE ADJUDICATING COURT DREW FROM THE APPLICATION OF THE THIRD PARAGRAPH OF ARTICLE 20 OF THE BRUSSELS CONVENTION AND ARTICLE 15 OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965.

10 ARTICLE 27 (2) OF THE BRUSSELS CONVENTION PROVIDES THAT A JUDGMENT GIVEN BY A COURT OF ANOTHER CONTRACTING STATE ' ' SHALL NOT BE RECOGNIZED... WHERE IT WAS GIVEN IN DEFAULT OF APPEARANCE , IF THE DEFENDANT WAS NOT DULY SERVED WITH THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE ' ' . FURTHERMORE , ARTICLE 46 (2) OF THE SAME CONVENTION REQUIRES A PARTY SEEKING RECOGNITION OR APPLYING FOR ENFORCEMENT , IN ONE MEMBER STATE , OF A JUDGMENT GIVEN IN DEFAULT IN ANOTHER MEMBER STATE TO PRODUCE THE ORIGINAL OR A CERTIFIED TRUE COPY OF THE DOCUMENT WHICH ESTABLISHES THAT THE PARTY IN DEFAULT WAS SERVED WITH THE DOCUMENT INSTITUTING THE PROCEEDINGS.

11 THE SECOND PARAGRAPH OF ARTICLE 20 OF THE BRUSSELS CONVENTION PROVIDES THAT , WHERE A DEFENDANT DOMICILED IN ONE CONTRACTING STATE IS SUED IN A COURT OF ANOTHER CONTRACTING STATE AND DOES NOT ENTER AN APPEARANCE , THE COURT MUST STAY THE PROCEEDINGS SO LONG AS IT IS NOT SHOWN THAT THE DEFENDANT HAS BEEN ABLE TO RECEIVE THE DOCUMENT INSTITUTING THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE , OR THAT ALL NECESSARY STEPS HAVE BEEN TAKEN TO THAT END . THE THIRD PARAGRAPH OF ARTICLE 20 PROVIDES THAT THE AFOREGOING PROVISIONS ARE TO BE REPLACED BY THOSE OF ARTICLE 15 OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 IF THE DOCUMENT INSTITUTING THE PROCEEDINGS OR NOTICE THEREOF HAD TO BE TRANSMITTED ABROAD IN ACCORDANCE WITH THAT CONVENTION.

12 AS THE BUNDESGERICHTSHOF HAS ESTABLISHED , THAT WAS PRECISELY THE CASE IN THIS INSTANCE , SINCE BOTH THE KINGDOM OF THE NETHERLANDS AND THE FEDERAL REPUBLIC OF GERMANY ARE PARTIES TO THE HAGUE CONVENTION. ARTICLE 15 OF THAT CONVENTION SPECIFIES , IN THE SAME WAY AS THE SECOND PARAGRAPH OF ARTICLE 20 OF THE BRUSSELS CONVENTION BUT IN ACCORDANCE WITH RULES WHICH ARE FAR MORE DETAILED AND MORE PRECISE , THE CIRCUMSTANCES IN WHICH A DOCUMENT INSTITUTING PROCEEDINGS MAY BE REGARDED AS HAVING BEEN SERVED ON A DEFENDANT WHO IS DOMICILED ABROAD AND HAS FAILED TO ENTER AN APPEARANCE.

13 ALTHOUGH THEY DO NOT SEEK TO HARMONIZE THE DIFFERENT SYSTEMS OF SERVICE ABROAD OF LEGAL DOCUMENTS WHICH ARE IN FORCE IN THE MEMBER STATES , THE PROVISIONS OF THE BRUSSELS CONVENTION ARE DESIGNED TO ENSURE THAT THE DEFENDANT ' S RIGHTS ARE EFFECTIVELY PROTECTED. FOR THAT REASON , JURISDICTION TO DETERMINE WHETHER THE DOCUMENT INTRODUCING THE PROCEEDINGS WAS PROPERLY SERVED WAS CONFERRED BOTH ON THE COURT OF THE ORIGINAL STATE AND ON THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT. THUS , IN ACCORDANCE WITH THE OBJECTIVE OF ARTICLE 27 OF THE CONVENTION , THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT MUST EXAMINE THE QUESTION POSED BY PARAGRAPH (2) OF THAT ARTICLE , NOTWITHSTANDING THE DECISION GIVEN BY THE COURT OF THE ORIGINAL STATE ON THE BASIS OF THE SECOND AND THIRD PARAGRAPHS OF ARTICLE 20 . THAT EXAMINATION IS SUBJECT ONLY TO THE LIMITATION SET BY THE THIRD PARAGRAPH OF ARTICLE 34 OF THE CONVENTION TO THE EFFECT THAT THE FOREIGN JUDGMENT MAY UNDER NO CIRCUMSTANCES BE REVIEWED AS TO ITS SUBSTANCE .

14 ACCORDINGLY , THE ANSWER TO THE QUESTION SUBMITTED BY THE BUNDESGERICHTSHOF MUST BE THAT THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT MAY , IF IT CONSIDERS THAT THE CONDITIONS LAID DOWN BY ARTICLE 27 (2) OF THE BRUSSELS CONVENTION ARE FULFILLED , REFUSE TO GRANT RECOGNITION AND ENFORCEMENT OF A JUDGMENT EVEN THOUGH THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN REGARDED IT AS PROVEN , IN ACCORDANCE WITH THE THIRD PARAGRAPH OF ARTICLE 20 OF THAT CONVENTION IN CONJUNCTION WITH ARTICLE 15 OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 , THAT THE DEFENDANT , WHO FAILED TO ENTER AN APPEARANCE , HAD AN OPPORTUNITY TO RECEIVE SERVICE OF THE DOCUMENT INSTITUTING THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO MAKE ARRANGEMENTS FOR HIS DEFENCE.

COSTS

15 THE COSTS INCURRED BY THE GOVERNMENTS OF THE FEDERAL REPUBLIC OF GERMANY , THE ITALIAN REPUBLIC AND THE UNITED KINGDOM , AND BY THE COMMISSION , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF 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 (SECOND CHAMBER),

IN ANSWER TO THE QUESTION SUBMITTED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 8 JULY 1981 , HEREBY RULES :

THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT MAY , IF IT CONSIDERS THAT THE CONDITIONS LAID DOWN BY ARTICLE 27 (2) OF THE BRUSSELS CONVENTION ARE FULFILLED , REFUSE TO GRANT RECOGNITION AND ENFORCEMENT OF A JUDGMENT , EVEN THOUGH THE COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN REGARDED IT AS PROVEN , IN ACCORDANCE WITH THE THIRD PARAGRAPH OF ARTICLE 20 OF THAT CONVENTION IN CONJUNCTION WITH ARTICLE 15 OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 , THAT THE DEFENDANT , WHO FAILED TO ENTER AN APPEARANCE , HAD AN OPPORTUNITY TO RECEIVE SERVICE OF THE DOCUMENT INSTITUTING THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO MAKE ARRANGEMENTS FOR HIS DEFENCE .

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CONCERNS
Interprets 41968A0927(01)-A20L3
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SUB Brussels Convention of 27 September 1968 ; Enforcement of judgments

AUTLANG German

OBSERV Federal Republic of Germany ; Italy ; United Kingdom ; Commission ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR
A5 Arrondissementsrechtbank 's-Hertogenbosch, vonnis van 08/06/1979 (1049/79)
A6 Arrondissementsrechtbank 's-Hertogenbosch, vonnis van 14/09/1979 (1049/79)
A7 Landgericht Düsseldorf, Beschluß vom 24/07/1980 (13 O 287/80)
A8 Oberlandesgericht Düsseldorf, Beschluß vom 06/01/1981 (19 W 13/80)
A9 Bundesgerichtshof, Vorlagebeschluß vom 08/07/1981 (VIII ZB 22/81)
- Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1981 p.847-848
I1 Hoge Raad, 1e kamer, arrest van 01/07/1982 (11.968)
- Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1983 no 781
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PROCEDU Reference for a preliminary ruling

ADVGEN Reischl

JUDGRAP Grévisse

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**Judgment of the Court
of 26 May 1982
Roger Ivenel v Helmut Schwab. Reference for a preliminary ruling: Cour de cassation - France.
Brussels Convention - Place of performance of the obligations. Case 133/81.**

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPECIAL JURISDICTION - COURT FOR THE PLACE OF PERFORMANCE OF A CONTRACTUAL OBLIGATION - CLAIMS BASED ON DIFFERENT OBLIGATIONS RESULTING FROM A CONTRACT OF EMPLOYMENT - OBLIGATION TO BE TAKEN INTO ACCOUNT FOR THE PURPOSE OF JURISDICTION - OBLIGATION CHARACTERIZING THE CONTRACT IN QUESTION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 5 (1))

THE OBLIGATION TO BE TAKEN INTO ACCOUNT FOR THE PURPOSES OF THE APPLICATION OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 IN THE CASE OF CLAIMS BASED ON DIFFERENT OBLIGATIONS ARISING UNDER A CONTRACT OF EMPLOYMENT AS A REPRESENTATIVE BINDING A WORKER TO AN UNDERTAKING IS THE OBLIGATION WHICH CHARACTERIZES THE CONTRACT.

IN CASE 133/81

REFERENCE TO THE COURT BY THE FRENCH COUR DE CASSATION 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 FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

ROGER IVENEL , STRASBOURG (FRANCE),

AND

HELMUT SCHWAB , OETTINGEN (FEDERAL REPUBLIC OF GERMANY),

ON THE INTERPRETATION OF ARTICLE 5 (1) OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY JUDGMENT OF 2 APRIL 1981 , RECEIVED AT THE COURT ON 3 JUNE 1981 , THE FRENCH COUR DE CASSATION REFERRED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING PURSUANT TO THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION OF 27 SEPTEMBER 1978 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , A QUESTION ON THE INTERPRETATION OF ARTICLE 5 (1) OF THE CONVENTION.

2 THAT QUESTION WAS RAISED IN PROCEEDINGS BETWEEN MR IVENEL , WHO RESIDES IN STRASBOURG , AND THE UNDERTAKING SCHWAB MASCHINENBAU , WHOSE PLACE OF ESTABLISHMENT IS AT OETTINGEN IN BAVARIA , RELATING TO AN ALLEGED BREACH OF A CONTRACT FOR REPRESENTATION WHICH GAVE RISE TO A CLAIM FOR PAYMENT OF COMMISSION , COMPENSATION FOR GOODWILL , IN LIEU OF NOTICE AND IN RESPECT OF PAID HOLIDAYS.

3 THE CONSEIL DE PRUD ' HOMMES , STRASBOURG , BEFORE WHICH THE CLAIM WAS BROUGHT , DISMISSED THE TWO OBJECTIONS FOUNDED ON LACK OF JURISDICTION WHICH WERE RAISED BY MR SCHWAB. IT BASED ITS JURISDICTION RATIONE MATERIAE ON THE FACT THAT IN ITS OPINION THE CONTRACT BETWEEN THE PARTIES WAS TO

BE CONSIDERED AS A CONTRACT OF EMPLOYMENT . AS REGARDS ITS JURISDICTION RATIONE LOCI IT CONSIDERED THAT , ACCORDING TO ARTICLE 5 (1) OF THE CONVENTION , IN MATTERS OF CONTRACT AN ACTION MIGHT BE BROUGHT AGAINST A DEFENDANT ORDINARILY RESIDENT IN THE TERRITORY OF ANOTHER MEMBER STATE BEFORE THE COURT FOR THE PLACE WHERE THE OBLIGATION WAS , OR WAS TO BE , PERFORMED AND THAT IN THE CASE IN POINT THE OBLIGATION TO BE TAKEN INTO ACCOUNT WAS THAT OF THE WORK CARRIED OUT BY THE REPRESENTATIVE WHO HAD HIS OFFICE IN STRASBOURG WHERE HE COLLATED ORDERS AND ATTENDED TO THEIR EXECUTION.

4 WHEN AN APPEAL BY SCHWAB WAS BROUGHT BEFORE THE COUR D ' APPEL , COLMAR , THAT COURT , WHILST CONFIRMING THE JUDGMENT OF THE CONSEIL DE PRUD ' HOMMES IN SO FAR AS IT FOUND THAT THERE WAS A CONTRACT OF EMPLOYMENT , SET ASIDE THAT JUDGMENT FOR LACK OF JURISDICTION RATIONE LOCI . THE COUR D ' APPEL CONSIDERED THAT THE OBLIGATION TO BE TAKEN INTO ACCOUNT FOR THE PURPOSE OF APPLYING ARTICLE 5 (1) OF THE CONVENTION WAS THAT WHICH CONSTITUTED THE BASIS OF THE COURT ACTION. IN THE CASE IN POINT THAT OBLIGATION WAS THE PAYMENT OF THE COMMISSION AND OTHER AMOUNTS CLAIMED FROM SCHWAB , WHICH WERE PAYABLE AT THE ADDRESS OF THE DEBTOR AND NOT THE CREDITOR.

5 MR IVENEL APPEALED IN CASSATION AGAINST THAT JUDGMENT AND MAINTAINED THAT THE COUR D ' APPEL HAD INFRINGED ARTICLE 5 (1) OF THE CONVENTION .

6 THE COUR DE CASSATION TOOK COGNIZANCE OF THE GROUNDS RELIED ON BY THE COUR D ' APPEL IN DECIDING THAT THE FRENCH COURTS HAD NO JURISDICTION IN THE CASE BUT NEVERTHELESS CONSIDERED THAT SINCE THE ACTION RELATED TO THE PERFORMANCE OF A CONTRACT FOR REPRESENTATION INVOLVING MUTUAL OBLIGATIONS SOME OF WHICH AT LEAST WERE PERFORMED IN FRANCE THE QUESTION WHICH WAS THE PLACE OF PERFORMANCE OF THE OBLIGATION WITHIN THE MEANING OF ARTICLE 5 (1) RAISED AN ISSUE OF INTERPRETATION. IT THEREFORE STAYED THE PROCEEDINGS AND ASKED THE COURT FOR A RULING ON THE INTERPRETATION TO BE GIVEN TO THAT PROVISION

7 IT MUST BE OBSERVED THAT , AS THE COURT OF JUSTICE HAS ALREADY STATED , IN PARTICULAR IN ITS JUDGMENT OF 6 OCTOBER 1976 IN CASE 12/76 TESSILI (1976) ECR 1473 , THE ' ' PLACE OF PERFORMANCE ' ' WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION IS TO BE DETERMINED IN ACCORDANCE WITH THE LAW WHICH GOVERNS THE OBLIGATION IN QUESTION ACCORDING TO THE CONFLICT RULES OF THE COURT BEFORE WHICH THE MATTER IS BROUGHT .

8 THE QUESTION RAISED BY THE NATIONAL COURT CONCERNS THE OBLIGATION TO BE TAKEN INTO ACCOUNT FOR THE PURPOSES OF THAT DEFINITION WHEN THE CLAIM BEFORE THE COURT IS BASED ON DIFFERENT OBLIGATIONS UNDER A SINGLE CONTRACT FOR REPRESENTATION WHICH HAS BEEN CLASSIFIED BY THE COURTS CONCERNED WITH THE SUBSTANCE OF THE CASE AS A CONTRACT OF EMPLOYMENT .

9 IN ITS JUDGMENT OF 6 OCTOBER 1976 IN CASE 14/76 DE BLOOS (1976) ECR 1497 THE COURT HAS ALREADY STATED THAT THE OBLIGATION TO BE TAKEN INTO ACCOUNT FOR THE PURPOSES OF ARTICLE 5 (1) OF THE CONVENTION IN THE CASE OF A CLAIM BASED ON A CONTRACT GRANTING AN EXCLUSIVE SALES CONCESSION BETWEEN TWO COMMERCIAL UNDERTAKINGS IS THAT WHICH FORMS THE BASIS OF THE LEGAL PROCEEDINGS. THE PROBLEM RAISED BY THIS CASE IS WHETHER THE SAME CRITERION MUST BE APPLIED TO CASES OF THE KIND DESCRIBED BY THE NATIONAL COURT.

10 IT IS APPROPRIATE TO EXAMINE THAT PROBLEM IN THE LIGHT OF THE OBJECTIVES OF THE CONVENTION AND THE GENERAL SCHEME OF ITS PROVISIONS

11 ADOPTION OF THE SPECIAL RULES OF JURISDICTION AS CONTAINED IN ARTICLES 5 AND 6 OF THE CONVENTION IS JUSTIFIED INTER ALIA BY THE FACT THAT THERE MUST BE A CLOSE CONNECTING FACTOR BETWEEN THE DISPUTE AND THE COURT WITH JURISDICTION TO RESOLVE IT. THE REPORT DRAWN UP BY THE COMMITTEE OF EXPERTS (OFFICIAL JOURNAL 1979 , C 59 , P. 1) WHICH DRAFTED THE TEXT OF THE CONVENTION STRESSES THAT CONNECTION BY STATING INTER ALIA THAT THE COURT FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION WILL BE USEFUL IN PROCEEDINGS FOR THE RECOVERY OF FEES SINCE THE CREDITOR WILL HAVE A CHOICE BETWEEN THE COURTS OF THE STATE WHERE THE DEFENDANT IS ORDINARILY RESIDENT BY VIRTUE OF THE GENERAL PROVISIONS CONTAINED IN ARTICLE 2 OF THE CONVENTION AND THE COURTS OF ANOTHER STATE WITHIN WHOSE JURISDICTION THE SERVICES WERE PROVIDED , PARTICULARLY WHERE , ACCORDING TO THE APPROPRIATE LAW , THE OBLIGATION TO PAY MUST BE PERFORMED WHERE THE SERVICES WERE PROVIDED.

12 THE ABOVE-MENTIONED REPORT ALSO REFERS TO THE REASONS WHY THOSE DRAFTING THE CONVENTION DID NOT CONSIDER IT APPROPRIATE TO INSERT INTO THE CONVENTION A PROVISION GIVING EXCLUSIVE JURISDICTION IN CONTRACTS OF EMPLOYMENT. ACCORDING TO THE REPORT IT IS DESIRABLE AS FAR AS POSSIBLE FOR DISPUTES TO BE BROUGHT BEFORE THE COURTS OF THE STATE WHOSE LAW GOVERNS THE CONTRACT WHEREAS AT THE TIME THE CONVENTION WAS BEING DRAFTED WORK WAS IN PROGRESS TO HARMONIZE THE APPLICATION OF THE RULES OF EMPLOYMENT LAW IN THE MEMBER STATES OF THE COMMUNITY. THE REPORT CONCLUDES THAT AT PRESENT THE EXISTING PROVISIONS OF THE CONVENTION , SUCH AS ARTICLE 2 STIPULATING THE FORUM FOR THE PLACE WHERE THE DEFENDANT IS ORDINARILY RESIDENT AND ARTICLE 5 (1) THE FORUM FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION , ARE LIKELY TO SATISFY THE RELEVANT INTERESTS.

13 IT SHOULD BE NOTED THAT ON 19 JUNE 1980 A CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS WAS OPENED FOR SIGNATURE BY THE MEMBER STATES (OFFICIAL JOURNAL 1980 , L 266 , P. 1). ARTICLE 6 THEREOF PROVIDES THAT A CONTRACT OF EMPLOYMENT IS TO BE GOVERNED , IN THE ABSENCE OF CHOICE OF THE APPLICABLE LAW , BY THE LAW OF THE COUNTRY IN WHICH THE EMPLOYEE HABITUALLY CARRIES OUT HIS WORK IN PERFORMANCE OF THE CONTRACT UNLESS IT APPEARS FROM THE CIRCUMSTANCES AS A WHOLE THAT THE CONTRACT IS MORE CLOSELY CONNECTED WITH ANOTHER COUNTRY .

14 THE EXPERTS ' REPORT ON THE CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (OFFICIAL JOURNAL 1980 , C 282 , P. 1) EXPLAINS IN THAT RESPECT THAT THE ADOPTING OF A SPECIAL CONFLICT RULE IN RELATION TO CONTRACTS OF EMPLOYMENT WAS INTENDED TO PROVIDE AN APPROPRIATE ARRANGEMENT FOR MATTERS IN WHICH THE INTERESTS OF ONE OF THE CONTRACTING PARTIES WERE NOT THE SAME AS THOSE OF THE OTHER AND TO SECURE THEREBY ADEQUATE PROTECTION FOR THE PARTY WHO FROM THE SOCIO-ECONOMIC POINT OF VIEW WAS TO BE REGARDED AS THE WEAKER IN THE CONTRACTUAL RELATIONSHIP.

15 IT FOLLOWS FROM THE FOREGOING ACCOUNT THAT IN THE MATTER OF CONTRACTS ARTICLE 5 (1) OF THE CONVENTION IS PARTICULARLY CONCERNED TO ATTRIBUTE JURISDICTION TO THE COURT OF THE COUNTRY WHICH HAS A CLOSE CONNECTION WITH THE CASE ; THAT IN THE CASE OF A CONTRACT OF EMPLOYMENT THE CONNECTION

LIES PARTICULARLY IN THE LAW APPLICABLE TO THE CONTRACT ; AND THAT ACCORDING TO THE TREND IN THE CONFLICT RULES IN REGARD TO THIS MATTER THAT LAW IS DETERMINED BY THE OBLIGATION CHARACTERIZING THE CONTRACT IN QUESTION AND IS NORMALLY THE OBLIGATION TO CARRY OUT WORK.

16 IT EMERGES FROM AN EXAMINATION OF THE PROVISIONS OF THE CONVENTION THAT IN ESTABLISHING SPECIAL OR EVEN EXCLUSIVE JURISDICTION FOR INSURANCE , INSTALMENT SALES AND TENANCIES OF IMMOVABLE PROPERTY THOSE PROVISIONS RECOGNIZE THAT THE RULES ON JURISDICTION , TOO , ARE INSPIRED BY CONCERN TO AFFORD PROPER PROTECTION TO THE PARTY TO THE CONTRACT WHO IS THE WEAKER FROM THE SOCIAL POINT OF VIEW.

17 THOSE FACTORS MUST BE TAKEN INTO ACCOUNT IN ANSWERING THE QUESTION WHICH HAS BEEN PUT TO THE COURT.

18 IN A CASE SUCH AS THE ONE IN POINT , WHERE THE NATIONAL COURT HAS BEFORE IT CLAIMS RELATING TO OBLIGATIONS UNDER A CONTRACT FOR REPRESENTATION , SOME OF WHICH CONCERN REMUNERATION DUE TO THE EMPLOYEE FROM AN UNDERTAKING ESTABLISHED IN ONE STATE AND OTHERS CONCERN COMPENSATION BASED ON THE MANNER IN WHICH THE WORK HAS BEEN DONE IN ANOTHER STATE , IT IS NECESSARY TO INTERPRET THE PROVISIONS OF THE CONVENTION IN SUCH A WAY THAT THE NATIONAL COURT IS NOT COMPELLED TO FIND THAT IT HAS JURISDICTION TO ADJUDICATE UPON CERTAIN CLAIMS BUT NOT ON OTHERS.

19 SUCH A RESULT WOULD BE EVEN LESS COMPATIBLE WITH THE OBJECTIVES AND GENERAL STRUCTURE OF THE CONVENTION IN THE CASE OF A CONTRACT OF EMPLOYMENT FOR WHICH , AS A GENERAL RULE , THE LAW APPLICABLE CONTAINS PROVISIONS PROTECTING THE WORKER AND IS NORMALLY THAT OF THE PLACE WHERE THE WORK CHARACTERIZING THE CONTRACT IS CARRIED OUT.

20 IT FOLLOWS FROM THE FOREGOING CONSIDERATIONS , TAKEN AS A WHOLE , THAT THE OBLIGATION TO BE TAKEN INTO ACCOUNT FOR THE PURPOSES OF THE APPLICATION OF ARTICLE 5 (1) OF THE CONVENTION IN THE CASE OF CLAIMS BASED ON DIFFERENT OBLIGATIONS ARISING UNDER A CONTRACT OF EMPLOYMENT AS A REPRESENTATIVE BINDING A WORKER TO AN UNDERTAKING IS THE OBLIGATION WHICH CHARACTERIZES THE CONTRACT.

COSTS

21 THE COSTS INCURRED BY THE COMISSION , WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. SINCE THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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

IN ANSWER TO THE QUESTION SUBMITTED TO IT BY THE FRENCH COUR DE CASSATION BY JUDGMENT OF 2 APRIL 1981 , HEREBY RULES :

THE OBLIGATION TO BE TAKEN INTO ACCOUNT FOR THE PURPOSES OF THE APPLICATION OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IN THE CASE

OF CLAIMS BASED ON DIFFERENT OBLIGATIONS ARISING UNDER CONTRACT OF EMPLOYMENT AS A REPRESENTATIVE BINDING A WORKER TO AN UNDERTAKING IS THE OBLIGATION WHICH CHARACTERIZES THE CONTRACT.

DOCNUM	61981J0133
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1982 Page 01891 Spanish special edition Page 00581 Swedish special edition Page 00441 Finnish special edition Page 00463
DOC	1982/05/26
LODGED	1981/06/03
JURCIT	41968A0927(01)-A05PT1 : N 1 3 - 7 9 12 15 20 41968A0927(01)-A02 : N 11 12 61976J0012 : N 7 61976J0014 : N 9 41980A0934-A06 : N 13
CONCERNS	Interprets 41968A0927(01) -A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Commission ; Institutions
NATIONA	France
NATCOUR	*A7* Conseil de prud'hommes commerciaux de Strasbourg, décision du 19/06/1978 (CPC 13/77) ; *A8* Cour d'appel de Colmar, Chambre sociale, arrêt du 10/10/1978 (UP 80/78) ; *A9* Cour de cassation (France), Chambre sociale, arrêt du 02/04/1981 (79-40.045 820) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1981 V no 312 ; - Gazette du Palais 1981 II Panor. p.320 (résumé) ; - La Semaine juridique - édition générale 1981 IV p.220 (résumé) ; - Revue critique de droit international privé 1982 p.769-770 (résumé) ; - Cahiers de droit européen 1985 p.463-464 ; - Holleaux, Dominique: Journal du droit international 1981 p.849-851 ; *P1* Cour de

cassation (France), Chambre sociale, arrêt du 23/06/1982 (79-40.045 1268) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1982 V no 410 ; *P2* Cour d'appel de Metz, arrêt du 22/02/1984 (302/83)

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PROCEDU Reference for a preliminary ruling

ADVGEN Reischl

JUDGRAP Koopmans

DATES of document: 26/05/1982
of application: 03/06/1981

Judgment of the Court (First Chamber)
of 4 March 1982
Effer SpA v Hans-Joachim Kantner.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention.
Case 38/81.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - JURISDICTION IN MATTERS RELATING TO A CONTRACT - SCOPE - DISPUTE BETWEEN THE PARTIES AS TO THE EXISTENCE OF THE CONTRACT - JURISDICTION EXTENDS TO THAT QUESTION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 5 (1))

IN THE CASES PROVIDED FOR IN ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 , THE NATIONAL COURT ' S JURISDICTION TO DETERMINE QUESTIONS RELATING TO A CONTRACT INCLUDES THE POWER TO CONSIDER THE EXISTENCE OF THE CONSTITUENT PARTS OF THE CONTRACT ITSELF , SINCE THAT IS INDISPENSABLE IN ORDER TO ENABLE THE NATIONAL COURT IN WHICH PROCEEDINGS ARE BROUGHT TO EXAMINE WHETHER IT HAS JURISDICTION UNDER THE CONVENTION. THEREFORE THE PLAINTIFF MAY INVOKE THE JURISDICTION OF THE COURTS OF THE PLACE OF PERFORMANCE IN ACCORDANCE WITH ARTICLE 5 (1) OF THE CONVENTION , EVEN WHEN THE EXISTENCE OF THE CONTRACT ON WHICH THE CLAIM IS BASED IS IN DISPUTE BETWEEN THE PARTIES.

IN CASE 38/81

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 BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

EFFER SPA , CASTEL MAGGIORE (BOLOGNA), ITALY ,

AND

HANS-JOACHIM KANTNER , LANGEN , FEDERAL REPUBLIC OF GERMANY ,

ON THE INTERPRETATION OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (OFFICIAL JOURNAL 1978 , L 304 , P. 36),

1 BY AN ORDER DATED 29 JANUARY 1981 WHICH WAS RECEIVED AT THE COURT REGISTRY ON 19 FEBRUARY 1981 , THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) 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 , PURSUANT TO WHICH :

' ' A PERSON DOMICILED IN A CONTRACTING STATE MAY , IN ANOTHER CONTRACTING STATE , BE SUED :

(1) IN MATTERS RELATING TO A CONTRACT , IN THE COURTS OF THE PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION ;

. . . ' ' .

2 THE QUESTION WAS RAISED IN THE CONTEXT OF A DISPUTE BETWEEN EFFER SPA OF CASTEL MAGGIORE (BOLOGNA , ITALY) AND MR KANTNER , A PATENT AGENT PRACTISING IN DARMSTADT (FEDERAL REPUBLIC OF GERMANY).

3 EFFER SPA , THE APPELLANT ON A POINT OF LAW IN THE MAIN PROCEEDINGS , IS AN UNDERTAKING WHICH MANUFACTURES CRANES. THEY WERE DISTRIBUTED IN THE FEDERAL REPUBLIC OF GERMANY THROUGH THE HYDRAULIKKRAN UNDERTAKING (HEREINAFTER REFERRED TO AS ' ' HYKRA ' '). EFFER DEVELOPED A NEW MACHINE AND IT WAS NECESSARY TO ESTABLISH WHETHER THE SALE OF THAT MACHINE WAS CONTRARY TO EXISTING PATENT RIGHTS . AFTER A DISCUSSION WITH EFFER , HYKRA COMMISSIONED MR KANTNER , PATENT AGENT , IN DECEMBER 1971 TO CARRY OUT INVESTIGATIONS IN GERMANY FOR THAT PURPOSE. THE DISPUTE BETWEEN THE PARTIES TO THE MAIN ACTION CONCERNS THE QUESTION WHETHER HYKRA , WHICH HAS SINCE BECOME INSOLVENT , COMMISSIONED MR KANTNER IN THE NAME OF EFFER OR IN ITS OWN NAME . IN ORDER TO OBTAIN PAYMENT OF HIS FEES - THE AMOUNT OF WHICH IS NOT IN DISPUTE - MR KANTNER BROUGHT AN ACTION BEFORE A GERMAN COURT IN DECEMBER 1974. EFFER DENIED THE EXISTENCE OF A CONTRACTUAL RELATIONSHIP BETWEEN IT AND THE PATENT AGENT. OWING TO THE ALLEGED ABSENCE OF A CONTRACT , EFFER ARGUED THAT THE GERMAN COURTS HAD NO JURISDICTION. THE GERMAN COURTS FOUND IN FAVOUR OF MR KANTNER , AT FIRST INSTANCE AND ON APPEAL. EFFER THEN APPEALED ON A POINT OF LAW TO THE BUNDESGERICHTSHOF , WHICH DECIDED TO STAY THE PROCEEDINGS AND REFER THE FOLLOWING QUESTION TO THE COURT FOR A PRELIMINARY RULING :

' ' MAY THE PLAINTIFF INVOKE THE JURISDICTION OF THE COURTS OF THE PLACE OF PERFORMANCE IN ACCORDANCE WITH ARTICLE 5 (1) OF THE CONVENTION EVEN WHEN THE EXISTENCE OF THE CONTRACT ON WHICH THE CLAIM IS BASED IS IN DISPUTE BETWEEN THE PARTIES?

' '

4 MR KANTNER , THE RESPONDENT IN THE APPEAL ON A POINT OF LAW , AND THE COMMISSION OF THE EUROPEAN COMMUNITIES TAKE THE VIEW THAT THIS QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE. THE UNITED KINGDOM , ALTHOUGH IT DOES NOT WHOLLY ACCEPT THAT ARGUMENT , NEVERTHELESS CONSIDERS THAT A DISPUTE AS TO THE EXISTENCE OF THE CONTRACT DOES NOT PREVENT ARTICLE 5 (1) OF THE CONVENTION FROM BEING APPLIED , PROVIDED THAT THE OBLIGATION IS PRIMA FACIE OF A CONTRACTUAL NATURE AND THE ACTION IS BONA FIDE BROUGHT BY THE PLAINTIFF. ONLY EFFER IS OF THE OPINION THAT THE PLAINTIFF MAY NOT INVOKE THE JURISDICTION OF THE COURTS FOR THE PLACE OF PERFORMANCE OF THE CONTRACT WHEN THE EXISTENCE OF THE CONTRACT ON WHICH THE CLAIM IS BASED IS IN DISPUTE.

5 IT IS ESTABLISHED THAT THE WORDING OF ARTICLE 5 (1) OF THE CONVENTION DOES NOT RESOLVE THIS QUESTION UNEQUIVOCALLY. WHILST THE GERMAN VERSION OF THAT PROVISION CONTAINS THE WORDS ' ' VERTRAG ODER ANSPRUCHE AUS EINEM VERTRAG ' ' , THE FRENCH AND ITALIAN VERSIONS CONTAIN THE EXPRESSIONS ' ' EN MATIERE CONTRACTUELLE ' ' AND ' ' IN MATERIA CONTRATTUALE ' ' RESPECTIVELY. UNDER THESE CIRCUMSTANCES , IN VIEW OF THE LACK OF UNIFORMITY BETWEEN THE DIFFERENT LANGUAGE VERSIONS OF THE PROVISION IN QUESTION , IT IS ADVISABLE , IN ORDER TO ARRIVE AT THE INTERPRETATION REQUESTED BY THE NATIONAL COURT , TO HAVE REGARD BOTH TO THE CONTEXT OF ARTICLE 5 (1) AND TO THE PURPOSE OF THE CONVENTION .

6 IT IS CLEAR FROM THE PROVISIONS OF THE CONVENTION , AND IN PARTICULAR FROM THE PREAMBLE THERETO , THAT ITS ESSENTIAL AIM IS TO STRENGTHEN IN THE COMMUNITY THE LEGAL PROTECTION OF PERSONS THEREIN ESTABLISHED . FOR THAT PURPOSE , THE CONVENTION PROVIDES A COLLECTION OF RULES WHICH ARE DESIGNED INTER ALIA TO AVOID THE OCCURRENCE , IN CIVIL AND COMMERCIAL MATTERS , OF CONCURRENT LITIGATION IN TWO OR MORE MEMBER STATES AND WHICH , IN THE INTERESTS OF LEGAL CERTAINTY AND FOR THE BENEFIT OF THE PARTIES , CONFER JURISDICTION UPON THE NATIONAL COURT TERRITORIALLY BEST QUALIFIED TO DETERMINE A DISPUTE.

7 IT FOLLOWS FROM THE PROVISIONS OF THE CONVENTION , AND IN PARTICULAR FROM THOSE IN SECTION 7 OF TITLE II , THAT , IN THE CASES PROVIDED FOR IN ARTICLE 5 (1) OF THE CONVENTION , THE NATIONAL COURT ' S JURISDICTION TO DETERMINE QUESTIONS RELATING TO A CONTRACT INCLUDES THE POWER TO CONSIDER THE EXISTENCE OF THE CONSTITUENT PARTS OF THE CONTRACT ITSELF , SINCE THAT IS INDISPENSABLE IN ORDER TO ENABLE THE NATIONAL COURT IN WHICH PROCEEDINGS ARE BROUGHT TO EXAMINE WHETHER IT HAS JURISDICTION UNDER THE CONVENTION. IF THAT WERE NOT THE CASE , ARTICLE 5 (1) OF THE CONVENTION WOULD BE IN DANGER OF BEING DEPRIVED OF ITS LEGAL EFFECT , SINCE IT WOULD BE ACCEPTED THAT , IN ORDER TO DEFEAT THE RULE CONTAINED IN THAT PROVISION IT IS SUFFICIENT FOR ONE OF THE PARTIES TO CLAIM THAT THE CONTRACT DOES NOT EXIST . ON THE CONTRARY , RESPECT FOR THE AIMS AND SPIRIT OF THE CONVENTION DEMANDS THAT THAT PROVISION SHOULD BE CONSTRUED AS MEANING THAT THE COURT CALLED UPON TO DECIDE A DISPUTE ARISING OUT OF A CONTRACT MAY EXAMINE , OF ITS OWN MOTION EVEN , THE ESSENTIAL PRECONDITIONS FOR ITS JURISDICTION , HAVING REGARD TO CONCLUSIVE AND RELEVANT EVIDENCE ADDUCED BY THE PARTY CONCERNED , ESTABLISHING THE EXISTENCE OR THE INEXISTENCE OF THE CONTRACT. THIS INTERPRETATION IS , MOREOVER , IN ACCORDANCE WITH THAT GIVEN IN THE JUDGMENT OF 14 DECEMBER 1977 IN CASE 73/77 (SANDERS V VAN DER PUTTE (1977) ECR 2383) CONCERNING THE JURISDICTION OF THE COURTS OF THE STATE WHERE THE IMMOVABLE PROPERTY IS SITUATED IN MATTERS RELATING TO TENANCIES OF IMMOVABLE PROPERTY (ARTICLE 16 (1) OF THE CONVENTION). IN THAT CASE THE COURT HELD THAT SUCH JURISDICTION APPLIES EVEN IF THERE IS A DISPUTE AS TO THE ' ' EXISTENCE ' ' OF A LEASE.

8 IT IS THEREFORE NECESSARY TO REPLY TO THE QUESTION PUT BY THE BUNDESGERICHTSHOF THAT THE PLAINTIFF MAY INVOKE THE JURISDICTION OF THE COURTS OF THE PLACE OF PERFORMANCE IN ACCORDANCE WITH ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS EVEN WHEN THE EXISTENCE OF THE CONTRACT ON WHICH THE CLAIM IS BASED IS IN DISPUTE BETWEEN THE PARTIES.

COSTS

THE COSTS INCURRED BY THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE ; AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT , COSTS ARE A MATTER FOR THAT COURT.

THE COURT (FIRST CHAMBER),

IN ANSWER TO THE QUESTION SUBMITTED TO IT BY THE BUNDESGERICHTSHOF BY

AN ORDER DATED 29 JANUARY 1981 , HEREBY RULES :

THE PLAINTIFF MAY INVOKE THE JURISDICTION OF THE COURTS OF THE PLACE OF PERFORMANCE IN ACCORDANCE WITH ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS EVEN WHEN THE EXISTENCE OF THE CONTRACT ON WHICH THE CLAIM IS BASED IS IN DISPUTE BETWEEN THE PARTIES

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1981 ; J ; judgment
PUBREF	European Court reports 1982 Page 00825 Spanish special edition 1982 Page 00185
DOC	1982/03/04
LODGED	1981/02/19
JURCIT	41968A0927(01)-A05PT1 : N 1 3 - 5 7 8 41968A0927(01)-A16PT1 : N 7 41968A0927(01)-C : N 6 61977J0073 : N 7
CONCERNS	Interprets 41968A0927(01)-A05PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	United Kingdom ; Commission ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A5* Landgericht Frankfurt/Main, Urteil vom 12/05/1976 (2/6 O 453/74) *A6* Oberlandesgericht Frankfurt/Main, Urteil vom 03/03/1977 (6 U 105/76) - Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1977 p.432 *A7* Landgericht Darmstadt, Urteil vom 25/04/1978 (10 O 266/77) *A8* Oberlandesgericht Frankfurt/Main, Urteil vom 28/11/1979 (13 U 118/78) *A9* Bundesgerichtshof, Vorlagebeschluß vom 29/01/1981 (III ZR 1/80)

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P1 Bundesgerichtshof, Urteil vom 13/05/1982 (III ZR 1/80)
- Der Betrieb 1982 p.1613-1614
- Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1982 no 139
- Neue Juristische Wochenschrift 1982 p.2733-2734
- Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1982 p.489-490
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Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1983 no 508
Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1985 p.a5 (PM)

PROCEDU Reference for a preliminary ruling

ADVGEN Reischl

JUDGRAP Bosco

DATES of document: 04/03/1982
of application: 19/02/1981

Judgment of the Court (Third Chamber)
of 22 October 1981
Etablissements Rohr Société anonyme v Dina Ossberger. Reference for a preliminary ruling: Cour d'appel de Versailles - France. Brussels Convention: Objection contesting jurisdiction without a defence as to the substance. Case 27/81.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - AGREEMENT ON JURISDICTION - APPEARANCE ENTERED BY THE DEFENDANT IN THE COURT SEISED - APPEARANCE ENTERED NOT ONLY TO CONTEST THE JURISDICTION BUT ALSO TO PRESENT A DEFENCE ON THE SUBSTANCE - ENTERING AN APPEARANCE DOES NOT ENTAIL SUBMISSION TO THE JURISDICTION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 18)

ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT IT ALLOWS THE DEFENDANT NOT ONLY TO CONTEST THE JURISDICTION BUT TO SUBMIT AT THE SAME TIME IN THE ALTERNATIVE A DEFENCE ON THE SUBSTANCE OF THE ACTION WITHOUT , HOWEVER , LOSING HIS RIGHT TO RAISE AN OBJECTION OF LACK OF JURISDICTION.

IN CASE 27/81

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 (COURT OF APPEAL), VERSAILLES , FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

ETABLISSEMENTS ROHR SOCIETE ANONYME SARCELLES , FRANCE ,

AND

DINA OSSBERGER , TRADING AS FIRMA OSSBERGER TURBINENFABRIK , WEISSENBURG , FEDERAL REPUBLIC OF GERMANY ,

ON THE INTERPRETATION OF ARTICLE 18 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY A JUDGMENT OF 26 NOVEMBER 1980 , WHICH WAS RECEIVED AT THE COURT ON 16 FEBRUARY 1981 , THE COUR D ' APPEL (COURT OF APPEAL), VERSAILLES , 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 AS TO THE INTERPRETATION OF ARTICLE 18 OF THE CONVENTION.

2 THE QUESTION WAS ASKED WITHIN THE FRAMEWORK OF APPEAL PROCEEDINGS INSTITUTED BY SOCIETE ANONYME ETABLISSEMENTS ROHR (HEREINAFTER REFERRED TO AS ' ' ROHR ' '), HAVING ITS REGISTERED OFFICE AT SARCELLES , FRANCE , AGAINST A WRIT OF EXECUTION ISSUED BY THE PRESIDENT OF THE TRIBUNAL DE GRANDE INSTANCE (REGIONAL COURT), PONTOISE , ON 5 JUNE 1979. BY THAT WRIT THE COURT RENDERED ENFORCEABLE , ON THE APPLICATION OF OSSBERGER TURBINENFABRIK (HEREINAFTER REFERRED TO AS ' ' OSSBERGER ' '), HAVING ITS PLACE OF BUSINESS AT WEISSENBURG , IN THE FEDERAL REPUBLIC OF GERMANY , A PROVISIONALLY

ENFORCEABLE JUDGMENT OF THE LANDGERICHT (REGIONAL COURT) ANSBACH OF 15 DECEMBER 1978 , TOGETHER WITH A TAXING ORDER IN RESPECT OF THE COSTS OF THAT COURT OF 5 FEBRUARY 1979.

3 THE JUDGMENT IN QUESTION WAS GIVEN BY THE LANDGERICHT ANSBACH FOLLOWING PROCEEDINGS INSTITUTED BY OSSBERGER AGAINST ROHR FOR PAYMENT OF VARIOUS ACCOUNTS FOR GOODS SUPPLIED BY OSSBERGER. SINCE ROHR MERELY ARGUED BEFORE THE LANDGERICHT THAT THE COURT HAD NO JURISDICTION RATIONE LOCI AND DID NOT SUBMIT ANY DEFENCE ON THE SUBSTANCE , AND SINCE THE LANDGERICHT CONSIDERED THAT IT HAD JURISDICTION IN ACCORDANCE WITH ARTICLE 17 OF THE CONVENTION BY REASON OF A CLAUSE CONFERRING JURISDICTION CONTAINED IN OSSBERGER ' S GENERAL CONDITIONS OF SALE , ROHR WAS ORDERED TO SETTLE THE SAID ACCOUNTS AND PAY THE COSTS. ROHR SUBMITTED AN APPEAL TO THE OBERLANDESGERICHT NURNBERG (HIGHER REGIONAL COURT , NUREMBERG), AGAIN RELYING UPON THE OBJECTION OF LACK OF JURISDICTION WITHOUT SUBMITTING ANY DEFENCE ON THE SUBSTANCE ; THAT APPEAL WAS DISMISSED BY A JUDGMENT OF 13 JUNE 1979 SINCE THE OBERLANDESGERICHT NURNBERG CONSIDERED THAT THE LANDGERICHT HAD JURISDICTION UNDER THE PROVISIONS OF THE CONVENTION AND THAT ROHR HAD STILL FAILED TO SUBMIT A DEFENCE ON THE SUBSTANCE IN THE COURSE OF THE APPELLATE PROCEDURE. A FURTHER APPEAL ON A POINT OF LAW BY ROHR THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) WAS DISMISSED AS INADMISSIBLE BY AN ORDER OF 19 MARCH 1980 BECAUSE THE GROUNDS FOR THE APPEAL WERE NOT STATED WITHIN THE PRESCRIBED TIME-LIMITS .

4 ROHR ARGUED BEFORE THE COUR D ' APPEL , VERSAILLES , THAT THE RECOGNITION AND ENFORCEMENT OF THE JUDGMENTS OF THE LANDGERICHT ANSBACH WERE CONTRARY TO PUBLIC POLICY WITHIN THE MEANING OF ARTICLE 27 (1) OF THE CONVENTION : SINCE ARTICLE 18 OF THE CONVENTION MADE IT IMPOSSIBLE FOR ROHR TO SUBMIT A DEFENCE ON THE SUBSTANCE BEFORE THE GERMAN COURTS WITHOUT LOSING THE RIGHT TO RAISE AN OBJECTION OF LACK OF JURISDICTION , THE FACT THAT THESE COURTS DID NOT RESTRICT THEMSELVES TO GIVING A RULING ON JURISDICTION BUT ALSO GIVE JUDGMENT ON THE SUBSTANCE OF THE CASE CONSTITUTED A MANIFEST INFRINGEMENT OF THE RIGHTS OF THE DEFENCE AND THEREBY OF PUBLIC POLICY IN FRANCE. OSSBERGER CONTENDED THAT ARTICLE 18 OF THE CONVENTION , LIKE THE PROVISIONS OF GERMAN LAW ON CIVIL PROCEDURE , DID NOT PREVENT ROHR FROM SUBMITTING A DEFENCE ON THE SUBSTANCE BUT THAT ROHR VOLUNTARILY REFRAINED FROM DOING SO.

5 THE COUR D ' APPEL , VERSAILLES , SINCE IT CONSIDERED THAT THIS CASE RAISED A QUESTION CONCERNING THE INTERPRETATION OF THE CONVENTION , REFERRED TO THE COURT A PRELIMINARY QUESTION WHICH IS ESSENTIALLY CONCERNED TO ESTABLISH WHETHER ARTICLE 18 OF THE CONVENTION PERMITS A DEFENDANT WHO CONTESTS THE JURISDICTION OF THE COURT BEFORE WHICH AN APPLICATION HAS BEEN BROUGHT TO SUBMIT AT THE SAME TIME IN THE ALTERNATIVE A DEFENCE ON THE SUBSTANCE OF THE ACTION WITHOUT THEREBY LOSING HIS RIGHT TO RAISE AN OBJECTION OF LACK OF JURISDICTION.

6 THE ITALIAN GOVERNMENT AND THE COMMISSION OF THE EUROPEAN COMMUNITIES HAVE ARGUED THAT THAT QUESTION MUST BE ANSWERED IN THE AFFIRMATIVE .

7 THE COURT OF JUSTICE HAS HAD OCCASION TO GIVE A PRELIMINARY RULING ON A SIMILAR QUESTION IN ITS JUDGMENT OF 29 JUNE 1981 (ELEFANTEN SCHUH GMBH V JACQMAIN , CASE 150/80 , (1981) ECR 1671). IN THAT JUDGMENT THE COURT DECLARED

: ' ' ALTHOUGH DIFFERENCES BETWEEN THE DIFFERENT LANGUAGE VERSIONS OF ARTICLE 18 OF THE CONVENTION APPEAR WHEN IT IS SOUGHT TO DETERMINE WHETHER , IN ORDER TO EXCLUDE THE JURISDICTION OF THE COURT SEISED , A DEFENDANT MUST CONFINE HIMSELF TO CONTESTING THAT JURISDICTION , OR WHETHER HE MAY ON THE CONTRARY STILL ACHIEVE THE SAME PURPOSE BY CONTESTING THE JURISDICTION OF THE COURT AS WELL AS THE SUBSTANCE OF THE CLAIM , THE SECOND INTERPRETATION IS MORE IN KEEPING WITH THE OBJECTIVES AND SPIRIT OF THE CONVENTION. IN FACT UNDER THE LAW OF CIVIL PROCEDURE OF CERTAIN CONTRACTING STATES A DEFENDANT WHO RAISES THE ISSUE OF JURISDICTION AND NO OTHER MIGHT BE BARRED FROM MAKING HIS SUBMISSIONS AS TO THE SUBSTANCE IF THE COURT REJECTS HIS PLEA THAT IT HAS NO JURISDICTION. AN INTERPRETATION OF ARTICLE 18 WHICH ENABLED SUCH A RESULT TO BE ARRIVED AT WOULD BE CONTRARY TO THE RIGHT OF THE DEFENDANT TO DEFEND HIMSELF IN THE ORIGINAL PROCEEDINGS , WHICH IS ONE OF THE AIMS OF THE CONVENTION. ' '

8 THIS CASE HAS DISCLOSED NO FACTOR OF SUCH A KIND AS TO AFFECT THESE FINDINGS. ACCORDINGLY THE ANSWER TO THE QUESTION SUBMITTED MUST BE THAT ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT IT ALLOWS THE DEFENDANT NOT ONLY TO CONTEST THE JURISDICTION BUT TO SUBMIT AT THE SAME TIME IN THE ALTERNATIVE A DEFENCE ON THE SUBSTANCE OF THE ACTION WITHOUT , HOWEVER , LOSING HIS RIGHT TO RAISE AN OBJECTION OF LACK OF JURISDICTION.

COSTS

9 THE COSTS INCURRED BY THE GOVERNMENT OF THE ITALIAN REPUBLIC AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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 (THIRD CHAMBER)

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE COUR D ' APPEL , VERSAILLES , BY JUDGMENT OF 26 NOVEMBER 1980 , HEREBY RULES :

ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT IT ALLOWS THE DEFENDANT NOT ONLY TO CONTEST THE JURISDICTION BUT TO SUBMIT AT THE SAME TIME IN THE ALTERNATIVE A DEFENCE ON THE SUBSTANCE OF THE ACTION WITHOUT , HOWEVER , LOSING HIS RIGHT TO RAISE AN OBJECTION OF LACK OF JURISDICTION.

DOCNUM	61981J0027
AUTHOR	Court of Justice of the European Communities
FORM	Judgment

TREATY	European Economic Community
PUBREF	European Court reports 1981 Page 02431 Spanish special edition Page 00669
DOC	1981/10/22
LODGED	1981/02/16
JURCIT	41968A0927(01)-A18 : N 1 4 5 7 8 41968A0927(01)-A17 : N 3 41968A0927(01)-A27PT1 : N 4 61980J0150 : N 7
CONCERNS	Interprets 41968A0927(01) -A18
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Italy ; Commission ; Member States ; Institutions
NATIONA	France
NATCOUR	*A5* Landgericht Ansbach, Urteil vom 15/12/1978 (HK O 351/78) ; *A6* Tribunal de grande instance de Pontoise, ordonnance du 05/06/1979 ; *A7* Oberlandesgericht Nürnberg, Urteil vom 13/06/1979 (9 U 28/79) ; *A8* Bundesgerichtshof, Beschluß vom 19/03/1980 (VIII ZR 271/79) ; *A9* Cour d'appel de Versailles, 1re chambre, arrêt du 26/11/1980 (535 4301/79) ; - Holleaux, Dominique: Journal du droit international 1981 p.852-854 ; *P1* Cour d'appel de Versailles, 1re chambre, arrêt du 12/07/1982 (4301/81)
NOTES	Pesce, Angelo: Il procedimento di contestazione della competenza nel diritto processuale comunitario (un caso di limitazione delle norme processuali comunitarie rispetto agli ordinamenti nazionali?), Il Foro padano 1981 IV Col.41-44 ; Fiumara, Oscar: In tema di proroga tacita della competenza nella Convenzione di Bruxelles 27 settembre 1968 (art. 18), Rassegna dell'avvocatura dello Stato 1981 I Sez.II p.672-676 ; Gaudemet-Tallon, H.: Revue critique de droit international privé 1982 p.152-161 ; Leipold, Dieter: Zuständigkeitsvereinbarung und rügelose Einlassung nach dem europäischen Gerichtsstands- und Vollstreckungsübereinkommen, Praxis des internationalen Privat- und Verfahrensrechts 1982 p.222-225 ; Huet, André: Journal du droit international 1982 p.482-485 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1985 p.a4 (PM)
PROCEDU	Reference for a preliminary ruling
ADVGEN	Capotorti
JUDGRAP	Everling
DATES	of document: 22/10/1981 of application: 16/02/1981

**Judgment of the Court
of 31 March 1982
C.H.W. v G.J.H. Reference for a preliminary ruling: Hoge Raad - Netherlands. Brussels Convention- Interpretation of the terms "wills and succession", "rights in property arising out a matrimonial relationship", "provisional, including protective measures" and of Article 18. Case 25/81.**

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SCOPE - APPLICATION FOR INTERIM MEASURES RELATING TO A DISPUTE CONCERNING THE PROPRIETARY RELATIONSHIPS BETWEEN SPOUSES - EXCLUSION - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 1)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SCOPE - PROVISIONAL OR PROTECTIVE MEASURES RELATING TO EXCLUDED MATTERS - INCLUSION - NONE

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS 1 AND 24)

3 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROROGATION OF JURISDICTION - APPEARANCE OF DEFENDANT BEFORE THE COURT SEISED - APPEARANCE NOT ONLY TO CONTEST THE JURISDICTION BUT ALSO TO MAKE SUBMISSIONS ON THE SUBSTANCE - APPEARANCE NOT CONFERRING JURISDICTION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 18)

1 . AN APPLICATION FOR PROVISIONAL MEASURES TO SECURE THE DELIVERY UP OF A DOCUMENT IN ORDER TO PREVENT IT FROM BEING USED AS EVIDENCE IN AN ACTION CONCERNING A HUSBAND ' S MANAGEMENT OF HIS WIFE ' S PROPERTY DOES NOT FALL WITHIN THE SCOPE OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IF SUCH MANAGEMENT IS CLOSELY CONNECTED WITH THE RELATIONSHIP RESULTING DIRECTLY FROM THE MARRIAGE BOND .

2 . ARTICLE 24 OF THE CONVENTION OF 27 SEPTEMBER 1968 MAY NOT BE RELIED ON TO BRING WITHIN THE SCOPE OF THE CONVENTION PROVISIONAL OR PROTECTIVE MEASURES RELATING TO MATTERS WHICH ARE EXCLUDED FROM IT.

3.ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT IT ALLOWS THE DEFENDANT NOT ONLY TO CONTEST THE JURISDICTION BUT TO SUBMIT AT THE SAME TIME IN THE ALTERNATIVE A DEFENCE ON THE SUBSTANCE OF THE ACTION WITHOUT HOWEVER LOSING THE RIGHT TO RAISE AN OBJECTION OF LACK OF JURISDICTION.

IN CASE 25/81

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 HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

C . H . W ., RESIDING AT EKEREN , BELGIUM , APPELLANT IN CASSATION AGAINST A JUDGMENT OF THE GERECHTSHOF (REGIONAL COURT OF APPEAL), THE HAGUE , DELIVERED BETWEEN THE PARTIES AND PRONOUNCED ON 14 DECEMBER 1979 AND RESPONDENT IN THE CROSS-APPEAL IN CASSATION , REPRESENTED BY O . DE SAVORNIN LOHMAN , ADVOCATE AT THE HOGE RAAD ,

AND

G . J . H ., RESIDING AT BRASSCHAAT , BELGIUM , RESPONDENT IN THE APPEAL IN CASSATION AND APPELLANT IN THE CROSS-APPEAL IN CASSATION AGAINST THE SAID JUDGMENT , REPRESENTED BY P. MOUT , ALSO AN ADVOCATE AT THE HOGE RAAD ,

ON THE INTERPRETATION OF ARTICLES 1 , 18 AND 24 (POSSIBLY IN CONJUNCTION WITH ARTICLE 6) OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS CONCLUDED IN BRUSSELS ON 27 SEPTEMBER 1968.

1 BY JUDGMENT DATED 6 FEBRUARY 1981 WHICH WAS RECEIVED AT THE COURT ON 17 MARCH 1981 THE HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') FOUR QUESTIONS AS TO THE INTERPRETATION OF ARTICLES 1 , 18 AND 24 OF THAT CONVENTION.

2 THOSE QUESTIONS WERE RAISED IN THE CONTEXT OF PROCEEDINGS BETWEEN A MARRIED COUPLE OF NETHERLANDS NATIONALITY DOMICILED IN BELGIUM CONCERNING THE HUSBAND ' S MANAGEMENT OF HIS WIFE ' S SEPARATE PROPERTY . BECAUSE THE WIFE WISHED TO PRODUCE IN EVIDENCE A DOCUMENT DRAWN UP BY THE HUSBAND MARKED ' ' CODICIL ' ' THE TERMS OF WHICH WERE INTENDED TO EXEMPT THE WIFE ' S SEPARATE PROPERTY FROM THE LIABILITIES RESULTING FROM HIS MANAGEMENT OF THAT PROPERTY , THE HUSBAND MADE AN APPLICATION TO THE PRESIDENT OF THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT), ROTTERDAM , FOR AN ORDER REQUIRING THE DOCUMENT TO BE RETURNED TO HIM AND AN INJUNCTION AGAINST ITS BEING USED AS EVIDENCE.

3 THE JURISDICTION OF THE PRESIDENT OF THE ARRONDISSEMENTSRECHTBANK TO ORDER DELIVERY UP OF THE DOCUMENT WAS CHALLENGED AND THE CASE WAS BROUGHT BEFORE THE GERECHTSHOF (REGIONAL COURT OF APPEAL), THE HAGUE , AND THEN BEFORE THE HOGE RAAD WHICH DECIDED THAT AN INTERPRETATION OF THE CONVENTION WAS NEEDED TO RESOLVE THE DISPUTE AND REFERRED THE FOLLOWING QUESTIONS TO THE COURT :

' ' 1 . DOES THE EXCLUSION OF ' WILLS AND SUCCESSION ' FROM THE APPLICATION OF THE CONVENTION , PROVIDED FOR BY THE OPENING WORDS OF THE SECOND PARAGRAPH OF ARTICLE 1 AND SUBPARAGRAPH (1) THEREOF , APPLY TO APPLICATIONS BY THE PERSON MAKING A CODICIL HELD BY ANOTHER PERSON FOR THE DELIVERY UP OF THAT CODICIL , THE DESTRUCTION OF PHOTOCOPIES , TRANSCRIPTS AND REPRODUCTIONS THEREOF , AND AN INJUNCTION AGAINST HOLDING OR USING (OR CAUSING TO BE HELD OR USED) ANY PHOTOCOPY , TRANSCRIPT OR REPRODUCTION OF THAT DOCUMENT FOR THE PURPOSE OF PREVENTING THE DECLARATIONS CONTAINED IN THE CODICIL FROM BEING USED AGAINST THE PERSON MAKING THE CODICIL AS EVIDENCE IN A LEGAL DISPUTE WHICH DOES NOT RELATE TO A WILL OR SUCCESSION?

2.DOES THE EXCLUSION OF ' RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP ' FROM THE APPLICATION OF THE CONVENTION , PROVIDED FOR

BY THE OPENING WORDS OF THE CONVENTION , PROVIDED FOR BY THE OPENING WORDS OF THE SECOND PARAGRAPH OF ARTICLE 1 AND SUBPARAGRAPH (1) THEREOF , APPLY TO APPLICATIONS AS DESCRIBED IN 1. ABOVE IF THEY ARE MADE IN ORDER TO PREVENT THE DECLARATIONS CONTAINED IN THE CODICIL FROM BEING USED AGAINST THE PERSON MAKING THE CODICIL IN A LEGAL DISPUTE ABOUT ALLEGED UNAUTHORIZED OR IMPROPER MANAGEMENT BY THAT PERSON OF HIS WIFE ' S SEPARATE PROPERTY , WHERE THAT MANAGEMENT MUST BE REGARDED AS BEING CLOSELY CONNECTED WITH PROPRIETARY RELATIONSHIPS FLOWING DIRECTLY FROM THE MARRIAGE BOND?

3.DOES THE CONCEPT OF ' PROVISIONAL , INCLUDING PROTECTIVE , MEASURES ' REFERRED TO IN ARTICLE 24 COVER THE POSSIBILITY , PROVIDED FOR IN THE EIGHTEENTH SECTION OF PART 13 OF THE FIRST BOOK OF THE NETHERLANDS CODE OF CIVIL PROCEDURE (WETBOEK VAN BURGERLIJKE RECHTSVORDERING), OF APPLYING FOR INTERIM RELIEF IN INTERLOCUTORY PROCEEDINGS? DOES THE FACT THAT THE RELIEF IS SOUGHT IN CONNECTION WITH OTHER PROCEEDINGS PENDING IN THE NETHERLANDS AFFECT THE ANSWER?

4.MUST THE ENTERING OF APPEARANCE BY THE DEFENDANT SOLELY IN ORDER TO CONTEST THE JURISDICTION OF THE COURT , REFERRED TO IN THE SECOND SENTENCE OF ARTICLE 18 , BE TAKEN TO COVER A CASE WHERE THE DEFENDANT CONTESTS THE COURT ' S JURISDICTION AND AT THE SAME TIME CHALLENGES IN THE ALTERNATIVE THE SUBSTANCE OF THE APPLICATION IN CASE THE COURT DECIDES THAT IT HAS JURISDICTION?

' '

THE FIRST AND SECOND QUESTIONS

4 THE ISSUE RAISED BY THE FIRST AND SECOND QUESTIONS IS WHETHER AN APPLICATION FOR A PROVISIONAL MEASURE FOR THE RETURN OF A DOCUMENT MARKED ' ' CODICIL ' ' WHICH IS LIKELY TO BE USED AS EVIDENCE IN AN ACTION RELATING TO A HUSBAND ' S MANAGEMENT OF HIS WIFE ' S SEPARATE PROPERTY SHOULD BE EXCLUDED FROM THE SCOPE OF THE CONVENTION IN ACCORDANCE WITH THE SECOND PARAGRAPH OF ARTICLE 1 THEREOF BECAUSE IT IS RELATED TO EITHER ' ' WILLS AND SUCCESSION ' ' OR ' ' RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP ' '.

5 THE SECOND QUESTION , RELATING TO ' ' RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP ' ' WITHIN THE MEANING OF ARTICLE 1 OF THE CONVENTION , SHOULD BE EXAMINED FIRST.

6 AS THE COURT HELD IN ITS JUDGMENT OF 27 MARCH 1979 IN CASE 143/78 DE CAVEL (1979) ECR 1055 THAT TERM INCLUDES NOT ONLY PROPERTY ARRANGEMENTS SPECIFICALLY AND EXCLUSIVELY ENVISAGED BY CERTAIN NATIONAL LEGAL SYSTEMS IN THE CASE OF MARRIAGE BUT ALSO ANY PROPRIETARY RELATIONSHIPS RESULTING DIRECTLY FROM THE MATRIMONIAL RELATIONSHIP OR THE DISSOLUTION THEREOF.

7 BY ITS VERY WORDING THE SECOND QUESTION HAS IN VIEW A CASE IN WHICH THE MANAGEMENT OF THE WIFE ' S PROPERTY IN QUESTION MUST BE CONSIDERED AS BEING CLOSELY CONNECTED WITH THE PROPRIETARY RELATIONSHIP BETWEEN THE SPOUSES FLOWING DIRECTLY FROM THEIR MARRIAGE BOND .

8 THEREFORE AN APPLICATION FOR PROVISIONAL MEASURES TO SECURE THE DELIVERY UP OF A DOCUMENT IN ORDER TO PREVENT THE STATEMENTS WHICH IT CONTAINS

FROM BEING USED AS EVIDENCE IN AN ACTION CONCERNING THE MANAGEMENT OF THE WIFE ' S PROPERTY MUST ALSO BE CONSIDERED TO BE CONNECTED WITH RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP WITHIN THE MEANING OF THE CONVENTION BECAUSE OF ITS ANCILLARY NATURE.

9 THEREFORE THE ANSWER TO THE SECOND QUESTION MUST BE THAT AN APPLICATION FOR PROVISIONAL MEASURES TO SECURE THE DELIVERY UP OF A DOCUMENT IN ORDER TO PREVENT IT FROM BEING USED AS EVIDENCE IN AN ACTION CONCERNING A HUSBAND ' S MANAGEMENT OF HIS WIFE ' S PROPERTY DOES NOT FALL WITHIN THE SCOPE OF THE CONVENTION IF SUCH MANAGEMENT IS CLOSELY CONNECTED WITH THE PROPRIETARY RELATIONSHIP RESULTING DIRECTLY FROM THE MARRIAGE BOND.

10 IN VIEW OF THAT ANSWER THERE IS NO NEED TO REPLY TO THE FIRST QUESTION .

THE THIRD QUESTION

11 THE FOREGOING CONCLUSION IS NOT AFFECTED BY ARTICLE 24 OF THE CONVENTION WHICH STATES THAT : ' ' APPLICATION MAY BE MADE TO THE COURTS OF A CONTRACTING STATE FOR SUCH PROVISIONAL , INCLUDING PROTECTIVE , MEASURES AS MAY BE AVAILABLE UNDER THE LAW OF THAT STATE , EVEN IF , UNDER THIS CONVENTION , THE COURTS OF ANOTHER CONTRACTING STATE HAVE JURISDICTION AS TO THE SUBSTANCE OF THE MATTER ' '.

12 THAT PROVISION IN FACT HAS IN VIEW CASES IN WHICH PROVISIONAL MEASURES ARE ORDERED IN A CONTRACTING STATE WHERE ' ' UNDER THIS CONVENTION ' ' A COURT OF ANOTHER CONTRACTING STATE HAS JURISDICTION AS TO THE SUBSTANCE OF THE MATTER. THEREFORE IT MAY NOT BE RELIED ON TO BRING WITHIN THE SCOPE OF THE CONVENTION PROVISIONAL OR PROTECTIVE MEASURES RELATING TO MATTERS WHICH ARE EXCLUDED FROM IT. THAT IS HOW THE THIRD QUESTION MUST BE ANSWERED.

THE FOURTH QUESTION

13 AS TO THE FOURTH QUESTION , IT SUFFICES TO RECALL THAT IN ITS JUDGMENTS OF 24 JUNE 1981 IN CASE 150/80 ELEFANTEN SCHUH GMBH (1981) ECR 1671 AND OF 22 OCTOBER 1981 IN CASE 27/81 ROHR (1981) ECR 2431 THE COURT HELD THAT ARTICLE 18 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT IT ALLOWS THE DEFENDANT NOT ONLY TO CONTEST THE JURISDICTION BUT TO SUBMIT AT THE SAME TIME IN THE ALTERNATIVE A DEFENCE ON THE SUBSTANCE OF THE ACTION WITHOUT HOWEVER LOSING HIS RIGHT TO RAISE AN OBJECTION OF LACK OF JURISDICTION.

COSTS

14 THE COSTS INCURRED BY THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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 ,

IN ANSWER TO THE QUESTION SUBMITTED TO IT BY THE HOGE RAAD DER NEDERLANDEN

BY JUDGMENT OF 6 FEBRUARY 1981 , HEREBY RULES :

1 . AN APPLICATION FOR PROVISIONAL MEASURES TO SECURE THE DELIVERY UP OF A DOCUMENT IN ORDER TO PREVENT IT FROM BEING USED AS EVIDENCE IN AN ACTION CONCERNING A HUSBAND ' S MANAGEMENT OF HIS WIFE ' S PROPERTY DOES NOT FALL WITHIN THE SCOPE OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IF SUCH MANAGEMENT IS CLOSELY CONNECTED WITH THE PROPRIETARY RELATIONSHIP RESULTING DIRECTLY FROM THE MARRIAGE BOND.

2.ARTICLE 24 OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MAY NOT BE RELIED ON TO BRING WITHIN THE SCOPE OF THE CONVENTION PROVISIONAL OR PROTECTIVE MEASURES RELATING TO MATTERS WHICH ARE EXCLUDED FROM IT.

3.ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT IT ALLOWS THE DEFENDANT NOT ONLY TO CONTEST THE JURISDICTION BUT TO SUBMIT AT THE SAME TIME IN THE ALTERNATIVE A DEFENCE ON THE SUBSTANCE OF THE ACTION WITHOUT HOWEVER LOSING THE RIGHT TO RAISE AN OBJECTION OF LACK OF JURISDICTION.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1982 Page 01189 Spanish special edition Page 00269
DOC	1982/03/31
LODGED	1981/03/17
JURCIT	41968A0927(01)-A01L2PT1 : N 1 3 - 6 9 41968A0927(01)-A18 : N 1 3 13 41968A0927(01)-A24 : N 1 3 11 12 61978J0143 : N 6 61980J0150 : N 13 61981J0027 : N 13
CONCERNS	Interprets 41968A0927(01) -A01L2PT1 Interprets 41968A0927(01) -A18 Interprets 41968A0927(01) -A24

SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
OBSERV	Italy ; Commission ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A7* President van de arrondissementsrechtbank Rotterdam, vonnis van 07/05/1979 (KG 330/78) ; *A8* Gerechtshof 's-Gravenhage, 2e kamer, arrest van 14/12/1979 (66 PRR/79) ; *A9* Hoge Raad, arrest van 06/02/1981 (11.638) ; - Rechtspraak van de week 1981 no 31 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1982 no 280 ; - Nederlands Internationaal Privaatrecht 1984 no 310 ; *P1* Hoge Raad, 1e kamer, arrest van 01/07/1982 (11.638) ; - Rechtspraak van de week 1982 no 150 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1983 no 682 ; - Nederlands Internationaal Privaatrecht 1984 no 310 ; - Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1983 no 682
NOTES	Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1982 no 281 ; Huet, André: Journal du droit international 1982 p.942-948 ; Pesce, Angelo: Il Foro padano 1982 IV Col.1-2 ; Sauveplanne, J.G.: Kodizill und kort geding. Oder: ungelöste Qualifikationsprobleme, Praxis des internationalen Privat- und Verfahrensrechts 1983 p.65-67 ; Storm, P.M.: TVVS ondernemingsrecht en rechtspersonen 1983 p.72 ; Verheul, Hans: Netherlands International Law Review 1983 p.242-243 ; Droz, Georges A.L.: Revue critique de droit international privé 1984 p.354-361 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1985 p.a6 (PM)
PROCEDU	Reference for a preliminary ruling
ADVGEN	Rozès
JUDGRAP	Chloros
DATES	of document: 31/03/1982 of application: 17/03/1981

Judgment of the Court
of 16 June 1981
Peter Klomps v Karl Michel.
Reference for a preliminary ruling: Hoge Raad - Netherlands.
Brussels Convention of 1968 - Service in sufficient time of the document which instituted the proceedings.
Case 166/80.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT OF JUDGMENTS - GROUNDS FOR REFUSAL - DOCUMENT WHICH INSTITUTED THE PROCEEDINGS NOT SERVED IN DUE FORM AND IN SUFFICIENT TIME ON DEFENDANT WHO FAILS TO TAKE APPROPRIATE ACTION - DOCUMENT WHICH INSTITUTED THE PROCEEDINGS - CONCEPT

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 27 , POINT 2)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT OF JUDGMENTS - GROUNDS FOR REFUSAL - DOCUMENT WHICH INSTITUTED THE PROCEEDINGS NOT SERVED IN DUE FORM AND IN SUFFICIENT TIME ON DEFENDANT WHO FAILS TO TAKE APPROPRIATE ACTION - SERVICE IN SUFFICIENT TIME - APPRAISAL OF THE COURT IN WHICH ENFORCEMENT IS SOUGHT - PERIOD TO BE TAKEN INTO CONSIDERATION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 27 , POINT 2)

3 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT OF JUDGMENTS - GROUNDS FOR REFUSAL - DOCUMENT WHICH INSTITUTED THE PROCEEDINGS NOT SERVED IN DUE FORM AND IN SUFFICIENT TIME ON A DEFENDANT WHO FAILS TO TAKE APPROPRIATE ACTION - EFFECT WHERE THERE IS AN OBJECTION AGAINST THE JUDGMENT IN DEFAULT WHICH IS DECLARED INADMISSIBLE BY A COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 27 , POINT 2)

4 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT OF JUDGMENTS - GROUNDS FOR REFUSAL - DOCUMENT WHICH INSTITUTED THE PROCEEDINGS NOT SERVED IN DUE FORM AND IN SUFFICIENT TIME ON A DEFENDANT WHO FAILS TO TAKE APPROPRIATE ACTION - DECISION OF A COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN FINDING THAT SERVICE WAS DULY EFFECTED - DUTY OF THE COURT IN WHICH ENFORCEMENT IS SOUGHT TO CONSIDER WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 27 , POINT 2)

5 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT OF JUDGMENTS - GROUNDS FOR REFUSAL - DOCUMENT WHICH INSTITUTED THE PROCEEDINGS NOT SERVED IN DUE FORM AND IN SUFFICIENT TIME ON DEFENDANT WHO FAILS TO TAKE APPROPRIATE ACTION - SERVICE IN SUFFICIENT TIME - APPRAISAL OF THE COURT IN WHICH ENFORCEMENT IS SOUGHT - BEGINNING OF TIME TO BE ALLOWED THE DEFENDANT

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 27 , POINT 2)

1 . THE WORDS ' ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' ' CONTAINED IN ARTICLE 27 , POINT 2 , OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS COVER ANY DOCUMENT , SUCH AS THE ORDER FOR PAYMENT (ZAHLUNGSBEFEHL) IN GERMAN LAW , SERVICE OF WHICH ENABLES THE PLAINTIFF , UNDER THE LAW OF THE STATE

OF THE COURT IN WHICH THE JUDGMENT WAS GIVEN , TO OBTAIN IN DEFAULT OF APPROPRIATE ACTION TAKEN BY THE DEFENDANT , A DECISION CAPABLE OF BEING RECOGNIZED AND ENFORCED UNDER THE PROVISIONS OF THE CONVENTION.

A DECISION SUCH AS THE ENFORCEMENT ORDER (VOLLSTRECKUNGSBEFEHL) IN GERMAN LAW , WHICH IS ISSUED AFTER SERVICE OF THE ORDER FOR PAYMENT HAS BEEN EFFECTED AND WHICH IS ENFORCEABLE UNDER THE CONVENTION , IS NOT COVERED BY THE WORDS ' ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' '.

2 . IN ORDER TO DETERMINE WHETHER THE DEFENDANT HAS BEEN ENABLED TO ARRANGE FOR HIS DEFENCE AS REQUIRED BY ARTICLE 27 , POINT 2 , THE COURT IN WHICH ENFORCEMENT IS SOUGHT MUST TAKE ACCOUNT ONLY OF THE TIME , SUCH AS THAT ALLOWED UNDER GERMAN LAW FOR SUBMITTING AN OBJECTION (WIDERSPRUCH) TO THE ORDER FOR PAYMENT , AVAILABLE TO THE DEFENDANT FOR THE PURPOSES OF PREVENTING THE ISSUE OF A JUDGMENT IN DEFAULT WHICH IS ENFORCEABLE UNDER THE CONVENTION.

3 . ARTICLE 27 , POINT 2 , OF THE CONVENTION , WHICH IS ADDRESSED EXCLUSIVELY TO THE COURT BEFORE WHICH PROCEEDINGS ARE BROUGHT FOR RECOGNITION OR ENFORCEMENT IN ANOTHER CONTRACTING STATE , REMAINS APPLICABLE WHERE THE DEFENDANT HAS LODGED AN OBJECTION AGAINST THE DECISION GIVEN IN DEFAULT AND A COURT IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN HAS DECLARED THE OBJECTION INADMISSIBLE ON THE GROUND THAT THE TIME FOR MAKING SUCH OBJECTION HAS EXPIRED.

4 . EVEN IF THE COURT IN WHICH THE JUDGMENT WAS GIVEN HAS HELD , IN SEPARATE ADVERSARY PROCEEDINGS , THAT SERVICE WAS DULY EFFECTED , ARTICLE 27 , POINT 2 , OF THE CONVENTION STILL REQUIRES THE COURT IN WHICH ENFORCEMENT IS SOUGHT TO EXAMINE WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME TO ENABLE THE DEFENDANT TO ARRANGE FOR HIS DEFENCE.

5 . ARTICLE 27 , POINT 2 , OF THE CONVENTION DOES NOT REQUIRE PROOF THAT THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS WAS ACTUALLY BROUGHT TO THE KNOWLEDGE OF THE DEFENDANT. AS A GENERAL RULE THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY ACCORDINGLY CONFINE ITS EXAMINATION TO ASCERTAINING WHETHER THE PERIOD RECKONED FROM THE DATE ON WHICH SERVICE WAS DULY EFFECTED ALLOWED THE DEFENDANT SUFFICIENT TIME TO ARRANGE FOR HIS DEFENCE. NEVERTHELESS THE COURT MUST CONSIDER WHETHER , IN A PARTICULAR CASE , THERE ARE EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT THE CONCLUSION THAT , ALTHOUGH SERVICE WAS DULY EFFECTED , IT WAS , HOWEVER , INADEQUATE FOR THE PURPOSE OF CAUSING TIME TO BEGIN TO RUN.

IN CASE 166/80

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 HOGE RAAD DER NEDERLANDEN FOR A PRELIMINARY RULING IN THE PROCEEDINGS IN CASSATION PENDING BEFORE THAT COURT BETWEEN

PETER KLOMPS

AND

KARL MICHEL

ON THE INTERPRETATION OF ARTICLES 27 AND 52 OF THE CONVENTION ,

25 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HOGE RAAD DER NEDERLANDEN BY JUDGMENT OF 8 JULY 1980 , HEREBY RULES :

ARTICLE 27 , POINT 2 , OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS FOLLOWS :

1 . THE WORDS ' ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' ' COVER ANY DOCUMENT , SUCH AS THE ORDER FOR PAYMENT (ZAHLUNGSBEFEHL) IN GERMAN LAW , SERVICE OF WHICH ENABLES THE PLAINTIFF , UNDER THE LAW OF THE STATE OF THE COURT IN WHICH THE JUDGMENT WAS GIVEN TO OBTAIN , IN DEFAULT OF APPROPRIATE ACTION TAKEN BY THE DEFENDANT , A DECISION CAPABLE OF BEING RECOGNIZED AND ENFORCED UNDER THE PROVISIONS OF THE CONVENTION .

2 . A DECISION SUCH AS THE ENFORCEMENT ORDER (VOLLSTRECKUNGSBEFEHL) IN GERMAN LAW , WHICH IS ISSUED AFTER SERVICE OF THE ORDER FOR PAYMENT HAS BEEN EFFECTED AND WHICH IS ENFORCEABLE UNDER THE CONVENTION , IS NOT COVERED BY THE WORDS ' ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' '.

3 . IN ORDER TO DETERMINE WHETHER THE DEFENDANT HAS BEEN ENABLED TO ARRANGE FOR HIS DEFENCE AS REQUIRED BY ARTICLE 27 , POINT 2 , THE COURT IN WHICH ENFORCEMENT IS SOUGHT MUST TAKE ACCOUNT ONLY OF THE TIME , SUCH AS THAT ALLOWED UNDER GERMAN LAW FOR SUBMITTING AN OBJECTION (WIDERSPRUCH) TO THE ORDER FOR PAYMENT , AVAILABLE TO THE DEFENDANT FOR THE PURPOSES OF PREVENTING THE ISSUE OF A JUDGMENT IN DEFAULT WHICH IS ENFORCEABLE UNDER THE CONVENTION.

4 . ARTICLE 27 , POINT 2 , REMAINS APPLICABLE WHERE THE DEFENDANT HAS LODGED AN OBJECTION AGAINST THE DECISION GIVEN IN DEFAULT AND A COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN HAS HELD THE OBJECTION TO BE INADMISSIBLE ON THE GROUND THAT THE TIME FOR LODGING AN OBJECTION HAS EXPIRED.

5 . EVEN IF A COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN HAS HELD , IN SEPARATE ADVERSARY PROCEEDINGS , THAT SERVICE WAS DULY EFFECTED ARTICLE 27 , POINT 2 , STILL REQUIRES THE COURT IN WHICH ENFORCEMENT IS SOUGHT TO EXAMINE WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME TO ENABLE THE DEFENDANT TO ARRANGE FOR HIS DEFENCE.

6 . THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY AS A GENERAL RULE CONFINE ITSELF TO EXAMINING WHETHER THE PERIOD , RECKONED FROM THE DATE ON WHICH SERVICE WAS DULY EFFECTED , ALLOWED THE DEFENDANT SUFFICIENT TIME FOR HIS DEFENCE. IT MUST , HOWEVER , CONSIDER WHETHER , IN A PARTICULAR CASE , THERE ARE EXCEPTIONAL CIRCUMSTANCES SUCH AS THE FACT THAT , ALTHOUGH

SERVICE WAS DULY EFFECTED , IT WAS INADEQUATE FOR THE PURPOSES OF CAUSING THAT TIME TO BEGIN TO RUN.

7 . ARTICLE 52 OF THE CONVENTION AND THE FACT THAT THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT CONCLUDED THAT UNDER THE LAW OF THAT STATE THE DEFENDANT WAS HABITUALLY RESIDENT WITHIN ITS TERRITORY AT THE DATE OF SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS DO NOT AFFECT THE REPLIES GIVEN ABOVE.

1 BY JUDGMENT OF 8 JULY 1980 , WHICH WAS RECEIVED AT THE COURT ON 15 JULY 1980 , THE HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) REFERRED TO THE COURT FOR A PRELIMINARY RULING 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 , FIVE QUESTIONS , THE FIRST FOUR OF WHICH CONCERN THE INTERPRETATION OF ARTICLE 27 , POINT 2 , OF THAT CONVENTION WHILST THE FIFTH REFERS TO ARTICLE 52 .

2 THESE QUESTIONS WERE SUBMITTED TO THE COURT IN THE CONTEXT OF AN APPEAL IN CASSATION AGAINST A JUDGMENT OF THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT), ROERMOND , OF 20 SEPTEMBER 1979 OVERRULING THE OBJECTION SUBMITTED AGAINST AN ORDER OF 27 JUNE 1978 WHEREBY THE PRESIDENT OF THAT COURT DECLARED ENFORCEABLE IN THE NETHERLANDS , BY VIRTUE OF THE PROVISIONS OF THE CONVENTION , AN ORDER FOR PAYMENT AND THE ORDER FOR ITS ENFORCEMENT ISSUED BY GERMAN COURTS IN THE CONTEXT OF SUMMARY PROCEEDINGS FOR THE RECOVERY OF DEBTS OR LIQUIDATED DEMANDS , KNOWN AS ' ' MAHNVERFAHREN ' '.

3 PERSONAL SERVICE OF THE ORDER FOR PAYMENT (ZAHLUNGSBEFEHL) WAS NOT EFFECTED BUT IN THE ABSENCE OF THE DEFENDANT THE ORDER WAS LODGED AT THE POST OFFICE AND WRITTEN NOTIFICATION OF THE ORDER WAS LEFT AT THE ADDRESS IN THE FEDERAL REPUBLIC OF GERMANY PROVIDED BY THE CREDITOR , WHICH , ACCORDING TO GERMAN LAW , CONSTITUTED SERVICE AT THAT ADDRESS. UNDER THE LEGISLATION IN FORCE AT THE TIME THE DEFENDANT WAS ALLOWED A PERIOD OF NOT LESS THAN THREE DAYS IN ORDER TO SUBMIT AN OBJECTION (WIDERSPRUCH) TO THE ORDER FOR PAYMENT BUT THAT PERIOD WAS EXTENDED UNTIL SUCH TIME AS THE COURT ISSUED AN ORDER FOR ITS ENFORCEMENT (VOLLSTRECKUNGSBEFEHL). IN THE PRESENT CASE THAT PERIOD WAS SIX DAYS. AFTER SERVICE OF THE ENFORCEMENT ORDER , WHICH WAS EFFECTED BY THE SAME METHOD , THE DEFENDANT HAD A SECOND PERIOD OF ONE WEEK WITHIN WHICH TO LODGE AN OBJECTION (EINSPRUCH) TO THE ENFORCEMENT ORDER. HOWEVER , THE DEFENDANT ALLOWED FOUR MONTHS TO PASS BEFORE SUBMITTING SUCH AN OBJECTION AND CLAIMED THAT AT THE TIME OF THE SUMMARY PROCEEDINGS HIS HABITUAL RESIDENCE WAS IN THE NETHERLANDS . THE OBJECTION WAS DISMISSED AS BEING OUT OF TIME FOLLOWING ADVERSARY PROCEEDINGS IN WHICH THE GERMAN COURT CONSIDERED THE QUESTION OF HABITUAL RESIDENCE IN ORDER TO ESTABLISH WHETHER SERVICE WAS DULY EFFECTED AND HELD THAT , ACCORDING TO GERMAN LAW , MR KLOMPS WAS HABITUALLY RESIDENT AT THE ADDRESS WHERE SERVICE WAS EFFECTED .

4 IT IS CLEAR FROM THE FILE THAT UNDER GERMAN LAW THE OBJECTION TO THE ORDER FOR PAYMENT MIGHT BE MADE QUITE INFORMALLY , WITHOUT STATING REASONS , AND EVEN BY A REPRESENTATIVE WHO WAS NOT REQUIRED TO PROVE THAT HE WAS DULY AUTHORIZED FOR THE PURPOSE. BOTH THE PROPERLY-INTRODUCED OBJECTION

AGAINST AN ENFORCEMENT ORDER AND THE OBJECTION TO THE ORDER FOR PAYMENT HAD THE EFFECT OF TRANSFORMING THE SUMMARY PROCEEDINGS FOR OBTAINING THAT ORDER INTO ADVERSARY PROCEEDINGS BUT THE ENFORCEMENT ORDER REMAINED PROVISIONALLY ENFORCEABLE DESPITE THE OBJECTION AND IT WAS THUS EQUIVALENT TO A JUDGMENT IN DEFAULT.

5 IN THE COURSE OF THE VARIOUS PROCEEDINGS BEFORE THE NETHERLANDS COURTS THE DEFENDANT , WHO IS THE APPELLANT IN CASSATION , CLAIMED THAT THE RECOGNITION , AND ACCORDINGLY THE ENFORCEMENT , IN THE NETHERLANDS , OF THE ORDERS MADE AGAINST HIM BY THE GERMAN COURTS WERE CONTRARY TO ARTICLE 27 , POINT 2 , OF THE CONVENTION WHICH PROVIDES :

' ' A JUDGMENT SHALL NOT BE RECOGNIZED :

. . .

2 . WHERE IT WAS GIVEN IN DEFAULT OF APPEARANCE , IF THE DEFENDANT WAS NOT DULY SERVED WITH THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE. ' '

6 IN THESE CIRCUMSTANCES THE HOGE RAAD DECIDED TO STAY THE PROCEEDINGS AND TO REQUEST THE COURT OF JUSTICE TO ANSWER THE FOLLOWING QUESTIONS :

' ' (1) MUST A ' ZAHLUNGSBEFEHL ' (ORDER FOR PAYMENT), OR A ' VOLLSTRECKUNGSBEFEHL ' (ENFORCEMENT ORDER), ISSUED UNDER GERMAN LAW AS IT WAS IN 1976 , BE REGARDED AS ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' WITHIN THE MEANING OF THE OPENING WORDS AND POINT 2 OF ARTICLE 27 OF THE EEC CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS?

(2)IF IT MUST BE ASSUMED THAT IN A CASE SUCH AS THE PRESENT ONE THE ' ZAHLUNGSBEFEHL ' IS THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS WITHIN THE MEANING OF THE OPENING WORDS AND POINT 2 OF ARTICLE 27 IS IT NECESSARY , WITH REGARD TO THE QUESTION WHETHER THAT DOCUMENT WAS SERVED ON THE DEFENDANT IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE , TO TAKE ACCOUNT ONLY OF THE PERIOD FOR SUBMITTING A ' WIDERSPRUCH ' (OBJECTION) AGAINST THE ' ZAHLUNGSBEFEHL ' , OR MUST ACCOUNT ALSO BE TAKEN OF THE FACT THAT AFTER THE EXPIRY OF THAT PERIOD THE DEFENDANT STILL HAS A PERIOD FOR LODGING AN ' EINSPRUCH ' (OBJECTION) AGAINST THE ' VOLLSTRECKUNGSBEFEHL ' ?

(3)ARE THE OPENING WORDS AND POINT 2 OF ARTICLE 27 APPLICABLE IF THE DEFENDANT IN THE STATE OF THE COURT THE RECOGNITION OR ENFORCEMENT OF WHOSE DECISION IS SOUGHT (THE COURT FIRST SEISED) HAS OBJECTED TO THE DECISION GIVEN IN DEFAULT AND THE COURT FIRST SEISED RULES THAT THE OBJECTION IS INADMISSIBLE BECAUSE IT WAS NOT LODGED WITHIN THE PERIOD LAID DOWN FOR THAT PURPOSE?

(4)IF THE COURT FIRST SEISED HAS RULED THAT AT THE TIME OF SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS THE DEFENDANT HAD HIS HABITUAL RESIDENCE IN THE STATE OF THAT COURT , WITH THE RESULT THAT IN THAT RESPECT SERVICE WAS DULY EFFECTED , DO THE PROVISIONS OF THE OPENING WORDS AND POINT 2 OF ARTICLE 27 REQUIRE THAT A SEPARATE EXAMINATION BE CARRIED OUT INTO THE QUESTION WHETHER THE DOCUMENT WAS SERVED IN SUFFICIENT TIME TO ENABLE THE DEFENDANT TO ARRANGE FOR HIS DEFENCE? IF SO , IS THAT EXAMINATION

THEN CONFINED TO THE QUESTION WHETHER THE DOCUMENT REACHED THE DEFENDANT ' S HABITUAL RESIDENCE IN GOOD TIME OR MUST , FOR EXAMPLE , THE QUESTION ALSO BE EXAMINED WHETHER SERVICE AT THAT RESIDENCE WAS SUFFICIENT TO ENSURE THAT THE DOCUMENT WOULD REACH THE DEFENDANT PERSONALLY IN GOOD TIME?

(5)IN CONNECTION WITH THE QUESTIONS SET OUT UNDER (4), IS THE POSITION ALTERED , HAVING REGARD TO ARTICLE 52 , BY THE QUESTION WHETHER THE COURT OF THE STATE IN WHICH RECOGNITION OR ENFORCEMENT IS SOUGHT RULES THAT UNDER THE LAW OF THAT STATE AT THE TIME OF SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS THE DEFENDANT HAD HIS HABITUAL RESIDENCE IN THAT STATE?

' '

7 BEFORE A REPLY IS GIVEN TO THOSE QUESTIONS IT MUST BE RECALLED THAT TITLE II OF THE BRUSSELS CONVENTION CONTAINS PROVISIONS REGULATING DIRECTLY AND IN DETAIL THE JURISDICTION OF THE COURTS OF THE STATE IN WHICH JUDGMENT WAS GIVEN , AND ALSO PROVISIONS CONCERNING THE VERIFICATION OF THAT JURISDICTION AND OF ADMISSIBILITY. THESE PROVISIONS , WHICH ARE BINDING ON THE COURT IN WHICH JUDGMENT WAS GIVEN , ARE OF SUCH A NATURE AS TO PROTECT THE INTERESTS OF DEFENDANTS . THIS HAS MADE IT POSSIBLE , AT THE STAGE OF RECOGNITION AND ENFORCEMENT WHICH IS GOVERNED BY TITLE III OF THE CONVENTION , TO FACILITATE THE FREE MOVEMENT OF JUDGMENTS WITHIN THE COMMUNITY BY SIMPLIFYING THE PROCEDURE FOR RECOGNITION AND BY REDUCING THE NUMBER OF GROUNDS WHICH MAY OPERATE TO PREVENT THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS. AMONGST THESE GROUNDS ARE THAT CONTAINED IN ARTICLE 27 , POINT 2 , WHICH , FOR THE SOLE PURPOSE OF SAFEGUARDING THE RIGHTS OF THE DEFENDANT , PROVIDES FOR REFUSAL OF RECOGNITION AND , READ TOGETHER WITH ARTICLE 34 , FOR REFUSAL OF ENFORCEMENT , IN EXCEPTIONAL CASES WHERE THE GUARANTEES CONTAINED IN THE LAW OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN AND IN THE CONVENTION ITSELF ARE INSUFFICIENT TO ENSURE THAT THE DEFENDANT HAS AN OPPORTUNITY OF ARRANGING FOR HIS DEFENCE BEFORE THE COURT IN WHICH JUDGMENT WAS GIVEN . IT IS IN THE LIGHT OF THESE CONSIDERATIONS THAT THE PROVISION RELIED UPON BY THE APPELLANT IN CASSATION IN THE MAIN PROCEEDINGS MUST BE INTERPRETED .

THE FIRST TWO QUESTIONS

8 BY THE FIRST QUESTION THE HOGE RAAD ASKS WHETHER , UNDER A SYSTEM LIKE THAT WHICH WAS IN FORCE IN THE FEDERAL REPUBLIC OF GERMANY IN 1976 IN ACCORDANCE WITH WHICH SERVICE ON THE DEFENDANT OF AN ORDER FOR PAYMENT ENABLES THE PLAINTIFF , WHERE THE DEFENDANT DOES NOT SUBMIT AN OBJECTION TO THE ORDER WITHIN THE PRESCRIBED PERIOD , TO OBTAIN A DECISION WHICH REMAINS PROVISIONALLY ENFORCEABLE EVEN AFTER THE SUBMISSION OF THE OBJECTION AGAINST THE ENFORCEMENT ORDER , BUT UNDER WHICH BOTH THAT OBJECTION AND THE OBJECTION TO THE ORDER FOR PAYMENT TRANSFORM THE PROCEDURE INTO ADVERSARY PROCEEDINGS , THE WORDS ' ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' ' REFERS TO THE ORDER FOR PAYMENT (ZAHLUNGSBEFEHL) OR THE ENFORCEMENT ORDER (VOLL- STRECKUNGSBEFEHL).

9 AS HAS BEEN INDICATED ABOVE , ARTICLE 27 , POINT 2 , IS INTENDED TO ENSURE THAT A JUDGMENT IS NOT RECOGNIZED OR ENFORCED UNDER THE CONVENTION IF

THE DEFENDANT HAS NOT HAD AN OPPORTUNITY OF DEFENDING HIMSELF BEFORE THE COURT FIRST SEISED. IT FOLLOWS THAT A MEASURE , SUCH AS THE ORDER FOR PAYMENT (ZAHLUNGSBEFEHL) IN GERMAN LAW , SERVICE OF WHICH ON THE DEFENDANT ENABLES THE PLAINTIFF , WHERE NO OBJECTION TO THE ORDER IS MADE , TO OBTAIN A DECISION WHICH IS ENFORCEABLE UNDER THE CONVENTION , MUST BE DULY SERVED ON THE DEFENDANT IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE AND ACCORDINGLY THAT SUCH A MEASURE MUST BE UNDERSTOOD AS BEING COVERED BY THE WORDS ' ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' ' IN ARTICLE 27 , POINT 2. ON THE OTHER HAND A DECISION , SUCH AS THE ENFORCEMENT ORDER (VOLL- STRECKUNGSBEFEHL) IN GERMAN LAW , WHICH IS ISSUED FOLLOWING SERVICE OF AN ORDER FOR PAYMENT AND WHICH IS IN ITSELF ENFORCEABLE UNDER THE CONVENTION , IS NOT COVERED BY THOSE WORDS EVEN ALTHOUGH THE LODGING OF AN OBJECTION AGAINST THE ENFORCEMENT ORDER , LIKE THE OBJECTION TO THE ORDER FOR PAYMENT , TRANSFORMS THE PROCEDURE INTO ADVERSARY PROCEEDINGS.

10 WITH REGARD TO THE SECOND QUESTION THE SAME CONSIDERATIONS SHOW THAT FOR THE PURPOSE OF EXAMINING WHETHER THE DEFENDANT HAS BEEN ABLE TO ARRANGE FOR HIS DEFENCE WITHIN THE MEANING OF ARTICLE 27 , POINT 2 , THE COURT IN WHICH ENFORCEMENT IS SOUGHT MUST TAKE ACCOUNT ONLY OF THE TIME , SUCH AS THAT ALLOWED UNDER GERMAN LAW FOR SUBMITTING AN OBJECTION TO THE ORDER FOR PAYMENT , AVAILABLE TO THE DEFENDANT FOR THE PURPOSES OF PREVENTING THE ISSUE OF A JUDGMENT IN DEFAULT WHICH IS ENFORCEABLE UNDER THE CONVENTION.

11 THE REPLY TO THOSE TWO QUESTIONS MUST ACCORDINGLY BE THAT ARTICLE 27 , POINT 2 , MUST BE INTERPRETED AS FOLLOWS :

- THE WORDS ' ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' ' COVER ANY DOCUMENT , SUCH AS THE ORDER FOR PAYMENT (ZAHLUNGSBEFEHL) IN GERMAN LAW , SERVICE OF WHICH ENABLES THE PLAINTIFF , UNDER THE LAW OF THE STATE OF THE COURT IN WHICH THE JUDGMENT WAS GIVEN , TO OBTAIN , IN DEFAULT OF APPROPRIATE ACTION TAKEN BY THE DEFENDANT , A DECISION CAPABLE OF BEING RECOGNIZED AND ENFORCED UNDER THE PROVISIONS OF THE CONVENTION ;

- A DECISION SUCH AS THE ENFORCEMENT ORDER (VOLLSTRECKUNGSBEFEHL) IN GERMAN LAW , WHICH IS ISSUED AFTER SERVICE OF THE ORDER FOR PAYMENT HAS BEEN EFFECTED AND WHICH IS ENFORCEABLE UNDER THE CONVENTION , IS NOT COVERED BY THE WORDS ' ' THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS ' ' ;

- IN ORDER TO DETERMINE WHETHER THE DEFENDANT HAS BEEN ENABLED TO ARRANGE FOR HIS DEFENCE AS REQUIRED BY ARTICLE 27 , POINT 2 , THE COURT IN WHICH ENFORCEMENT IS SOUGHT MUST TAKE ACCOUNT ONLY OF THE TIME , SUCH AS THAT ALLOWED UNDER GERMAN LAW FOR SUBMITTING AN OBJECTION (WIDERSPRUCH) TO THE ORDER FOR PAYMENT , AVAILABLE TO THE DEFENDANT FOR THE PURPOSES OF PREVENTING THE ISSUE OF A JUDGMENT IN DEFAULT WHICH IS ENFORCEABLE UNDER THE CONVENTION.

THIRD QUESTION

12 THIS QUESTION REFERS IN SUBSTANCE TO THE JURISDICTION OF THE COURTS OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN AND THE COURTS OF ANOTHER CONTRACTING STATE BEFORE WHICH PROCEEDINGS HAVE BEEN BROUGHT FOR THE RECOGNITION OR ENFORCEMENT OF A JUDGMENT GIVEN IN THE FORMER STATE . IN THIS CONNECTION IT SHOULD BE EMPHASIZED THAT ARTICLE 27 , POINT 2 , IS NOT

ADDRESSED TO THE COURTS OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN , BUT ONLY TO THE COURT BEFORE WHICH PROCEEDINGS HAVE BEEN BROUGHT FOR RECOGNITION OR ENFORCEMENT OF THE JUDGMENT IN ANOTHER CONTRACTING STATE. IN THE CASE WITH WHICH THE QUESTION IS CONCERNED THE DEFENDANT DID NOT SUBMIT A DEFENCE AS TO THE SUBSTANCE OF THE CASE BEFORE THE COURT FIRST SEISED. THE DISMISSAL OF THE OBJECTION TO THE ENFORCEMENT ORDER AS INADMISSIBLE MEANS THAT THE DECISION GIVEN IN DEFAULT REMAINS INTACT. FOR THAT REASON THE OBJECTIVE OF ARTICLE 27 , POINT 2 , REQUIRES THAT IN THE CASE WITH WHICH THIS QUESTION IS CONCERNED THE COURT IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT SHOULD CARRY OUT THE EXAMINATION PRESCRIBED BY THAT PROVISION.

13 THE REPLY TO THE THIRD QUESTION SHOULD THEREFORE BE THAT ARTICLE 27 , POINT 2 , REMAINS APPLICABLE WHERE THE DEFENDANT HAS LODGED AN OBJECTION AGAINST THE DECISION GIVEN IN DEFAULT AND A COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN HAS HELD THE OBJECTION TO BE INADMISSIBLE ON THE GROUND THAT THE TIME FOR LODGING AN OBJECTION HAS EXPIRED .

FOURTH QUESTION

14 BY THIS QUESTION THE HOGE RAAD ASKS FIRST WHETHER , WHERE A COURT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN HAS ALREADY FOUND THAT SERVICE HAS BEEN DULY EFFECTED , THE COURT SEISED IN THE OTHER CONTRACTING STATE IS STILL REQUIRED TO CONSIDER WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME TO ENABLE THE DEFENDANT TO ARRANGE FOR HIS DEFENCE .

15 FOR THE PURPOSES OF THE REPLY TO THE FIRST PART OF THE QUESTION IT SHOULD FIRST OF ALL BE POINTED OUT THAT ARTICLE 27 , POINT 2 , LAYS DOWN TWO CONDITIONS , THE FIRST OF WHICH , THAT SERVICE SHOULD BE DULY EFFECTED , ENTAILS A DECISION BASED ON THE LEGISLATION OF THE STATE IN WHICH JUDGMENT WAS GIVEN AND ON THE CONVENTIONS BINDING ON THAT STATE IN REGARD TO SERVICE WHILST THE SECOND , CONCERNING THE TIME NECESSARY TO ENABLE THE DEFENDANT TO ARRANGE FOR HIS DEFENCE , IMPLIES APPRAISALS OF A FACTUAL NATURE. A DECISION CONCERNING THE FIRST OF THOSE CONDITIONS MADE IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN ACCORDINGLY DOES NOT RELEASE THE COURT IN THE STATE IN WHICH ENFORCEMENT IS SOUGHT FROM ITS DUTY TO EXAMINE THE SECOND CONDITION , EVEN IF THAT DECISION WAS MADE IN THE CONTEXT OF SEPARATE ADVERSARY PROCEEDINGS .

16 THE REPLY TO THIS PART OF THE QUESTION MUST ACCORDINGLY BE THAT , EVEN IF THE COURT IN WHICH THE JUDGMENT WAS GIVEN HAS HELD , IN SEPARATE ADVERSARY PROCEEDINGS , THAT SERVICE WAS DULY EFFECTED , ARTICLE 27 , POINT 2 , STILL REQUIRES THE COURT IN WHICH ENFORCEMENT IS SOUGHT TO EXAMINE WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME TO ENABLE THE DEFENDANT TO ARRANGE FOR HIS DEFENCE.

17 IN THE EVENT OF AN AFFIRMATIVE REPLY TO FIRST PART OF THE FOURTH QUESTION , THE HOGE RAAD ASKS FURTHER WHETHER THE EXAMINATION IN QUESTION MUST BE LIMITED TO THE FINDING THAT THE DOCUMENT REACHED THE HABITUAL RESIDENCE OF THE DEFENDANT IN SUFFICIENT TIME OR WHETHER IT IS A FURTHER REQUIREMENT , FOR EXAMPLE , THAT THE SERVICE IN QUESTION SHOULD PROVIDE A SUFFICIENT GUARANTEE THAT THE DOCUMENT WOULD REACH THE DEFENDANT PERSONALLY IN GOOD TIME.

18 THE SECOND CONDITION CONTAINED IN ARTICLE 27 , POINT 2 , IS INTENDED TO ENSURE THAT THE DEFENDANT HAS SUFFICIENT TIME TO PREPARE HIS DEFENCE OR TO TAKE THE STEPS NECESSARY TO PREVENT JUDGMENT ' S BEING GIVEN IN DEFAULT. THE QUESTION SUBMITTED TO THE COURT IS NOT CONCERNED WITH HOW LONG THIS TIME IS BUT RATHER WITH THE POINT FROM WHICH IT BEGINS TO RUN. THE HOGE RAAD IS IN FACT ASKING WHETHER THE COURT IN WHICH ENFORCEMENT IS SOUGHT MUST PROCEED ON THE ASSUMPTION THAT A DEFENDANT IS ABLE TO PREPARE HIS DEFENCE AS SOON AS THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS REACHES HIS HABITUAL RESIDENCE .

19 IN THIS CONNECTION IT MUST BE STATED FIRST OF ALL THAT ARTICLE 27 , POINT 2 , DOES NOT REQUIRE PROOF THAT THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS WAS ACTUALLY BROUGHT TO THE KNOWLEDGE OF THE DEFENDANT . HAVING REGARD TO THE EXCEPTIONAL NATURE OF THE GROUNDS FOR REFUSING ENFORCEMENT AND TO THE FACT THAT THE LAWS OF THE CONTRACTING STATES ON THE SERVICE OF COURT DOCUMENTS , LIKE THE INTERNATIONAL CONVENTIONS ON THIS SUBJECT , HAVE AS THEIR OBJECTIVE THE SAFEGUARDING OF THE INTERESTS OF DEFENDANTS , THE COURT IN WHICH ENFORCEMENT IS SOUGHT IS ORDINARILY JUSTIFIED IN CONSIDERING THAT , FOLLOWING DUE SERVICE , THE DEFENDANT IS ABLE TO TAKE STEPS TO DEFEND HIS INTERESTS AS SOON AS THE DOCUMENT HAS BEEN SERVED ON HIM AT HIS HABITUAL RESIDENCE OR ELSEWHERE . AS A GENERAL RULE THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY ACCORDINGLY CONFINE ITS EXAMINATION TO ASCERTAINING WHETHER THE PERIOD RECKONED FROM THE DATE ON WHICH SERVICE WAS DULY EFFECTED ALLOWED THE DEFENDANT SUFFICIENT TIME TO ARRANGE FOR HIS DEFENCE. NEVERTHELESS THE COURT MUST CONSIDER WHETHER , IN A PARTICULAR CASE , THERE ARE EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT THE CONCLUSION THAT , ALTHOUGH SERVICE WAS DULY EFFECTED , IT WAS , HOWEVER , INADEQUATE FOR THE PURPOSES OF ENABLING THE DEFENDANT TO TAKE STEPS TO ARRANGE FOR HIS DEFENCE AND , ACCORDINGLY , COULD NOT CAUSE THE TIME STIPULATED BY ARTICLE 27 , POINT 2 , TO BEGIN TO RUN.

20 IN CONSIDERING WHETHER IT IS CONFRONTED WITH SUCH A CASE THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY TAKE ACCOUNT OF ALL THE CIRCUMSTANCES OF THE CASE IN POINT , INCLUDING THE MEANS EMPLOYED FOR EFFECTING SERVICE , THE RELATIONS BETWEEN THE PLAINTIFF AND THE DEFENDANT OR THE NATURE OF THE STEPS WHICH HAD TO BE TAKEN IN ORDER TO PREVENT JUDGMENT FROM BEING GIVEN IN DEFAULT. IF , FOR EXAMPLE , THE DISPUTE CONCERNS COMMERCIAL RELATIONS AND IF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS WAS SERVED AT AN ADDRESS AT WHICH THE DEFENDANT CARRIES ON HIS BUSINESS ACTIVITIES THE MERE FACT THAT THE DEFENDANT WAS ABSENT AT THE TIME OF SERVICE SHOULD NOT NORMALLY PREVENT HIM FROM ARRANGING HIS DEFENCE , ABOVE ALL IF THE ACTION NECESSARY TO AVOID A JUDGMENT IN DEFAULT MAY BE TAKEN INFORMALLY AND EVEN BY A REPRESENTATIVE.

21 THE REPLY TO THAT PART OF THE FOURTH QUESTION SHOULD THEREFORE BE THAT THE COURT IN WHICH ENFORCEMENT IS SOUGHT MAY AS A GENERAL RULE CONFINE ITSELF TO EXAMINING WHETHER THE PERIOD RECKONED FROM THE DATE ON WHICH SERVICE WAS DULY EFFECTED ALLOWED THE DEFENDANT SUFFICIENT TIME FOR HIS DEFENCE. HOWEVER THE COURT IS ALSO REQUIRED TO CONSIDER WHETHER , IN A PARTICULAR CASE , THERE ARE EXCEPTIONAL CIRCUMSTANCES SUCH AS THE FACT THAT , ALTHOUGH SERVICE WAS DULY EFFECTED , IT WAS NEVERTHELESS INADEQUATE

FOR THE PURPOSE OF CAUSING THAT TIME TO BEGIN TO RUN .

FIFTH QUESTION

22 THIS QUESTION CONCERNS ARTICLE 52 OF THE CONVENTION , THE RELEVANT PROVISIONS OF WHICH READ AS FOLLOWS :

' ' IN ORDER TO DETERMINE WHETHER A PARTY IS DOMICILED IN THE CONTRACTING STATE WHOSE COURTS ARE SEISED OF A MATTER , THE COURT SHALL APPLY ITS INTERNAL LAW.

IF A PARTY IS NOT DOMICILED IN THE STATE WHOSE COURTS ARE SEISED OF THE MATTER , THEN , IN ORDER TO DETERMINE WHETHER THE PARTY IS DOMICILED IN ANOTHER CONTRACTING STATE , THE COURT SHALL APPLY THE LAW OF THAT STATE. ' '

23 THAT ARTICLE STATES WHICH LAW IS APPLICABLE WHERE , ACCORDING TO THE OTHER PROVISIONS OF THE CONVENTION , IN PARTICULAR THOSE CONCERNING JURISDICTION , IT IS NECESSARY TO DETERMINE THE HABITUAL RESIDENCE (OR ONE OF THE HABITUAL RESIDENCES) OF A PARTY. IN THE CONTEXT OF ARTICLE 27 , POINT 2 , THE HABITUAL RESIDENCE OF THE DEFENDANT MAY BE A DECISIVE FACTOR FOR THE PURPOSE OF CONSIDERING WHETHER SERVICE HAS BEEN DULY EFFECTED BUT THAT QUESTION MUST IN ANY CASE BE RESOLVED BY APPLYING THE INTERNAL LAW OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN AND OF THE RELEVANT CONVENTIONS. THE QUESTION WHETHER SERVICE WAS EFFECTED IN SUFFICIENT TIME INVOLVES , AS HAS BEEN INDICATED ABOVE , ASSESSMENTS OF FACT TO WHICH THE CONCEPT OF HABITUAL RESIDENCE IS IRRELEVANT.

24 THE REPLY TO THE FIFTH QUESTION SHOULD THEREFORE BE THAT ARTICLE 52 OF THE CONVENTION AND THE FACT THAT THE COURT OF THE STATE IN WHICH ENFORCEMENT IS SOUGHT CONCLUDED THAT UNDER THE LAW OF THAT STATE THE DEFENDANT WAS HABITUALLY RESIDENT WITHIN ITS TERRITORY AT THE DATE OF SERVICE OF THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS DO NOT AFFECT THE REPLIES GIVEN ABOVE.

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NATCOUR *A7* Amtsgericht Krefeld, Urteil vom 19/04/1977 (8 C 600/76)
A8 Arrondissementsrechtbank Roermond, vonnis van 20/09/1979 (908/1978)
A9 Hoge Raad, arrest van 08/07/1980 (11.594)
- Nederlands juristenblad 1980 p.730-731
- Rechtspraak van de week 1980 no 93
- Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1983 no 304
P1 Hoge Raad, 1e kamer, arrest van 17/09/1982 (11.594)
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PROCEDU Reference for a preliminary ruling

ADVGEN Reischl

JUDGRAP Due

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**Judgment of the Court
of 26 May 1981
Criminal proceedings against Siegfried Ewald Rinkau. Reference for a preliminary ruling: Hoge Raad - Netherlands. Article II of the Protocol annexed to the Convention on Jurisdiction of 27 September 1968. Case 157/80.**

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPECIAL PROVISIONS AS REGARDS CRIMINAL PROCEEDINGS - RIGHT TO BE DEFENDED WITHOUT APPEARING IN PERSON IN CRIMINAL PROCEEDINGS RELATING TO AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED - CONCEPT OF AN ' ' OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED ' ' - INDEPENDENT CONCEPT - DEFINITION

(ART . II OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPECIAL PROVISIONS AS REGARDS CRIMINAL PROCEEDINGS - RIGHT TO BE DEFENDED WITHOUT APPEARING IN PERSON IN CRIMINAL PROCEEDINGS RELATING TO AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED - SCOPE - CRIMINAL PROCEEDINGS RELATING TO AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED RAISING THE ISSUE OF THE ACCUSED ' S CIVIL LIABILITY

(ART . II OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968)

1 . THE CONCEPT OF AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED APPEARING IN ARTICLE II OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE REGARDED AS AN INDEPENDENT CONCEPT WHICH MUST BE EXPLAINED BY REFERENCE , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH THE NATIONAL LEGAL SYSTEMS HAVE IN COMMON. IT COVERS ANY OFFENCE THE LEGAL DEFINITION OF WHICH DOES NOT REQUIRE , EITHER EXPRESSLY OR AS APPEARS FROM THE NATURE OF THE OFFENCE DEFINED , THE EXISTENCE OF INTENT ON THE PART OF THE ACCUSED TO COMMIT THE PUNISHABLE ACT OR OMISSION.

2 . THE RIGHT TO BE DEFENDED WITHOUT APPEARING IN PERSON , GRANTED BY ARTICLE II OF THE AFOREMENTIONED PROTOCOL , APPLIES IN ALL CRIMINAL PROCEEDINGS CONCERNING OFFENCES WHICH WERE NOT INTENTIONALLY COMMITTED , IN WHICH THE ACCUSED ' S LIABILITY AT CIVIL LAW , ARISING FROM THE ELEMENTS OF THE OFFENCE FOR WHICH HE IS BEING PROSECUTED , IS IN QUESTION OR ON WHICH SUCH LIABILITY MIGHT SUBSEQUENTLY BE BASED.

IN CASE 157/80

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 HOGE RAAD (SUPREME COURT) OF THE NETHERLANDS FOR A PRELIMINARY RULING IN THE CRIMINAL PROCEEDINGS AGAINST

SIEGFRIED EWALD RINKAU

ON THE INTERPRETATION OF ARTICLE II OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY A JUDGMENT DATED 17 JUNE 1980 WHICH WAS RECEIVED AT THE COURT ON 3 JULY 1980 THE HOGE RAAD (SUPREME COURT) OF THE NETHERLANDS 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') TWO QUESTIONS AS TO THE INTERPRETATION OF ARTICLE II OF THE PROTOCOL ANNEXED TO THE CONVENTION (HEREINAFTER REFERRED TO AS ' ' THE PROTOCOL ' ').

2 AFTER BEING SUMMONED TO APPEAR BEFORE THE POLITIERECHTER (MAGISTRATE) OF THE ARRONDISSEMENTSRECHTBANK (DISTRICT COURT), ZUTPHEN (NETHERLANDS), FOR DRIVING IN THE NETHERLANDS A VEHICLE EQUIPPED WITH A RADIO-ELECTRICAL TRANSMITTING DEVICE WITHOUT HOLDING THE REQUISITE LICENCE , SIEGFRIED RINKAU , RESIDENT IN THE FEDERAL REPUBLIC OF GERMANY , DID NOT APPEAR AT THE HEARING. HIS COUNSEL ASKED FOR LEAVE TO DEFEND HIM. NOTWITHSTANDING THE OPINION OF THE PUBLIC PROSECUTOR THE MAGISTRATE TOOK THE VIEW THAT THE ACCUSED SHOULD BE ALLOWED TO AVAIL HIMSELF OT THE RIGHT GRANTED BY THE FIRST PARAGRAPH OF ARTICLE II OF THE PROTOCOL AND GAVE HIS COUNSEL LEAVE TO DEFEND HIM . MR RINKAU WAS SENTENCED IN HIS ABSENCE TO A FINE OR FAILING PAYMENT THEREOF TO ONE DAY ' S IMPRISONMENT AND THE RADIO-ELECTRICAL DEVICE WAS ORDERED TO BE CONFISCATED.

3 FOLLOWING AN APPEAL BY THE PUBLIC PROSECUTOR , THE GERECHTSHOF (REGIONAL COURT OF APPEAL), ARNHEM , HELD IN ITS INTERLOCUTORY JUDGMENT OF 28 AUGUST 1979 THAT ARTICLE II OF THE PROTOCOL HAD APPLICATION IN ALL CRIMINAL PROCEEDINGS CONCERNING OFFENCES WHICH WERE NOT INTENTIONALLY COMMITTED BUT THAT THE OFFENCE WITH WHICH THE ACCUSED WAS CHARGED WAS NOT SUCH AN OFFENCE. THE GERECHTSHOF ACCORDINGLY DECIDED NOT TO GRANT THE ACCUSED ' S COUNSEL LEAVE TO DEFEND HIM IN HIS ABSENCE AND , AS REGARDS THE SUBSTANCE OF THE CASE , BY A JUDGMENT OF 11 SEPTEMBER 1979 UPHELD THE JUDGMENT GIVEN AT FIRST INSTANCE .

4 MR RINKAU APPEALED IN CASSATION AGAINST THOSE TWO JUDGMENTS. HE CLAIMED THAT ARTICLE II OF THE PROTOCOL HAD BEEN INFRINGED. THE HOGE RAAD DECIDED BEFORE MAKING ANY FURTHER RULING TO REFER THE FOLLOWING QUESTIONS TO THE COURT FOR AN INTERPRETATION :

' ' 1 . MUST THE EXPRESSION ' AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED ' APPEARING IN THE FIRST PARAGRAPH OF ARTICLE II OF THE SAID PROTOCOL BE UNDERSTOOD AS INCLUDING ANY OFFENCE FOR WHICH THE LEGAL DEFINITION DOES NOT REQUIRE SPECIFIC INTENT IN REGARD TO ANY ELEMENT OF THE OFFENCE , OR SHOULD THE EXPRESSION BE UNDERSTOOD IN A NARROWER SENSE AS RELATING ONLY TO OFFENCES IN THE DEFINITION OF WHICH THERE IS REFERENCE TO SOME ELEMENT OF GUILT (CULPA) ON THE PART OF THE OFFENDER?

2 . IF THE CONDITIONS SET OUT IN ARTICLE II OF THE SAID PROTOCOL ARE FULFILLED , DOES THE RIGHT GRANTED TO ' THE ACCUSED ' BY THAT ARTICLE APPLY WITHOUT RESTRICTION , OR DOES THE ACCUSED PERSON HAVE THAT RIGHT ONLY WHERE HE HAS TO DEFEND HIMSELF AGAINST A CIVIL CLAIM MADE IN THE RELEVANT CRIMINAL PROCEEDINGS , OR AT ANY RATE WHERE THE INTERESTS OF THE ACCUSED UNDER CIVIL LAW ARE AFFECTED BY THE OUTCOME OF THE CRIMINAL PROCEEDINGS?

' '

GENERAL CONSIDERATIONS

5 ACCORDING TO ARTICLE 65 OF THE CONVENTION THE PROTOCOL FORMS AN INTEGRAL PART THEREOF. THE SCOPE OF THE CONVENTION , WHICH IS DEFINED IN ARTICLE 1 , IS CONFINED TO CIVIL AND COMMERCIAL MATTERS. THE QUESTION TO BE ASKED AT THE OUTSET , THEREFORE , IS WHY A RULE OF CRIMINAL PROCEDURE LIKE ARTICLE II OF THE PROTOCOL CAME TO BE INSERTED IN A CONVENTION ON CIVIL AND COMMERCIAL MATTERS. THAT ARTICLE READS :

' ' WITHOUT PREJUDICE TO ANY MORE FAVOURABLE PROVISIONS OF NATIONAL LAWS , PERSONS DOMICILED IN A CONTRACTING STATE WHO ARE BEING PROSECUTED IN THE CRIMINAL COURTS OF ANOTHER CONTRACTING STATE OF WHICH THEY ARE NOT NATIONALS FOR AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED MAY BE DEFENDED BY PERSONS QUALIFIED TO DO SO , EVEN IF THEY DO NOT APPEAR IN PERSON.

HOWEVER , THE COURT SEISED OF THE MATTER MAY ORDER APPEARANCE IN PERSON ; IN THE CASE OF FAILURE TO APPEAR , A JUDGMENT GIVEN IN THE CIVIL ACTION WITHOUT THE PERSON CONCERNED HAVING HAD THE OPPORTUNITY TO ARRANGE FOR HIS DEFENCE NEED NOT BE RECOGNIZED OR ENFORCED IN THE OTHER CONTRACTING STATES. ' '

6 IN THE REPORT SUBMITTED TO THE NATIONAL GOVERNMENTS AT THE SAME TIME AS THE DRAFT CONVENTION (OFFICIAL JOURNAL 1979 , C 59 , P. 1) THAT EXTENSION TO THE CRIMINAL FIELD IS JUSTIFIED BY REFERENCE TO THE CONSEQUENCES WHICH A JUDGMENT OF A CRIMINAL COURT MAY ENTAIL IN CIVIL AND COMMERCIAL MATTERS IF THOSE CONSEQUENCES THEMSELVES COME WITHIN THE AMBIT OF THE CONVENTION.

7 THE FIRST PARAGRAPH OF ARTICLE II OF THE PROTOCOL APPEARS TO HAVE BEEN THE TRANSPOSITION INTO THE CONVENTION OF ARTICLE II OF THE PROTOCOL ANNEXED TO THE TREATY BETWEEN BELGIUM , THE NETHERLANDS AND LUXEMBOURG ON JURISDICTION , BANKRUPTCY AND THE VALIDITY AND ENFORCEMENT OF JUDGMENTS , ARBITRATION AWARDS AND AUTHENTIC INSTRUMENTS . THAT PROVISION IN FACT PROVIDES :

' ' WITHOUT PREJUDICE TO ANY MORE FAVOURABLE PROVISIONS OF NATIONAL LAWS THE NATIONALS OF ANY ONE OF THE THREE COUNTRIES WHO ARE RESIDENT IN THEIR COUNTRY MAY APPEAR BEFORE THE COURTS OF THE OTHER TWO COUNTRIES BY SPECIAL ATTORNEY IF THEY ARE BEING PROSECUTED THERE FOR AN OFFENCE OTHER THAN ONE WHICH WAS INTENTIONALLY COMMITTED ' '.

THE COMMISSION RESPONSIBLE FOR DRAWING UP THE DRAFT BENELUX TREATY EXPLAINED IN ITS REPORT THAT IT BELIEVED THAT IT WAS ' ' ESSENTIAL ' ' THAT THE ACCUSED ' ' SHOULD BE ABLE TO CONDUCT HIS DEFENCE DURING THE CRIMINAL STAGE OF THE PROCEEDINGS ' ' WITHOUT HAVING TO APPEAR IN PERSON .

8 THAT SAME REASON IS ALSO CITED IN THE REPORT ON THE BRUSSELS CONVENTION IN CONNEXION WITH ARTICLE II OF THE PROTOCOL ANNEXED TO THE CONVENTION . HOWEVER , THAT RIGHT IS CONFERRED BY THE CONVENTION ONLY ON ACCUSED PERSONS BEING PROSECUTED FOR AN ' ' OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED ' '. THAT CONCEPT IS NOT FURTHER DEFINED OR CLARIFIED IN THE CONVENTION. HOWEVER , THE REPORT DOES SAY THAT IT ' ' INCLUDES ROAD ACCIDENTS ' ' WHICH THUS APPEAR TO BE A PARTICULARLY IMPORTANT AREA OF APPLICATION OF ARTICLE II OF THE PROTOCOL.

9 IT IS NECESSARY TO STRESS ONCE MORE THAT , AS ARTICLE II EXPRESSLY PROVIDES , THE RIGHT GRANTED TO THE ACCUSED PERSON TO BE DEFENDED WITHOUT APPEARING IN PERSON DOES NOT PREJUDICE THE COURT ' S POWER TO ORDER APPEARANCE IN PERSON. IF , NOTWITHSTANDING SUCH AN ORDER , THE ACCUSED PERSON DOES NOT APPEAR , THE COURT MAY DELIVER JUDGMENT WITHOUT GRANTING THE ACCUSED ' S COUNSEL LEAVE TO DEFEND HIM. THE RESULT OF THE ABSENCE OF A DEFENCE , ACCORDING TO THE SECOND PARAGRAPH OF ARTICLE II OF THE PROTOCOL , IS THAT A JUDGMENT GIVEN IN THE CIVIL ACTION NEED NOT BE RECOGNIZED OR ENFORCED IN THE OTHER CONTRACTING STATES .

10 THE QUESTIONS FRAMED BY THE HOGE RAAD OF THE NETHERLANDS MUST BE ANSWERED IN THE LIGHT OF THOSE VARIOUS CONSIDERATIONS.

THE CONCEPT OF AN ' ' OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED ' '

11 ALTHOUGH THE CONCEPT OF AN ' ' OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED ' ' IS NOT DEFINED IN THE CONVENTION , IN ORDER TO ENSURE AS FAR AS POSSIBLE THAT THE RIGHTS AND OBLIGATIONS OF THE CONTRACTING STATES AND OF THE PERSONS CONCERNED ARISING FROM THE CONVENTION ARE EQUAL AND UNIFORM , IT MUST NEVERTHELESS BE REGARDED AS AN INDEPENDENT CONCEPT WHICH MUST BE EXPLAINED BY REFERENCE , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH THE NATIONAL LEGAL SYSTEMS HAVE IN COMMON. THAT IS ALL THE MORE NECESSARY WHERE , AS IN THIS CASE , TERMINOLOGICAL DIFFERENCES EXIST BETWEEN THE VARIOUS LANGUAGE VERSIONS OF THE CONVENTION.

12 THE AIM OF THE CONVENTION TO COVER OFFENCES CONNECTED WITH ROAD ACCIDENTS THROUGH ITS USE OF THE CONCEPT OF AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED HAS ALREADY BEEN MENTIONED IN CONNEXION WITH THE OBJECTIVES OF THE CONVENTION. ANOTHER MORE GENERAL GUIDE IS THE FACT THAT BY RESTRICTING THE RIGHT TO BE DEFENDED WITHOUT APPEARING IN PERSON , WHICH IS MADE AVAILABLE TO PERSONS WHO HAVE COMMITTED CERTAIN OFFENCES , THE CONVENTION CLEARLY SEEKS TO DENY THAT RIGHT TO PERSONS BEING PROSECUTED FOR OFFENCES WHICH ARE SUFFICIENTLY SERIOUS TO JUSTIFY ITS DENIAL.

13 IT IS THEREFORE NECESSARY TO ASCERTAIN WHETHER THERE IS A CRITERION FOR CLASSIFICATION WHICH IS COMMON TO THE NATIONAL LEGAL SYSTEMS OF ALL THE CONTRACTING STATES , BY WHICH OFFENCES MAY DE DISTINGUISHED ACCORDING TO THEIR SERIOUSNESS AND ON THE BASIS OF WHICH MOST , IF NOT ALL , OF THE OFFENCES CONNECTED WITH ROAD ACCIDENTS MAY BE CLASSIFIED AMONGST THE LESS SERIOUS OFFENCES.

14 THE NATIONAL LAWS OF MOST OF THE CONTRACTING STATES DISTINGUISH IN ONE WAY OR ANOTHER BETWEEN OFFENCES COMMITTED INTENTIONALLY AND THOSE NOT SO COMMITTED. EVEN THOUGH THAT DISTINCTION MAY LEAD TO THE CLASSIFICATION OF OFFENCES INTO CATEGORIES OF WHICH THE CONTENT MAY VARY APPRECIABLY FROM ONE LEGAL SYSTEM TO ANOTHER , IT STILL SERVES THE AFOREMENTIONED PURPOSE.

15 WHEREAS OFFENCES WHICH WERE INTENTIONALLY COMMITTED , IF THEY ARE TO BE PUNISHABLE , REQUIRE AN INTENT TO COMMIT THEM ON THE PART OF THE PERSON CONCERNED , OFFENCES WHICH WERE NOT INTENTIONALLY COMMITTED MAY RESULT FROM CARELESSNESS , NEGLIGENCE OR EVEN THE MERE OBJECTIVE BREACH OF A

LEGAL PROVISION. THEY ARE THEREFORE , FIRST , GENERALLY LESS SERIOUS IN NATURE AND , SECONDLY , COVER MOST OFFENCES CONNECTED WITH ROAD ACCIDENTS WHICH ARE TO BE ASCRIBED TO CARELESSNESS , NEGLIGENCE OR THE MERE ACTUAL BREACH OF A LEGAL PROVISION.

16 CONSEQUENTLY THE ANSWER TO THE FIRST QUESTION OF THE HOGE RAAD MUST BE THAT THE EXPRESSION ' ' AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED ' ' WITHIN THE MEANING OF ARTICLE II OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS SHOULD BE UNDERSTOOD AS MEANING ANY OFFENCE THE LEGAL DEFINITION OF WHICH DOES NOT REQUIRE , EITHER EXPRESSLY OR AS APPEARS FROM THE NATURE OF THE OFFENCE DEFINED , THE EXISTENCE OF INTENT ON THE PART OF THE ACCUSED TO COMMIT THE PUNISHABLE ACT OR OMISSION.

THE SECOND QUESTION

17 THE HOGE RAAD ASKS IN THE SECOND PLACE WHETHER THE RIGHT GRANTED TO THE ACCUSED BY ARTICLE II OF THE PROTOCOL HAS APPLICATION IN ALL CRIMINAL PROCEEDINGS WHICH AFFECT THE ACCUSED ' S INTERESTS AT CIVIL LAW OR ONLY IN THOSE IN WHICH A CRIMINAL COURT HAS TO DECIDE A CIVIL CLAIM AT THE SAME TIME.

18 THE NETHERLANDS GOVERNMENT POINTS OUT IN ITS OBSERVATIONS THAT THE SCOPE OF THE CONVENTION IS RESTRICTED TO CIVIL AND COMMERCIAL MATTERS . IT CONSIDERS THAT THAT RESTRICTION SHOULD BE BORNE IN MIND WHEN ARTICLE II OF THE PROTOCOL IS CONSTRUED , AS APPEARS FROM THE SECOND PARAGRAPH OF THAT ARTICLE. THE NETHERLANDS GOVERNMENT ACCORDINGLY CONCLUDES THAT THE RIGHT GRANTED TO THE ACCUSED BY THE FIRST PARAGRAPH HAS APPLICATION ONLY IF THE CRIMINAL COURT HAS TO DECIDE A CIVIL CLAIM AT THE SAME TIME.

19 THE COMMISSION DOES NOT DENY THAT THE AIM OF ARTICLE II OF THE PROTOCOL IS TO LAY DOWN A RULE OF CRIMINAL PROCEDURE IN SO FAR AS CRIMINAL PROCEEDINGS MAY HAVE AN EFFECT ON THE ACCUSED ' S INTERESTS AT CIVIL LAW. HOWEVER , HAVING REGARD TO THE FACT THAT A RULE OF CRIMINAL PROCEDURE WHICH IS FOR THE BENEFIT OF THE ACCUSED SHOULD RECEIVE A WIDE INTERPRETATION AND IN VIEW OF THE DIFFICULTY WHICH FREQUENTLY EXISTS , IN THE COMMISSION ' S VIEW , IN DECIDING WHETHER OR NOT CRIMINAL PROCEEDINGS ARE LIKELY TO AFFECT THE ACCUSED ' S INTERESTS AT CIVIL LAW , THE COMMISSION CONSIDERS THAT THE RIGHT GRANTED TO THE ACCUSED BY ARTICLE II OF THE PROTOCOL MUST APPLY IN ALL CRIMINAL PROCEEDINGS.

20 ALTHOUGH IT IS NOT EXPRESSLY PROVIDED BY THE FIRST PARAGRAPH OF ARTICLE II OF THE PROTOCOL THAT THE RIGHT THEREIN GRANTED TO THE ACCUSED APPLIES ONLY DURING CRIMINAL PROCEEDINGS IN WHICH HIS LIABILITY AT CIVIL LAW (ARISING FROM THE ELEMENTS OF THE OFFENCE FOR WHICH HE IS BEING PROSECUTED) IS IN QUESTION OR ON WHICH SUCH LIABILITY MIGHT SUBSEQUENTLY BE BASED , IT SHOULD NEVERTHELESS NOT BE FORGOTTEN THAT THAT WAS THE ACTUAL INTENTION BEHIND THE INSERTION IN THE PROTOCOL OF THE PROVISION IN QUESTION. THAT INTENTION PRECLUDES THE RIGHT TO BE DEFENDED WITHOUT APPEARING IN PERSON FROM HAVING APPLICATION IN CRIMINAL PROCEEDINGS IN WHICH THE ACCUSED IS NOT OPEN TO A CIVIL CLAIM IN THE CIRCUMSTANCES DESCRIBED ABOVE.

21 THE ANSWER TO THE SECOND QUESTION OF THE HOGE RAAD SHOULD THEREFORE

BE THAT THE ACCUSED ' S RIGHT TO BE DEFENDED WITHOUT APPEARING IN PERSON , GRANTED BY ARTICLE II OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , APPLIES IN ALL CRIMINAL PROCEEDINGS CONCERNING OFFENCES WHICH WERE NOT INTENTIONALLY COMMITTED , IN WHICH THE ACCUSED ' S LIABILITY AT CIVIL LAW , ARISING FROM THE ELEMENTS OF THE OFFENCE FOR WHICH HE IS BEING PROSECUTED , IS IN QUESTION OR ON WHICH SUCH LIABILITY MIGHT SUBSEQUENTLY BE BASED.

22 THE COSTS INCURRED BY THE GOVERNMENT OF THE NETHERLANDS AND THE COMMISSION WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE . AS THE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HOGE RAAD BY JUDGMENT OF 17 JUNE 1980 , HEREBY RULES :

1 . THE EXPRESSION ' ' AN OFFENCE WHICH WAS NOT INTENTIONALLY COMMITTED ' ' WITHIN THE MEANING OF ARTICLE II OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS SHOULD BE UNDERSTOOD AS MEANING ANY OFFENCE THE LEGAL DEFINITION OF WHICH DOES NOT REQUIRE , EITHER EXPRESSLY OR AS APPEARS FROM THE NATURE OF THE OFFENCE DEFINED , THE EXISTENCE OF INTENT ON THE PART OF THE ACCUSED TO COMMIT THE PUNISHABLE ACT OR OMISSION.

2 . THE ACCUSED ' S RIGHT TO BE DEFENDED WITHOUT APPEARING IN PERSON , GRANTED BY ARTICLE II OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , APPLIES IN ALL CRIMINAL PROCEEDINGS CONCERNING OFFENCES WHICH WERE NOT INTENTIONALLY COMMITTED , IN WHICH THE ACCUSED ' S LIABILITY AT CIVIL LAW , ARISING FROM THE ELEMENTS OF THE OFFENCE FOR WHICH HE IS BEING PROSECUTED , IS IN QUESTION OR ON WHICH SUCH LIABILITY MIGHT SUBSEQUENTLY BE BASED.

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SUB	Brussels Convention of 27 September 1968
AUTLANG	Dutch
OBSERV	Netherlands ; Commission ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A8* Gerechtshof Arnhem, arrest van 11/09/1979 (511/77) ; *A9* Hoge Raad, strafkamer, arrest van 17/06/1980 (71.382/383) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1980 no 592 ; - Van Veen, Th.W.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1980 no 592 ; *P1* Hoge Raad, strafkamer, arrest van 17/11/1981 (71.382/383) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1982 no 269 ; - Van Veen, Th.W.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1982 no 269 ; - Sins, L.H.P.: Advocatenblad 1982 p.177-179
NOTES	Hartley, Trevor: Civil Proceedings in Criminal Courts: Article II of the Protocol, European Law Review 1981 p.483-486 ; Huet, André: Journal du droit international 1981 p.888-893 ; Habscheid, Walther J.: Zur Auslegung von Art.II des Protokolls zum EuGVÜ, Praxis des internationalen Privat- und Verfahrensrechts 1982 p.173-174 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a28
PROCEDU	Reference for a preliminary ruling
ADVGEN	Reischl
JUDGRAP	Mackenzie Stuart
DATES	of document: 26/05/1981 of application: 03/07/1980

**Judgment of the Court
of 24 June 1981
Elefanten Schuh GmbH v Pierre Jacqmain. Reference for a preliminary ruling: Hof van Cassatie - Belgium. Brussels Convention: Prorogation of jurisdiction. Case 150/80.**

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROROGATION OF JURISDICTION - APPEARANCE OF THE DEFENDANT BEFORE THE COURT SEISED - AGREEMENT CONFERRING JURISDICTION DESIGNATING ANOTHER COURT - EFFECT

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS 17 AND 18)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROROGATION OF JURISDICTION - APPEARANCE OF THE DEFENDANT BEFORE THE COURT SEISED - CHALLENGE AS TO JURISDICTION AND DEFENCE ON THE SUBSTANCE - APPEARANCE NOT CONFERRING JURISDICTION - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 18)

3 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROROGATION OF JURISDICTION - AGREEMENTS CONFERRING JURISDICTION - FORMAL REQUIREMENTS - RULES OF THE CONVENTION - STIPULATION BY A CONTRACTING STATE OF OTHER REQUIREMENTS - NOT PERMISSIBLE - APPLICATION TO PROVISIONS ON LANGUAGES

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 17)

1 . ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS APPLIES EVEN WHERE THE PARTIES HAVE BY AGREEMENT DESIGNATED A COURT WHICH IS TO HAVE JURISDICTION WITHIN THE MEANING OF ARTICLE 17 OF THAT CONVENTION.

2 . ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT THE RULE ON JURISDICTION WHICH THAT PROVISION LAYS DOWN DOES NOT APPLY WHERE THE DEFENDANT NOT ONLY CONTESTS THE COURT ' S JURISDICTION BUT ALSO MAKES SUBMISSIONS ON THE SUBSTANCE OF THE ACTION , PROVIDED THAT IF THE CHALLENGE TO JURISDICTION IS NOT PRELIMINARY TO ANY DEFENCE AS TO THE SUBSTANCE IT DOES NOT OCCUR AFTER THE MAKING OF THE SUBMISSIONS WHICH UNDER NATIONAL PROCEDURAL LAW ARE CONSIDERED TO BE THE FIRST DEFENCE ADDRESSED TO THE COURT SEISED.

3 . SINCE THE AIM OF ARTICLE 17 OF THE CONVENTION IS TO LAY DOWN THE FORMAL REQUIREMENTS WHICH AGREEMENTS CONFERRING JURISDICTION MUST MEET , CONTRACTING STATES ARE NOT FREE TO LAY DOWN FORMAL REQUIREMENTS OTHER THAN THOSE CONTAINED IN THE CONVENTION. WHEN THOSE RULES ARE APPLIED TO PROVISIONS CONCERNING THE LANGUAGE TO BE USED IN AN AGREEMENT CONFERRING JURISDICTION THEY IMPLY THAT THE LEGISLATION OF A CONTRACTING STATE MAY NOT ALLOW THE VALIDITY OF SUCH AN AGREEMENT TO BE CALLED IN QUESTION SOLELY ON THE GROUND THAT THE LANGUAGE USED IS NOT THAT PRESCRIBED BY THAT LEGISLATION.

IN CASE 150/80

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 HOF VAN CASSATIE (COURT OF CASSATION), BELGIUM , FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

ELEFANTEN SCHUH GMBH , KLEVE , FEDERAL REPUBLIC OF GERMANY ,

AND

PIERRE JACQMAIN , SCHOTEN , BELGIUM ,

ON THE INTERPRETATION OF ARTICLES 17 , 18 AND 22 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY JUDGMENT DATED 9 JUNE 1980 WHICH WAS RECEIVED AT THE COURT ON 24 JUNE 1980 THE COUR DE CASSATION (COURT OF CASSATION) OF BELGIUM 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 SEVERAL QUESTIONS AS TO THE INTERPRETATION OF ARTICLES 17 , 18 AND 22 OF THAT CONVENTION.

2 THOSE QUESTIONS WERE PUT IN THE CONTEXT OF AN APPEAL IN CASSATION AGAINST A JUDGMENT OF THE ARBEIDSHOF ANTWERPEN (LABOUR COURT , ANTWERP) ORDERING ELEFANTEN SCHUH GMBH , A COMPANY INCORPORATED UNDER GERMAN LAW , AND ELEFANT NV , A COMPANY INCORPORATED UNDER BELGIAN LAW , TO PAY JOINTLY THE SUM OF BFR 3 120 597 TOGETHER WITH INTEREST TO MR PIERRE JACQMAIN FOR HAVING INTER ALIA DISMISSED MR JACQMAIN WITHOUT NOTICE .

3 IT APPEARS FROM THE PAPERS PLACED BEFORE THE COURT THAT IN 1970 MR JACQMAIN WAS EMPLOYED AS A SALES AGENT BY THE GERMAN COMPANY HOFFMANN GMBH WHICH SUBSEQUENTLY ADOPTED THE NAME ELEFANTEN SCHUH GMBH ; HOWEVER , HE ACTUALLY WORKED IN BELGIUM , IN PARTICULAR IN THE PROVINCES OF ANTWERP , BRABANT AND LIMBURG , ON INSTRUCTIONS WHICH HE RECEIVED FROM THE BELGIAN SUBSIDIARY OF THAT UNDERTAKING , ELEFANT NV THE MAIN ACTION AROSE AS A RESULT OF DIFFICULTIES WHICH OCCURRED IN 1975 BETWEEN MR JACQMAIN AND THE TWO COMPANIES CONCERNING DETAILS OF THE TRANSFER OF THE CONTRACT OF EMPLOYMENT FROM THE GERMAN COMPANY TO THE BELGIAN COMPANY.

4 MR JACQMAIN BROUGHT AN ACTION IN THE ARBEIDSRECHTBANK ANTWERPEN (LABOUR TRIBUNAL , ANTWERP) AGAINST THE TWO COMPANIES. THE DEFENDANT COMPANIES APPEARED BEFORE THAT COURT AND BY THEIR FIRST SUBMISSIONS THEY CONTESTED THE SUBSTANCE OF THE APPLICATIONS LODGED AGAINST THEM. IN FURTHER SUBMISSIONS LODGED NINE MONTHS LATER THE GERMAN COMPANY CLAIMED THAT THE ARBEIDSRECHTBANK DID NOT HAVE JURISDICTION ON THE GROUND THAT THE CONTRACT OF EMPLOYMENT CONTAINED A CLAUSE STIPULATING THAT THE COURT AT KLEVE IN THE FEDERAL REPUBLIC OF GERMANY WAS TO HAVE EXCLUSIVE JURISDICTION IN THE EVENT OF ANY DISPUTE. THE ARBEIDSRECHTBANK DISMISSED THAT OBJECTION. IT TOOK THE VIEW THAT SUCH A CLAUSE COULD NOT DEROGATE FROM ARTICLE 627 OF THE BELGIAN JUDICIAL CODE WHICH IN DISPUTES OF THIS KIND PROVIDES THAT THE COURT OF THE PLACE WHERE THE OCCUPATION IS PURSUED IS TO HAVE JURISDICTION.

5 THE ARBEIDSHOF ANTWERPEN , TO WHICH AN APPEAL FROM THE JUDGMENT OF THE ARBEIDSRECHTBANK WAS MADE , CONSIDERED THAT PURSUANT TO ARTICLE 17 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 THE PARTIES TO THE CONTRACT OF EMPLOYMENT COULD CONFER TERRITORIAL JURISDICTION ON THE COURT OF KLEVE BY AGREEING IN WRITING TO DEROGATE FROM THE RULES ON TERRITORIAL JURISDICTION

CONTAINED IN THE BELGIAN JUDICIAL CODE. HOWEVER , THE ARBEIDSHOF HELD THAT THE GERMAN COMPANY COULD NOT RELY ON THE JURISDICTION CLAUSE ON THE GROUND THAT THE CONTRACT OF EMPLOYMENT HAD TO BE WRITTEN IN DUTCH BY VIRTUE OF ARTICLE 10 OF THE DECREE OF 19 JULY 1973 GOVERNING THE USE OF LANGUAGES IN RELATIONS BETWEEN EMPLOYERS AND EMPLOYEES , ADOPTED BY THE CULTUURRAAD VOOR NEDERLANDSE CULTUURGEMEENSCHAP (CULTURE COUNCIL FOR THE NETHERLANDS CULTURAL COMMUNITY) (MONITEUR BELGE , P. 10089). THE ARBEIDSHOF TOOK THE VIEW THAT ARTICLE 10 , WHICH PROVIDES THAT ANY ACT OR DOCUMENT NOT WRITTEN IN DUTCH IS NULL AND VOID , APPLIES TO DOCUMENTS DRAWN UP BEFORE THE DECREE ENTERED INTO FORCE. CONSEQUENTLY THE CONTRACT OF EMPLOYMENT , DRAWN UP IN GERMAN , WAS NULL AND VOID AND THE CLAUSE CONFERRING JURISDICTION CONTAINED THEREIN WAS INVALID.

6 THE APPEAL IN CASSATION LODGED AGAINST THE JUDGMENT OF THE ARBEIDSHOF BY THE BELGIAN COMPANY WAS DECLARED INADMISSIBLE BY THE HOF VAN CASSATIE (COURT OF CASSATION). AS THE APPEAL IN CASSATION LODGED BY THE GERMAN COMPANY CONCERNED THE VALIDITY OF THE JURISDICTION CLAUSE IN PARTICULAR THE HOF VAN CASSATIE DECIDED IN VIEW OF ARTICLE 17 OF THE BRUSSELS CONVENTION TO PUT THREE QUESTIONS TO THE COURT OF JUSTICE .

QUESTION 1

7 QUESTION 1 IS WORDED AS FOLLOWS :

' ' 1 . (A) IS ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS APPLICABLE IF PARTIES HAVE AGREED TO CONFER JURISDICTION ON A COURT WITHIN THE MEANING OF ARTICLE 17?

(B)IS THE RULE ON JURISDICTION CONTAINED IN ARTICLE 18 APPLICABLE IF THE DEFENDANT HAS NOT ONLY CONTESTED JURISDICTION BUT HAS IN ADDITION MADE SUBMISSIONS ON THE ACTION ITSELF?

(C)IF IT IS , MUST JURISDICTION THEN BE CONTESTED IN LIMINE LITIS? ' '

8 ARTICLES 17 AND 18 FORM SECTION 6 OF TITLE II OF THE CONVENTION WHICH DEALS WITH PROROGATION OF JURISDICTION ; ARTICLE 17 CONCERNS JURISDICTION BY CONSENT AND ARTICLE 18 JURISDICTION IMPLIED FROM SUBMISSION AS A RESULT OF THE DEFENDANT ' S APPEARANCE. THE FIRST PART OF THE QUESTION SEEKS TO DETERMINE THE RELATIONSHIP BETWEEN THOSE TWO TYPES OF PROROGATION.

9 IN THE FIRST SENTENCE , ARTICLE 18 OF THE CONVENTION LAYS DOWN THE RULE THAT A COURT OF A CONTRACTING STATE BEFORE WHOM A DEFENDANT ENTERS AN APPEARANCE IS TO HAVE JURISDICTION AND IN THE SECOND SENTENCE IT PROVIDES THAT THAT RULE IS NOT TO APPLY WHERE APPEARANCE WAS ENTERED SOLELY IN ORDER TO CONTEST THE JURISDICTION , OR WHERE ANOTHER COURT HAS EXCLUSIVE JURISDICTION BY VIRTUE OF ARTICLE 16 OF THE CONVENTION.

10 THE CASE ENVISAGED IN ARTICLE 17 IS NOT THEREFORE ONE OF THE EXCEPTIONS WHICH ARTICLE 18 ALLOWS TO THE RULE WHICH IT LAYS DOWN. MOREOVER NEITHER THE GENERAL SCHEME NOR THE OBJECTIVES OF THE CONVENTION PROVIDE GROUNDS FOR THE VIEW THAT THE PARTIES TO AN AGREEMENT CONFERRING JURISDICTION WITHIN THE MEANING OF ARTICLE 17 ARE PREVENTED FROM VOLUNTARILY SUBMITTING THEIR DISPUTE TO A COURT OTHER THAN THAT STIPULATED IN THE AGREEMENT.

11 IT FOLLOWS THAT ARTICLE 18 OF THE CONVENTION APPLIES EVEN WHERE THE PARTIES HAVE BY AGREEMENT DESIGNATED A COURT WHICH IS TO HAVE JURISDICTION WITHIN THE MEANING OF ARTICLE 17.

12 THE SECOND AND THIRD PARTS OF THE QUESTION ENVISAGE THE CASE IN WHICH THE DEFENDANT HAS APPEARED BEFORE A COURT WITHIN THE MEANING OF ARTICLE 18 BUT CONTESTS THE JURISDICTION OF THAT COURT.

13 THE HOF VAN CASSATIE FIRST ASKS IF ARTICLE 18 HAS APPLICATION WHERE THE DEFENDANT MAKES SUBMISSIONS AS TO THE JURISDICTION OF THE COURT AS WELL AS ON THE SUBSTANCE OF THE ACTION.

14 ALTHOUGH DIFFERENCES BETWEEN THE DIFFERENT LANGUAGE VERSIONS OF ARTICLE 18 OF THE CONVENTION APPEAR WHEN IT IS SOUGHT TO DETERMINE WHETHER , IN ORDER TO EXCLUDE THE JURISDICTION OF THE COURT SEISED , A DEFENDANT MUST CONFINE HIMSELF TO CONTESTING THAT JURISDICTION , OR WHETHER HE MAY ON THE CONTRARY STILL ACHIEVE THE SAME PURPOSE BY CONTESTING THE JURISDICTION OF THE COURT AS WELL AS THE SUBSTANCE OF THE CLAIM , THE SECOND INTERPRETATION IS MORE IN KEEPING WITH THE OBJECTIVES AND SPIRIT OF THE CONVENTION. IN FACT UNDER THE LAW OF CIVIL PROCEDURE OF CERTAIN CONTRACTING STATES A DEFENDANT WHO RAISES THE ISSUE OF JURISDICTION AND NO OTHER MIGHT BE BARRED FROM MAKING HIS SUBMISSIONS AS TO THE SUBSTANCE IF THE COURT REJECTS HIS PLEA THAT IT HAS NO JURISDICTION. AN INTERPRETATION OF ARTICLE 18 WHICH ENABLED SUCH A RESULT TO BE ARRIVED AT WOULD BE CONTRARY TO THE RIGHT OF THE DEFENDANT TO DEFEND HIMSELF IN THE ORIGINAL PROCEEDINGS , WHICH IS ONE OF THE AIMS OF THE CONVENTION.

15 HOWEVER , THE CHALLENGE TO JURISDICTION MAY HAVE THE RESULT ATTRIBUTED TO IT BY ARTICLE 18 ONLY IF THE PLAINTIFF AND THE COURT SEISED OF THE MATTER ARE ABLE TO ASCERTAIN FROM THE TIME OF THE DEFENDANT ' S FIRST DEFENCE THAT IT IS INTENDED TO CONTEST THE JURISDICTION OF THE COURT.

16 THE HOF VAN CASSATIE ASKS IN THIS REGARD WHETHER JURISDICTION MUST BE CONTESTED IN LIMINE LITIS. FOR THE PURPOSES OF INTERPRETING THE CONVENTION THAT CONCEPT IS DIFFICULT TO APPLY IN VIEW OF THE APPRECIABLE DIFFERENCES EXISTING BETWEEN THE LEGISLATION OF THE CONTRACTING STATES WITH REGARD TO BRINGING ACTIONS BEFORE COURTS OF LAW , THE APPEARANCE OF DEFENDANTS AND THE WAY IN WHICH THE PARTIES TO AN ACTION MUST FORMULATE THEIR SUBMISSIONS. HOWEVER , IT FOLLOWS FROM THE AIM OF ARTICLE 18 THAT IF THE CHALLENGE TO JURISDICTION IS NOT PRELIMINARY TO ANY DEFENCE AS TO THE SUBSTANCE IT MAY NOT IN ANY EVENT OCCUR AFTER THE MAKING OF THE SUBMISSIONS WHICH UNDER NATIONAL PROCEDURAL LAW ARE CONSIDERED TO BE THE FIRST DEFENCE ADDRESSED TO THE COURT SEISED.

17 THEREFORE THE ANSWER TO THE SECOND AND THIRD PARTS OF QUESTION 1 SHOULD BE THAT ARTICLE 18 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT THE RULE ON JURISDICTION WHICH THAT PROVISION LAYS DOWN DOES NOT APPLY WHERE THE DEFENDANT NOT ONLY CONTESTS THE COURT ' S JURISDICTION BUT ALSO MAKES SUBMISSIONS ON THE SUBSTANCE OF THE ACTION , PROVIDED THAT , IF THE CHALLENGE TO JURISDICTION IS NOT PRELIMINARY TO ANY DEFENCE AS TO THE SUBSTANCE , IT DOES NOT OCCUR AFTER THE MAKING OF THE SUBMISSIONS WHICH UNDER NATIONAL PROCEDURAL LAW ARE CONSIDERED TO BE THE FIRST DEFENCE ADDRESSED TO THE COURT SEISED.

QUESTION 2

18 QUESTION 2 IS AS FOLLOWS :

' ' 2 . (A) IN APPLICATION OF ARTICLE 22 OF THE CONVENTION , CAN RELATED ACTIONS WHICH , HAD THEY BEEN BROUGHT SEPARATELY , WOULD HAVE HAD TO BE BROUGHT BEFORE COURTS OF DIFFERENT CONTRACTING STATES , BE BROUGHT SIMULTANEOUSLY BEFORE ONE OF THOSE COURTS , PROVIDED THAT THE LAW OF THAT COURT PERMITS THE CONSOLIDATION OF RELATED ACTIONS AND THAT COURT HAS JURISDICTION OVER BOTH ACTIONS?

(B)IS THAT ALSO THE CASE IF THE PARTIES TO ONE OF THE DISPUTES WHICH HAVE GIVEN RISE TO THE ACTIONS HAVE AGREED , IN ACCORDANCE WITH ARTICLE 17 OF THE CONVENTION , THAT A COURT OF ANOTHER CONTRACTING STATE IS TO HAVE JURISDICTION TO SETTLE THAT DISPUTE?

' '

19 ARTICLE 22 OF THE CONVENTION IS INTENDED TO ESTABLISH HOW RELATED ACTIONS WHICH HAVE BEEN BROUGHT BEFORE COURTS OF DIFFERENT MEMBER STATES ARE TO BE DEALT WITH. IT DOES NOT CONFER JURISDICTION ; IN PARTICULAR , IT DOES NOT ACCORD JURISDICTION TO A COURT OF A CONTRACTING STATE TO TRY AN ACTION WHICH IS RELATED TO ANOTHER ACTION OF WHICH THAT COURT IS SEISED PURSUANT TO THE RULES OF THE CONVENTION

20 THE ANSWER TO QUESTION 2 SHOULD THEREFORE BE THAT ARTICLE 22 OF THE CONVENTION APPLIES ONLY WHERE RELATED ACTIONS ARE BROUGHT BEFORE COURTS OF TWO OR MORE CONTRACTING STATES.

QUESTION 3

21 THE FINAL QUESTION IS WORDED AS FOLLOWS :

' ' 3 . DOES IT CONFLICT WITH ARTICLE 17 OF THE CONVENTION TO RULE THAT AN AGREEMENT CONFERRING JURISDICTION ON A COURT IS VOID IF THE DOCUMENT IN WHICH THE AGREEMENT IS CONTAINED IS NOT DRAWN UP IN THE LANGUAGE WHICH IS PRESCRIBED BY THE LAW OF A CONTRACTING STATE UPON PENALTY OF NULLITY AND IF THE COURT OF THE STATE BEFORE WHICH THE AGREEMENT IS RELIED UPON IS BOUND BY THAT LAW TO DECLARE THE DOCUMENT TO BE VOID OF ITS OWN MOTION?

' '

22 FROM THAT WORDING IT APPEARS THAT THE HOF VAN CASSATIE IS SOLELY CONCERNED WITH THE VALIDITY OF AN AGREEMENT CONFERRING JURISDICTION WHICH IS RENDERED VOID BY THE NATIONAL LEGISLATION OF THE COURT SEISED AS HAVING BEEN WRITTEN IN A LANGUAGE OTHER THAN THAT PRESCRIBED BY THAT LEGISLATION.

23 ARTICLE 17 STIPULATES THAT THE AGREEMENT CONFERRING JURISDICTION MUST TAKE THE FORM OF AN AGREEMENT IN WRITING OR AN ORAL AGREEMENT EVIDENCED IN WRITING.

24 ACCORDING TO THE REPORT ON THE CONVENTION SUBMITTED TO THE GOVERNMENTS OF THE CONTRACTING STATES AT THE SAME TIME AS THE DRAFT CONVENTION THOSE FORMAL REQUIREMENTS WERE INSERTED OUT OF THE CONCERN NOT TO IMPEDE COMMERCIAL PRACTICE , YET AT THE SAME TIME TO CANCEL OUT THE EFFECTS OF CLAUSES IN CONTRACTS WHICH MIGHT GO UNREAD , SUCH AS CLAUSES IN PRINTED FORMS FOR BUSINESS CORRESPONDENCE OR IN INVOICES , IF THEY WERE NOT AGREED TO

BY THE PARTY AGAINST WHOM THEY OPERATE . FOR THOSE REASONS JURISDICTION CLAUSES SHOULD BE TAKEN INTO CONSIDERATION ONLY IF THEY ARE THE SUBJECT OF A WRITTEN AGREEMENT , AND THAT IMPLIES THE CONSENT OF ALL THE PARTIES. FURTHERMORE , THE DRAFTSMEN OF ARTICLE 17 WERE OF THE OPINION THAT , IN ORDER TO ENSURE LEGAL CERTAINTY , THE FORMAL REQUIREMENTS APPLICABLE TO AGREEMENTS CONFERRING JURISDICTION SHOULD BE EXPRESSLY PRESCRIBED.

25 ARTICLE 17 IS THUS INTENDED TO LAY DOWN ITSELF THE FORMAL REQUIREMENTS WHICH AGREEMENTS CONFERRING JURISDICTION MUST MEET ; THE PURPOSE IS TO ENSURE LEGAL CERTAINTY AND THAT THE PARTIES HAVE GIVEN THEIR CONSENT.

26 CONSEQUENTLY CONTRACTING STATES ARE NOT FREE TO LAY DOWN FORMAL REQUIREMENTS OTHER THAN THOSE CONTAINED IN THE CONVENTION. THAT IS CONFIRMED BY THE FACT THAT THE SECOND PARAGRAPH OF ARTICLE 1 OF THE PROTOCOL ANNEXED TO THE CONVENTION EXPRESSLY PRESCRIBES SPECIAL REQUIREMENTS OF FORM WITH REGARD TO PERSONS DOMICILED IN LUXEMBOURG.

27 WHEN THOSE RULES ARE APPLIED TO PROVISIONS CONCERNING THE LANGUAGE TO BE USED IN AN AGREEMENT CONFERRING JURISDICTION THEY IMPLY THAT THE LEGISLATION OF A CONTRACTING STATE MAY NOT ALLOW THE VALIDITY OF SUCH AN AGREEMENT TO BE CALLED IN QUESTION SOLELY ON THE GROUND THAT THE LANGUAGE USED IS NOT THAT PRESCRIBED BY THAT LEGISLATION.

28 MOREOVER , ANY DIFFERENT INTERPRETATION WOULD RUN COUNTER TO ARTICLE 17 OF THE CONVENTION THE VERY PURPOSE OF WHICH IS TO ENABLE A COURT OF A CONTRACTING STATE TO BE CHOSEN BY AGREEMENT WHERE THAT COURT , IF NOT SO CHOSEN , WOULD NOT NORMALLY HAVE JURISDICTION. THAT CHOICE MUST THEREFORE BE RESPECTED BY THE COURTS OF ALL THE CONTRACTING STATES.

29 CONSEQUENTLY , THE ANSWER TO QUESTION 3 MUST BE THAT ARTICLE 17 OF THE CONVENTION MUST BE INTERPRETED AS MEANING THAT THE LEGISLATION OF A CONTRACTING STATE MAY NOT ALLOW THE VALIDITY OF AN AGREEMENT CONFERRING JURISDICTION TO BE CALLED IN QUESTION SOLELY ON THE GROUND THAT THE LANGUAGE USED IS NOT THAT PRESCRIBED BY THAT LEGISLATION.

30 THE COSTS INCURRED BY THE GOVERNMENT OF THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE. SINCE THE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , 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 ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HOF VAN CASSATIE BY JUDGMENT OF 9 JUNE 1980 , HEREBY RULES :

1 . ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS APPLIES EVEN WHERE THE PARTIES HAVE BY AGREEMENT DESIGNATED A COURT WHICH IS TO HAVE JURISDICTION WITHIN THE MEANING OF ARTICLE 17 OF THAT CONVENTION.

2 . ARTICLE 18 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED

AS MEANING THAT THE RULE ON JURISDICTION WHICH THAT PROVISION LAYS DOWN DOES NOT APPLY WHERE THE DEFENDANT NOT ONLY CONTESTS THE COURT ' S JURISDICTION BUT ALSO MAKES SUBMISSIONS ON THE SUBSTANCE OF THE ACTION , PROVIDED THAT , IF THE CHALLENGE TO JURISDICTION IS NOT PRELIMINARY TO ANY DEFENCE AS TO THE SUBSTANCE , IT DOES NOT OCCUR AFTER THE MAKING OF THE SUBMISSIONS WHICH UNDER NATIONAL PROCEDURAL LAW ARE CONSIDERED TO BE THE FIRST DEFENCE ADDRESSED TO THE COURT SEISED.

3 . ARTICLE 22 OF THE CONVENTION OF 27 SEPTEMBER 1968 APPLIES ONLY WHERE RELATED ACTIONS ARE BROUGHT BEFORE COURTS OF TWO OR MORE CONTRACTING STATES.

4 . ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT THE LEGISLATION OF A CONTRACTING STATE MAY NOT ALLOW THE VALIDITY OF AN AGREEMENT CONFERRING JURISDICTION TO BE CALLED IN QUESTION SOLELY ON THE GROUND THAT THE LANGUAGE USED IS NOT THAT PRESCRIBED BY THAT LEGISLATION.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1981 Page 01671 Spanish special edition Page 00457
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JURCIT	41968A0927(01)-A17 : N 1 5 - 8 10 11 18 21 23 - 25 28 29 41968A0927(01)-A18 : N 1 7 - 17 41968A0927(01)-A22 : N 1 18 - 20 41968A0927(01)-A16 : N 9 41968A0927(02)-A01L2 : N 26
CONCERNS	Interprets 41968A0927(01) -A17 Interprets 41968A0927(01) -A18 Interprets 41968A0927(01) -A22
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
OBSERV	United Kingdom ; Commission ; Member States ; Institutions

NATIONA	Belgium
NATCOUR	*A* Corte di Cassazione, Sezioni unite civili, sentenza del 03/05/2005 (9107) ; - Il Corriere giuridico 2006 p.63-64 (résumé)
NOTES	Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1981 no 546 ; Laurent, Philippe: Gazette du Palais 1981 I Jur. p.8-10 ; Huet, André: Journal du droit international 1981 p.903-912 ; Blanpain, R.: Taaldecreet en verdrag betreffende de rechterlijke bevoegdheid en de tenuitvoerlegging van beslissingen in burgerlijke en handelszaken van 27 september 1968. Zaak Jacqmain arrest van het Hof van Justitie van de EG van 24/06/1981, Revue de droit social 1981 p.465-466 ; Pesce, Angelo: Il Foro padano 1981 IV Col.29-32 ; Gaudemet-Tallon, H.: Revue critique de droit international privé 1982 p.152-161 ; Hartley, Trevor: Articles 17 and 18: Choice of Jurisdiction Clauses and Submission, European Law Review 1982 p.237-239 ; Laenens, Jean: Taaldecreet versus Europees Executieverdrag, Rechtskundig weekblad 1982-83 Col.498-500 ; Leipold, Dieter: Zuständigkeitsvereinbarung und rügelose Einlassung nach dem europäischen Gerichtsstands- und Vollstreckungsübereinkommen, Praxis des internationalen Privat- und Verfahrensrechts 1982 p.222-225 ; Storm, P.M.: TVVS ondernemingsrecht en rechtspersonen 1983 p.71 ; Verheul, Hans: Netherlands International Law Review 1983 p.258 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1985 p.a3 (PM)
PROCEDU	Reference for a preliminary ruling
ADVGEN	Sir Gordon Slynn
JUDGRAP	Koopmans
DATES	of document: 24/06/1981 of application: 24/06/1980

Judgment of the Court (Third Chamber)
of 18 March 1981
Blanckaert & Willems PVBA v Luise Trost. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Convention on Jurisdiction: Article 5(5) (operations of an agency or other establishment). Case 139/80.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPECIAL JURISDICTION - DISPUTES ARISING OUT OF ' ' THE OPERATIONS OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT ' ' - BRANCH OR OTHER ESTABLISHMENT - CONCEPT - COMMERCIAL AGENT - EXCLUSION - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 5 (5))

AN INDEPENDENT COMMERCIAL AGENT WHO MERELY NEGOTIATES BUSINESS (HANDELSVERTRETER (VERMITTLUNGSVERTRETER)), INASMUCH AS HIS LEGAL STATUS LEAVES HIM BASICALLY FREE TO ARRANGE HIS OWN WORK AND DECIDE WHAT PROPORTION OF HIS TIME TO DEVOTE TO THE INTERESTS OF THE UNDERTAKING WHICH HE AGREES TO REPRESENT AND WHOM THAT UNDERTAKING MAY NOT PREVENT FROM REPRESENTING AT THE SAME TIME SEVERAL FIRMS COMPETING IN THE SAME MANUFACTURING OR MARKETING SECTOR , AND WHO , MOREOVER , MERELY TRANSMITS ORDERS TO THE PARENT UNDERTAKING WITHOUT BEING INVOLVED IN EITHER THEIR TERMS OR THEIR EXECUTION , DOES NOT HAVE THE CHARACTER OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS .

IN CASE 139/80

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 BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

BLANCKAERT & WILLEMS PVBA , HAVING ITS REGISTERED OFFICE IN EEKLO , BELGIUM ,

DEFENDANT AND APPELLANT IN THE APPEAL ON A POINT OF LAW ,

AND

LUISE TROST , AACHEN ,

PLAINTIFF AND RESPONDENT IN THE APPEAL ON A POINT OF LAW ,

ON THE INTERPRETATION OF THE WORDS ' ' AGENCY ' ' AND ' ' OTHER ESTABLISHMENT ' ' WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY AN ORDER OF 21 MARCH 1980 WHICH AS RECEIVED AT THE COURT ON 11 JUNE 1980 THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') TWO QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 5 (5) OF THAT CONVENTION.

2 ACCORDING TO THAT PROVISION , WHICH DEROGATES FROM THE GENERAL RULE OF FORUM DOMICILII SET OUT IN ARTICLE 2 OF THE CONVENTION , A DEFENDANT DOMICILED IN A CONTRACTING STATE MAY BE SUED IN ANOTHER CONTRACTING STATE ' ' AS REGARDS A DISPUTE ARISING OUT OF THE OPERATIONS OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT , IN THE COURTS OF THE PLACE IN WHICH THE BRANCH , AGENCY OR OTHER ESTABLISHMENT IS SITUATED ' '.

3 BLANCKAERT & WILLEMS , A BELGIAN FURNITURE MANUFACTURER AND THE DEFENDANT IN THE MAIN ACTION (HEREINAFTER REFERRED TO AS ' ' BLANCKAERT ' ') HAS ACCORDING TO ITS OWN STATEMENTS HAD A BUSINESS ASSOCIATION SINCE 1960 WITH THE GERMAN UNDERTAKING HERMANN BEY (HEREINAFTER REFERRED TO AS ' ' BEY ' '), A FURNITURE AGENCY (MOBELAGENTUR), WHICH IT MADE RESPONSIBLE FOR THE ESTABLISHMENT IN THE FEDERAL REPUBLIC OF GERMANY OF A SALES NETWORK FOR THE FURNITURE WHICH BLANCKAERT MANUFACTURED. IN PERFORMANCE OF THAT OBLIGATION BEY , ACTING ON BEHALF OF BLANCKAERT , ENTERED INTO A COMMERCIAL AGENCY WITH TROST , THE PLAINTIFF IN THE MAIN ACTION , FOR THE RHINE AND RUHR , EIFEL AND SOUTH WESTPHALIA AREA. UNDER THE TERMS OF THAT CONTRACT TROST WAS TO WORK AS THE DIRECT REPRESENTATIVE OF BLANCKAERT AND RECEIVE FROM THE LATTER A COMMISSION OF 5 %. THE CONTRACT STIPULATED THAT TROST WAS TO TRANSMIT THE ORDERS SHE OBTAINED FOR BLANCKAERT THROUGH BEY AT AACHEN. ON ANY SUCH ORDERS TRANSMITTED TO IT THROUGH BEY BLANCKAERT WOULD PAY THE LATTER THE EXTRA COMMISSION CUSTOMARILY GIVEN TO COMMERCIAL AGENTS WHO ARE RESPONSIBLE FOR SUPERVISING OTHER COMMERICAL AGENTS OF AN UNDERTAKING.

4 IN DECEMBER 1976 BLANCKAERT TERMINATED ITS CONTRACT WITH TROST , LEADING TO AN ACTION BY THE LATTER FOR PAYMENT OF COMMISSION AND AGENT ' S ADJUSTMENT FEES. TROST BROUGHT THE ACTION BEFORE THE LANDGERICHT (REGIONAL COURT) AACHEN , ON THE GROUND THAT BEY WAS AN AGENCY OR BRANCH OF BLANCKAERT AND THEREFORE THE DISPUTE COULD BE BROUGHT BEFORE THE COURT OF THE PLACE IN WHICH THAT AGENCY OR BRANCH WAS ESTABLISHED

5 THE LANDGERICHT AACHEN DID NOT ACCEPT THAT VIEW AND DECLINED JURISDICTION BUT THE OBERLANDESGERICHT KOLN (HIGHER REGIONAL COURT , COLOGNE), HEARING THE APPEAL , HELD THAT THE CONDITIONS FOR THE INTERNATIONAL JURISDICTION OF THE LANDGERICHT AACHEN WERE FULFILLED BECAUSE BEY WAS AN AGENCY OF BLANCKAERT ' S WITHIN THE MEANING OF ARTICLE 5 OF THE CONVENTION AND BECAUSE THE AMOUNTS CLAIMED WERE ATTRIBUTABLE TO THE OPERATION OF THAT AGENCY.

6 HEARING THE APPEAL ON A POINT OF LAW THE BUNDESGERICHTSHOF HELD THAT THE OBERLANDESGERICHT KOLN HAD RIGHTLY ESTABLISHED THAT BOTH BEY AND TROST HAD WORKED FOR BLANCKAERT ' ' AS A COMMERCIAL AGENT (HANDELSVERTRETER) AND MORE SPECIFICALLY AS A BUSINESS NEGOTIATOR (VERMITTLUNGSVERTRETER), THAT IS TO SAY , BOTH WERE CHARGED ON A PERMANENT BASIS WITH NEGOTIATING BUSINESS ON BEHALF OF AN UNDERTAKING , NAMELY THE DEFENDANT , AS INDEPENDENT BUSINESSMEN WITHIN THE MEANING OF THE FIRST PARAGRAPH IN ARTICLE 84 OF THE GERMAN COMMERCIAL CODE (HANDELSGESETZBUCH) ' ' , AND RULED THAT THE QUESTION WHETHER THE OPERATIONS OF AN AGENCY OR OTHER ESTABLISHMENT WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION INCLUDE THE ACTIVITIES OF A COMMERCIAL AGENT , AND MORE PARTICULARLY THOSE OF A BUSINESS NEGOTIATOR WITHIN THE MEANING OF THE ABOVE-QUOTED PROVISION OF GERMAN LAW , HAD YET TO BE DECIDED BY THE COURT OF JUSTICE.

7 CONSIDERING THEREFORE THAT THE DISPUTE RAISED QUESTIONS CONCERNING THE INTERPRETATION OF THE CONVENTION THE BUNDESGERICHTSHOF REFERRED TWO QUESTIONS TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING ON THE INTERPRETATION OF ARTICLE 5 (5) OF THAT CONVENTION.

FIRST QUESTION

8 THE FIRST QUESTION ASKS IN SUBSTANCE WHETHER A COMMERCIAL AGENT (HANDELSVERTRETER) WHO IS A BUSINESS NEGOTIATOR (VERMITTLUNGSVERTRETER) WITHIN THE MEANING OF ARTICLE 84 ET SEQ. OF THE GERMAN COMMERCIAL CODE IS TO BE CONSIDERED AS AN ' ' AGENCY ' ' OR ' ' OTHER ESTABLISHMENT ' ' WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION.

9 AS THE NATIONAL COURT CORRECTLY OBSERVES , THE COURT STATED IN ITS JUDGMENT OF 6 OCTOBER 1976 (CASE 14/76 DE BLOOS V BOUYER (1976) ECR 1497) THAT ONE OF THE ESSENTIAL CHARACTERISTICS OF THE CONCEPT OF A BRANCH OR AGENCY IS THE FACT OF BEING SUBJECT OF THE DIRECTION AND CONTROL OF THE PARENT BODY.

10 THE COURT DID NOT HAVE OCCASION IN THAT DECISION TO IDENTIFY THE FACTORS ENABLING IT TO BE DETERMINED WHETHER OR NOT AN UNDERTAKING OR OTHER BUSINESS CONCERN IS SUBJECT TO THE DIRECTION AND CONTROL OF A PARENT BODY , BECAUSE THE MAIN DISPUTE CONCERNED THE RELATIONSHIP BETWEEN THE GRANTOR AND THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION , AND THE NATIONAL COURT HAD STATED THAT THE GRANTEE WAS NOT SUBJECT TO EITHER THE DIRECTION OR THE CONTROL OF THE GRANTOR.

11 FURTHERMORE , IN ITS JUDGMENT OF 22 NOVEMBER 1978 (CASE 33/78 SOMAFER (1978) ECR 2183), THE COURT STATED THAT ' ' THE CONCEPT OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT IMPLIES A PLACE OF BUSINESS WHICH HAS THE APPEARANCE OF PERMANENCY , SUCH AS THE EXTENSION OF A PARENT BODY , HAS A MANAGEMENT AND IS MATERIALLY EQUIPPED TO NEGOTIATE BUSINESS WITH THIRD PARTIES SO THAT THE LATTER , ALTHOUGH KNOWING THAT THERE WILL IF NECESSARY BE A LEGAL LINK WITH THE PARENT BODY , THE HEAD OFFICE OF WHICH IS ABROAD , DO NOT HAVE TO DEAL DIRECTLY WITH SUCH PARENT BODY BUT MAY TRANSACT BUSINESS AT THE PLACE OF BUSINESS CONSTITUTING THE EXTENSION ' '.

12 FROM THE GROUNDS GIVEN IN THOSE TWO JUDGMENTS , AND ESPECIALLY FROM THE RULE THAT A ' ' BRANCH , AGENCY OR OTHER ESTABLISHMENT ' ' WITHIN THE MEANING OF ARTICLE 5 (5) MUST APPEAR TO THIRD PARTIES AS AN EASILY DISCERNIBLE EXTENSION OF THE PARENT BODY , IT IS CLEAR THAT THE DEPENDENCY ON THE DIRECTION AND CONTROL OF THAT PARENT BODY IS NOT ESTABLISHED WHEN THE REPRESENTATIVE OF THE PARENT BODY IS ' ' BASICALLY FREE TO ORGANIZE HIS OWN WORK AND HOURS OF WORK ' ' (ARTICLE 84 (1), LAST SENTENCE , OF THE GERMAN COMMERCIAL CODE) WITHOUT BEING SUBJECT TO INSTRUCTIONS FROM THE PARENT BODY IN THAT REGARD ; WHEN HE IS FREE TO REPRESENT AT THE SAME TIME SEVERAL RIVAL FIRMS PRODUCING OR MARKETING IDENTICAL OR SIMILAR PRODUCTS AND , LASTLY , WHEN HE DOES NOT EFFECTIVELY PARTICIPATE IN THE COMPLETION AND EXECUTION OF TRANSACTIONS BUT IS RESTRICTED IN PRINCIPLE TO TRANSMITTING ORDERS TO THE UNDERTAKING HE REPRESENTS. THOSE THREE FACTORS PRECLUDE A CONCERN HAVING ALL THOSE CHARACTERISTICS FROM BEING CONSIDERED AS THE PLACE OF BUSINESS HAVING THE APPEARANCE OF PERMANENCY AS AN EXTENSION OF THE PARENT BODY.

13 THE REPLY TO THE FIRST QUESTION MUST THEREFORE BE THAT AN INDEPENDENT

COMMERCIAL AGENT WHO MERELY NEGOTIATES BUSINESS (HANDELSVERTRETER (VERMITTLUNGSVERTRETER)), INASMUCH AS HIS LEGAL STATUS LEAVES HIM BASICALLY FREE TO ARRANGE HIS OWN WORK AND DECIDE WHAT PROPORTION OF HIS TIME TO DEVOTE TO THE INTERESTS OF THE UNDERTAKING WHICH HE AGREES TO REPRESENT AND WHOM THAT UNDERTAKING MAY NOT PREVENT FROM REPRESENTING AT THE SAME TIME SEVERAL FIRMS COMPETING IN THE SAME MANUFACTURING OR MARKETING SECTOR , AND WHO , MOREOVER , MERELY TRANSMITS ORDERS TO THE PARENT UNDERTAKING WITHOUT BEING INVOLVED IN EITHER THEIR TERMS OR THEIR EXECUTION , DOES NOT HAVE THE CHARACTER OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION.

SECOND QUESTION

14 THE SECOND QUESTION IS ASKED ONLY IF THE REPLY TO THE FIRST QUESTION SHOULD BE IN THE AFFIRMATIVE. A REPLY TO IT IS THEREFORE NOT REQUIRED .

15 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE. AS THE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE PROCEEDINGS BEFORE THE NATIONAL COURT , THE DECISION ON COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT (THIRD CHAMBER)

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESGERICHTSHOF BY AN ORDER OF 21 MARCH 1980 HEREBY RULES :

AN INDEPENDENT COMMERCIAL AGENT WHO MERELY NEGOTIATES BUSINESS (HANDELSVERTRETER (VERMITTLUNGSVERTRETER)), INASMUCH AS HIS LEGAL STATUS LEAVES HIM BASICALLY FREE TO ARRANGE HIS OWN WORK AND DECIDE WHAT PROPORTION OF HIS TIME TO DEVOTE TO THE INTERESTS OF THE UNDERTAKING WHICH HE AGREES TO REPRESENT AND WHOM THAT UNDERTAKING MAY NOT PREVENT FROM REPRESENTING AT THE SAME TIME SEVERAL FIRMS COMPETING IN THE SAME MANUFACTURING OR MARKETING SECTOR , AND WHO , MOREOVER , MERELY TRANSMITS ORDERS TO THE PARENT UNDERTAKING WITHOUT BEING INVOLVED IN EITHER THEIR TERMS OR THEIR EXECUTION , DOES NOT HAVE THE CHARACTER OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS .

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community

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CONCERNS	Interprets 41968A0927(01) -A05PT5
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Commission ; Institutions
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NATCOUR	*A7* Landgericht Aachen, Urteil vom 13/12/1977 (8 O 41/77) ; *A8* Oberlandesgericht Köln, Urteil vom 13/07/1978 (1 U 10/78) ; *A9* Bundesgerichtshof, Vorlagebeschluß vom 21/03/1980 (1 ZR 135/78) ; *P1* Bundesgerichtshof, Schreiben vom 25/03/1982 (1 ZR 135/78)
NOTES	Pesce, Angelo: Agenzia, agenti e criterio di competenza speciale, Il Foro padano 1981 IV Col.19-20 ; Hartley, Trevor: Article 5(5): "Branch, Agency or Other Establishment", European Law Review 1981 p.481-483 ; Linke, Hartmut: Der "kleineuropäische" Niederlassungsgerichtsstand, Praxis des internationalen Privat- und Verfahrensrechts 1982 p.46-49 ; Bischoff, Jean-Marc: Journal du droit international 1982 p.479-482 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a27
PROCEDU	Reference for a preliminary ruling
ADVGEN	Reischl
JUDGRAP	Mertens de Wilmars
DATES	of document: 18/03/1981 of application: 11/06/1980

Judgment of the Court
of 16 December 1980
Netherlands State v Reinhold Rüffer.
Reference for a preliminary ruling: Hoge Raad - Netherlands.
Brussels Convention of 1968.
Case 814/79.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - AMBIT - CIVIL AND COMMERCIAL MATTERS - CONCEPT - INDEPENDENT INTERPRETATION - CRITERIA

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 1)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - AMBIT - DETERMINATION - FACTORS TO BE TAKEN INTO CONSIDERATION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 1)

3 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - AMBIT - CIVIL AND COMMERCIAL MATTERS - ACTIONS BROUGHT BY A PUBLIC AUTHORITY AGAINST A PRIVATE PERSON ON THE BASIS OF ITS PUBLIC AUTHORITY POWERS - RECOVERY OF THE COSTS OF REMOVING A WRECK - EXCLUSION - CLAIM FOR REDRESS BEFORE CIVIL COURTS - NOT AVAILABLE

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 1)

1 . THE CONCEPT ' ' CIVIL AND COMMERCIAL MATTERS ' ' USED IN ARTICLE 1 OF THE CONVENTION MUST BE REGARDED AS AN INDEPENDENT CONCEPT WHICH MUST BE CONSTRUED WITH REFERENCE FIRST TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND SECONDLY TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS.

2 . AS THE CONVENTION MUST BE APPLIED IN SUCH A WAY AS TO ENSURE , AS FAR AS POSSIBLE , THAT THE RIGHTS AND OBLIGATIONS WHICH DERIVE FROM IT FOR THE CONTRACTING STATES AND THE PERSONS TO WHOM IT APPLIES ARE EQUAL AND UNIFORM IT MUST BE INTERPRETED SOLELY IN THE LIGHT OF THE DIVISION OF JURISDICTION BETWEEN THE VARIOUS TYPES OF COURTS EXISTING IN CERTAIN STATES ; ITS AMBIT MUST THEREFORE BE ESSENTIALLY DETERMINED BY REASON OF THE LEGAL RELATIONSHIPS EXISTING BETWEEN THE PARTIES TO THE ACTION OR OF THE SUBJECT-MATTER OF THE ACTION.

3 . THE CONCEPT OF ' ' CIVIL AND COMMERCIAL MATTERS ' ' WITHIN THE MEANING OF THE FIRST PARAGRAPH ARTICLE 1 OF THE CONVENTION DOES NOT INCLUDE ACTIONS BROUGHT BY THE AGENT RESPONSIBLE FOR ADMINISTERING PUBLIC WATERWAYS AGAINST THE PERSON HAVING LIABILITY IN LAW IN ORDER TO RECOVER THE COSTS INCURRED IN THE REMOVAL OF A WRECK CARRIED OUT BY OR AT THE INSTIGATION OF THE ADMINISTERING AGENT IN THE EXERCISE OF ITS PUBLIC AUTHORITY.

THE FACT THAT THE AGENT RESPONSIBLE FOR ADMINISTERING PUBLIC WATERWAYS IS SEEKING TO RECOVER THOSE COSTS BY MEANS OF A CLAIM FOR REDRESS BEFORE THE CIVIL COURTS AND NOT BY ADMINISTRATIVE PROCESS CANNOT BE SUFFICIENT TO BRING THE MATTER IN DISPUTE WITHIN THE AMBIT OF THE CONVENTION.

IN CASE 814/79

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 HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

NETHERLANDS STATE (MINISTRY OF TRANSPORT , WATER CONTROL AND CONSTRUCTION)

AND

REINHOLD RUFFER , RESIDING IN THE DISTRICT OF HAMELN/PYRMONT (FEDERAL REPUBLIC OF GERMANY),

ON THE INTERPRETATION OF A NUMBER OF PROVISIONS OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY JUDGMENT OF 14 DECEMBER 1979 WHICH WAS RECEIVED AT THE COURT ON 17 DECEMBER 1979 THE HOGE RAAD (SUPREME COURT) APPLIED TO THE COURT IN PROCEEDINGS BASED ON ARTICLE 1 OF THE PROTOCOL 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.

2 THAT APPLICATION WAS ORDERED IN THE COURSE OF A DISPUTE CONCERNING A CLAIM FOR REDRESS BROUGHT BY THE NETHERLANDS STATE AGAINST A WATERMAN , THE OWNER OF A GERMAN RIVER MOTOR VESSEL , THE OTRATE WHICH ON 26 OCTOBER 1971 COLLIDED WITH THE DUTCH MOTOR VESSEL VECHTBORG IN THE BIGHT OF WATUM AND AS A RESULT OF THAT COLLISION SANK ON THE SPOT

3 THE BIGHT OF WATUM IS A PUBLIC WATERWAY IN THE MOUTH OF THE EMS LOCATED IN AN AREA OVER WHICH BOTH THE KINGDOM OF THE NETHERLANDS AND THE FEDERAL REPUBLIC OF GERMANY CLAIM SOVEREIGN RIGHTS. CO-OPERATION IN THAT WATERWAY BETWEEN THE TWO BORDERING STATES IS GOVERNED BY THE EMS-DOLLARD TREATY OF 8 APRIL 1960. ARTICLE 19 (1) (A) OF THAT TREATY PROVIDES THAT THE KINGDOM OF THE NETHERLANDS SHALL BE RESPONSIBLE , IN THE BIGHT OF WATUM AND OTHER PLACES , FOR RIVER-POLICE FUNCTIONS WHICH , UNDER ARTICLE 20 (2) (D), INCLUDE ' ' REMOVAL OF WRECKS ' '. ARTICLE 21 OF THE SAME TREATY STIPULATES FURTHER THAT ' ' IN CARRYING OUT RIVER-POLICE FUNCTIONS , EACH CONTRACTING PARTY COMMISSION SHALL BE NOTIFIED ' '.

4 IN ACCORDANCE WITH THAT TREATY AND ON THE BASIS OF THE PROVISIONS OF THE NETHERLANDS LAW ON WRECKS OF 19 JUNE 1934 (HEREINAFTER REFERRED TO AS THE ' ' WRAKKENWET ' ') THE KINGDOM OF THE NETHERLANDS HAD THE WRECK OF THE GERMAN BOAT WHICH HAD SUNK IN THE BIGHT OF WATUM REMOVED BY A NETHERLANDS FIRM. THE REMAINS OF THE BOAT RECOVERED IN THAT WAY TOGETHER WITH ITS CARGO WERE SOLD PURSUANT TO ARTICLE 6 OF THE WRAKKENWET BY PUBLIC AUCTION IN ORDER THAT THE NETHERLANDS STATE MIGHT RECOVER THE COSTS INVOLVED IN THE REMOVAL OF THE WRECK. AFTER THE PROCEEDS OF THAT SALE WERE DEDUCTED FROM THOSE COSTS A DEBIT BALANCE REMAINED WHICH THE NETHERLANDS STATE SOUGHT TO RECOVER FROM THE WATERMAN AND OWNER OF THE BOAT IN QUESTION BY THE CLAIM FOR REDRESS REFERRED TO ABOVE.

5 THE DISTRICT COURT OF THE HAGUE BEFORE WHICH THE MATTER WAS BROUGHT AT FIRST INSTANCE DECLARED THAT IT HAD NO JURISDICTION TO ENTERTAIN THE APPLICATION. ITS GROUND WAS THE FINDING THAT OWING TO THE GERMAN FLAG

OF THE BOAT WHICH SUNK THE PLACE WHERE THE HARMFUL EVENT OCCURRED , NAMELY THE WRECK OF THE OTRATE , MUST BE REGARDED AS THE FEDERAL REPUBLIC OF GERMANY IN THIS CASE SO THAT JURISDICTION TO ENTERTAIN THE APPLICATION LAY WITH GERMAN COURTS BY VIRTUE OF ARTICLE 5 (3) OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (HEREINAFTER REFERRED TO AS ' ' THE BRUSSELS CONVENTION ' '). THE DECISION BY THAT COURT WAS UPHELD BY THE GERECHTSHOF (REGIONAL COURT OF APPEAL) OF THE HAGUE AND THE NETHERLANDS STATE APPEALED IN CASSATION TO THE HOGE RAAD OF THE NETHERLANDS. BEFORE RULING ON THE SUBSTANCE OF THE MATTER THAT COURT DECIDED TO SUBMIT SEVERAL QUESTIONS TO THE COURT OF JUSTICE ON THE INTERPRETATION OF THE BRUSSELS CONVENTION .

THE FIRST QUESTION

6 IN ITS FIRST QUESTION THE HOGE RAAD ASKS THE COURT TO STATE FIRST OF ALL WHETHER THE CONCEPT ' ' CIVIL AND COMMERCIAL MATTERS ' ' IN ARTICLE 1 OF THE CONVENTION MUST BE CONSTRUED AS INCLUDING A CLAIM FOR REDRESS SUCH AS THAT BROUGHT IN THE INSTANT CASE BY THE NETHERLANDS STATE .

7 IT IS APPARENT FROM THE CASE-LAW OF THE COURT (JUDGMENT OF 14 OCTOBER 1976 IN CASE 29/76 LTU (1976) ECR 1541 ; JUDGMENT OF 14 JULY 1977 IN CASES 9 AND 10/77 BAVARIA-GERMANAIR (1977) ECR 1517 ; JUDGMENT OF 22 FEBRUARY 1979 IN CASE 133/78 GOURDAIN (1978) ECR 733) THAT THE CONCEPT ' ' CIVIL AND COMMERCIAL MATTERS ' USED IN ARTICLE 1 OF THE BRUSSELS CONVENTION MUST BE REGARDED AS AN INDEPENDENT CONCEPT WHICH MUST BE CONSTRUED WITH REFERENCE FIRST TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND SECONDLY TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYTEMS.

8 IN THE LIGHT OF THOSE CONSIDERATIONS THE COURT HAS SPECIFICALLY HELD IN THAT SAME CASE-LAW THAT WHILST CERTAIN JUDGMENTS GIVEN IN AN ACTION BETWEEN A PUBLIC AUTHORITY AND A PERSON GOVERNED BY PRIVATE LAW MAY COME WITHIN THE AREA OF APPLICATION OF THE CONVENTION THAT IS NOT THE CASE IF THE PUBLIC AUTHORITY IS ACTING IN THE EXERCISE OF ITS PUBLIC AUTHORITY POWERS.

9 SUCH A CASE IS AN ACTION FOR THE RECOVERY OF THE COSTS INVOLVED IN THE REMOVAL OF A WRECK IN A PUBLIC WATERWAY , ADMINISTERED BY THE STATE RESPONSIBLE IN PERFORMANCE OF AN INTERNATIONAL OBLIGATION AND ON THE BASIS OF PROVISIONS OF NATIONAL LAW WHICH , IN THE ADMINISTRATION OF THAT WATERWAY , CONFER ON IT THE STATUS OF PUBLIC AUTHORITY IN REGARD TO PRIVATE PERSONS.

10 IT IS COMMON GROUND THAT IN THIS CASE THE NETHERLANDS STATE HAD THE WRECK OF THE OTRATE REMOVED IN PERFORMANCE OF AN OBLIGATION WHICH WAS ASSUMED UNDER ARTICLE 19 (1) (A) AND 20 (2) (D) OF THE EMS-DOLLARD TREATY WITHIN THE FRAMEWORK OF THE RIVER-POLICE FUNCTIONS CONFERRED ON IT IN THAT WATERWAY BY THE SAID TREATY AND THAT CONSEQUENTLY IT ACTED IN THIS CASE AS THE BODY INVESTED WITH PUBLIC AUTHORITY .

11 THE GRANTING OF SUCH STATUS TO THE AGENT RESPONSIBLE FOR POLICING PUBLIC WATERWAYS , FOR THE PURPOSE OF REMOVING WRECKS LOCATED IN THOSE WATERWAYS , IS FURTHERMORE IN KEEPING WITH THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS OF THE MEMBER STATES WHOSE PROVISIONS ON THE ADMINISTRATION OF PUBLIC WATERWAYS PRECISELY SHOW THAT THE AGENT

ADMINISTERING THOSE WATERWAYS DOES SO , WHEN REMOVING WRECKS , IN THE EXERCISE OF PUBLIC AUTHORITY.

12 IN VIEW OF THOSE FACTORS THE ACTION BROUGHT BY THE NETHERLANDS STATE BEFORE THE NATIONAL COURT MUST BE REGARDED AS BEING OUTSIDE THE AMBIT OF THE BRUSSELS CONVENTION , AS DEFINED BY THE CONCEPT OF ' ' CIVIL AND COMMERCIAL MATTERS ' ' WITHIN THE MEANING OF THE FIRST PARAGRAPH OF ARTICLE 1 OF THAT CONVENTION , SINCE IT IS ESTABLISHED THAT THE NETHERLANDS STATE ACTED IN THE INSTANT CASE IN THE EXERCISE OF PUBLIC AUTHORITY.

13 THE FACT THAT IN THIS CASE THE ACTION PENDING BEFORE THE NATIONAL COURT DOES NOT CONCERN THE ACTUAL REMOVAL OF THE WRECK BUT THE COSTS INVOLVED IN THAT REMOVAL AND THAT THE NETHERLANDS STATE IS SEEKING TO RECOVER THOSE COSTS BY MEANS OF A CLAIM FOR REDRESS AND NOT BY ADMINISTRATIVE PROCESS AS PROVIDED FOR BY THE NATIONAL LAW OF OTHER MEMBER STATES CANNOT BE SUFFICIENT TO BRING THE MATTER IN DISPUTE WITHIN THE AMBIT OF THE BRUSSELS CONVENTION.

14 AS THE COURT HAS STATED IN THE AUTHORITIES CITED ABOVE THE BRUSSELS CONVENTION MUST BE APPLIED IN SUCH A WAY AS TO ENSURE , AS FAR AS POSSIBLE , THAT THE RIGHTS AND OBLIGATIONS WHICH DERIVE FROM IT FOR THE CONTRACTING STATES AND THE PERSONS TO WHOM IT APPLIES ARE EQUAL AND UNIFORM. BY THAT SAME CASE-LAW SUCH A REQUIREMENT RULES OUT THE POSSIBILITY OF THE CONVENTION ' S BEING INTERPRETED SOLELY IN THE LIGHT OF THE DIVISION OF JURISDICTION BETWEEN THE VARIOUS TYPES OF COURTS EXISTING IN CERTAIN STATES : ON THE CONTRARY IT IMPLIES THAT THE AREA OF APPLICATION OF THE CONVENTION IS ESSENTIALLY DETERMINED EITHER BY REASON OF THE LEGAL RELATIONSHIPS BETWEEN THE PARTIES TO THE ACTION OR OF THE SUBJECT-MATTER OF THE ACTION.

15 THE FACT THAT IN RECOVERING THOSE COSTS THE ADMINISTERING AGENT ACTS PURSUANT TO A DEBT WHICH ARISES FROM AN ACT OF PUBLIC AUTHORITY IS SUFFICIENT FOR ITS ACTION , WHATEVER THE NATURE OF THE PROCEEDINGS AFFORDED BY NATIONAL LAW FOR THAT PURPOSE , TO BE TREATED AS BEING OUTSIDE THE AMBIT OF THE BRUSSELS CONVENTION.

16 FOR THOSE REASONS THE ANSWER TO THE FIRST QUESTION MUST BE THAT THE CONCEPT OF ' ' CIVIL AND COMMERCIAL MATTERS ' ' WITHIN THE MEANING OF THE FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS DOES NOT INCLUDE ACTIONS SUCH AS THAT REFERRED TO BY THE NATIONAL COURT BROUGHT BY THE AGENT RESPONSIBLE FOR ADMINISTERING PUBLIC WATERWAYS AGAINST A PERSON HAVING LIABILITY IN LAW IN ORDER TO RECOVER THE COSTS INCURRED IN THE REMOVAL OF A WRECK CARRIED OUT BY OR AT THE INSTIGATION OF THE ADMINISTERING AGENT IN THE EXERCISE OF ITS PUBLIC AUTHORITY.

THE OTHER QUESTIONS

17 THE OTHER QUESTIONS WERE SUBMITTED BY THE NATIONAL COURT IN CASE THE ANSWER TO THE FIRST QUESTION WERE IN THE AFFIRMATIVE. AS THE ANSWER TO THAT QUESTION IS IN THE NEGATIVE THERE IS NO FURTHER POINT IN CONSIDERING THEM.

THE COSTS INCURRED BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH

HAVE SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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 ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HOGE RAAD BY JUDGMENT OF 14 DECEMBER 1979 , HEREBY RULES :

THE CONCEPT OF ' ' CIVIL AND COMMERCIAL MATTERS ' ' WITHIN THE MEANING OF THE FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS DOES NOT INCLUDE ACTIONS SUCH AS THAT REFERRED TO BY THE NATIONAL COURT BROUGHT BY THE AGENT RESPONSIBLE FOR ADMINISTERING PUBLIC WATERWAYS AGAINST THE PERSON HAVING LIABILITY IN LAW IN ORDER TO RECOVER THE COSTS INCURRED IN THE REMOVAL OF A WRECK CARRIED OUT BY OR AT THE INSTIGATION OF THE ADMINISTERING AGENT IN THE EXERCISE OF ITS PUBLIC AUTHORITY.

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AUTLANG Dutch

OBSERV United Kingdom ; Commission ; Member States ; Institutions

NATIONA Netherlands

NATCOUR *A8* Gerechtshof 's-Gravenhage, 1e kamer, arrest van 16/03/1978 (74/885)
A9 Hoge Raad, arrest van 14/12/1979 (11.400)
- Rechtspraak van de week 1980 no 5
- Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1982 no 96
P1 Hoge Raad, arrest van 26/06/1981 (11.400)
- Rechtspraak van de week 1981 no 104
- Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1982 no 98
- European Law Digest 1982 p.179 (résumé)
- Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1982 no 98

NOTES Hartley, Trevor: European Law Review 1981 p.215-217
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PROCEDU Reference for a preliminary ruling

ADVGEN Warner

JUDGRAP Bosco

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Judgment of the Court (Third Chamber)
of 6 May 1980
Porta-Leasing GmbH v Prestige International SA. Reference for a preliminary ruling: Oberlandesgericht Koblenz - Germany. Convention on jurisdiction - persons domiciled in Luxembourg. Case 784/79.

CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROROGATION OF JURISDICTION - AGREEMENTS CONFERRING JURISDICTION - VALIDITY WITH RESPECT TO A PERSON DOMICILED IN LUXEMBOURG - SPECIAL REQUIREMENTS AS TO FORM - EXPRESS AND SPECIFIC AGREEMENT - CONCEPT

(CONVENTION OF 27 SEPTEMBER 1968 , PROTOCOL , ART. I , SECOND PARAGRAPH)

THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT A CLAUSE CONFERRING JURISDICTION WITHIN THE MEANING OF THAT PROVISION MAY NOT BE CONSIDERED TO HAVE BEEN EXPRESSLY AND SPECIFICALLY AGREED TO BY A PERSON DOMICILED IN LUXEMBOURG UNLESS THAT CLAUSE , BESIDES BEING IN WRITING AS REQUIRED BY ARTICLE 17 OF THE CONVENTION , IS MENTIONED IN A PROVISION SPECIALLY AND EXCLUSIVELY MEANT FOR THIS PURPOSE AND WHICH HAS BEEN SPECIFICALLY SIGNED BY THE PARTY DOMICILED IN LUXEMBOURG ; IN THIS RESPECT THE SIGNING OF THE CONTRACT AS A WHOLE DOES NOT IN ITSELF SUFFICE. IT IS NOT HOWEVER NECESSARY FOR THAT CLAUSE TO BE MENTIONED IN A DOCUMENT SEPARATE FROM THE ONE WHICH CONSTITUTES THE WRITTEN INSTRUMENT OF THE CONTRACT.

IN CASE 784/79

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 IN JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , BY THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) KOBLENZ (SECOND CIVIL SENATE), FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

PORTA-LEASING GMBH , TRIER ,

AND

PRESTIGE INTERNATIONAL S.A., SENNINGERBERG , LUXEMBOURG ,

ON THE INTERPRETATION OF THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ,

1 BY AN ORDER OF 12 OCTOBER 1979 WHICH WAS RECEIVED AT THE COURT ON 23 OCTOBER 1979 THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) KOBLENZ ASKED THE COURT UNDER ARTICLE I OF THE PROTOCOL 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 (OFFICIAL JOURNAL 1975 , L 204 , P. 28) FOR A PRELIMINARY RULING ON THE INTERPRETATION OF THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL ANNEXED TO THE ABOVE-MENTIONED CONVENTION OF 27 SEPTEMBER 1968 .

2 THIS QUESTION ARISES OUT OF A DISPUTE BETWEEN A LEASING UNDERTAKING , THE PLAINTIFF IN THE MAIN ACTION , WHOSE REGISTERED OFFICE IS AT TRIER

, FEDERAL REPUBLIC OF GERMANY , AND ONE OF ITS CUSTOMERS , THE DEFENDANT IN THE MAIN ACTION , WHOSE REGISTERED OFFICE IS IN THE GRAND DUCHY OF LUXEMBOURG. THE CONTRACTS MADE BETWEEN THE PARTIES WERE DRAWN UP IN ADVANCE AS STANDARD PRINTED CONTRACTS AND CONTAIN A CLAUSE CONFERRING JURISDICTION ON THE COURTS OF THE PLACE WHERE THE PLAINTIFF IN THE MAIN ACTION HAS ITS SEAT. WHEN SUED BY THE PLAINTIFF IN THE LANDGERICHT (REGIONAL COURT) TRIER THE LUXEMBOURG FIRM DISPUTED THE JURISDICTION ON GROUNDS OF LOCALITY OF THE GERMAN COURT BY RELYING ON THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968.

3 THE SECOND PARAGRAPH OF ARTICLE I PROVIDES THAT : ' ' AN AGREEMENT CONFERRING JURISDICTION WITHIN THE MEANING OF ARTICLE 17 (OF THE CONVENTION) SHALL BE VALID WITH RESPECT TO A PERSON DOMICILED IN LUXEMBOURG ONLY IF THAT PERSON HAS EXPRESSLY AND SPECIFICALLY SO AGREED ' ' .

4 IN ORDER TO ENABLE IT TO RESOLVE THE PROBLEM OF JURISDICTION WHICH THUS AROSE THE OBERLANDESGERICHT KOBLENZ , HAVING BEEN ASKED TO RULE ON APPEAL , PUT THE FOLLOWING QUESTION :

' ' DOES AN AGREEMENT CONFERRING JURISDICTION WHICH IS CONTAINED IN A STANDARD FORM CONTRACT CONCLUDED WITH AND SIGNED BY A PERSON RESIDENT IN LUXEMBOURG BUT TO WHICH HIS ATTENTION HAS NOT SPECIFICALLY BEEN BROUGHT SATISFY THE REQUIREMENTS AS TO VALIDITY CONTAINED IN THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS?

' '

5 IN ORDER TO REPLY TO THIS QUESTION THE PROVISION WHICH IT IS SOUGHT TO INTERPRET SHOULD BE PUT IN PERSPECTIVE IN REGARD TO ARTICLE 17 OF THE CONVENTION. ACCORDING TO ARTICLE 17 A PROROGATION OF JURISDICTION (VEREINBARUNG UBER DIE ZUSTANDIGKEIT) AGREED TO BETWEEN THE PARTIES MUST BE BY AGREEMENT IN WRITING OR BY AN ORAL AGREEMENT EVIDENCED IN WRITING. IT FOLLOWS FROM THE JUDGMENTS GIVEN BY THE COURT OF JUSTICE ON 14 DECEMBER 1976 (CASE 24/76 ESTASIS SALOTTI AND CASE 25/76 SEGOURA ECR 1831 AND 1851) THAT THE PURPOSE OF THE REQUIREMENT OF A WRITING UNDER ARTICLE 17 SERVES TO ENSURE THAT THE CONSENSUS BETWEEN THE PARTIES , WHO , BY A PROROGATION OF COMPETENCE , DEPART FROM THE GENERAL RULES FOR DETERMINING JURISDICTION LAID DOWN IN ARTICLES 2 , 5 AND 6 OF THE CONVENTION , IS CLEARLY AND PRECISELY DEMONSTRATED AND HAS ACTUALLY BEEN REACHED. THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL WHICH IT IS SOUGHT TO INTERPRET GOES FURTHER . BY EXPRESSLY PROVIDING THAT AN AGREEMENT CONFERRING JURISDICTION SHALL BE VALID WITH RESPECT TO A PERSON DOMICILED IN LUXEMBOURG ONLY IF THAT PERSON HAS ' ' EXPRESSLY AND SPECIFICALLY SO AGREED ' ' THAT PROVISION IMPOSES MORE SPECIAL AND MORE STRICT CONDITIONS WHICH ARE SUPERIMPOSED ON THOSE IN ARTICLE 17 OF THE CONVENTION.

6 THIS INTERPRETATION ACCORDS WITH THE PURPOSE OF THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968. INDEED , IN VIEW OF THE FACT THAT MANY CONTRACTS CONCLUDED BY PERSONS RESIDENT IN THE GRAND DUCHY OF LUXEMBOURG ARE INTERNATIONAL CONTRACTS , THE AUTHORS OF THE CONVENTION OF 27 SEPTEMBER 1968 THOUGHT THAT IT WAS

ABSOLUTELY NECESSARY TO MAKE CLAUSES CONFERRING JURISDICTION WHICH WERE LIKELY TO BE USED AGAINST PERSONS DOMICILED IN LUXEMBOURG SUBJECT TO MORE STRINGENT CONDITIONS THAN THOSE CONTAINED IN ARTICLE 17 OF THE CONVENTION. THIS AIM CAN ONLY BE COMPLETELY ACHIEVED IF THE CLAUSE IN QUESTION HAS BEEN ACCEPTED BOTH EXPRESSLY AND SPECIFICALLY BY THE PERSON DOMICILED IN LUXEMBOURG .

7 IN REGARD TO PERSONS DOMICILED IN LUXEMBOURG THERE ARE THEREFORE TWO REQUIREMENTS IN ADDITION TO THE CONDITIONS CONTAINED IN ARTICLE 17 OF THE CONVENTION ; THESE MUST BE CUMULATIVELY FULFILLED , THAT IS TO SAY , FIRST , EXPRESS AGREEMENT AND , SECONDLY , SPECIFIC AGREEMENT. A COMPARISON BETWEEN THE WORDS USED IN ARTICLE 17 AND THOSE USED IN ARTICLE I OF THE PROTOCOL INDICATES THAT THE FIRST OF THESE CONDITIONS IS NOT SATISFIED UNLESS THE AGREEMENT CONFERRING JURISDICTION IS CONTAINED IN A PROVISION WHICH IS SPECIALLY AND EXCLUSIVELY DEVOTED TO IT .

8 IN ORDER TO MEET THE REQUIREMENT OF SPECIFIC AGREEMENT IT IS FURTHER NECESSARY FOR THE LUXEMBOURG PARTY SPECIFICALLY TO SIGN THE CLAUSE CONFERRING JURISDICTION AS AN INDICATION OF HIS AGREEMENT ; HIS MERE SIGNING OF THE CONTRACT IS NOT SUFFICIENT TO SECURE THE SAFEGUARDS WHICH THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL HAS IN VIEW . IT IS NOT , HOWEVER , NECESSARY FOR THAT CLAUSE TO BE MENTIONED IN A DOCUMENT SEPARATE FROM THE ONE WHICH CONSTITUTES THE WRITTEN INSTRUMENT OF THE CONTRACT.

9 . ON THE BASIS OF THE FOREGOING CONSIDERATIONS IT IS APPROPRIATE TO ANSWER THAT THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED AS MEANING THAT A CLAUSE CONFERRING JURISDICTION WITHIN THE MEANING OF THAT PROVISION MAY NOT BE CONSIDERED TO HAVE BEEN EXPRESSLY AND SPECIFICALLY AGREED TO BY A PERSON DOMICILED IN LUXEMBOURG UNLESS THAT CLAUSE , BESIDES BEING IN WRITING AS REQUIRED BY ARTICLE 17 OF THE CONVENTION , IS MENTIONED IN A PROVISION SPECIALLY AND EXCLUSIVELY MEANT FOR THIS PURPOSE AND SPECIFICALLY SIGNED BY THE PARTY DOMICILED IN LUXEMBOURG ; IN THIS RESPECT THE SIGNING OF THE CONTRACT AS A WHOLE DOES NOT IN ITSELF SUFFICE. IT IS NOT HOWEVER NECESSARY FOR THAT CLAUSE TO BE MENTIONED IN A DOCUMENT SEPARATE FROM THE ONE WHICH CONSTITUTES THE WRITTEN INSTRUMENT OF THE CONTRACT.

10 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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 (THIRD CHAMBER),

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE OBERLANDESGERICHT KOBLENZ (SECOND CIVIL CHAMBER) BY ORDER OF 12 OCTOBER 1979 , RECEIVED AT THE COURT ON 23 OCTOBER 1979 , HEREBY RULES :

THE SECOND PARAGRAPH OF ARTICLE I OF THE PROTOCOL ANNEXED TO THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENT IN

CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED AS MEANING THAT A CLAUSE CONFERRING JURISDICTION WITHIN THE MEANING OF THAT PROVISION MAY NOT BE CONSIDERED TO HAVE BEEN EXPRESSLY AND SPECIFICALLY AGREED TO BY A PERSON DOMICILED IN LUXEMBOURG UNLESS THAT CLAUSE , BESIDES BEING IN WRITING AS REQUIRED BY ARTICLE 17 OF THE CONVENTION , IS MENTIONED IN A PROVISION SPECIALLY AND EXCLUSIVELY MEANT FOR THIS PURPOSE AND SPECIFICALLY SIGNED BY THE PARTY DOMICILED IN LUXEMBOURG ; IN THIS RESPECT THE SIGNING OF THE CONTRACT AS A WHOLE DOES NOT IN ITSELF SUFFICE. IT IS NOT HOWEVER NECESSARY FOR THAT CLAUSE TO BE MENTIONED IN A DOCUMENT SEPARATE FROM THE ONE WHICH CONSTITUTES THE WRITTEN INSTRUMENT OF THE CONTRACT.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
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CONCERNS	Interprets 41968A0927(02) -A01L2
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
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NATIONA	Federal Republic of Germany
NATCOUR	*A8* Landgericht Trier, Urteil vom 19/10/1978 (7 HO 23/78) ; *A9* Oberlandesgericht

Koblenz, Vorlagebeschluß vom 12/10/1979 (2 U 994/78) ; *P1*
Oberlandesgericht Koblenz, Beschluß vom 29/07/1980 (2 U 994/78)

NOTES Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1980 no 607 ; Huet, André: Chronique de jurisprudence de la Cour de justice des Communautés européennes, Journal du droit international 1980 p.934-939 ; Hartley, Trevor: Choice of Jurisdiction Clauses: Special Privileges of Luxembourgers, European Law Review 1981 p.62-64 ; Lagarde, Paul: Revue critique de droit international privé 1981 p.342-344 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a24

PROCEDU Reference for a preliminary ruling

ADVGEN Reischl

JUDGRAP Mertens de Wilmars

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Judgment of the Court
of 21 May 1980
Bernard Denilauler v SNC Couchet Frères.
Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany.
Convention on Jurisdiction - Provisional measures authorized in the absence of one party.
Case 125/79.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - PROVISIONS OF TITLE II (JURISDICTION) AND TITLE III (RECOGNITION AND ENFORCEMENT) - OBSERVANCE OF RIGHTS OF THE DEFENCE - CONSEQUENCES - DECISIONS WITH WHICH THE CONVENTION IS CONCERNED - DECISIONS CAPABLE OF BEING THE SUBJECT OF AN INQUIRY IN ADVERSARY PROCEEDINGS IN THE STATE OF ORIGIN

(CONVENTION OF 27 SEPTEMBER 1968 , TITLES II AND III)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION AND ENFORCEMENT OF JUDGMENTS - DECISIONS AUTHORIZING PROVISIONAL OR PROTECTIVE MEASURES - EXCLUSION FROM THE PROCEDURE PROVIDED FOR BY TITLE III - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , TITLE III)

1 . ALL THE PROVISIONS OF THE CONVENTION , BOTH THOSE CONTAINED IN TITLE II ON JURISDICTION AND THOSE CONTAINED IN TITLE III ON RECOGNITION AND ENFORCEMENT , EXPRESS THE INTENTION TO ENSURE THAT , WITHIN THE SCOPE OF THE OBJECTIVES OF THE CONVENTION , PROCEEDINGS LEADING TO THE DELIVERY OF JUDICIAL DECISIONS TAKE PLACE IN SUCH A WAY THAT THE RIGHTS OF THE DEFENCE ARE OBSERVED. IT IS BECAUSE OF THE GUARANTEES GIVEN TO THE DEFENDANT IN THE ORIGINAL PROCEEDINGS THAT THE CONVENTION , IN TITLE III , IS VERY LIBERAL IN REGARD TO RECOGNITION AND ENFORCEMENT. IN THE LIGHT OF THESE CONSIDERATIONS IT IS CLEAR THAT THE CONVENTION IS FUNDAMENTALLY CONCERNED WITH JUDICIAL DECISIONS WHICH , BEFORE THE RECOGNITION AND ENFORCEMENT OF THEM ARE SOUGHT IN A STATE OTHER THAN THE STATE OF ORIGIN , HAVE BEEN , OR HAVE BEEN CAPABLE OF BEING , THE SUBJECT IN THAT STATE OF ORIGIN AND UNDER VARIOUS PROCEDURES , OF AN INQUIRY IN ADVERSARY PROCEEDINGS

2 . THE CONDITIONS IMPOSED BY TITLE III OF THE CONVENTION ON THE RECOGNITION AND THE ENFORCEMENT OF JUDICIAL DECISIONS ARE NOT FULFILLED IN THE CASE OF PROVISIONAL OR PROTECTIVE MEASURES WHICH ARE ORDERED OR AUTHORIZED BY A COURT WITHOUT THE PARTY AGAINST WHOM THEY ARE DIRECTED HAVING BEEN SUMMONED TO APPEAR AND WHICH ARE INTENDED TO BE ENFORCED WITHOUT PRIOR SERVICE ON THAT PARTY. IT FOLLOWS THAT THIS TYPE OF JUDICIAL DECISION IS NOT COVERED BY THE SYSTEM OF RECOGNITION AND ENFORCEMENT PROVIDED FOR BY TITLE III OF THE CONVENTION.

IN CASE 125/79

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 OBERLANDESGERICHT (HIGHER REGIONAL COURT) FRANKFURT AM MAIN , FOR A PRELIMINARY RULING IN PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

BERNARD DENILAULER , 26 SPESSARTSTRASSE , 6204 TAUNUSSTEIN 2

DEFENDANT AND APPELLANT ,

AND

S.N.C . COUCHET FRERES , ANDREZIEUX-BOUTHEON (FRANCE)

PLAINTIFF AND RESPONDENT ,

ON THE INTERPRETATION OF ARTICLES 24 , 27 , 34 , 36 , 46 AND 47 OF THE CONVENTION OF 27 SEPTEMBER 1968 (OFFICIAL JOURNAL 1978 , L 304 , P. 36),

1 BY AN ORDER OF 25 JULY 1979 RECEIVED AT THE COURT ON 6 AUGUST 1979 THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) FRANKFURT AM MAIN REFERRED TO THE COURT UNDER THE PROTOCOL 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) (OFFICIAL JOURNAL 1978 , L 304 , P. 36) FOUR QUESTIONS RELATING TO THE INTERPRETATION OF ARTICLES 24 , 27 (2), THE SECOND PARAGRAPH OF ARTICLE 34 , THE FIRST PARAGRAPH OF ARTICLES 36 AND ARTICLES 46 (2) AND 47 (1) OF THE CONVENTION .

2 IN 1978 A DISPUTE BETWEEN A CREDITOR , COUCHET FRERES , AND ITS DEBTOR , DENILAULER , WAS BROUGHT BEFORE THE TRIBUNAL DE GRANDE INSTANCE (REGIONAL COURT), MONTBRISON (FRANCE). ON 7 FEBRUARY 1979 THE PRESIDENT OF THAT COURT , EXERCISING THE POWERS CONFERRED ON HIM BY ARTICLE 48 OF THE FRENCH CODE OF CIVIL PROCEDURE AT THE REQUEST OF THE CREDITOR AND WITHOUT THE OTHER PARTY ' S HAVING BEEN SUMMONED TO APPEAR , MADE AN ORDER WHICH WAS DECLARED PROVISIONALLY ENFORCEABLE , AUTHORIZING THE CREDITOR TO FREEZE THE ACCOUNT OF THE DEBTOR AT A BANK IN FRANKFURT AM MAIN AS SECURITY FOR A DEBT ESTIMATED AT FF 130 000. UNDER FRENCH LAW SUCH FREEZING OF ASSETS (' ' SAISIE CONSERVATOIRE ' ') WHICH THE CREDITOR WAS THUS AUTHORIZED TO CARRY OUT MAY BE AFFECTED WITHOUT PRIOR SERVICE OF THE ORDER ON THE DEBTOR WHOSE ASSETS ARE SEIZED .

3 THE QUESTIONS BEFORE THE COURT HAVE BEEN REFERRED TO IT PURSUANT TO PROCEEDINGS BEFORE GERMAN COURTS FOR THE ISSUE OF AN ORDER FOR THE ENFORCEMENT OF THE FRENCH ORDER AND ALSO FOR A ' ' PFANDUNGSBESCHLUSS ' ' (ATTACHMENT ORDER) SEIZING THE FUNDS IN THE BANK ' S POSSESSION . THESE PROCEEDINGS WERE FIRST BEFORE THE PRESIDENT OF THE LANDGERICHT (REGIONAL COURT) WIESBADEN WHO ORDERED ENFORCEMENT ON 23 MARCH 1979 RESULTING IN SEIZURE OF THE FUNDS ON 28 MARCH , ALL WITHOUT THE DEBTOR ' S HAVING BEEN A PARTY TO THE PROCEEDINGS. IT SEEMS THAT THE ORDER BY THE PRESIDENT OF THE LANDGERICHT WIESBADEN WAS NOT SERVED ON THE DEBTOR UNTIL 3 MAY 1979 ; THE DEBTOR IMMEDIATELY APPEALED AGAINST IT BEFORE THE OBERLANDESGERICHT FRANKFURT AM MAIN WHICH REFERRED TO THE COURT THE QUESTIONS NOW UNDER CONSIDERATION.

4 THESE QUESTIONS FIRST SEEK TO KNOW WHETHER DECISIONS OF THE JUDICIAL AUTHORITIES OF A CONTRACTING STATE ORDERING PROVISIONAL AND PROTECTIVE MEASURES , WHERE THE PARTY AGAINST WHOM THEY ARE DIRECTED HAS NOT BEEN SUMMONED TO APPEAR AND DOES NOT BECOME AWARE OF THEM UNTIL AFTER THEIR ENFORCEMENT , MAY BE RECOGNIZED AND MADE ENFORCEABLE IN ANOTHER CONTRACTING STATE WITHOUT PRIOR SERVICE ON THE PARTY AGAINST WHOM THEY ARE DIRECTED (QUESTIONS 1 AND 2). THEY SECONDLY SEEK CLARIFICATION OF THE OBJECTIONS WHICH THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT MAY RAISE WHEN LODGING THE APPEAL AGAINST THE ENFORCEMENT ORDER AS PROVIDED BY ARTICLE 36 OF THE CONVENTION (QUESTIONS 3 AND 4).

QUESTIONS 1 AND 2

5 QUESTIONS 1 AND 2 , WHICH SHOULD BE ANSWERED TOGETHER , READ AS FOLLOWS :

' ' 1 . DO ARTICLES 27 (2) AND 46 (2) ALSO APPLY TO PROCEEDINGS IN WHICH PROVISIONAL PROTECTIVE MEASURES ARE TAKEN WITHOUT THE OPPOSITE PARTY ' S BEING HEARD?

2 . IS ARTICLE 47 (1) OF THE CONVENTION TO BE INTERPRETED AS MEANING THAT THE PARTY APPLYING FOR ENFORCEMENT MUST ALSO PRODUCE THE DOCUMENTS WHICH ESTABLISH THAT THE JUDGMENT OF WHICH ENFORCEMENT IS SOUGHT HAS BEEN SERVED , EVEN IF THAT JUDGMENT CONCERNS A PROVISIONAL AND PURELY PROTECTIVE MEASURE?

' '

6 THE COMMISSION , THE ITALIAN GOVERNMENT AND THE PLAINTIFF IN THE MAIN ACTION EXPRESS THE OPINION IN THEIR OBSERVATIONS THAT SUCH JUDGMENTS MUST BE RECOGNIZED AS ENFORCEABLE IN THE CONTRACTING STATE ADDRESSED WITHOUT PRIOR SERVICE ON THE PARTY AGAINST WHICH THEY ARE DIRECTED .

THE SPECIFIC OBJECT OF THIS TYPE OF PROVISIONAL OR PROTECTIVE MEASURE IS THOUGHT TO BE TO PRODUCE A SURPRISE EFFECT INTENDED TO SAFEGUARD THE THREATENED RIGHTS OF THE PARTY SEEKING THEM BY PREVENTING THE PARTY AGAINST WHOM THEY ARE DIRECTED FROM REMOVING THE ASSETS IN ITS POSSESSION , WHETHER THEY BE THE SUBJECT-MATTER OF THE DISPUTE OR CONSTITUTE THE CREDITOR ' S SECURITY. TO STIPULATE THAT THE RECOGNITION AND THE ENFORCEMENT OF SUCH TYPES OF JUDGMENTS MUST BE SUBJECT TO THEIR PRIOR SERVICE ON THE OTHER PARTY AND FROM THE STAGE OF THE PROCEEDINGS IN THE CONTRACTING STATE OF ORIGIN WOULD , IT IS SAID , MAKE THEM TOTALLY MEANINGLESS.

THE UNITED KINGDOM GOVERNMENT , ON THE OTHER HAND , IS OF THE OPINION THAT THE RECOGNITION AND THE ENFORCEMENT OF THESE JUDGMENTS MUST BE SUBJECT TO THE CONDITIONS SET OUT IN ARTICLES , 27 , 46 AND 47 AS REGARDS SERVICE ON THE OTHER PARTY. IT ACKNOWLEDGES THAT THIS REQUIREMENT REMOVES THE SURPRISE EFFECT PECULIAR TO SUCH DECISIONS AND DESTROYS ALL THEIR PRACTICAL VALUE SO THAT IT VIRTUALLY AMOUNTS TO A REFUSAL TO RECOGNIZE AND ENFORCE THE DECISIONS IN QUESTION. HOWEVER , IT FEELS THAT THE EFFECT OF THIS IS NOT SO SERIOUS AS WHAT IT REGARDS THE INTOLERABLE RISKS WHICH WOULD HAVE TO BE RUN BY UNDERTAKINGS HAVING ASSETS IN DIFFERENT CONTRACTING STATES AS A RESULT OF A PROCEDURE WHICH OBLIGES THE COURTS OF THE STATE ADDRESSED TO AUTHORIZE MEASURES FREEZING ASSETS LOCATED IN THAT STATE WITHOUT THE OWNER OF THOSE ASSETS HAVING EVER HAD THE OPPORTUNITY TO PUT FORWARD HIS VERSION OF THE CASE EITHER BEFORE THE COURT OF THE STATE OF ORIGIN OR BEFORE THE COURT OF THE STATE ADDRESSED WHEN SUCH ASSETS MAY HAVE BEEN LEGITIMATELY INTENDED TO MEET OTHER OBLIGATIONS. ONLY THE COURT HAVING JURISDICTION IN THE STATE IN WHICH THE ASSETS ARE LOCATED IS IN A POSITION TO DETERMINE , IN THE FULL KNOWLEDGE OF THE FACTS OF THE CASE , THE NECESSITY TO AUTHORIZE THIS TYPE OF PROVISIONAL OR PROTECTIVE MEASURE. THE UNITED KINGDOM GOVERNMENT FURTHER CONTENDS THAT ITS POINT OF VIEW DOES NOT CREATE A LACUNA IN THE SCHEME OF THE CONVENTION BECAUSE ARTICLE 24 ENABLES ANY PARTY TO APPLY TO THE COURTS OF A CONTRACTING STATE FOR SUCH PROVISIONAL OR PROTECTIVE MEASURES AS MAY BE AVAILABLE UNDER THE LAW OF THAT STATE , EVEN IF THE COURTS OF ANOTHER CONTRACTING STATE HAVE JURISDICTION AS

TO THE SUBSTANCE OF THE MATTER .

7 ARTICLE 27 OF THE CONVENTION SETS OUT THE CONDITIONS TO BE FULFILLED FOR THE RECOGNITION IN A CONTRACTING STATE OF JUDGMENTS GIVEN IN ANOTHER CONTRACTING STATE. UNDER ARTICLE 27 (2) A JUDGMENT SHALL NOT BE RECOGNIZED ' ' IF THE DEFENDANT WAS NOT DULY SERVED WITH THE DOCUMENT WHICH INSTITUTED THE PROCEEDINGS IN SUFFICIENT TIME TO ENABLE HIM TO ARRANGE FOR HIS DEFENCE ' '. ARTICLE 46 (2) STIPULATES THAT A PARTY SEEKING RECOGNITION OR APPLYING FOR ENFORCEMENT OF A JUDGMENT GIVEN IN DEFAULT IN ANOTHER CONTRACTING STATE MUST PRODUCE AMONGST OTHER DOCUMENTS THE DOCUMENT WHICH ESTABLISHES THAT THE PARTY IN DEFAULT WAS SERVED WITH THE DOCUMENT INSTITUTING THE PROCEEDINGS OR NOTICE THEREOF.

8 THESE PROVISIONS WERE CLEARLY NOT DESIGNED IN ORDER TO BE APPLIED TO JUDGMENTS WHICH , UNDER THE NATIONAL LAW OF A CONTRACTING STATE , ARE INTENDED TO BE DELIVERED IN THE ABSENCE OF THE PARTY AGAINST WHOM THEY ARE DIRECTED AND TO BE ENFORCED WITHOUT PRIOR SERVICE ON HIM. IT IS APPARENT FROM A COMPARISON OF THE DIFFERENT LANGUAGE VERSIONS OF THE WORDS IN QUESTION AND IN PARTICULAR FROM THE TERMS USED TO DESCRIBE THE PARTY WHO DOES NOT APPEAR THAT THESE PROVISIONS ARE INTENDED TO REFER TO PROCEEDINGS IN WHICH IN PRINCIPLE BOTH PARTIES PARTICIPATE BUT IN WHICH THE COURT IS NEVERTHELESS EMPOWERED TO GIVE JUDGMENT IF THE DEFENDANT , ALTHOUGH DULY SUMMONED , DOES NOT APPEAR.

9 THE SAME APPLIES TO ARTICLE 47 (1) OF THE CONVENTION UNDER WHICH THE PARTY SEEKING ENFORCEMENT MUST PRODUCE DOCUMENTS WHICH ESTABLISH THAT , ACCORDING TO THE LAW OF THE STATE IN WHICH IT HAS BEEN GIVEN , THE JUDGMENT IS ENFORCEABLE AND HAS BEEN SERVED. THIS PROVISION WHICH RELATES TO JUDGMENTS IN CASES IN WHICH BOTH PARTIES PARTICIPATE AS WELL AS TO JUDGMENTS IN DEFAULT DELIVERED IN THE STATE OF ORIGIN CANNOT BY DEFINITION APPLY TO JUDGMENTS SUCH AS THE TYPE IN DISPUTE , WHICH HAVE A DIFFERENT CHARACTER.

10 HOWEVER , IT CANNOT BE INFERRED FROM THE FACT THAT ARTICLES 27 (2), 46 (2) AND 47 (1) CANNOT APPLY TO DECISIONS OF THE TYPE IN QUESTION , SAVE BY DISTORTING THEIR SUBSTANCE AND SCOPE , THAT SUCH DECISIONS MUST NEVERTHELESS BE RECOGNIZED AND ENFORCED IN THE STATE ADDRESSED . IT IS NECESSARY TO CONSIDER WHETHER JUDICIAL DECISIONS OF THIS TYPE , HAVING REGARD TO THE SCHEME AND OBJECTS OF THE CONVENTION , MAY BE DEALT WITH UNDER THE SIMPLIFIED PROCEDURE FOR RECOGNITION AND ENFORCEMENT PROVIDED BY THE CONVENTION.

11 IN FAVOUR OF AN AFFIRMATIVE ANSWER , THE COMMISSION AND THE ITALIAN GOVERNMENT MAINTAIN THAT , ACCORDING TO ARTICLE 25 , THE CONVENTION COVERS ALL DECISIONS GIVEN BY THE COURTS OF THE CONTRACTING STATES WITHOUT DISTINGUISHING BETWEEN THOSE INVOLVING ADVERSARY PROCEEDINGS AND THOSE GIVEN WITHOUT THE OTHER PARTY ' S BEING SUMMONED TO APPEAR . AS IS APPARENT FROM ARTICLE 24 THE FIELD OF APPLICATION OF THE CONVENTION EMBRACES PROTECTIVE AND PROVISIONAL MEASURES WHICH , UNDER THE LAW OF THE DIFFERENT CONTRACTING STATES AND BY REASON OF THEIR VERY NATURE OR THEIR URGENCY ARE OFTEN ADOPTED WITHOUT THE OPPOSITE PARTY ' S HAVING FIRST BEEN HEARD. THE CONTRACTING STATES CANNOT HAVE INTENDED TO RESTRICT THE FIELD OF APPLICATION OF THE CONVENTION TO SUCH AN EXTENT WITHOUT EXPRESS MENTION BEING MADE TO THAT EFFECT . FINALLY , IT MAY CLEARLY BE SEEN FROM ARTICLE 34 OF THE CONVENTION

, WHICH STATES THAT IN THE PROCEEDINGS FOR AN ENFORCEMENT ORDER ' ' THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT SHALL NOT AT THIS STAGE OF THE PROCEEDINGS BE ENTITLED TO MAKE ANY SUBMISSIONS ON THE APPLICATION ' ' , THAT THE CONVENTION ITSELF RECOGNIZES THAT PROCEEDINGS IN WHICH ONLY ONE PARTY IS HEARD ARE , WHERE CIRCUMSTANCES JUSTIFY THEM , IN KEEPING WITH THE BASIC PRINCIPLE OF THE RIGHTS OF THE DEFENCE .

12 THESE ARGUMENTS CANNOT PREVAIL OVER THE SCHEME OF THE CONVENTION AND THE PRINCIPLES UNDERLYING IT.

13 ALL THE PROVISIONS OF THE CONVENTION , BOTH THOSE CONTAINED IN TITLE II ON JURISDICTION AND THOSE CONTAINED IN TITLE III ON RECOGNITION AND ENFORCEMENT , EXPRESS THE INTENTION TO ENSURE THAT , WITHIN THE SCOPE OF THE OBJECTIVES OF THE CONVENTION , PROCEEDINGS LEADING TO THE DELIVERY OF JUDICIAL DECISIONS TAKE PLACE IN SUCH A WAY THAT THE RIGHTS OF THE DEFENCE ARE OBSERVED. IT IS BECAUSE OF THE GUARANTEES GIVEN TO THE DEFENDANT IN THE ORIGINAL PROCEEDINGS THAT THE CONVENTION , IN TITLE III , IS VERY LIBERAL IN REGARD TO RECOGNITION AND ENFORCEMENT. IN THE LIGHT OF THESE CONSIDERATIONS IT IS CLEAR THAT THE CONVENTION IS FUNDAMENTALLY CONCERNED WITH JUDICIAL DECISIONS WHICH , BEFORE THE RECOGNITION AND ENFORCEMENT OF THEM ARE SOUGHT IN A STATE OTHER THAN THE STATE OF ORIGIN , HAVE BEEN , OR HAVE BEEN CAPABLE OF BEING , THE SUBJECT IN THAT STATE OF ORIGIN AND UNDER VARIOUS PROCEDURES , OF AN INQUIRY IN ADVERSARY PROCEEDINGS. IT CANNOT THEREFORE BE DEDUCED FROM THE GENERAL SCHEME OF THE CONVENTION THAT A FORMAL EXPRESSION OF INTENTION WAS NEEDED IN ORDER TO EXCLUDE JUDGMENTS OF THE TYPE IN QUESTION FROM RECOGNITION AND ENFORCEMENT.

14 NOR IS THE ARGUMENT BY ANALOGY , BASED ON ARTICLE 34 OF THE CONVENTION , OF SUCH A NATURE AS TO TURN THE SCALE. ALTHOUGH ENFORCEMENT PROCEEDINGS MAY BE UNILATERAL - BUT ONLY PROVISIONALLY SO - THIS FACT HAS TO BE BROUGHT INTO ACCORD WITH THE LIBERAL CHARACTER OF THE CONVENTION AS REGARDS THE PROCEDURE FOR ENFORCEMENT , WHICH IS JUSTIFIED BY THE GUARANTEE THAT IN THE STATE OF ORIGIN BOTH PARTIES HAVE EITHER STATED THEIR CASE OR HAD THE OPPORTUNITY TO DO SO. WHILST ANOTHER REASON FOR THE UNILATERAL CHARACTER OF THE ENFORCEMENT PROCEDURE UNDER ARTICLE 34 IS TO PRODUCE THE SURPRISE EFFECT WHICH THIS PROCEDURE MUST HAVE IN ORDER TO PREVENT A DEFENDANT FROM HAVING THE OPPOR TUNITY TO PROTECT HIS ASSETS AGAINST ANY ENFORCEMENT MEASURES , THE SURPRISE EFFECT IS ATTENUATED SINCE THE UNILATERAL PROCEEDINGS ARE BASED ON THE ASSUMPTION THAT BOTH PARTIES WILL HAVE BEEN HEARD IN THE STATE OF ORIGIN.

15 AN ANALYSIS OF THE FUNCTION ATTRIBUTED UNDER THE GENERAL SCHEME OF THE CONVENTION TO ARTICLE 24 , WHICH IS SPECIFICALLY DEVOTED TO PROVISIONAL AND PROTECTIVE MEASURES , LEADS , MOREOVER , TO THE CONCLUSION THAT , WHERE THESE TYPES OF MEASURES ARE CONCERNED , SPECIAL RULES WERE CONTEMPLATED. WHILST IT IS TRUE THAT PROCEDURES OF THE TYPE IN QUESTION AUTHORIZING PROVISIONAL AND PROTECTIVE MEASURES MAY BE FOUND IN THE LEGAL SYSTEM OF ALL THE CONTRACTING STATES AND MAY BE REGARDED , WHERE CERTAIN CONDITIONS ARE FULFILLED , AS NOT INFRINGING THE RIGHTS OF THE DEFENCE , IT SHOULD HOWEVER BE EMPHASIZED THAT THE GRANTING OF THIS TYPE OF MEASURE REQUIRES PARTICULAR CARE ON THE PART OF THE COURT AND DETAILED KNOWLEDGE OF THE ACTUAL CIRCUMSTANCES IN WHICH THE MEASURE IS TO TAKE EFFECT. DEPENDING

ON EACH CASE AND COMMERCIAL PRACTICES IN PARTICULAR THE COURT MUST BE ABLE TO PLACE A TIME-LIMIT ON ITS ORDER OR , AS REGARDS THE NATURE OF THE ASSETS OR GOODS SUBJECT TO THE MEASURES CONTEMPLATED , REQUIRE BANK GUARANTEES OR NOMINATE A SEQUESTRATOR AND GENERALLY MAKE ITS AUTHORIZATION SUBJECT TO ALL CONDITIONS GUARANTEEING THE PROVISIONAL OR PROTECTIVE CHARACTER OF THE MEASURE ORDERED.

16 THE COURTS OF THE PLACE OR , IN ANY EVENT , OF THE CONTRACTING STATE , WHERE THE ASSETS SUBJECT TO THE MEASURES SOUGHT ARE LOCATED , ARE THOSE BEST ABLE TO ASSESS THE CIRCUMSTANCES WHICH MAY LEAD TO THE GRANT OR REFUSAL OF THE MEASURES SOUGHT OR TO THE LAYING DOWN OF PROCEDURES AND CONDITIONS WHICH THE PLAINTIFF MUST OBSERVE IN ORDER TO GUARANTEE THE PROVISIONAL AND PROTECTIVE CHARACTER OF THE MEASURES ORDERED . THE CONVENTION HAS TAKEN ACCOUNT OF THESE REQUIREMENTS BY PROVIDING IN ARTICLE 24 THAT APPLICATION MAY BE MADE TO THE COURTS OF A CONTRACTING STATE FOR SUCH PROVISIONAL , INCLUDING PROTECTIVE , MEASURES AS MAY BE AVAILABLE UNDER THE LAW OF THAT STATE , EVEN IF , UNDER THE CONVENTION , THE COURTS OF ANOTHER CONTRACTING STATE HAVE JURISDICTION AS TO THE SUBSTANCE OF THE MATTER.

17 ARTICLE 24 DOES NOT PRECLUDE PROVISIONAL OR PROTECTIVE MEASURES ORDERED IN THE STATE OF ORIGIN PURSUANT TO ADVERSARY PROCEEDINGS - EVEN THOUGH BY DEFAULT - FROM BEING THE SUBJECT OF RECOGNITION AND AN AUTHORIZATION FOR ENFORCEMENT ON THE CONDITIONS LAID DOWN IN ARTICLES 25 TO 49 OF THE CONVENTION. ON THE OTHER HAND THE CONDITIONS IMPOSED BY TITLE III OF THE CONVENTION ON THE RECOGNITION AND THE ENFORCEMENT OF JUDICIAL DECISIONS ARE NOT FULFILLED IN THE CASE OF PROVISIONAL OR PROTECTIVE MEASURES WHICH ARE ORDERED OR AUTHORIZED BY A COURT WITHOUT THE PARTY AGAINST WHOM THEY ARE DIRECTED HAVING BEEN SUMMONED TO APPEAR AND WHICH ARE INTENDED TO BE ENFORCED WITHOUT PRIOR SERVICE ON THAT PARTY . IT FOLLOWS THAT THIS TYPE OF JUDICIAL DECISION IS NOT COVERED BY THE SIMPLIFIED ENFORCEMENT PROCEDURE PROVIDED FOR BY TITLE III OF THE CONVENTION. HOWEVER , AS THE GOVERNMENT OF THE UNITED KINGDOM HAS RIGHTLY OBSERVED , ARTICLE 24 PROVIDES A PROCEDURE FOR LITIGANTS WHICH TO A LARGE EXTENT REMOVES THE DRAWBACKS OF THIS SITUATION .

18 THE REPLY TO QUESTIONS 1 AND 2 SHOULD THEREFORE BE THAT JUDICIAL DECISIONS AUTHORIZING PROVISIONAL OR PROTECTIVE MEASURES , WHICH ARE DELIVERED WITHOUT THE PARTY AGAINST WHICH THEY ARE DIRECTED HAVING BEEN SUMMONED TO APPEAR AND WHICH ARE INTENDED TO BE ENFORCED WITHOUT PRIOR SERVICE DO NOT COME WITHIN THE SYSTEM OF RECOGNITION AND ENFORCEMENT PROVIDED FOR BY TITLE III OF THE CONVENTION.

QUESTIONS 3 AND 4

19 IN VIEW OF THE ANSWER TO QUESTIONS 1 AND 2 THERE IS NO LONGER ANY REASON TO EXAMINE QUESTIONS 3 AND 4 WHICH NOW HAVE NO PURPOSE.

20 THE COSTS INCURRED BY THE GOVERNMENT OF THE ITALIAN REPUBLIC , THE GOVERNMENT OF THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE OBERLANDESGERICHT FRANKFURT AM MAIN BY ORDER OF 25 JULY 1979 RECEIVED AT THE COURT ON 6 AUGUST 1979 , HEREBY RULES :

JUDICIAL DECISIONS AUTHORIZING PROVISIONAL OR PROTECTIVE MEASURES , WHICH ARE DELIVERED WITHOUT THE PARTY AGAINST WHICH THEY ARE DIRECTED HAVING BEEN SUMMONED TO APPEAR AND WHICH ARE INTENDED TO BE ENFORCED WITHOUT PRIOR SERVICE DO NOT COME WITHIN THE SYSTEM OF RECOGNITION AND ENFORCEMENT PROVIDED FOR BY TITLE III OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS.

DOCNUM	61979J0125
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1979 ; J ; judgment
PUBREF	European Court reports 1980 Page 01553 Greek special edition 1980:II Page 00149 Swedish special edition V Page 00197 Finnish special edition V Page 00201 Spanish special edition 1980 Page 00525
DOC	1980/05/21
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JURCIT	41968A0927(01)-A24 : N 1 6 11 15 - 17 41968A0927(01)-A25 : N 11 41968A0927(01)-A27PT2 : N 1 5 - 7 10 41968A0927(01)-A34 : N 11 14 41968A0927(01)-A34L2 : N 1 41968A0927(01)-A36L1 : N 1 4 41968A0927(01)-A46PT2 : N 1 5 - 7 10 41968A0927(01)-A47PT1 : N 1 5 - 7 10
CONCERNS	Interprets 41968A0927(01)-A27PT2 Interprets 41968A0927(01)-A46PT2 Interprets 41968A0927(01)-A47PT1 Interprets 41968A0927(01)-TIT3

SUB	Brussels Convention of 27 September 1968 ; Jurisdiction ; Enforcement of judgments
AUTLANG	German
OBSERV	Commission ; United Kingdom ; Italy ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A7* Landgericht Wiesbaden, Beschluß vom 28/03/1979 (6 O 85/79) *A8* Tribunal de grande instance de Montbrison, jugement du 04/07/1979 *A9* Oberlandesgericht Frankfurt/Main, Vorlagebeschluß vom 25/07/1979 (20 W 266/79) *P1* Oberlandesgericht Frankfurt/Main, Schreiben vom 09/07/1980 (20 W 266/79) *P2* Landgericht Wiesbaden, Beschluß vom 24/12/1980 (6 O 582/80)
NOTES	Mauro, Jacques: Gazette du Palais 1980 I Jur. p.659-660 Vandencasteele, Alexandre: Journal des tribunaux 1980 p.737-739 Huet, André: Journal du droit international 1980 p.939-948 Mezger, Ernst: Revue critique de droit international privé 1980 p.801-804 Pesce, Angelo: Il Foro padano 1980 IV Col.25-26 Hartley, Trevor: European Law Review 1981 p.59-61 Audit, Bernard: Recueil Dalloz Sirey 1981 Som. p.158-159 Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1981 no 184 Hausmann, Rainer: Praxis des internationalen Privat- und Verfahrensrechts 1981 p.79-82 March Hunnings, Neville: The Journal of Business Law 1981 p.243-245 Mari, Luigi: Diritto comunitario e degli scambi internazionali 1981 p.237-242 Verheul, Hans: Netherlands International Law Review 1981 p.84 Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a25
PROCEDU	Reference for a preliminary ruling
ADVGEN	Mayras
JUDGRAP	Mertens de Wilmars
DATES	of document: 21/05/1980 of application: 06/08/1979

Judgment of the Court (Third Chamber)
of 6 March 1980
Louise de Cavel v Jacques de Cavel. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Maintenance obligations. Case 120/79.

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SCOPE - SUBJECT OF MAINTENANCE OBLIGATIONS - INCLUSION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 1 , FIRST PARAGRAPH)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SCOPE - CLAIM ANCILLARY TO PROCEEDINGS WHICH ARE EXCLUDED BY VIRTUE OF THEIR SUBJECT-MATTER - INCLUSION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 1 , FIRST PARAGRAPH)

3 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SCOPE - DISTINCTION BETWEEN INTERIM AND FINAL MEASURES - NONE

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS. 1 AND 24)

4 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SCOPE - INTERLOCUTORY MEASURE ORDERING THE PAYMENT OF A MAINTENANCE ALLOWANCE DURING DIVORCE PROCEEDINGS - INTERIM COMPENSATION PAYMENT AWARDED BY A DIVORCE JUDGMENT - INCLUSION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 1 , FIRST PARAGRAPH)

1 . THE SUBJECT OF MAINTENANCE OBLIGATIONS FALLS OF ITSELF WITHIN THE CONCEPT OF ' ' CIVIL... MATTERS ' ' WITHIN THE MEANING OF THE FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION AND ACCORDINGLY COMES WITHIN THE SCOPE OF THE CONVENTION SINCE IT HAS NOT BEEN EXCEPTED BY THE SECOND PARAGRAPH OF THAT ARTICLE.

2 . A CLAIM FALLS WITHIN THE SCOPE OF THE CONVENTION WHERE ITS OWN SUBJECT-MATTER IS ONE OF THE MATTERS COVERED BY THE CONVENTION EVEN IF IT IS ANCILLARY TO PROCEEDINGS WHICH , BECAUSE OF THEIR SUBJECT-MATTER , DO NOT COME WITHIN THE CONVENTION ' S SPHERE OF APPLICATION.

3 . THE INTERIM OR FINAL NATURE OF A JUDGMENT IS NOT RELEVANT TO WHETHER THE JUDGMENT COMES WITHIN THE SCOPE OF THE CONVENTION.

4 . THE CONVENTION IS APPLICABLE , ON THE ONE HAND , TO THE ENFORCEMENT OF AN INTERLOCUTORY ORDER MADE BY A FRENCH COURT IN DIVORCE PROCEEDINGS WHEREBY ONE OF THE PARTIES TO THE PROCEEDINGS IS AWARDED A MONTHLY MAINTENANCE ALLOWANCE AND , ON THE OTHER HAND , TO AN INTERIM COMPENSATION PAYMENT , PAYABLE MONTHLY , AWARDED TO ONE OF THE PARTIES BY A FRENCH DIVORCE JUDGMENT PURSUANT TO ARTICLE 270 ET SEQ . OF THE FRENCH CIVIL CODE.

IN CASE 120/79

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 BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

LUISE DE CAVEL , NEE BRUMMER , HUGELSTRASSE 116 , FRANKFURT AM MAIN

APPLICANT AND APPELLANT ,

AND

JACQUES DE CAVEL , FLUGHAFENBEREICH-OST , GEBAUDE 124-2040 , FRANKFURT AM MAIN ,

DEFENDANT AND RESPONDENT ,

ON THE INTERPRETATION OF SUBPARAGRAPH (1) OF THE SECOND PARAGRAPH OF ARTICLE 1 AND SUBPARAGRAPH (2) OF ARTICLE 5 OF THE CONVENTION OF 27 SEPTEMBER 1968 (OFFICIAL JOURNAL 1978 L 304 , P. 36),

1 BY ORDER OF 27 JUNE 1979 WHICH WAS RECEIVED AT THE COURT ON 30 JULY 1979 THE BUNDESGERICHTSHOF SUBMITTED TO THE COURT OF JUSTICE , UNDER THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION 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 SUBPARAGRAPH (1) OF THE SECOND PARAGRAPH OF ARTICLE 1 AND SUBPARAGRAPH (2) OF ARTICLE 5 OF THE CONVENTION.

2 THE FIRST QUESTION IS DIRECTED TOWARDS ASCERTAINING WHETHER THE CONVENTION , AND IN PARTICULAR ARTICLE 31 THEREOF WHICH RELATES TO THE ENFORCEMENT OF JUDGMENTS GIVEN IN ANOTHER CONTRACTING STATE , APPLY TO ' ' THE ENFORCEMENT OF AN INTERLOCUTORY ORDER MADE BY A FRENCH JUDGE IN DIVORCE PROCEEDINGS , WHEREBY ONE OF THE PARTIES TO THE PROCEEDINGS IS AWARDED MAINTENANCE PAYABLE MONTHLY ' ' OR WHETHER , ON THE CONTRARY , SUCH A JUDGMENT MUST BE CONSIDERED AS NOT BEING A ' ' CIVIL MATTER ' ' WITHIN THE MEANING OF SUBPARAGRAPH (1) OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION. THIS QUESTION IS RAISED IN THE CONTEXT OF PROCEEDINGS RELATING TO THE ENFORCEMENT IN THE FEDERAL REPUBLIC OF GERMANY OF AN ORDER MADE ON 18 MAY 1977 BY THE JUDGE IN MATRIMONIAL MATTERS AT THE TRIBUNAL DE GRANDE INSTANCE , PARIS , AWARDING THE WIFE , PURSUANT TO ARTICLE 253 ET SEQ. OF THE FRENCH CIVIL CODE , AN INTERIM MAINTENANCE ALLOWANCE PENDING DIVORCE.

3 THE SECOND QUESTION ASKS , LIKEWISE , WHETHER THE CONVENTION - IN PARTICULAR ITS PROVISIONS RELATING TO THE ENFORCEMENT OF JUDGMENTS - IS APPLICABLE ' ' TO THE PAYMENT OF INTERIM COMPENSATION , ON A MONTHLY BASIS , GRANTED TO ONE OF THE PARTIES IN A FRENCH JUDGMENT DISSOLVING A MARRIAGE PURSUANT TO ARTICLE 270 ET SEQ. OF THE CODE CIVIL ' ' . IN TERMS OF THE SAID ARTICLE 270 , THE PAYMENT IN QUESTION IS INTENDED TO COMPENSATE , SO FAR AS POSSIBLE , FOR THE DISPARITY WHICH THE BREAKDOWN OF THE MARRIAGE CREATES IN THE PARTIES ' RESPECTIVE LIVING STANDARDS. ARTICLE 271 PROVIDES FURTHER THAT THE COMPENSATORY PAYMENT IS TO BE FIXED ACCORDING TO THE NEEDS OF THE SPOUSE TO WHOM IT IS PAID AND THE MEANS OF THE OTHER , HAVING REGARD TO THE POSITION AT THE TIME OF DIVORCE AND ITS DEVELOPMENT IN THE FORESEEABLE FUTURE.

4 ACCORDING TO THE FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION ITS SCOPE EXTENDS TO ' ' CIVIL AND COMMERCIAL MATTERS ' '. HOWEVER , CERTAIN MATTERS , ALTHOUGH FALLING WITHIN THAT CONCEPT , HAVE BEEN REMOVED FROM THAT FIELD , BY WAY OF EXCEPTION , BY THE SECOND PARAGRAPH OF THE SAME PROVISION.

SUCH IS THE CASE IN REGARD TO , INTER ALIA , THE STATUS OR LEGAL CAPACITY OF NATURAL PERSONS , RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP , WILLS AND SUCCESSION .

5 IT IS WELL SETTLED THAT THE SUBJECT OF MAINTENANCE OBLIGATIONS ITSELF FALLS WITHIN THE CONCEPT OF A ' ' CIVIL MATTER ' ' AND THAT SINCE IT IS NOT TAKEN OUT BY THE EXCEPTIONS PROVIDED FOR IN THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION IT THEREFORE FALLS WITHIN THE SCOPE OF THE CONVENTION. ARTICLE 5 (2) OF THE CONVENTION PROVIDES CONFIRMATION , SHOULD SUCH BE NECESSARY , THAT IS SO FALLS. ON THE OTHER HAND , THE ' ' COMPENSATORY PAYMENTS ' ' PROVIDED FOR IN ARTICLE 270 ET SEQ. OF THE FRENCH CIVIL CODE AND REFERRED TO IN THE SECOND QUESTION ARE CONCERNED WITH ANY FINANCIAL OBLIGATIONS BETWEEN FORMER SPOUSES AFTER DIVORCE WHICH ARE FIXED ON THE BASIS OF THEIR RESPECTIVE NEEDS AND RESOURCES AND ARE EQUALLY IN THE NATURE OF MAINTENANCE . THEY ARE THEREFORE CIVIL MATTERS WITHIN THE MEANING OF THE FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION AND ACCORDINGLY COME WITHIN THE SCOPE OF THE CONVENTION SINCE THEY HAVE NOT BEEN EXCEPTED BY THE SECOND PARAGRAPH OF THAT ARTICLE.

6 ACCORDINGLY , ALL THAT HAS TO BE CONSIDERED IS WHETHER THE FACT THAT THE MAINTENANCE JUDGMENT IS GIVEN IN THE CONTEXT OF DIVORCE PROCEEDINGS - WHICH UNQUESTIONABLY CONCERN THE STATUS OF PERSONS AND ARE CONSEQUENTLY OUTSIDE THE FIELD OF APPLICATION OF THE CONVENTION - HAS THE CONSEQUENCE THAT THE MAINTENANCE PROCEEDINGS MUST , AS BEING ANCILLARY TO THE DIVORCE PROCEEDINGS , ALSO BE EXCEPTED FROM THAT FIELD OF APPLICATION , WITH THE RESULT THAT THEY MAY NOT BENEFIT FROM INTER ALIA THE SIMPLIFIED PROCEDURES FOR RECOGNITION AND ENFORCEMENT PROVIDED BY ARTICLES 26 TO 30 AND ARTICLES 31 TO 45 RESPECTIVELY.

7 IN SO FAR AS ITS FIELD OF APPLICATION IS CONCERNED , NO PROVISION OF THE CONVENTION LINKS THE TREATMENT OF ANCILLARY CLAIMS TO THE TREATMENT OF PRINCIPAL CLAIMS. ON THE CONTRARY , VARIOUS PROVISIONS CONFIRM THAT THE CONVENTION DOES NOT LINK THE TREATMENT OF CLAIMS CLASSIFIED AS ' ' ANCILLARY ' ' TO THE TREATMENT OF THE PRINCIPAL CLAIM . IN PARTICULAR , SUCH IS THE CASE WITH ARTICLE 42 WHICH PROVIDES THAT , WHERE A FOREIGN JUDGMENT HAS BEEN GIVEN IN RESPECT OF SEVERAL MATTERS AND ENFORCEMENT CANNOT BE AUTHORIZED FOR ALL OF THEM , THE COURT SHALL AUTHORIZE ENFORCEMENT FOR ONE OR MORE OF THEM , AND WITH ARTICLE 24 , WHICH PROVIDES THAT APPLICATION FOR SUCH PROVISIONAL , INCLUDING PROTECTIVE , MEASURES - WHICH ARE , BY DEFINITION , ANCILLARY MEASURES - AS MAY BE AVAILABLE UNDER THE LAW OF A CONTRACTING STATE MAY BE MADE TO THE COURTS OF THAT STATE ' ' EVEN IF , UNDER THIS CONVENTION , THE COURTS OF ANOTHER CONTRACTING STATE HAVE JURISDICTION AS TO THE SUBSTANCE OF THE MATTER ' '.

8 THESE PROVISIONS DEMONSTRATE UNEQUIVOCALLY THAT THE GENERAL SCHEME OF THE CONVENTION DOES NOT NECESSARILY LINK THE TREATMENT OF AN ANCILLARY CLAIM TO THAT OF A PRINCIPAL CLAIM. IN ACCORDANCE WITH THAT PRINCIPLE , AND IN REGARD PRECISELY TO THE CONVENTION ' S SCOPE , A CRIMINAL COURT , THE JUDGMENTS OF WHICH , WHEN GIVEN IN ITS PROPER AREA OF ACTIVITY , ARE CLEARLY EXCLUDED FROM THE SCOPE OF THE CONVENTION , HAS JURISDICTION CONFERRED UPON IT BY ARTICLE 5 (4) OF THE CONVENTION TO ENTERTAIN AN ANCILLARY CIVIL CLAIM , WITH THE RESULT THAT A JUDGMENT GIVEN ON THAT CLAIM WILL

BENEFIT FROM THE CONVENTION AS REGARDS ITS RECOGNITION AND ENFORCEMENT. THAT PROVISION THUS EXPRESSLY PROVIDES THAT A CLAIM ANCILLARY TO CRIMINAL PROCEEDINGS , WHICH ARE OBVIOUSLY EXCLUDED FROM THE SCOPE OF THE CONVENTION , COMES WITHIN IT .

9 ANCILLARY CLAIMS ACCORDINGLY COME WITHIN THE SCOPE OF THE CONVENTION ACCORDING TO THE SUBJECT-MATTER WITH WHICH THEY ARE CONCERNED AND NOT ACCORDING TO THE SUBJECT-MATTER INVOLVED IN THE PRINCIPAL CLAIM. IT WAS BY WAY OF APPLYING THAT RULE THAT THE COURT HELD IN ITS JUDGMENT OF 27 MARCH 1979 IN CASE 143/78 DE CAVEL (1979) ECR 1055 , INVOLVING THE SAME PARTIES , THAT AN APPLICATION IN THE COURSE OF DIVORCE PROCEEDINGS FOR PLACING ASSETS UNDER SEAL DID NOT COME WITHIN THE SCOPE OF THE CONVENTION , NOT ON ACCOUNT OF ITS ANCILLARY NATURE , BUT BECAUSE IT APPEARED THAT , HAVING REGARD TO ITS TRUE FUNCTION , IT CONCERNED , IN THAT CASE , RIGHTS IN PROPERTY ARISING OUT OF THE SPOUSES ' MATRIMONIAL RELATIONSHIP.

10 ON THE OTHER HAND , THE COURT HAS ALREADY RECOGNIZED IN THAT SAME JUDGMENT THAT THE INTERIM OR FINAL NATURE OF A JUDGMENT IS NOT RELEVANT TO WHETHER THE JUDGMENT COMES WITHIN THE SCOPE OF THE CONVENTION . ACCORDINGLY , THE ARGUMENT TO THE EFFECT THAT THE MAINTENANCE OBLIGATION IS ONLY AN INTERIM ONE PENDING DIVORCE MUST BE REJECTED .

11 IT FOLLOWS FROM THE FOREGOING CONSIDERATIONS THAT THE SCOPE OF THE CONVENTION EXTENDS ALSO , AND FOR THE SAME REASONS , TO MAINTENANCE OBLIGATIONS WHICH LEGISLATION OR THE COURT PLACES ON SPOUSES FOR THE PERIOD AFTER DIVORCE.

12 THE ANSWER TO THE QUESTIONS PUT BY THE BUNDESGERICHTSHOF SHOULD THEREFORE BE THAT THE CONVENTION IS APPLICABLE , ON THE ONE HAND , TO THE ENFORCEMENT OF AN INTERLOCUTORY ORDER MADE BY A FRENCH COURT IN DIVORCE PROCEEDINGS WHEREBY ONE OF THE PARTIES TO THE PROCEEDINGS IS AWARDED A MONTHLY MAINTENANCE ALLOWANCE AND , ON THE OTHER HAND , TO AN INTERIM COMPENSATION PAYMENT , PAYABLE MONTHLY , AWARDED TO ONE OF THE PARTIES BY A FRENCH DIVORCE JUDGMENT PURSUANT TO ARTICLE 270 ET SEQ . OF THE FRENCH CIVIL CODE.

13 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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 (THIRD CHAMBER),

IN ANSWER TO THE QUESTIONS SUBMITTED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 27 JUNE 1979 RECEIVED AT THE COURT ON 30 JULY 1979 , HEREBY RULES :

THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (ENGLISH VERSION , OFFICIAL JOURNAL 1978 L 304 , P. 36) IS APPLICABLE , ON THE ONE HAND , TO THE ENFORCEMENT OF AN INTERLOCUTORY ORDER MADE BY A FRENCH COURT IN DIVORCE PROCEEDINGS WHEREBY ONE OF THE PARTIES TO THE PROCEEDINGS IS AWARDED A MONTHLY MAINTENANCE

ALLOWANCE AND , ON THE OTHER HAND , TO AN INTERIM COMPENSATION PAYMENT , PAYABLE MONTHLY , AWARDED TO ONE OF THE PARTIES BY A FRENCH DIVORCE JUDGMENT PURSUANT TO ARTICLE 270 ET SEQ. OF THE FRENCH CIVIL CODE.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
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JURCIT	41968A0927(01)-A01L1 : N 1 2 4 5 41968A0927(01)-A05PT2 : N 1 5 41968A0927(01)-A31 : N 2 6 41968A0927(01)-A01L2 : N 4 5 41968A0927(01)-A26 : N 6 41968A0927(01)-A42 : N 7 41968A0927(01)-A24 : N 7 41968A0927(01)-A05PT4 : N 8 61978J0143 : N 9 10
CONCERNS	Interprets 41968A0927(01) -
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	German
OBSERV	Commission ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A4* Tribunal de grande instance de Paris, 5e chambre II, ordonnance du 18/05/1977 (242 3430) ; *A5* Amtsgericht Frankfurt/Main, Urteil vom 07/06/1977 (34 C 209/77) ; *A6* Landgericht Frankfurt/Main, Beschluß vom 20/12/1977 (2/18 O 430/77) ; *A7* Landgericht Frankfurt/Main, Urteil vom 23/02/1978 (2/1 S 248/77) ; *A8* Oberlandesgericht Frankfurt/Main, Beschluß vom 02/05/1978 (20 W 61/78) ; *A9* Bundesgerichtshof, Vorlagebeschluß vom

27/06/1979 (VIII ZB 34/78) ; *P1* Bundesgerichtshof, Beschluß vom 30/04/1980 (VIII ZB 34/78) ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1980 no 166 ; - Monatsschrift für deutsches Recht 1980 p.1017 ; - Neue Juristische Wochenschrift 1980 p.2022 ; - Zeitschrift für das gesamte Familienrecht 1980 p.672-673 ; - European Commercial Cases 1980 p.420-423 ; *P2* Oberlandesgericht Frankfurt/Main, Beschluß vom 24/10/1980 (20 W 61/78) ; *P3* Oberlandesgericht Frankfurt/Main, Beschluß vom 24/03/1981 (20 W 214/81) ; - Monatsschrift für deutsches Recht 1981 p.681 ; - Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1981 p.700-701

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PROCEDU Reference for a preliminary ruling

ADVGEN Warner

JUDGRAP Mertens de Wilmars

DATES of document: 06/03/1980
of application: 30/07/1979

**Judgment of the Court
of 17 January 1980
Siegfried Zelger v Sebastiano Salinitri. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Case 56/79.**

1 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - JURISDICTION - JURISDICTION OF THE COURT FOR THE PLACE OF PERFORMANCE - JURISDICTION OF THE COURT DESIGNATED BY THE PARTIES - NATURE AND FOUNDATION OF BOTH

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS. 5 (1) AND 17)

2 . CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - JURISDICTION - JURISDICTION OF THE COURT FOR THE PLACE OF PERFORMANCE - DESIGNATION OF PLACE OF PERFORMANCE BY A CLAUSE VALID ACCORDING TO THE LAW APPLICABLE - OBSERVANCE OF FORMAL CONDITIONS PROVIDED FOR UNDER ARTICLE 17 NOT REQUIRED

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS. 5 (1) AND 17)

1 . THE PROVISIONS OF ARTICLE 5 (1) OF THE CONVENTION , TO THE EFFECT THAT IN MATTERS RELATING TO A CONTRACT A DEFENDANT DOMICILED IN A CONTRACTING STATE MAY BE SUED IN THE COURTS FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION , INTRODUCE A CRITERION FOR JURISDICTION , THE SELECTION OF WHICH IS AT THE OPTION OF THE PLAINTIFF AND WHICH IS JUSTIFIED BY THE EXISTENCE OF A DIRECT LINK BETWEEN THE DISPUTE AND THE COURT CALLED UPON TO TAKE COGNIZANCE OF IT . BY CONTRAST , ARTICLE 17 OF THE CONVENTION , WHICH PROVIDES FOR THE EXCLUSIVE JURISDICTION OF THE COURT DESIGNATED BY THE PARTIES IN ACCORDANCE WITH THE PRESCRIBED FORM , PUTS ASIDE BOTH THE RULE OF GENERAL JURISDICTION - PROVIDED FOR IN ARTICLE 2 - AND THE RULES OF SPECIAL JURISDICTION - PROVIDED FOR IN ARTICLE 5 - AND DISPENSES WITH ANY OBJECTIVE CONNEXION BETWEEN THE LEGAL RELATIONSHIP IN DISPUTE AND THE COURT DESIGNATED. IT THUS APPEARS THAT THE JURISDICTION OF THE COURT FOR THE PLACE OF PERFORMANCE AND THAT OF THE SELECTED COURT ARE TWO DISTINCT CONCEPTS AND ONLY AGREEMENTS SELECTING A COURT ARE SUBJECT TO THE REQUIREMENTS OF FORM PRESCRIBED BY ARTICLE 17 OF THE CONVENTION .

2 . IF THE PLACE OF PERFORMANCE OF A CONTRACTUAL OBLIGATION HAS BEEN SPECIFIED BY THE PARTIES IN A CLAUSE WHICH IS VALID ACCORDING TO THE NATIONAL LAW APPLICABLE TO THE CONTRACT , THE COURT FOR THAT PLACE HAS JURISDICTION TO TAKE COGNIZANCE OF DISPUTES RELATING TO THAT OBLIGATION UNDER ARTICLE 5 (1) OF THE CONVENTION , IRRESPECTIVE OF WHETHER THE FORMAL CONDITIONS PROVIDED FOR UNDER ARTICLE 17 HAVE BEEN OBSERVED .

IN CASE 56/79

REFERENCE TO THE COURT OF JUSTICE UNDER ARTICLE 3 OF THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION OF THE CONVENTION OF THE EUROPEAN COMMUNITIES ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS OF 27 SEPTEMBER 1968 BY THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

SIEGFRIED ZELGER , MERCHANT , 81 THALKIRCHNER STRASSE , GROSSMARKTHALLE , MUNICH 75 ,

AND

SEBASTIANO SALINITRI , MERCHANT , CASSELLA POSTALE 10 , MASCALI , ITALY ,

ON THE INTERPRETATION OF ARTICLES 5 AND 17 OF THE ABOVE-MENTIONED CONVENTION ,

1 BY ORDER OF 15 MARCH 1979 , RECEIVED AT THE COURT REGISTRY ON 11 APRIL 1979 , THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) REFERRED TO THE COURT , UNDER ARTICLE 3 OF THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION OF THE CONVENTION OF BRUSSELS OF 27 SEPTEMBER 1968 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' '), A QUESTION CONCERNING THE INTERPRETATION OF ARTICLE 5 (1) AND 17 OF THE SAID CONVENTION .

THIS QUESTION HAS BEEN RAISED IN THE COURSE OF LITIGATION BETWEEN TWO MERCHANTS , ONE DOMICILED IN MUNICH , IN THE FEDERAL REPUBLIC OF GERMANY , AND THE OTHER IN MASCARI , IN ITALY , RELATING TO THE REPAYMENT BY THE DEFENDANT IN THE MAIN ACTION OF A LOAN SAID TO HAVE BEEN MADE TO HIM BY THE PLAINTIFF IN THE MAIN ACTION. THE LATTER , RELYING UPON AN ORAL AGREEMENT UNDER WHICH MUNICH IS SAID TO HAVE BEEN FIXED AS THE PLACE OF REPAYMENT , INSTITUTED PROCEEDINGS BEFORE THE LANDGERICHT MUNCHEN (MUNICH REGIONAL COURT) WHICH HELD THAT IT HAD NO JURISDICTION ON THE GROUNDS THAT , ON THE ONE HAND , A MERE ORAL AGREEMENT ON THE PLACE OF PERFORMANCE WAS NOT SUFFICIENT TO ESTABLISH INTERNATIONAL JURISDICTION AND , ON THE OTHER HAND , THAT THAT AGREEMENT COULD ONLY HAVE THE EFFECT OF CONFERRING JURISDICTION IF THE FORM PRESCRIBED BY ARTICLE 17 OF THE CONVENTION HAD BEEN OBSERVED. THAT DECISION WAS UPHELD BY THE OBERLANDESGERICHT MUNCHEN (MUNICH HIGHER REGIONAL COURT) AND THE PLAINTIFF IN THE MAIN ACTION APPEALED ON A POINT OF LAW TO THE BUNDESGERICHTSHOF WHICH POSED THE FOLLOWNING QUESTION :

' ' DOES AN INFORMAL AGREEMENT WHICH IS EFFECTIVE UNDER NATIONAL - IN THIS CASE GERMAN - LAW BETWEEN FULL-SCALE MERCHANTS (VOLLKAUFLEUTE) CONCERNING THE PLACE OF PERFORMANCE OF THE OBLIGATION WHICH IS AT ISSUE IN THE PROCEEDINGS SUFFICE TO FOUND JURISDICTION IN THAT PLACE UNDER ARTICLE 5 (1) OF THE CONVENTION , OR IS THE CAPACITY OF SUCH AN AGREEMENT TO FOUND JURISDICTION DEPENDENT UPON OBSERVANCE OF THE FORM LAID DOWN IN ARTICLE 17 OF THE CONVENTION?

' '

2 IT FOLLOWS FROM THE WORDING OF THIS QUESTION THAT THE NATIONAL COURT IS ASKING WHETHER AN AGREEMENT SUCH AS THAT DESCRIBED , IN ORDER TO FOUND JURISDICTION UNDER ARTICLE 5 (1) OF THE CONVENTION , IS DEPENDENT UPON OBSERVANCE OF THE FORM PRESCRIBED BY ARTICLE 17 OF THE CONVENTION , ACCORDING TO WHICH PROVISION THE COURT OF THE CONTRACTING STATE SPECIFIED BY THE PARTIES - OF WHOM AT LEAST ONE MUST HAVE HIS DOMICILE IN THE TERRITORY OF A CONTRACTING STATE - AS HAVING JURISDICTION TO SETTLE ANY DISPUTES WHICH HAVE ARISEN OR MAY ARISE IN CONNEXION WITH A PARTICULAR LEGAL RELATIONSHIP SHALL HAVE EXCLUSIVE JURISDICTION , PROVIDED THAT IT HAS BEEN SPECIFIED BY AN AGREEMENT IN WRITING OR AN ORAL AGREEMENT EVIDENCED IN WRITING.

3 IT IS APPROPRIATE TO POINT OUT THAT ARTICLE 5 (1), WHICH OCCURS IN SECTION

2 OF TITLE II OF THE CONVENTION INTITLED ' ' SPECIAL JURISDICTION ' ' , CREATES A GROUND OF JURISDICTION WHICH IS AN EXCEPTION TO THE GENERAL RULE OF JURISDICTION PROVIDED FOR IN ARTICLE 2 OF THE CONVENTION ; THE PROVISIONS OF ARTICLE 5 , WHICH PROVIDE THAT IN MATTERS RELATING TO A CONTRACT A DEFENDANT DOMICILED IN A CONTRACTING STATE MAY BE SUED IN THE COURTS FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION , INTRODUCE A CRITERION FOR JURISDICTION , THE SELECTION OF WHICH IS AT THE OPTION OF THE PLAINTIFF AND WHICH IS JUSTIFIED BY THE EXISTENCE OF A DIRECT LINK BETWEEN THE DISPUTE AND THE COURT CALLED UPON TO TAKE COGNIZANCE OF IT

4 BY CONTRAST , ARTICLE 17 , WHICH OCCURS IN SECTION 6 OF THE CONVENTION INTITLED ' ' PROROGATION OF JURISDICTION ' ' AND WHICH PROVIDES FOR THE EXCLUSIVE JURISDICTION OF THE COURT DESIGNATED BY THE PARTIES IN ACCORDANCE WITH THE PRESCRIBED FORM , PUTS ASIDE BOTH THE RULE OF GENERAL JURISDICTION - PROVIDED FOR IN ARTICLE 2 - AND THE RULES OF SPECIAL JURISDICTION - PROVIDED FOR IN ARTICLE 5 - AND DISPENSES WITH ANY OBJECTIVE CONNEXION BETWEEN THE LEGAL RELATIONSHIP IN DISPUTE AND THE COURT DESIGNATED. IT THUS APPEARS THAT THE JURISDICTION OF THE COURT FOR THE PLACE OF PERFORMANCE (PROVIDED FOR IN ARTICLE 5 (1)) AND THAT OF THE SELECTED COURT (PROVIDED FOR IN ARTICLE 17) ARE TWO DISTINCT CONCEPTS AND ONLY AGREEMENTS SELECTING A COURT ARE SUBJECT TO THE REQUIREMENTS OF FORM PRESCRIBED BY ARTICLE 17 OF THE CONVENTION.

5 CONSEQUENTLY , IF THE PARTIES TO THE CONTRACT ARE PERMITTED BY THE LAW APPLICABLE TO THE CONTRACT , SUBJECT TO ANY CONDITIONS IMPOSED BY THAT LAW , TO SPECIFY THE PLACE OF PERFORMANCE OF AN OBLIGATION WITHOUT SATISFYING ANY SPECIAL CONDITION OF FORM , AN AGREEMENT ON THE PLACE OF PERFORMANCE OF THE OBLIGATION IS SUFFICIENT TO FOUND JURISDICTION IN THAT PLACE WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION .

6 THE ANSWER TO THE QUESTION PUT BY THE BUNDESGERICHTSHOF MUST THEREFORE BE THAT IF THE PLACE OF PERFORMANCE OF A CONTRACTUAL OBLIGATION HAS BEEN SPECIFIED BY THE PARTIES IN A CLAUSE WHICH IS VALID ACCORDING TO THE NATIONAL LAW APPLICABLE TO THE CONTRACT , THE COURT FOR THAT PLACE HAS JURISDICTION TO TAKE COGNIZANCE OF DISPUTES RELATING TO THAT OBLIGATION UNDER ARTICLE 5 (1) OF THE CONVENTION OF BRUSSELS OF 27 SEPTEMBER 1968 , IRRESPECTIVE OF WHETHER THE FORMAL CONDITIONS PROVIDED FOR UNDER ARTICLE 17 HAVE BEEN OBSERVED.

COSTS

7 THE COSTS INCURRED BY THE GOVERNMENT OF THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE.

8 AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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 ,

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 15 MARCH 1979 , HEREBY RULES :

IF THE PLACE OF PERFORMANCE OF A CONTRACTUAL OBLIGATION HAS BEEN SPECIFIED BY THE PARTIES IN A CLAUSE WHICH IS VALID ACCORDING TO THE NATIONAL LAW APPLICABLE TO THE CONTRACT , THE COURT FOR THAT PLACE HAS JURISDICTION TO TAKE COGNIZANCE OF DISPUTES RELATING TO THAT OBLIGATION UNDER ARTICLE 5 (1) OF THE CONVENTION OF BRUSSELS OF 27 SEPTEMBER 1968 , IRRESPECTIVE OF WHETHER THE FORMAL CONDITIONS PROVIDED FOR UNDER ARTICLE 17 HAVE BEEN OBSERVED.

DOCNUM	61979J0056
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1980 Page 00089 Greek special edition Page 00057 Spanish special edition Page 00063
DOC	1980/01/17
LODGED	1979/04/11
JURCIT	41968A0927(01)-A05PT1 : N 1 - 6 41968A0927(01)-A17 : N 1 4 6 41968A0927(01)-A02 : N 3 4
CONCERNS	Interprets 41968A0927(01) -A05PT1 Interprets 41968A0927(01) -A17
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	German
OBSERV	Commission ; United Kingdom ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A7* Landgericht München I, Urteil vom 18/04/1977 (3 HKO 14 054/76) ; *A8* Oberlandesgericht München, Urteil vom 09/11/1977 (7 U 2924/77) ; - Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1978 p.119-121 ; - Mezger, Ernst: Außenwirtschaftsdienst des Betriebs-Beraters / Recht der Internationalen Wirtschaft 1978 p.334-336 ; *A9* Bundesgerichtshof, Vorlagebeschluß vom 15/03/1979 (III ZR 15/78) ; *P1* Bundesgerichtshof, Urteil vom 07/07/1980 (III ZR 15/78) ; -

Der Betrieb 1980 p.2236-2237 ; - Monatsschrift für deutsches Recht 1980 p.1005 ; - Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1980 p.725-726 ; - Praxis des internationalen Privat- und Verfahrensrechts 1981 p.93-95 ; - European Commercial Cases 1981 p.191-196 ; - Spellenberg, U.: Praxis des internationalen Privat- und Verfahrensrechts 1981 p.75-79 ; *P2* Landgericht München I, Urteil vom 10/01/1983 (3 HKO 14054/76) ; *P3* Oberlandesgericht München, Beschluß vom 22/06/1983 (7 U 1937/83)

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PROCEDU Reference for a preliminary ruling

ADVGEN Capotorti

JUDGRAP Touffait

DATES of document: 17/01/1980
of application: 11/04/1979

**Judgment of the Court
of 13 November 1979
Sanicentral GmbH v René Collin. Reference for a preliminary ruling: Cour de cassation - France.
Case 25/79.**

1 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - FIELD OF APPLICATION - EMPLOYMENT LAW - INCLUSION

(CONVENTION OF 27 SEPTEMBER 1968 , ART.1)

2 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - OBJECT - PRECEDENCE OVER NATIONAL LAWS

3 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - TRANSITIONAL PROVISIONS - JUDICIAL PROCEEDINGS INSTITUTED AFTER THE COMING INTO FORCE OF THE CONVENTION - PRIOR CLAUSES CONFERRING JURISDICTION WHICH ACCORDING TO NATIONAL RULES IN FORCE AT THE TIME OF AGREEMENT WERE VOID - VALIDITY

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS. 17 AND 54)

1 . EMPLOYMENT LAW COMES WITHIN THE SUBSTANTIVE FIELD OF APPLICATION OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS SIGNED AT BRUSSELS ON 27 SEPTEMBER 1968.

2 . AS THE BRUSSELS CONVENTION SEEKS TO DETERMINE THE JURISDICTION OF THE COURTS OF THE CONTRACTING STATES IN THE INTRA-COMMUNITY LEGAL ORDER IN REGARD TO MATTERS OF CIVIL JURISDICTION , THE NATIONAL PROCEDURAL LAWS APPLICABLE TO THE CASES CONCERNED ARE SET ASIDE IN THE MATTERS GOVERNED BY THE CONVENTION IN FAVOUR OF THE PROVISIONS THEREOF

3 . ARTICLES 17 AND 54 OF THE BRUSSELS CONVENTION MUST BE INTERPRETED TO MEAN THAT , IN JUDICIAL PROCEEDINGS INSTITUTED AFTER THE COMING INTO FORCE OF THE CONVENTION , CLAUSES CONFERRING JURISDICTION INCLUDED IN CONTRACTS OF EMPLOYMENT CONCLUDED PRIOR TO THAT DATE MUST BE CONSIDERED VALID EVEN IN CASES IN WHICH THEY WOULD HAVE BEEN REGARDED AS VOID UNDER THE NATIONAL LAW IN FORCE AT THE TIME WHEN THE CONTRACT WAS ENTERED INTO.

IN CASE 25/79 ,

REFERENCE TO THE COURT UNDER THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION SIGNED AT BRUSSELS ON 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS BY THE COUR DE CASSATION (COURT OF CASSATION) OF FRANCE (SOCIAL CHAMBER) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

SANICENTRAL GMBH , SAARBRUCKEN (FEDERAL REPUBLIC OF GERMANY),

AND

RENE COLLIN , RESIDING AT STILL (FRANCE),

ON THE APPLICATION OF ARTICLES 17 AND 54 OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY A JUDGMENT DATED 10 JANUARY 1979 , RECEIVED AT THE COURT REGISTRY ON

12 FEBRUARY 1979 , THE FRENCH COUR DE CASSATION (SOCIAL CHAMBER) REFERRED TO THE COURT OF JUSTICE 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') A QUESTION RELATING TO THE INTERPRETATION OF ARTICLES 17 AND 54 OF THE SAID CONVENTION WHICH , IN ACCORDANCE WITH ARTICLE 62 THEREOF , ENTERED INTO FORCE ON 1 FEBRUARY 1973.

THIS QUESTION IS RAISED IN THE COURSE OF AN ACTION , CONCERNED WITH THE BREACH - ON 8 DECEMBER 1971 - OF A CONTRACT OF EMPLOYMENT CONTAINING A CLAUSE CONFERRING JURISDICTION UPON A GERMAN COURT , BETWEEN A FRENCH WORKER , RESIDENT IN FRANCE , AND A GERMAN COMPANY WHICH HAD ENGAGED HIM TO WORK IN THE FEDERAL REPUBLIC OF GERMANY , INDEPENDENTLY OF ANY ESTABLISHMENT.

THIS CONTRACT OF EMPLOYMENT WAS CONCLUDED ON 27 OCTOBER 1971 AND THE COURT PROCEEDINGS WERE COMMENCED ON 27 NOVEMBER 1973.

2 IN VIEW OF THESE FACTS THE COUR DE CASSATION ASKS WHETHER THE CLAUSE CONFERRING JURISDICTION IS EFFECTIVE IN THE CASE OF CONTRACTS OF EMPLOYMENT CONCLUDED PRIOR TO THE CONVENTION OR WHETHER ' ' IN SO FAR AS THEY CONCERN THE PROTECTION OF EMPLOYED WORKERS THOSE PROVISIONS RELATE TO THE VERY SUBSTANCE OF AGREEMENTS AND MUST BE GIVEN EFFECT ONLY IN RELATION TO SUBSEQUENT CONTRACTS ' '. THE COUR DE CASSATION ACCORDINGLY FRAMED THE FOLLOWING QUESTION :

' ' WHETHER , IN APPLICATION OF ARTICLE 54 OF THE BRUSSELS CONVENTION , ARTICLE 17 OF THAT CONVENTION MUST BE INTERPRETED TO MEAN THAT , WHEN PROCEEDINGS HAVE BEEN COMMENCED AFTER 1 FEBRUARY 1973 , CLAUSES CONFERRING JURISDICTION INSERTED INTO A CONTRACT OF EMPLOYMENT CONCLUDED BEFORE 1 FEBRUARY 1973 WHICH WOULD HAVE BEEN REGARDED AS VOID BY THE INTERNAL LEGISLATION IN FORCE AT THAT TIME MUST HENCEFORWARD BE DEEMED TO BE VALID , REGARDLESS OF THE DATE OF THE AGREEMENTS BETWEEN THE PARTIES AND THE DATE OF THE PERFORMANCE OF THE WORK IN QUESTION. ' '

3 IT FOLLOWS FROM THIS QUESTIONS THAT THE COUR DE CASSATION RIGHTLY ACCEPTS THAT EMPLOYMENT LAW COMES WITHIN THE SUBSTANTIVE FIELD OF APPLICATION OF THE CONVENTION AND THAT LITIGATION ARISING OUT OF A CONTRACT OF EMPLOYMENT CONCLUDED AFTER 1 FEBRUARY 1973 IS SUBJECT TO THE CONVENTION AND PARTICULARLY TO ARTICLE 17 THEREOF RELATING TO PROROGATION OF JURISDICTION.

4 IN VIEW OF THE FACT THAT THE CONTRACT OF EMPLOYMENT WAS BROKEN OFF ON 8 DECEMBER 1971 AND THAT THE JUDICIAL PROCEEDINGS WERE NOT COMMENCED UNTIL 27 NOVEMBER 1973 , THAT IS , AFTER THE CONVENTION HAD COME INTO FORCE , THE COUR DE CASSATION IS CONCERNED AS TO THE MEANING OF ARTICLE 54 OF THE CONVENTION WHICH PROVIDES THAT ' ' THE PROVISIONS OF THIS CONVENTION SHALL APPLY ONLY TO LEGAL PROCEEDINGS INSTITUTED AND TO DOCUMENTS FORMALLY DRAWN UP OR REGISTERED AS AUTHENTIC INSTRUMENTS AFTER ITS ENTRY INTO FORCE ' ' AND ASKS WHETHER THE CLAUSE IN THE CONTRACT OF EMPLOYMENT CONFERRING JURISDICTION , WHICH COULD HAVE BEEN REGARDED UNDER FRENCH LEGISLATION PRIOR TO 1 FEBRUARY 1973 AS BEING VOID , RECOVERS ITS VALIDITY AT THE DATE OF THE ENTRY INTO FORCE OF THE CONVENTION.

5 IT IS APPROPRIATE TO ANSWER THIS POINT BY STATING , ON THE ONE HAND ,

THAT THE CONVENTION DOES NOT AFFECT RULES OF SUBSTANTIVE LAW AND , ON THE OTHER HAND , THAT , AS THE CONVENTION SEEKS TO DETERMINE THE JURISDICTION OF THE COURTS OF THE CONTRACTING STATES IN THE INTRA-COMMUNITY LEGAL ORDER IN REGARD TO MATTERS OF CIVIL JURISDICTION , THE NATIONAL PROCEDURAL LAWS APPLICABLE TO THE CASES CONCERNED ARE SET ASIDE IN THE MATTERS GOVERNED BY THE CONVENTION IN FAVOUR OF THE PROVISIONS THEREOF.

6 BY ITS NATURE A CLAUSE IN WRITING CONFERRING JURISDICTION AND OCCURRING IN A CONTRACT OF EMPLOYMENT IS A CHOICE OF JURISDICTION ; SUCH A CHOICE HAS NO LEGAL EFFECT FOR SO LONG AS NO JUDICIAL PROCEEDINGS HAVE BEEN COMMENCED AND ONLY BECOMES OF CONSEQUENCE AT THE DATE WHEN JUDICIAL PROCEEDINGS ARE SET IN MOTION.

THAT IS THEREFORE THE RELEVANT DATE FOR THE PURPOSES OF AN APPRECIATION OF THE SCOPE OF SUCH A CLAUSE IN RELATION TO THE LEGAL RULES APPLYING AT THAT TIME.

THE JUDICIAL PROCEEDINGS WERE INSTITUTED ON 27 NOVEMBER 1973 AND THE CONVENTION THUS APPLIES IN PURSUANCE OF ARTICLE 54 THEREOF.

THE EFFECT OF THAT ARTICLE INDEED IS THAT THE ONLY ESSENTIAL FOR THE RULES OF THE CONVENTION TO BE APPLICABLE TO LITIGATION RELATING TO LEGAL RELATIONSHIPS CREATED BEFORE THE DATE OF THE COMING INTO FORCE OF THE CONVENTION IS THAT THE JUDICIAL PROCEEDINGS SHOULD HAVE BEEN INSTITUTED SUBSEQUENTLY TO THAT DATE , WHICH IS THE POSITION IN THE PRESENT INSTANCE.

7 CONSEQUENTLY THE ANSWER TO THE QUESTION RAISED BY THE FRENCH COUR DE CASSATION (SOCIAL CHAMBER) MUST BE THAT ARTICLES 17 AND 54 OF THE CONVENTION MUST BE INTERPRETED TO MEAN THAT , IN JUDICIAL PROCEEDINGS INSTITUTED AFTER THE COMING INTO FORCE OF THE CONVENTION , CLAUSES CONFERRING JURISDICTION INCLUDED IN CONTRACTS OF EMPLOYMENT CONCLUDED PRIOR TO THAT DATE MUST BE CONSIDERED VALID EVEN IN CASES IN WHICH THEY WOULD HAVE BEEN REGARDED AS VOID UNDER THE NATIONAL LAW IN FORCE AT THE TIME WHEN THE CONTRACT WAS ENTERED INTO.

COSTS

8 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE COUR DE CASSATION (SOCIAL CHAMBER) BY A JUDGMENT OF 10 JANUARY 1979 , HEREBY RULES :

ARTICLES 17 AND 54 OF THE CONVENTION OF BRUSSELS OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE INTERPRETED TO MEAN THAT , IN JUDICIAL PROCEEDINGS INSTITUTED AFTER THE COMING INTO FORCE OF THE CONVENTION , CLAUSES CONFERRING JURISDICTION INCLUDED IN CONTRACTS OF EMPLOYMENT CONCLUDED PRIOR TO THAT DATE MUST BE CONSIDERED VALID EVEN IN CASES IN WHICH THEY WOULD HAVE BEEN REGARDED AS VOID UNDER THE NATIONAL LAW IN FORCE AT THE TIME WHEN THE CONTRACT WAS ENTERED INTO.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1979 Page 03423 Greek special edition Page 00653 Swedish special edition Page 00615 Finnish special edition Page 00669 Spanish special edition Page 01651
DOC	1979/11/13
LODGED	1979/02/12
JURCIT	41968A0927(01)-A17 : N 1 2 3 7 41968A0927(01)-A54 : N 1 2 4 6 7 41968A0927(01)-A62 : N 1
CONCERNS	Interprets 41968A0927(01) -A17 Interprets 41968A0927(01) -A54
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Commission ; Institutions
NATIONA	France
NATCOUR	*A9* Cour de cassation (France), Chambre sociale, arrêt du 10/01/1979 (77-40.043 44) ; - Revue critique de droit international privé 1979 p.453-455 ; - Revue de jurisprudence sociale 1989 p.549 (résumé) ; - P.L.: Revue critique de droit international privé 1979 p.455-457 ; *P1* Cour de cassation (France), Chambre sociale, arrêt du 04/06/1980 (77-40.043 1331) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1980 V no 486 ; - Gazette du Palais 1980 II Panor. p.578 (résumé) ; - La Semaine juridique - édition générale 1980 IV p.310 (résumé) ; - Revue critique de droit international privé 1981 p.767-768 (résumé) ; - Tillhet-Pretnar, J.: Journal du droit international 1980 p.896
NOTES	Pesce, Angelo: Il Foro padano 1979 IV Col.57-58 ; Hartley, Trevor: Employment Contracts and Choice of Jurisdiction Clauses, European Law Review 1980 p.73-74 ; Huet, André: Chronique de jurisprudence de la Cour de justice des Communautés européennes, Journal du droit international 1980 p.429-434 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1980 no 510 ; Mestre, Jacques: Recueil Dalloz Sirey 1980 Jur. p.544-549 ; Kremlis, Giorgos: Symvasi tis 27is Septemvriou 1968 gia ti diethni dikaiodosia kai tin ektelesi apofaseon se astikes kai emporikes ypotheseis - Pedio efarmogis - Ergatiko dikaio - Ritres parektaseos diethnous dikaiodosias, Elliniki Epitheorisi Evropaïkou Dikaiou 1983 p.145-151 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a20

PROCEDU	Reference for a preliminary ruling
ADVGEN	Capotorti
JUDGRAP	Touffait
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**Judgment of the Court
of 27 March 1979
Jacques de Cavel v Louise de Cavel. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Case 143/78.**

1 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPHERE OF APPLICATION - MATTERS EXCLUDED - ' ' RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP ' ' - CONCEPT

(CONVENTION OF 27 SEPTEMBER 1968 , SECOND PARAGRAPH OF ART. 1)

2 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPHERE OF APPLICATION - PROVISIONAL MEASURES ORDERED IN THE COURSE OF PROCEEDINGS FOR DIVORCE - EXCLUSION - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , SECOND PARAGRAPH OF ART. 1)

3 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPHERE OF APPLICATION - DISTINCTION BETWEEN PROVISIONAL AND DEFINITIVE MEASURES - NONE

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS. 1 AND 24)

1 . THE TERM ' ' RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP ' ' WITHIN THE MEANING OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION , INCLUDES NOT ONLY PROPERTY ARRANGEMENTS SPECIFICALLY AND EXCLUSIVELY ENVISAGED BY CERTAIN NATIONAL LEGAL SYSTEMS IN THE CASE OF MARRIAGE BUT ALSO ANY PROPRIETARY RELATIONSHIPS RESULTING DIRECTLY FROM THE MATRIMONIAL RELATIONSHIP OR THE DISSOLUTION THEREOF.

2 . JUDICIAL DECISIONS AUTHORIZING PROVISIONAL PROTECTIVE MEASURES - SUCH AS THE PLACING UNDER SEAL OR THE FREEZING OF THE ASSETS OF THE SPOUSES - IN THE COURSE OF PROCEEDINGS FOR DIVORCE DO NOT FALL WITHIN THE SCOPE OF THE CONVENTION AS DEFINED IN ARTICLE 1 THEREOF IF THOSE MEASURES CONCERN OR ARE CLOSELY CONNECTED WITH EITHER QUESTIONS OF THE STATUS OF THE PERSONS INVOLVED IN THE DIVORCE PROCEEDINGS OR PROPRIETARY LEGAL RELATIONS RESULTING DIRECTLY FROM THE MATRIMONIAL RELATIONSHIP OR THE DISSOLUTION THEREOF.

3 . IN RELATION TO THE MATTERS COVERED BY THE CONVENTION , NO LEGAL BASIS IS TO BE FOUND THEREIN FOR DRAWING A DISTINCTION BETWEEN PROVISIONAL AND DEFINITIVE MEASURES.

IN CASE 143/78

REFERENCE TO THE COURT IN PURSUANCE 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 FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

JACQUES DE CAVEL , FLUGHAFENBEREICH OST , GEBAUDE 124-2040 , D-6000 FRANKFURT AM MAIN ,

APPELLANT ,

AND

LUISE DE CAVEL , 20 DIELMANNSTRASSE , D-6000 FRANKFURT AM MAIN

RESPONDENT ,

ON THE INTERPRETATION OF SUBPARAGRAPH (1) OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION OF 27 SEPTEMBER 1968.

1BY AN ORDER OF 22 MAY 1978 , WHICH WAS RECEIVED AT THE COURT ON 19 JUNE 1978 , THE BUNDESGERICHTSHOF REFERRED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') A QUESTION RELATING TO THE INTERPRETATION OF SUBPARAGRAPH (1) OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION WHICH EXCLUDES FROM THE SCOPE OF THE CONVENTION THE STATUS OR LEGAL CAPACITY OF NATURAL PERSONS , RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP , WILLS AND SUCCESSION.

2THE QUESTION WAS RAISED IN THE CONTEXT OF A DISPUTE CONCERNING THE ENFORCEMENT IN THE FEDERAL REPUBLIC OF GERMANY OF AN ORDER MADE ON 19 JANUARY 1977 BY THE JUDGE OF FAMILY MATTERS AT THE TRIBUNAL DE GRANDE INSTANCE , PARIS , AUTHORIZING , AS A PROTECTIVE MEASURE IN DIVORCE PROCEEDINGS PENDING BETWEEN THE PARTIES , THE PUTTING UNDER SEAL OF FURNITURE , EFFECTS AND OTHER OBJECTS IN THE FLAT AT FRANKFURT-AM-MAIN BELONGING TO THE PARTIES AND THE FREEZING OF THE ASSETS AND ACCOUNTS OF THE RESPONDENT AT TWO BANKING ESTABLISHMENTS IN THAT CITY.

IN RELIANCE ON ARTICLE 31 OF THE CONVENTION THE HUSBAND , WHO HAD COMMENCED PROCEEDINGS FOR THE DIVORCE , AND IN WHOSE FAVOUR THE AUTHORIZATION TO FREEZE THE ASSETS WAS MADE , APPLIED TO THE PRESIDENT OF THE LANDGERICHT FRANKFURT-AM-MAIN FOR AN ORDER FOR THE ENFORCEMENT OF THE DECISION OF THE FRENCH COURT , BUT THAT APPLICATION WAS DISMISSED ON THE GROUND THAT THE APPLICANT HAD NOT PRODUCED THE DOCUMENTS REFERRED TO IN ARTICLE 47 OF THE CONVENTION.

ON APPEAL , THE OBERLANDESGERICHT FRANKFURT-AM-MAIN ALSO REJECTED THE APPLICATION , ON THE GROUND THAT THE PROTECTIVE MEASURES ENFORCEMENT OF WHICH WAS SOUGHT FORMED PART OF DIVORCE PROCEEDINGS AND WERE THEREFORE EXCLUDED FROM THE SCOPE OF THE CONVENTION BY SUBPARAGRAPH (1) OF THE SECOND PARAGRAPH OF ARTICLE 1.

3THE CASE WAS THEN BROUGHT BEFORE THE BUNDESGERICHTSHOF WHICH REFERRED TO THE COURT OF JUSTICE THE FOLLOWING QUESTION :

' ' IS THE CONVENTION OF THE EUROPEAN COMMUNITY OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS INAPPLICABLE TO AN ORDER MADE BY A FRENCH JUDGE OF FAMILY MATTERS SIMULTANEOUSLY WITH PROCEEDINGS FOR THE DISSOLUTION OF MARRIAGE PENDING BEFORE A FRENCH COURT FOR PUTTING UNDER SEAL AND FREEZING ASSETS , SINCE IT RELATES TO PROCEEDINGS INCIDENTAL TO AN ACTION CONCERNING PERSONAL STATUS OR RIGHT IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP (SUBPARAGRAPH (1) OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION)?

' '

4THE COMMISSION AND THE APPELLANT ARGUE THAT THE ANSWER SHOULD BE GIVEN THAT THE PROCEEDINGS REFERRED TO FALL WITHIN THE SCOPE OF THE CONVENTION , WHILE THE GOVERNMENTS OF THE UNITED KINGDOM AND OF THE FEDERAL REPUBLIC OF GERMANY AND THE RESPONDENT CONTEND THAT THE ANSWER SHOULD BE THAT THE CONVENTION IS INAPPLICABLE.

5IT APPEARS FROM THE FILE ON THE CASE THAT THE MATTERS IN DISPUTE BEFORE THE GERMAN COURTS CONCERN , ON THE ONE HAND , THE CONNEXION BETWEEN THE MEASURES ORDERED BY THE FRENCH JUDGE OF FAMILY MATTERS AND THE DIVORCE PROCEEDINGS AND , ON THE OTHER , THE QUESTION WHETHER THE CONVENTION IS APPLICABLE IN VIEW OF THE PROPRIETARY NATURE OF THE PROTECTIVE MEASURES IN QUESTION.

6IN THE WORDS OF ARTICLE 1 , THE CONVENTION IS TO APPLY IN ' ' CIVIL AND COMMERCIAL MATTERS ' '.

NEVERTHELESS , BECAUSE OF THE SPECIFIC NATURE OF CERTAIN MATTERS , INCLUDING ' ' THE STATUS OR LEGAL CAPACITY OF NATURAL PERSONS , RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP , WILLS AND SUCCESSION ' ' , DISPUTES RELATING TO SUCH MATTERS ARE EXCLUDED FROM ITS SCOPE .

7THE ENFORCED SETTLEMENT ON A PROVISIONAL BASIS OF PROPRIETARY LEGAL RELATIONSHIPS BETWEEN SPOUSES IN THE COURSE OF PROCEEDINGS FOR DIVORCE IS CLOSELY LINKED TO THE GROUNDS FOR THE DIVORCE AND THE PERSONAL SITUATION OF THE SPOUSES OR ANY CHILDREN OF THE MARRIAGE AND IS , FOR THAT REASON , INSEPARABLE FROM QUESTIONS RELATING TO THE STATUS OF PERSONS RAISED BY THE DISSOLUTION OF THE MATRIMONIAL RELATIONSHIP AND FROM THE SETTLEMENT OF RIGHTS IN PROPERTY ARISING OUT OF THE MATRIMONIAL RELATIONSHIP.

CONSEQUENTLY , THE TERM ' ' RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP ' ' INCLUDES NOT ONLY PROPERTY ARRANGEMENTS SPECIFICALLY AND EXCLUSIVELY ENVISAGED BY CERTAIN NATIONAL LEGAL SYSTEMS IN THE CASE OF MARRIAGE BUT ALSO ANY PROPRIETARY RELATIONSHIPS RESULTING DIRECTLY FROM THE MATRIMONIAL RELATIONSHIP OR THE DISSOLUTION THEREOF.

DISPUTES RELATING TO THE ASSETS OF SPOUSES IN THE COURSE OF PROCEEDINGS FOR DIVORCE MAY THEREFORE , DEPENDING ON THE CIRCUMSTANCES , CONCERN OR BE CLOSELY CONNECTED WITH :

(1) QUESTIONS RELATING TO THE STATUS OF PERSONS ; OR

(2)PROPRIETARY LEGAL RELATIONSHIPS BETWEEN SPOUSES RESULTING DIRECTLY FROM THE MATRIMONIAL RELATIONSHIP OR THE DISSOLUTION THEREOF ; OR

(3)PROPRIETARY LEGAL RELATIONS EXISTING BETWEEN THEM WHICH HAVE NO CONNEXION WITH THE MARRIAGE.

WHEREAS DISPUTES OF THE LATTER CATEGORY FALL WITHIN THE SCOPE OF THE CONVENTION , THOSE RELATING TO THE FIRST TWO CATEGORIES MUST BE EXCLUDED THEREFROM.

8THE FOREGOING CONSIDERATIONS ARE APPLICABLE TO MEASURES RELATING TO THE PROPERTY OF SPOUSES WHETHER THEY ARE PROVISIONAL OR DEFINITIVE IN NATURE .

AS PROVISIONAL PROTECTIVE MEASURES RELATING TO PROPERTY - SUCH AS THE AFFIXING OF SEALS OR THE FREEZING OF ASSETS - CAN SERVE TO SAFEGUARD A

VARIETY OF RIGHTS , THEIR INCLUSION IN THE SCOPE OF THE CONVENTION IS DETERMINED NOT BY THEIR OWN NATURE BUT BY THE NATURE OF THE RIGHTS WHICH THEY SERVE TO PROTECT.

9FURTHERMORE , IN RELATION TO THE MATTERS COVERED BY THE CONVENTION , NO LEGAL BASIS IS TO BE FOUND THEREIN FOR DRAWING A DISTINCTION BETWEEN PROVISIONAL AND DEFINITIVE MEASURES.

THAT CONCLUSION IS NOT AFFECTED BY ARTICLE 24 OF THE CONVENTION WHEREBY : ' ' APPLICATION MAY BE MADE TO THE COURTS OF A CONTRACTING STATE FOR SUCH PROVISIONAL , INCLUDING PROTECTIVE , MEASURES AS MAY BE AVAILABLE UNDER THE LAW OF THAT STATE , EVEN IF , UNDER THIS CONVENTION , THE COURTS OF ANOTHER CONTRACTING STATE HAVE JURISDICTION AS TO THE SUBSTANCE OF THE MATTER ' '.

IN FACT THAT PROVISION EXPRESSLY ENVISAGES THE CASE OF PROVISIONAL MEASURES IN A CONTRACTING STATE WHERE ' ' UNDER THIS CONVENTION ' ' THE COURTS OF ANOTHER CONTRACTING STATE HAVE JURISDICTION AS TO THE SUBSTANCE OF THE MATTER AND IT CANNOT , THEREFORE , BE RELIED ON TO BRING WITHIN THE SCOPE OF THE CONVENTION PROVISIONAL OR PROTECTIVE MEASURES RELATING TO MATTERS WHICH ARE EXCLUDED THEREFROM.

10IT MAY THEREFORE BE CONCLUDED THAT JUDICIAL DECISIONS AUTHORIZING PROVISIONAL PROTECTIVE MEASURES - SUCH AS THE PLACING UNDER SEAL OR THE FREEZING OF THE ASSETS OF THE SPOUSES - IN THE COURSE OF PROCEEDINGS FOR DIVORCE DO NOT FALL WITHIN THE SCOPE OF THE CONVENTION AS DEFINED IN ARTICLE 1 THEREOF IF THOSE MEASURES CONCERN OR ARE CLOSELY CONNECTED WITH EITHER QUESTIONS OF THE STATUS OF THE PERSONS INVOLVED IN THE DIVORCE PROCEEDINGS OR PROPRIETARY LEGAL RELATIONS RESULTING DIRECTLY FROM THE MATRIMONIAL RELATIONSHIP OR THE DISSOLUTION THEREOF.

COSTS

11THE COSTS INCURRED BY THE GOVERNMENT OF THE UNITED KINGDOM , THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 22 MAY 1978 , HEREBY RULES :

JUDICIAL DECISIONS AUTHORIZING PROVISIONAL PROTECTIVE MEASURES - SUCH AS THE PLACING UNDER SEAL OR THE FREEZING OF THE ASSETS OF THE SPOUSES - IN THE COURSE OF PROCEEDINGS FOR DIVORCE DO NOT FALL WITHIN THE SCOPE OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENT IN CIVIL AND COMMERCIAL MATTERS AS DEFINED IN ARTICLE 1 THEREOF IF THOSE MEASURES CONCERN OR ARE CLOSELY CONNECTED WITH EITHER QUESTIONS

OF THE STATUS OF THE PERSONS INVOLVED IN THE DIVORCE PROCEEDINGS OR PROPRIETARY LEGAL RELATIONS RESULTING DIRECTLY FROM THE MATRIMONIAL RELATIONSHIP OR THE DISSOLUTION THEREOF

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SUB	Brussels Convention of 27 September 1968
AUTLANG	German
OBSERV	Commission ; Federal Republic of Germany ; United Kingdom ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A8* Oberlandesgericht Frankfurt/Main, Beschluß vom 19/09/1977 (20 W 421/77) ; - Juristenzeitung 1977 p.803-804 ; *A9* Bundesgerichtshof, Vorlagebeschluß vom 22/05/1978 (VIII ZB 39/77) ; - Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1978 p.685 ; *P1* Bundesgerichtshof, Schreiben vom 21/05/1979 (VIII ZB 39/77)
NOTES	Huet, André: Journal du droit international 1979 p.681-691 ; Hartley, Trevor: Enforcement of Ancillary Orders in Divorce Proceedings, European

Law Review 1979 p.222-224 ; Audit, Bernard: Droit international privé, Recueil Dalloz Sirey 1979 IR. p.457-458 ; Droz, Georges A.L.: Revue critique de droit international privé 1980 p.621-629 ; Pesce, Angelo: Il Foro padano 1980 IV Col.19-20 ; Verheul, Hans: The EEC Convention on Jurisdiction and Judgments of 27 September in Dutch Legal Practice, Netherlands International Law Review 1981 p.70 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a19

PROCEDU Reference for a preliminary ruling

ADVGEN Warner

JUDGRAP Mertens de Wilmars

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Judgment of the Court
of 22 February 1979
Henri Gourdain v Franz Nadler.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Brussels Convention. Bankruptcy and proceedings relating to the winding-up of insolvent companies or other legal persons. Action for making good the deficiency.
Case 133/78.

1 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - INTERPRETATIONS - CONCEPTS SERVING TO INDICATE THE SCOPE OF THE CONVENTION - INDEPENDENT INTERPRETATION

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 1)

2 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - SCOPE - MATTERS TO WHICH THE CONVENTION DOES NOT APPLY - BANKRUPTCY , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS , JUDICIAL ARRANGEMENTS , COMPOSITIONS AND ANALOGOUS PROCEEDINGS - EXCLUSION FROM THE SCOPE OF THE CONVENTION - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , SECOND PARAGRAPH OF ARTICLE 1)

1 . THE CONCEPTS USED IN ARTICLE 1 OF THE CONVENTION WHICH SERVE TO INDICATE ITS SCOPE MUST BE REGARDED AS INDEPENDENT CONCEPTS WHICH MUST BE INTERPRETED BY REFERENCE , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS.

2 . BANKRUPTCY , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS , JUDICIAL ARRANGEMENTS , COMPOSITIONS AND ANALOGOUS PROCEEDINGS ARE PROCEEDINGS FOUNDED , ACCORDING TO THE VARIOUS LAWS OF THE CONTRACTING PARTIES RELATING TO DEBTORS WHO HAVE DECLARED THEMSELVES UNABLE TO MEET THEIR LIABILITIES , INSOLVENCY OR THE COLLAPSE OF THE DEBTOR ' S CREDITWORTHINESS , WHICH INVOLVE THE INTERVENTION OF THE COURTS CULMINATING IN THE COMPULSORY ' ' LIQUIDATION DES BIENS ' ' IN THE INTEREST OF THE GENERAL BODY OF CREDITORS OF THE PERSON , FIRM OR COMPANY OR AT LEAST IN SUPERVISION BY THE COURTS. IF DECISIONS RELATING TO BANKRUPTCY AND WINDING-UP ARE TO BE EXCLUDED FROM THE SCOPE OF THE CONVENTION THEY MUST DERIVE DIRECTLY FROM BANKRUPTCY OR WINDING-UP AND BE CLOSELY CONNECTED WITH PROCEEDINGS FOR THE ' ' LIQUIDATION DES BIENS ' ' OR THE ' ' REGLEMENT JUDICIAIRE ' '.

IN CASE 133/78

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 BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

HENRI GOURDAIN , ADVOCATE , RESIDING IN PARIS , AS LIQUIDATOR OF THE SOCIETE FROMME FRANCE MANUTENTION ,

AND

FRANZ NADLER , RESIDING AT WETZLAR (FEDERAL REPUBLIC OF GERMANY),

ON THE INTERPRETATION OF SUBPARAGRAPH 2 OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE SAID CONVENTION WHICH PROVIDES THAT THE SAID CONVENTION SHALL NOT APPLY TO BANKRUPTCY AND PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS.

1BY AN ORDER OF 22 MAY 1978 WHICH WAS RECEIVED AT THE COURT REGISTRY ON 12 JUNE 1978 THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE), PURSUANT TO THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION 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 ' '), REFERRED TO THE COURT OF JUSTICE FOR A PRELIMINARY RULING A QUESTION ON THE INTERPRETATION OF SUBPARAGRAPH 2 OF THE SECOND PARAGRAPH OF ARTICLE 1 WHICH PROVIDES THAT THE CONVENTION SHALL NOT APPLY TO ' ' BANKRUPTCY , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS , JUDICIAL ARRANGEMENTS , COMPOSITIONS AND ANALOGOUS PROCEEDINGS ' '.

2THIS QUESTION HAS BEEN REFERRED TO THE COURT FOLLOWING AN ORDER BY THE COUR D ' APPEL , PARIS , DATED 15 MARCH 1976 , WHICH ORDERED THE DE FACTO MANAGER OF A FRENCH COMPANY , IN RESPECT OF WHICH THERE HAD BEEN A PREVIOUS DECLARATION THAT THE CONDITIONS EXISTED FOR A ' ' LIQUIDATION DES BIENS ' ' , TO BEAR A PART OF THE COMPANY ' S DEBTS PURSUANT TO ARTICLE 99 OF THE FRENCH LAW NO 67-563 OF 13 JULY 1967 ON THE ' ' REGLEMENT JUDICIARE ' ' , THE ' ' LIQUIDATION DES BIENS ' ' , THE ' ' FAILLITE PERSONNELLE ' ' AND ' ' BANQUEROUTES ' '. THE ' ' SYNDIC ' ' OF THE SAID COMPANY HAS APPLIED FOR LEAVE TO ENFORCE THE ORDER IN THE FEDERAL REPUBLIC OF GERMANY SUBMITTING THAT IT RELATES TO A SPECIAL CASE CONCERNING CIVIL LIABILITY WHICH FALLS WITHIN THE FIELD OF APPLICATION OF THE FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION.

THE OBERLANDESGERICHT (HIGHER REGIONAL COURT) FRANKFURT , BEFORE THE MATTER WAS BROUGHT BEFORE THE BUNDESGERICHTSHOF , REFUSED AN APPLICATION FOR LEAVE BY WAY OF EXEQUATUR TO ENFORCE THE ORDER ON THE GROUNDS THAT THE ORDER IN PERSONAM UNDER ARTICLE 99 OF THE FRENCH LAW , WHICH IS NOT KNOWN IN THE GERMAN LEGAL SYSTEM , DID NOT COME WITHIN THE SCOPE OF DECISIONS IN CIVIL AND COMMERCIAL MATTERS COVERED BY THE CONVENTION BUT WAS PART OF THE PROCEEDINGS FOR THE ' ' LIQUIDATION DES BIENS ' ' .

IT IS IN THESE CIRCUMSTANCES THAT THE BUNDESGERICHTSHOF HAS REFERRED TO THE COURT THE FOLLOWING QUESTION :

' ' IS A JUDGMENT GIVEN BY FRENCH CIVIL COURTS ON THE BASIS OF ARTICLE 99 OF THE FRENCH LAW NO 67-563 OF 13 JULY 1967 AGAINST THE DE FACTO MANAGER OF A LEGAL PERSON FOR PAYMENT INTO THE ASSETS OF A COMPANY IN LIQUIDATION TO BE REGARDED AS HAVING BEEN GIVEN IN BANKRUPTCY PROCEEDINGS , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS AND ANALOGOUS PROCEEDINGS (SUBPARAGRAPH 2 OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION) OR IS SUCH A JUDGMENT A DECISION GIVEN IN A CIVIL AND COMMERCIAL MATTER (FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION)?

' '

3THE CONVENTION , THE PARTICULAR AIM OF WHICH IS TO SECURE THE SIMPLIFICATION OF FORMALITIES GOVERNING THE RECIPROCAL RECOGNITION AND ENFORCEMENT

OF JUDGMENTS OF COURTS AND TRIBUNALS AND TO STRENGTHEN IN THE COMMUNITY THE LEGAL PROTECTION OF PERSONS WHO ARE ESTABLISHED THERE HAS LAID DOWN AS A MATTER OF PRINCIPLE THAT ITS SCOPE INCLUDES ' ' CIVIL AND COMMERCIAL MATTERS ' ' WITHOUT HOWEVER DEFINING THIS EXPRESSION .

HOWEVER BECAUSE OF THE SPECIAL NATURE OF CERTAIN MATTERS AND OF THE PROFOUND DIFFERENCES BETWEEN THE LAWS OF THE CONTRACTING STATES THE CONVENTION DOES NOT APPLY TO CERTAIN FIELDS INCLUDING ' ' BANKRUPTCY , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS , JUDICIAL ARRANGEMENTS , COMPOSITIONS AND ANALOGOUS PROCEEDINGS ' ' WITHOUT THE MEANING OF THESE CONCEPTS BEING DEFINED EITHER .

AS ARTICLE 1 SERVES TO INDICATE THE SCOPE OF THE CONVENTION IT IS NECESSARY , IN ORDER TO ENSURE , AS FAR AS POSSIBLE , THAT THE RIGHTS AND OBLIGATIONS WHICH DERIVE FROM IT FOR THE CONTRACTING STATES AND THE PERSONS TO WHOM IT APPLIES ARE EQUAL AND UNIFORM , THAT THE TERMS OF THAT PROVISION SHOULD NOT BE INTERPRETED AS A MERE REFERENCE TO THE INTERNAL LAW OF ONE OR OTHER OF THE STATES CONCERNED.

BY PROVIDING THAT THE CONVENTION SHALL APPLY ' ' WHATEVER THE NATURE OF THE COURT OR TRIBUNAL ' ' THE FIRST PARAGRAPH OF ARTICLE 1 SHOWS THAT THE CONCEPT OF ' ' CIVIL AND COMMERCIAL MATTERS ' ' CANNOT BE INTERPRETED SOLELY IN THE LIGHT OF THE DIVISION OF JURISDICTION BETWEEN THE VARIOUS TYPES OF COURTS EXISTING IN CERTAIN STATES.

THE CONCEPTS USED IN ARTICLE 1 MUST BE REGARDED AS INDEPENDENT CONCEPTS WHICH MUST BE INTERPRETED BY REFERENCE , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS .

4AS FAR AS CONCERNS BANKRUPTCY , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS , JUDICIAL ARRANGEMENTS , COMPOSITIONS AND ANALOGOUS PROCEEDINGS , ACCORDING TO THE VARIOUS LAWS OF THE CONTRACTING PARTIES RELATING TO DEBTORS WHO HAVE DECLARED THEMSELVES UNABLE TO MEET THEIR LIABILITIES , INSOLVENCY OR THE COLLAPSE OF THE DEBTOR ' S CREDITWORTHINESS , WHICH INVOLVE THE INTERVENTION OF THE COURTS CULMINATING IN THE COMPULSORY ' ' LIQUIDATION DES BIENS ' ' IN THE INTEREST OF THE GENERAL BODY OF CREDITORS OF THE PERSON , FIRM OR COMPANY , OR AT LEAST IN SUPERVISION BY THE COURTS , IT IS NECESSARY , IF DECISIONS RELATING TO BANKRUPTCY AND WINDING-UP ARE TO BE EXCLUDED FROM THE SCOPE OF THE CONVENTION , THAT THEY MUST DERIVE DIRECTLY FROM THE BANKRUPTCY OR WINDING-UP AND BE CLOSELY CONNECTED WITH THE PROCEEDINGS FOR THE ' ' LIQUIDATION DES BIENS ' ' OR THE ' ' REGLEMENT JUDICIAIRE ' '.

IN ORDER TO ANSWER THE QUESTION REFERRED TO THE COURT BY THE NATIONAL COURT IT IS THEREFORE NECESSARY TO ASCERTAIN WHETHER THE LEGAL FOUNDATION OF AN APPLICATION SUCH AS THAT PROVIDED FOR IN ARTICLE 99 OF THE FRENCH LAW IS BASED ON THE LAW RELATING TO BANKRUPTCY AND WINDING-UP AS INTERPRETED FOR THE PURPOSES OF THE CONVENTION .

5THE APPLICATION UNDER ARTICLE 99 , CALLED AN APPLICATION TO MAKE GOOD A DEFICIENCY IN THE ASSETS , FOR WHICH SPECIAL PROVISION IS MADE IN A LAW ON BANKRUPTCY AND WINDING-UP IS MADE ONLY TO THE COURT WHICH MADE THE

ORDER FOR THE ' ' REGLEMENT JUDICIAIRE ' ' OR THE ' ' LIQUIDATION DES BIENS ' '.

IT IS ONLY THE ' ' SYNDIC ' ' - APART FROM THE COURT WHICH CAN MAKE THE ORDER OF ITS OWN MOTION - WHO CAN MAKE THIS APPLICATION ON BEHALF OF AND IN THE INTEREST OF THE GENERAL BODY OF CREDITORS WITH A VIEW TO THE PARTIAL REIMBURSEMENT OF THE CREDITORS BY RESPECTING THE PRINCIPLE THAT THEY RANK EQUALLY AND BY TAKING ACCOUNT OF ANY PREFERENTIAL RIGHTS LAWFULLY ACQUIRED.

IN THIS APPLICATION , WHICH DEROGATES FROM THE GENERAL RULES OF THE LAW OF LIABILITY , THE DE JURE OR DE FACTO MANAGERS OF THE COMPANY ARE PRESUMED TO BE LIABLE AND THEY CAN ONLY DISCHARGE THIS BURDEN BY PROVING THAT THEY MANAGED THE AFFAIRS OF THE COMPANY WITH ALL THE REQUISITE ENERGY AND DILIGENCE.

THE PERIOD OF LIMITATION OF THREE YEARS FOR THE APPLICATION RUNS FROM THE DATE WHEN THE FINAL LIST OF CLAIMS IS DRAWN UP AND IS SUSPENDED FOR THE DURATION OF ANY SCHEME OF ARRANGEMENT WHICH MAY HAVE BEEN ENTERED INTO AND BEGINS TO RUN AGAIN IF SUCH A SCHEME IS TERMINATED OR DECLARED VOID.

IF THE APPLICATION DIRECTED AGAINST THE MANAGER OF THE COMPANY SUCCEEDS IT IS THE GENERAL BODY OF CREDITORS WHICH BENEFITS , SOME ASSETS BEING ADDED TO THE FUNDS TO WHICH THEY ARE ENTITLED , AS HAPPENS WHERE THE ' ' SYNDIC ' ' ESTABLISHES A CLAIM WHICH BENEFITS THE GENERAL BODY OF CREDITORS.

FURTHERMORE , THE COURT MAY ORDER THE ' ' REGLEMENT JUDICIAIRE ' ' OR THE ' ' LIQUIDATION DES BIENS ' ' OF THOSE MANAGERS WHO HAVE BEEN MADE RESPONSIBLE FOR PART OR ALL OF THE LIABILITIES OF A LEGAL PERSON AND WHO DO NOT DISCHARGE THE SAID LIABILITIES , WITHOUT HAVING TO VERIFY WHETHER THE SAID MANAGERS ARE BUSINESS MEN AND WHETHER THEY ARE UNABLE TO MEET THEIR LIABILITIES.

6IT IS QUITE APPARENT FROM ALL THESE FINDINGS THAT THE LEGAL FOUNDATION OF ARTICLE 99 , THE OBJECT OF WHICH , IN THE EVENT OF THE WINDING-UP OF A COMMERCIAL COMPANY , IS TO GO BEYOND THE LEGAL PERSON AND PROCEED AGAINST ITS MANAGERS AND THEIR PROPERTY IS BASED SOLELY ON THE PROVISIONS OF THE LAW OF BANKRUPTCY AND WINDING-UP AS INTERPRETED FOR THE PURPOSE OF THE CONVENTION.

A DECISION SUCH AS THAT OF A FRENCH CIVIL COURT BASED ON ARTICLE 99 OF THE FRENCH LAW NO 67-563 OF 15 JULY 1967 ORDERING THE DE FACTO MANAGER OF A LEGAL PERSON TO PAY A CERTAIN SUM INTO THE ASSETS OF A COMPANY MUST BE CONSIDERED AS GIVEN IN THE CONTEXT OF BANKRUPTCY , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS OR ANALOGOUS PROCEEDINGS WITHIN THE MEANING OF SUBPARAGRAPH 2 OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION

COSTS

7THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES AND BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , WHICH HAVE SUBMITTED OBSERVATIONS PURSUANT TO ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE OF THE EEC , ARE NOT RECOVERABLE.

AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION

ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE BUNDESGERICHTSHOF , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE BUNDESGERICHTSHOF BY AN ORDER OF 22 MAY 1978 , HEREBY RULES :

A DECISION SUCH AS THAT OF A FRENCH CIVIL COURT BASED ON ARTICLE 99 OF THE FRENCH LAW NO 67-563 OF 15 JULY 1967 , ORDERING THE DE FACTO MANAGER OF A LEGAL PERSON TO PAY A CERTAIN SUM INTO THE ASSETS OF A COMPANY MUST BE CONSIDERED AS GIVEN IN THE CONTEXT OF BANKRUPTCY , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS OR ANALOGOUS PROCEEDINGS WITHIN THE MEANING OF SUBPARAGRAPH 2 OF THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION

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AUTLANG	German
OBSERV	Commission ; Federal Republic of Germany ; Member States ; Institutions
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NATCOUR

A8 Oberlandesgericht Frankfurt/Main, Beschluß vom 07/09/1977 (20 W 466/77)
- Entscheidungen der Oberlandesgerichte in Zivilsachen 1978 p.220-224
- Neue Juristische Wochenschrift 1978 p.501-502
- Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1978 p.195-197
A9 Bundesgerichtshof, Vorlagebeschluß vom 22/05/1978 (VIII ZB 41/77)
- Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1978 p.684-685
P1 Bundesgerichtshof, Beschluß vom 16/05/1979 (VIII ZB 41/77)
- Der Betrieb 1979 p.2368 (résumé)
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PROCEDU

Reference for a preliminary ruling

ADVGEN

Reischl

JUDGRAP

Touffait

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**Judgment of the Court
of 22 November 1978
Somafer SA v Saar-Ferngas AG. Reference for a preliminary ruling: Oberlandesgericht Saarbrücken - Germany. Case 33/78.**

1 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - INTERPRETATION - GENERAL RULES

2 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - SPECIAL JURISDICTION - CONCEPTS IN ARTICLE 5 (5): ' ' OPERATIONS OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT ' ' - INDEPENDENT INTERPRETATION - MEANING - JURISDICTION OF THE NATIONAL COURT

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 5 (5))

1 . THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED HAVING REGARD BOTH TO ITS PRINCIPLES AND OBJECTIVES AND TO ITS RELATIONSHIP WITH THE TREATY. THE QUESTION WHETHER THE WORDS AND CONCEPTS USED IN THE CONVENTION MUST BE REGARDED AS HAVING THEIR OWN INDEPENDENT MEANING AND AS BEING THUS COMMON TO ALL THE CONTRACTING STATES OR AS REFERRING TO SUBSTANTIVE RULES OF THE LAW APPLICABLE IN EACH CASE UNDER THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS FIRST BROUGHT MUST BE SO ANSWERED AS TO ENSURE THAT THE CONVENTION IS FULLY EFFECTIVE IN ACHIEVING THE OBJECTS WHICH IT PURSUES .

2 . THE NEED TO ENSURE LEGAL CERTAINTY AND EQUALITY OF RIGHTS AND OBLIGATIONS FOR THE PARTIES AS REGARDS THE POWER TO DEROGATE FROM THE GENERAL JURISDICTION OF ARTICLE 2 REQUIRES AN INDEPENDENT INTERPRETATION , COMMON TO ALL THE CONTRACTING STATES , OF THE CONCEPTS IN ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968.

THE CONCEPT OF BRANCH , AGENCY OR OTHER ESTABLISHMENT IMPLIES A PLACE OF BUSINESS WHICH HAS THE APPEARANCE OF PERMANENCY , SUCH AS THE EXTENSION OF A PARENT BODY , HAS A MANAGEMENT AND IS MATERIALLY EQUIPPED TO NEGOTIATE BUSINESS WITH THIRD PARTIES SO THAT THE LATTER , ALTHOUGH KNOWING THAT THERE WILL IF NECESSARY BE A LEGAL LINK WITH THE PARENT BODY , THE HEAD OFFICE OF WHICH IS ABROAD , DO NOT HAVE TO DEAL DIRECTLY WITH SUCH PARENT BODY BUT MAY TRANSACT BUSINESS AT THE PLACE OF BUSINESS CONSTITUTING THE EXTENSION.

THE CONCEPT OF ' ' OPERATIONS ' ' COMPRISES :

- ACTIONS RELATING TO RIGHTS AND CONTRACTUAL OR NON-CONTRACTUAL OBLIGATIONS CONCERNING THE MANAGEMENT PROPERLY SO-CALLED OF THE AGENCY , BRANCH OR OTHER ESTABLISHMENT ITSELF SUCH AS THOSE CONCERNING THE SITUATION OF THE BUILDING WHERE SUCH ENTITY IS ESTABLISHED OR THE LOCAL ENGAGEMENT OF STAFF TO WORK THERE ;

- ACTIONS RELATING TO UNDERTAKINGS WHICH HAVE BEEN ENTERED INTO AT THE ABOVE-MENTIONED PLACE OF BUSINESS IN THE NAME OF THE PARENT BODY AND WHICH MUST BE PERFORMED IN THE CONTRACTING STATE WHERE THE PLACE OF BUSINESS IS ESTABLISHED AND ALSO ACTIONS CONCERNING NON-CONTRACTUAL OBLIGATIONS ARISING FROM THE ACTIVITIES IN WHICH THE BRANCH , AGENCY OR OTHER ESTABLISHMENT WITHIN THE ABOVE DEFINED MEANING , HAS ENGAGED AT THE PLACE IN WHICH IT IS ESTABLISHED ON BEHALF OF THE PARENT BODY.

IT IS IN EACH CASE FOR THE COURT BEFORE WHICH THE MATTER COMES TO FIND THE FACTS WHEREON IT MAY BE ESTABLISHED THAT AN EFFECTIVE PLACE OF BUSINESS EXISTS AND TO DETERMINE THE LEGAL POSITION BY REFERENCE TO THE CONCEPT OF ' ' OPERATIONS ' ' AS ABOVE DEFINED.

IN CASE 33/78

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 OBERLANDESGERICHT SAARBRUCKEN FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

ETABLISSEMENTS SOMAFER SA , WHOSE REGISTERED OFFICE IS AT UCKANGE (FRANCE),

AND

SAAR-FERNGAS AG , WHOSE REGISTERED OFFICE IS AT SAARBRUCKEN-SCHAFBRUCKE (FEDERAL REPUBLIC OF GERMANY),

ON THE INTERPRETATION OF THE WORDS ' ' BRANCH ' ' AND ' ' AGENCY ' ' WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1BY ORDER DATED 21 FEBRUARY 1978 , RECEIVED AT THE COURT ON 13 MARCH 1978 , THE OBERLANDESGERICHT SAARBRUCKEN REFERRED TO THE COURT UNDER THE PROTOCOL OF 3 JUNE 1971 CONCERNING THE INTERPRETATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (OFFICIAL JOURNAL 1978 , NO L 304 , P . 77) (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') THREE QUESTIONS ON THE INTERPRETATION OF ARTICLE 5 (5) OF THE CONVENTION . ACCORDING TO THE PROVISION , INTERPRETATION OF WHICH IS SOUGHT , A PERSON DOMICILED IN A CONTRACTING STATE MAY , IN ANOTHER CONTRACTING STATE , BE SUED :... ' ' (5) AS REGARDS A DISPUTE ARISING OUT OF THE OPERATIONS OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT , IN THE COURTS FOR THE PLACE IN WHICH THE BRANCH , AGENCY OR OTHER ESTABLISHMENT IS SITUATED ' '.

2THE QUESTIONS PUT MUST ENABLE THE NATIONAL COURT TO DECIDE WHETHER IT HAS JURISDICTION UNDER THE SAID PROVISION - WITHOUT PREJUDICE TO ITS JURISDICTION ON THE BASIS OF OTHER PROVISIONS OF THE CONVENTION - TO TRY AN ACTION BROUGHT BY A GERMAN UNDERTAKING AGAINST A FRENCH UNDERTAKING , THE REGISTERED OFFICE OF WHICH IS IN FRENCH TERRITORY BUT WHICH HAS AN OFFICE OR PLACE OF CONTACT IN THE FEDERAL REPUBLIC OF GERMANY DESCRIBED ON ITS NOTE-PAPER AS ' ' VERTRETUNG FUR DEUTSCHLAND ' ' (' ' REPRESENTATION FOR GERMANY ' '), FOR THE RECOVERY OF THE EXPENSES INCURRED BY THE GERMAN UNDERTAKING TO PROTECT GAS MAINS BELONGING TO IT FROM ANY DAMAGE WHICH MIGHT BE CAUSED BY DEMOLITION WORK WHICH THE FRENCH UNDERTAKING WAS CARRYING OUT IN THE VICINITY ON BEHALF OF THE SAARLAND.

THE FIRST QUESTION

3THE FIRST QUESTION ASKS

' ' ARE THE CONDITIONS REGARDING JURISDICTION IN THE CASE OF ' THE OPERATIONS OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT ' MENTIONED IN ARTICLE 5 (5)

OF THE SAID CONVENTION TO BE DETERMINED.

(A) UNDER THE LAW OF THE STATE BEFORE THE COURTS OF WHICH THE PROCEEDINGS HAVE BEEN BROUGHT ; OR

(B) UNDER THE LAW OF THE STATES CONCERNED (QUALIFICATION ACCORDING TO THE LAW TO BE APPLIED IN THE MAIN ACTION); OR

(C) INDEPENDENTLY , I.E. IN ACCORDANCE WITH THE OBJECTIVES AND SYSTEM OF THE SAID CONVENTION AND ALSO WITH THE GENERAL PRINCIPLES OF LAW WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEM (JUDGMENT OF 14 OCTOBER 1976 IN CASE 29/76 LTU LUFTTRANSPORTUNTERNEHMEN GMBH & CO . KG V EUROCONTROL (1976) ECR 1541)?

' '

4THE CONVENTION , CONCLUDED PURSUANT TO ARTICLE 220 OF THE EEC TREATY , IS INTENDED ACCORDING TO THE EXPRESS TERMS OF ITS PREAMBLE TO IMPLEMENT THE PROVISIONS OF THAT ARTICLE ON THE SIMPLIFICATION OF FORMALITIES GOVERNING THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS OF COURTS OR TRIBUNALS AND TO STRENGTHEN IN THE COMMUNITY THE LEGAL PROTECTION OF PERSONS THEREIN ESTABLISHED. IN ORDER TO ELIMINATE OBSTACLES TO LEGAL RELATIONS AND TO SETTLE DISPUTES WITHIN THE SPHERE OF INTRA-COMMUNITY RELATIONS IN CIVIL AND COMMERCIAL MATTERS THE CONVENTION CONTAINS , INTER ALIA , RULES ENABLING THE JURISDICTION IN THESE MATTERS OF THE COURTS OF CONTRACTING STATES TO BE DETERMINED AND FACILITATING THE RECOGNITION AND EXECUTION OF COURTS ' JUDGMENTS. ACCORDINGLY THE CONVENTION MUST BE INTERPRETED HAVING REGARD BOTH TO ITS PRINCIPLES AND OBJECTIVES AND TO ITS RELATIONSHIP WITHIN THE TREATY.

5THE CONVENTION FREQUENTLY USES WORDS AND LEGAL CONCEPTS DRAWN FROM CIVIL , COMMERCIAL AND PROCEDURAL LAW AND CAPABLE OF A DIFFERENT MEANING FROM ONE CONTRACTING STATE TO ANOTHER. THE QUESTION THEREFORE ARISES WHETHER THESE WORDS AND CONCEPTS MUST BE REGARDED AS HAVING THEIR OWN INDEPENDENT MEANING AND AS BEING THUS COMMON TO ALL THE CONTRACTING STATES OR AS REFERRING TO SUBSTANTIVE RULES OF THE LAW APPLICABLE IN EACH CASE UNDER THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS FIRST BROUGHT. THE ANSWER TO THIS QUESTION MUST ENSURE THAT THE CONVENTION IS FULLY EFFECTIVE IN ACHIEVING THE OBJECTIVES WHICH IT PURSUES.

6THE MEANING OF THE WORDS ' ' DISPUTE ARISING OUT OF THE OPERATIONS OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT ' ' , WHICH ARE THE BASIS OF THE JURISDICTION GIVE BY ARTICLE 5 (5), ARE DIFFERENT FROM ONE CONTRACTING STATE TO ANOTHER , NOT ONLY IN THE RESPECTIVE LAWS BUT ALSO IN THE APPLICATION GIVEN TO BILATERAL CONVENTIONS ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS.

7THEIR FUNCTION IN THE CONTEXT OF THE CONVENTION MUST BE DECIDED IN RELATION TO THE GENERAL RULE CONFERRING JURISDICTION CONTAINED IN ARTICLE 2 (1) OF THE CONVENTION WHICH 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 ' '. ALTHOUGH ARTICLE 5 MAKES PROVISION IN A NUMBER OF CASES FOR A SPECIAL JURISDICTION , WHICH THE PLAINTIFF MAY CHOOSE , THIS IS BECAUSE OF THE EXISTENCE , IN CERTAIN CLEARLY-DEFINED

SITUATIONS , OF A PARTICULARLY CLOSE CONNECTING FACTOR BETWEEN A DISPUTE AND THE COURT WHICH MAY BE CALLED UPON TO HEAR IT , WITH A VIEW TO THE EFFICACIOUS CONDUCT OF THE PROCEEDINGS. MULTIPLICATION OF THE BASES OF JURISDICTION IN ONE AND THE SAME CASE IS NOT LIKELY TO ENCOURAGE LEGAL CERTAINTY AND THE EFFECTIVENESS OF LEGAL PROTECTION THROUGHOUT THE TERRITORY OF THE COMMUNITY AND THEREFORE IT IS IN ACCORD WITH THE OBJECTIVE OF THE CONVENTION TO AVOID A WIDE AND MULTIFARIOUS INTERPRETATION OF THE EXCEPTIONS TO THE GENERAL RULE OF JURISDICTION CONTAINED IN ARTICLE 2. THIS IS ALL THE MORE SO SINCE IN NATIONAL LAWS OR IN BILATERAL CONVENTIONS THE SIMILAR EXCEPTION IS FREQUENTLY DUE , AS THE UNITED KINGDOM RIGHTLY POINTS OUT IN ITS WRITTEN OBSERVATIONS , TO THE NOTION THAT A NATIONAL STATE SERVES THE INTERESTS OF ITS NATIONALS BY OFFERING THEM AN OPPORTUNITY TO ESCAPE THE JURISDICTION OF A FOREIGN COURT AND THIS CONSIDERATION IS OUT OF PLACE IN THE COMMUNITY CONTEXT , SINCE THE JUSTIFICATION FOR THE EXCEPTIONS CONTAINED IN ARTICLE 5 TO THE GENERAL RULE OF JURISDICTION IN ARTICLE 2 IS SOLELY IN THE INTERESTS OF DUE ADMINISTRATION OF JUSTICE .

8THE SCOPE AND LIMITS OF THE RIGHT GIVEN TO THE PLAINTIFF BY ARTICLE 5 (5) MUST BE DETERMINED BY THE PARTICULAR FACTS WHICH EITHER IN THE RELATIONS BETWEEN THE PARENT BODY AND ITS BRANCHES , AGENCIES OR OTHER ESTABLISHMENTS OR IN THE RELATIONS BETWEEN ONE OF THE LATTER ENTITIES AND THIRD PARTIES SHOW THE SPECIAL LINK JUSTIFYING , IN DEROGATION FROM ARTICLE 2 , THE OPTION GRANTED TO THE PLAINTIFF. IT IS BY DEFINITION A QUESTION OF FACTORS CONCERNING TWO ENTITIES ESTABLISHED IN DIFFERENT CONTRACTING STATES BUT WHICH IN SPITE OF THIS MUST BE CONSIDERED IN THE SAME WAY , WHETHER FROM THE POINT OF VIEW OF THE PARENT BODY OR OF AN EXTENSION OR EXTENSIONS WHICH THE PARENT BODY HAS ESTABLISHED IN THE OTHER MEMBER STATES OR FROM THAT OF THE THIRD PARTIES WITH WHOM LEGAL RELATIONS ARE CREATED THROUGH SUCH EXTENSIONS . IN THESE CIRCUMSTANCES THE NEED TO ENSURE LEGAL CERTAINTY AND EQUALITY OF RIGHTS AND OBLIGATIONS FOR THE PARTIES AS REGARDS THE POWER TO DEROGATE FROM THE GENERAL JURISDICTION OF ARTICLE 2 REQUIRES AN INDEPENDENT INTERPRETATION , COMMON TO ALL THE CONTRACTING STATES , OF THE CONCEPTS IN ARTICLE 5 (5) OF THE CONVENTION WHICH ARE THE SUBJECT OF THE REFERENCE FOR A PRELIMINARY RULING.

THE SECOND AND THIRD QUESTIONS

9IN THE EVENT OF THE WORDS REFERRED TO BEING INTERPRETED INDEPENDENTLY , THE SECOND QUESTION ASKS WHAT CRITERIA APPLY WITH REFERENCE TO THE CAPACITY TO TAKE INDEPENDENT DECISIONS (INTER ALIA TO ENTER INTO CONTRACTS) AND ALSO TO THE EXTENT OF THE OUTWARD MANIFESTATION. THE THIRD QUESTION ASKS

' ' ARE THE PRINCIPLES GOVERNING LIABILITY FOR HOLDING ONESELF OUT IN LAW TO OTHERS , I.E. TO THIRD PARTIES , TO BE APPLIED TO THE QUESTIONS WHETHER THERE IS IN FACT A BRANCH OR AGENCY , WITH LEGAL CONSEQUENCES THAT ANYONE WHO CREATES THE APPEARANCE OF SUCH A SITUATION IS TO BE TREATED AS HAVING OPERATED A BRANCH OR AGENCY - AS IS FOR EXAMPLE THE CASE UNDER GERMAN LAW (CF. ARTICLE 21 OF THE ZIVILPROZESSORDNUNG (CODE OF CIVIL PROCEDURE) BAUMBACH , 36TH EDITION NOTE 2 A , STEIN-JONAS , 19TH EDITION , NOTE II 2 ; OBERLANDESGERICHT KOLN NEUE JURISTISCHE WOCHENSCHRIFT 1953 , 1834 , OBERLANDESGERICHT BRESLAU HOCHSTRICHTERLICHE RECHTSPRECHUNG 1939 (CASE NO 111))?

' '

10THESE TWO QUESTIONS MUST BE TAKEN TOGETHER.

11HAVING REGARD TO THE FACT THAT THE CONCEPTS REFERRED TO GIVE THE RIGHT TO DEROGATE FROM THE PRINCIPLE OF JURISDICTION OF ARTICLE 2 OF THE CONVENTION THEIR INTERPRETATION MUST SHOW WITHOUT DIFFICULTY THE SPECIAL LINK JUSTIFYING SUCH DEROGATION. SUCH SPECIAL LINK COMPRISES IN THE FIRST PLACE THE MATERIAL SIGNS ENABLING THE EXISTENCE OF THE BRANCH , AGENCY OR OTHER ESTABLISHMENT TO BE EASILY RECOGNIZED AND IN THE SECOND PLACE THE CONNEXION THAT THERE IS BETWEEN THE LOCAL ENTITY AND THE CLAIM DIRECTED AGAINST THE PARENT BODY ESTABLISHED IN ANOTHER CONTRACTING STATE.

12AS REGARDS THE FIRST ISSUE , THE CONCEPT OF BRANCH , AGENCY OR OTHER ESTABLISHMENT IMPLIES A PLACE OF BUSINESS WHICH HAS THE APPEARANCE OF PERMANENCY , SUCH AS THE EXTENSION OF A PARENT BODY , HAS A MANAGEMENT AND IS MATERIALLY EQUIPPED TO NEGOTIATE BUSINESS WITH THIRD PARTIES SO THAT THE LATTER , ALTHOUGH KNOWING THAT THERE WILL IF NECESSARY BE A LEGAL LINK WITH THE PARENT BODY , THE HEAD OFFICE OF WHICH IS ABROAD , DO NOT HAVE TO DEAL DIRECTLY WITH SUCH PARENT BODY BUT MAY TRANSACT BUSINESS AT THE PLACE OF BUSINESS CONSTITUTING THE EXTENSION .

13AS REGARDS THE SECOND ISSUE THE CLAIM IN THE ACTION MUST CONCERN THE OPERATIONS OF THE BRANCH , AGENCY OR OTHER ESTABLISHMENT. THIS CONCEPT OF OPERATIONS COMPRISES ON THE ONE HAND ACTIONS RELATING TO RIGHTS AND CONTRACTUAL OR NON-CONTRACTUAL OBLIGATIONS CONCERNING THE MANAGEMENT PROPERLY SO-CALLED OF THE AGENCY , BRANCH OR OTHER ESTABLISHMENT ITSELF SUCH AS THOSE CONCERNING THE SITUATION OF THE BUILDING WHERE SUCH ENTITY IS ESTABLISHED OR THE LOCAL ENGAGEMENT OF STAFF TO WORK THERE. FURTHER IT ALSO COMPRISES THOSE RELATING TO UNDERTAKINGS WHICH HAVE BEEN ENTERED INTO AT THE ABOVE-MENTIONED PLACE OF BUSINESS IN THE NAME OF THE PARENT BODY AND WHICH MUST BE PERFORMED IN THE CONTRACTING STATE WHERE THE PLACE OF BUSINESS IS ESTABLISHED AND ALSO ACTIONS CONCERNING NON-CONTRACTUAL OBLIGATIONS ARISING FROM THE ACTIVITIES IN WHICH THE BRANCH , AGENCY OR OTHER ESTABLISHMENT WITHIN THE ABOVE DEFINED MEANING , HAS ENGAGED AT THE PLACE IN WHICH IT IS ESTABLISHED ON BEHALF OF THE PARENT BODY. IT IS IN EACH CASE FOR THE COURT BEFORE WHICH THE MATTER COMES TO FIND THE FACTS WHEREON IT MAY BE ESTABLISHED THAT AN EFFECTIVE PLACE OF BUSINESS EXISTS AND TO DETERMINE THE LEGAL POSITION BY REFERENCE TO THE CONCEPT OF ' ' OPERATIONS ' ' AS ABOVE DEFINED.

14THE ABOVE CONSIDERATIONS MAKE IT UNNECESSARY TO ANSWER THE THIRD QUESTION .

COSTS

15THE COSTS INCURRED BY THE GOVERNMENT OF THE UNITED KINGDOM AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED WRITTEN OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE AND AS THE PROCEEDINGS ARE , SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , 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

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE OBERLANDESGERICHT SAARBRUCKEN BY ORDER OF 21 FEBRUARY 1978 , HEREBY RULES :

1 . THE NEED TO ENSURE LEGAL CERTAINTY AND EQUALITY OF RIGHTS AND OBLIGATIONS FOR THE PARTIES AS REGARDS THE POWER TO DEROGATE FROM THE GENERAL JURISDICTION OF ARTICLE 2 REQUIRES AN INDEPENDENT INTERPRETATION , COMMON TO ALL THE CONTRACTING STATES , OF THE CONCEPTS IN ARTICLE 5 (5) OF THE CONVENTION.

2 . THE CONCEPT OF BRANCH , AGENCY OR OTHER ESTABLISHMENT IMPLIES A PLACE OF BUSINESS WHICH HAS THE APPEARANCE OF PERMANENCY , SUCH AS THE EXTENSION OF A PARENT BODY , HAS A MANAGEMENT AND IS MATERIALLY EQUIPPED TO NEGOTIATE BUSINESS WITH THIRD PARTIES SO THAT THE LATTER , ALTHOUGH KNOWING THAT THERE WILL IF NECESSARY BE A LEGAL LINK WITH THE PARENT BODY , THE HEAD OFFICE OF WHICH IS ABROAD , DO NOT HAVE TO DEAL DIRECTLY WITH SUCH PARENT BODY BUT MAY TRANSACT BUSINESS AT THE PLACE OF BUSINESS CONSTITUTING THE EXTENSION.

3 . THE CONCEPT OF ' ' OPERATIONS ' ' COMPRISES :

- ACTIONS RELATING TO RIGHTS AND CONTRACTUAL OR NON-CONTRACTUAL OBLIGATIONS CONCERNING THE MANAGEMENT PROPERLY SO-CALLED OF THE AGENCY , BRANCH OR OTHER ESTABLISHMENT ITSELF SUCH AS THOSE CONCERNING THE SITUATION OF THE BUILDING WHERE SUCH ENTITY IS ESTABLISHED OR THE LOCAL ENGAGEMENT OF STAFF TO WORK THERE ;

- ACTIONS RELATING TO UNDERTAKINGS WHICH HAVE BEEN ENTERED INTO AT THE ABOVE-MENTIONED PLACE OF BUSINESS IN THE NAME OF THE PARENT BODY AND WHICH MUST BE PERFORMED IN THE CONTRACTING STATE WHERE THE PLACE OF BUSINESS IS ESTABLISHED AND ALSO ACTIONS CONCERNING NON-CONTRACTUAL OBLIGATIONS ARISING FROM THE ACTIVITIES IN WHICH THE BRANCH , AGENCY OR OTHER ESTABLISHMENT WITHIN THE ABOVE DEFINED MEANING , HAS ENGAGED AT THE PLACE IN WHICH IT IS ESTABLISHED ON BEHALF OF THE PARENT BODY.

4 . IT IS IN EACH CASE FOR THE COURT BEFORE WHICH THE MATTER COMES TO FIND THE FACTS WHEREON IT MAY BE ESTABLISHED THAT AN EFFECTIVE PLACE OF BUSINESS EXISTS AND TO DETERMINE THE LEGAL POSITION BY REFERENCE TO THE CONCEPT OF ' ' OPERATIONS ' ' AS ABOVE DEFINED.

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NOTES Pesce, Angelo: La sede secondaria dell'impresa nel diritto processuale comunitario, Il Foro padano 1978 IV Col.66-68 ; Crut, Danielle: Notions européennes d'exploitation de succursale, d'agence et autre établissement, La vie judiciaire 1979 no 1717 p.8 ; Hartley, Trevor: "Branch, Agency or Other Establishment" - Article 5(5), European Law Review 1979 p.127-130 ; Huet, André: Journal du droit international 1979 p.672-681 ; Audit, Bernard: Recueil Dalloz Sirey 1979 IR. p.458 ; Verheul, Hans: The EEC Convention on Jurisdiction and Judgments of 27 September in Dutch Legal Practice, Netherlands International Law Review 1981 p.73-74 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a17

PROCEDU Reference for a preliminary ruling

ADVGEN Mayras

JUDGRAP Mertens de Wilmars

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Judgment of the Court
of 9 November 1978
Nikolaus Meeth v Glacetal.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
First paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
Case 23/78.

1 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - AGREEMENT CONFERRING JURISDICTION - MUTUAL ASSENT TO THE JURISDICTION OF THE COURTS OF THE STATE OF DOMICILE OF THE DEFENDANT - LAWFULNESS

(CONVENTION OF 27 SEPTEMBER 1968 , FIRST PARAGRAPH OF ARTICLE 17)

2 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - AGREEMENT CONFERRING JURISDICTION - MUTUAL ASSENT TO THE JURISDICTION OF THE COURTS OF THE STATE OF DOMICILE OF THE DEFENDANT - POWER OF SUCH COURTS TO TAKE INTO ACCOUNT A SET-OFF CONNECTED WITH THE LEGAL RELATIONSHIP IN DISPUTE - CONDITIONS

(CONVENTION OF 27 SEPTEMBER 1968 , FIRST PARAGRAPH OF ARTICLE 17)

1 . ALTHOUGH , WITH REGARD TO AN AGREEMENT CONFERRING JURISDICTION , ARTICLE 17 OF THE BRUSSELS CONVENTION , AS IT IS WORDED , REFERS TO THE CHOICE BY THE PARTIES TO A CONTRACT OF A SINGLE COURT OR THE COURTS OF A SINGLE STATE , THAT WORDING CANNOT BE INTERPRETED AS PROHIBITING AN AGREEMENT UNDER WHICH THE TWO PARTIES TO A CONTRACT , WHO ARE DOMICILED IN DIFFERENT STATES , CAN BE SUED ONLY IN THE COURTS OF THEIR RESPECTIVE STATES.

2 . HAVING REGARD TO THE NEED TO RESPECT INDIVIDUALS ' RIGHT OF INDEPENDENCE , UPON WHICH ARTICLE 17 IS BASED , AND THE NEED TO AVOID SUPERFLUOUS PROCEDURE , WHICH FORMS THE BASIS OF THE CONVENTION AS A WHOLE , THE FIRST PARAGRAPH OF ARTICLE 17 CANNOT BE INTERPRETED AS PREVENTING A COURT BEFORE WHICH PROCEEDINGS HAVE BEEN INSTITUTED PURSUANT TO A CLAUSE OF THE TYPE DESCRIBED ABOVE FROM TAKING INTO ACCOUNT A CLAIM FOR A SET-OFF CONNECTED WITH THE LEGAL RELATIONSHIP IN DISPUTE IF SUCH COURT CONSIDERS THAT COURSE TO BE COMPATIBLE WITH THE LETTER AND SPIRIT OF THE CLAUSE CONFERRING JURISDICTION.

IN CASE 23/78

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 BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

NIKOLAUS MEETH , TRADER , OWNER OF THE UNDERTAKING NIKOLAUS MEETH , WINDOW MANUFACTURERS AND WOOD PROCESSORS , ESTABLISHED IN PIESPORT/MOSEL , FEDERAL REPUBLIC OF GERMANY ,

AND

GLACETAL , SOCIETE A RESPONSABILITE LIMITEE (LIMITED LIABILITY COMPANY), HAVING ITS REGISTERED OFFICE IN VIENNE-ESTRESSIN , FRANCE ,

ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION

OF 27 SEPTEMBER 1968 ,

1BY AN ORDER OF 1 FEBRUARY 1978 , WHICH WAS RECEIVED AT THE COURT REGISTRY ON 27 FEBRUARY 1978 , THE BUNDESGERICHTSHOF SUBMITTED 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 (HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ') CERTAIN QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 17 OF THE CONVENTION .

2THE FILE SHOWS THAT THE UNDERTAKING NIKOLAUS MEETH , WINDOW MANUFACTURERS AND WOOD PROCESSORS , ESTABLISHED IN PIESPORT/MOSEL , FEDERAL REPUBLIC OF GERMANY , THE DEFENDANT IN THE MAIN ACTION AND APPELLANT ON A POINT OF LAW , ENTERED INTO A CONTRACT WITH GLACETAL S . A R . L ., THE PLAINTIFF IN THE MAIN ACTION AND RESPONDENT TO THE APPEAL , FOR THE SUPPLY OF GLASS BY THE FRENCH COMPANY TO THE GERMAN UNDERTAKING .

THE PARTIES AGREED THAT THE CONTRACT SHOULD BE GOVERNED BY GERMAN LAW , THAT THE PLACE OF PERFORMANCE OF THE CONTRACT WAS PIESPORT AND THAT ' ' IF MEETH SUES GLACETAL THE FRENCH COURTS ALONE SHALL HAVE JURISDICTION. IF GLACETAL SUES MEETH THE GERMAN COURTS ALONE SHALL HAVE JURISDICTION ' '.

WHEN MEETH FAILED TO PAY FOR CERTAIN DELIVERIES EFFECTED BY GLACETAL THE LATTER COMMENCED PROCEEDINGS TO OBTAIN PAYMENT OF THE SUMS DUE BEFORE THE LANDGERICHT TRIER - THE COURT HAVING JURISDICTION ON THE BASIS OF THE DEFENDANT ' S DOMICILE - WHICH ORDERED THE GERMAN UNDERTAKING TO MAKE PAYMENT.

3IN THE COURSE OF THAT PROCEDURE MEETH RAISED AGAINST GLACETAL ' S CLAIM A DEFENCE OF SET-OFF RELATING TO THE DAMAGE WHICH IT CLAIMED TO HAVE SUFFERED OWING TO DELAY OR DEFAULT ON THE PART OF THE FRENCH COMPANY IN PERFORMING ITS OBLIGATIONS UNDER THE CONTRACT.

THE COURT OF FIRST INSTANCE , HOWEVER , REFUSED TO ALLOW THAT SUM TO BE SET OFF AGAINST THE SALE-PRICE CLAIMED BY THE FRENCH COMPANY SINCE IT CONSIDERED THAT MEETH HAD FAILED TO ADDUCE SUFFICIENT PROOF IN SUPPORT OF ITS CLAIM FOR DAMAGES.

MEETH APPEALED AGAINST THAT JUDGMENT TO THE OBERLANDESGERICHT KOBLENZ , WHICH IN TURN FOUND THAT THE FRENCH UNDERTAKING WAS ENTITLED TO THE PAYMENTS IT CLAIMED , SUBJECT , HOWEVER , TO THE EFFECTS OF A COMPOSITION IN BANKRUPTCY WHICH HAD IN THE MEANTIME BEEN ARRANGED.

WITH REGARD TO THE SET-OFF BETWEEN THE SELLING PRICE AND THE CLAIM SUBMITTED BY MEETH , THE OBERLANDESGERICHT DID NOT ALLOW THIS DEFENCE ON THE GROUND THAT THE CLAUSE CONFERRING JURISDICTION CONTAINED IN THE AGREEMENT BETWEEN THE PARTIES DID NOT PERMIT A SET-OFF TO BE CLAIMED BEFORE THE GERMAN COURTS.

AN APPEAL WAS MADE AGAINST THIS JUDGMENT ON A POINT OF LAW TO THE BUNDESGERICHTSHOF WHICH CONSIDERS THAT THE ANSWER TO THIS QUESTION DEPENDS ON THE INTERPRETATION OF ARTICLE 17 OF THE CONVENTION AND HAS REFERRED TWO PRELIMINARY QUESTIONS ON THIS POINT TO THE COURT OF JUSTICE .

THE FIRST QUESTION

4THE FIRST QUESTION ASKS :

' ' DOES THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION PERMIT AN AGREEMENT UNDER WHICH THE TWO PARTIES TO A CONTRACT FOR SALE , WHO ARE DOMICILED IN DIFFERENT STATES , CAN BE SUED ONLY IN THE COURTS OF THEIR RESPECTIVE STATES?

' '

5ACCORDING TO THE FIRST PARAGRAPH OF ARTICLE 17 ' ' IF THE PARTIES. . . 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 CONNEXION WITH A PARTICULAR LEGAL RELATIONSHIP , THAT COURT OR THOSE COURTS SHALL HAVE EXCLUSIVE JURISDICTION ' '.

WITH REGARD TO AN AGREEMENT CONFERRING RECIPROCAL JURISDICTION IN THE FORM IN WHICH IT APPEARS IN THE CONTRACT WHOSE IMPLEMENTATION FORMS THE SUBJECT- MATTER OF THE DISPUTE , THE INTERPRETATION OF THAT PROVISION GIVES RISE TO DIFFICULTY BECAUSE OF THE FACT THAT ARTICLE 17 , AS IT IS WORDED , REFERS TO THE CHOICE BY THE PARTIES TO THE CONTRACT OF A SINGLE COURT OR THE COURTS OF A SINGLE STATE.

THAT WORDING , WHICH IS BASED ON THE MOST WIDESPREAD BUSINESS PRACTICE , CANNOT , HOWEVER , BE INTERPRETED AS INTENDING TO EXCLUDE THE RIGHT OF THE PARTIES TO AGREE ON TWO OR MORE COURTS FOR THE PURPOSE OF SETTLING ANY DISPUTES WHICH MAY ARISE.

THIS INTERPRETATION IS JUSTIFIED ON THE GROUND THAT ARTICLE 17 IS BASED ON A RECOGNITION OF THE INDEPENDENT WILL OF THE PARTIES TO A CONTRACT IN DECIDING WHICH COURTS ARE TO HAVE JURISDICTION TO SETTLE DISPUTES FALLING WITHIN THE SCOPE OF THE CONVENTION , OTHER THAN THOSE WHICH ARE EXPRESSLY EXCLUDED PURSUANT TO THE SECOND PARAGRAPH OF ARTICLE 17 .

THIS APPLIES PARTICULARLY WHERE THE PARTIES HAVE BY SUCH AN AGREEMENT RECIPROCALLY CONFERRED JURISDICTION ON THE COURTS SPECIFIED IN THE GENERAL RULE LAID DOWN BY ARTICLE 2 OF THE CONVENTION.

ALTHOUGH SUCH AN AGREEMENT COINCIDES WITH THE SCOPE OF ARTICLE 2 IT IS NEVERTHELESS EFFECTIVE IN THAT IT EXCLUDES , IN RELATIONS BETWEEN THE PARTIES , OTHER OPTIONAL ATTRIBUTIONS OF JURISDICTION , SUCH AS THOSE DETAILED IN ARTICLES 5 AND 6 OF THE CONVENTION.

6THE REPLY TO THE FIRST QUESTION MUST ACCORDINGLY BE THAT THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION CANNOT BE INTERPRETED AS PROHIBITING AN AGREEMENT UNDER WHICH THE TWO PARTIES TO A CONTRACT FOR SALE , WHO ARE DOMICILED IN DIFFERENT STATES , CAN BE SUED ONLY IN THE COURTS OF THEIR RESPECTIVE STATES.

THE SECOND QUESTION

7THE SECOND QUESTIONS ASKS :

' ' WHERE AN AGREEMENT PERMITTED BY THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION CONTAINS THE CLAUSE MENTIONED IN QUESTION 1 , DOES IT AUTOMATICALLY RULE OUT ANY OFF-SET WHICH ONE OF THE PARTIES TO THE CONTRACT WISHES TO PROPOSE IN PURSUANCE OF A CLAIM ARISING UNDER THE SAID AGREEMENT IN ANSWER

TO THE CLAIM MADE BY THE OTHER PARTY IN THE COURT HAVING JURISDICTION TO HEAR THE LATTER CLAIM?

' '

8ACCORDING TO THE FIRST PARAGRAPH OF ARTICLE 17 , JURISDICTION IS CONFERRED ON A GIVEN COURT OR COURTS IN ORDER TO SETTLE ANY DISPUTES WHICH HAVE ARISEN OR WHICH MAY ARISE ' ' IN CONNEXION WITH A PARTICULAR LEGAL RELATIONSHIP ' '.

THE QUESTION OF THE EXTENT TO WHICH A COURT BEFORE WHICH A CASE IS BROUGHT PURSUANT TO A RECIPROCAL JURISDICTION CLAUSE , SUCH AS THAT APPEARING IN THE CONTRACT BETWEEN THE PARTIES , HAS JURISDICTION TO DECIDE ON A SET-OFF CLAIMED BY ONE OF THE PARTIES ON THE BASIS OF THE DISPUTED CONTRACTUAL OBLIGATION MUST BE DETERMINED WITH REGARD BOTH TO THE NEED TO RESPECT INDIVIDUALS ' RIGHT OF INDEPENDENCE , UPON WHICH ARTICLE 17 , AS HAS BEEN NOTED ABOVE , IS BASED , AND THE NEED TO AVOID SUPERFLUOUS PROCEDURE , WHICH FORMS THE BASIS OF THE CONVENTION AS A WHOLE OF WHICH ARTICLE 17 IS PART.

IN THE LIGHT OF BOTH OF THESE OBJECTIVES ARTICLE 17 CANNOT BE INTERPRETED AS PREVENTING A COURT BEFORE WHICH PROCEEDINGS HAVE BEEN INSTITUTED PURSUANT TO A CLAUSE CONFERRING JURISDICTION OF THE TYPE DESCRIBED ABOVE FROM TAKING INTO ACCOUNT A CLAIM FOR A SET-OFF CONNECTED WITH THE LEGAL RELATIONSHIP IN DISPUTE IF SUCH COURT CONSIDERS THAT COURSE TO BE COMPATIBLE WITH THE LETTER AND SPIRIT OF THE CLAUSE CONFERRING JURISDICTION.

9ACCORDINGLY THE REPLY TO THE SECOND QUESTION MUST BE THAT WHERE THERE IS A CLAUSE CONFERRING JURISDICTION SUCH AS THAT DESCRIBED IN THE REPLY TO THE FIRST QUESTION THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION CANNOT BE INTERPRETED AS PROHIBITING THE COURT BEFORE WHICH A DISPUTE HAS BEEN BROUGHT IN PURSUANCE OF SUCH A CLAUSE FROM TAKING INTO ACCOUNT A SET-OFF CONNECTED WITH THE LEGAL RELATIONSHIP IN DISPUTE .

COSTS

10THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND BY THE COMMISSION , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE BUNDESGERICHTSHOF , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESGERICHTSHOF BY AN ORDER OF 1 FEBRUARY 1978 , HEREBY RULES :

1 . THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS CANNOT BE INTERPRETED AS PROHIBITING AN AGREEMENT UNDER WHICH THE TWO PARTIES TO A CONTRACT FOR SALE , WHO ARE DOMICILED IN DIFFERENT STATES , CAN BE SUED ONLY IN THE COURTS OF THEIR RESPECTIVE STATES.

2 . WHERE THERE IS A CLAUSE CONFERRRING JURISDICTION SUCH AS THAT DESCRIBED IN THE REPLY TO THE FIRST QUESTION THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 CANNOT BE INTERPRETED AS PROHIBITING THE COURT BEFORE WHICH A DISPUTE HAS BEEN BROUGHT IN PURSUANCE OF SUCH A CLAUSE FROM TAKING INTO ACCOUNT A SET-OFF CONNECTED WITH THE LEGAL RELATIONSHIP IN DISPUTE.

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PROCEDU Reference for a preliminary ruling

ADVGEN Capotorti

JUDGRAP Pescatore

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**Judgment of the Court
of 21 June 1978
Bertrand v Paul Ott KG. Reference for a preliminary ruling: Cour de cassation - France. Sale of goods on instalment credit terms. Case 150/77.**

CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMMERCIAL MATTERS - JURISDICTION IN THE CASE OF SALES AND LOANS ON INSTALMENTS - CONCEPT OF ' ' SALE OF GOODS ON INSTALMENT CREDIT TERMS ' ' - INDEPENDENT CLASSIFICATION WITHIN THE CONTEXT OF THE CONVENTION - DESCRIPTION

(CONVENTION OF 27 SEPTEMBER 1968 , ARTS. 13 AND 14)

SINCE THE CONCEPT OF A CONTRACT OF SALE ON INSTALMENT CREDIT TERMS VARIES FROM ONE MEMBER STATE TO ANOTHER , IN ACCORDANCE WITH THE OBJECTIVES PURSUED BY THEIR RESPECTIVE LAWS , IT IS NECESSARY , IN THE CONTEXT OF THE CONVENTION , TO CONSIDER THAT CONCEPT AS BEING INDEPENDENT AND THEREFORE TO GIVE IT A UNIFORM SUBSTANTIVE CONTENT ALLIED TO THE COMMUNITY ORDER.

ACCORDING TO THE PRINCIPLES COMMON TO THE LAWS OF THE MEMBER STATES , THE SALE OF GOODS ON INSTALMENT CREDIT TERMS IS TO BE UNDERSTOOD AS A TRANSACTION IN WHICH THE PRICE IS DISCHARGED BY WAY OF SEVERAL PAYMENTS OR WHICH IS LINKED TO A FINANCING CONTRACT. HOWEVER , A RESTRICTIVE INTERPRETATION OF THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION , IN CONFORMITY WITH THE OBJECTIVES PURSUED BY SECTION 4 , ENTAILS THE RESTRICTION OF THE JURISDICTIONAL ADVANTAGE FOR WHICH PROVISION IS MADE BY THAT ARTICLE TO BUYERS WHO ARE IN NEED OF PROTECTION , THEIR ECONOMIC POSITION BEING ONE OF WEAKNESS IN COMPARISON WITH SELLERS BY REASON OF THE FACT THAT THEY ARE PRIVATE FINAL CONSUMERS AND ARE NOT ENGAGED , WHEN BUYING THE PRODUCT ACQUIRED ON INSTALMENT CREDIT TERMS , IN TRADE OR PROFESSIONAL ACTIVITIES.

IN CASE 150/77

REFERENCE TO THE COURT PURSUANT TO ARTICLES 1 TO 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 FRENCH COUR DE CASSATION (FIRST CIVIL CHAMBER) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

SOCIETE BERTRAND , HAVING ITS REGISTERED OFFICE AT ARNAGE (FRANCE)

AND

PAUL OTT KG , HAVING ITS REGISTERED OFFICE AT NEUSTADT/STUTTGART (FEDERAL REPUBLIC OF GERMANY)

ON THE INTERPRETATION OF THE CONCEPT ' ' SALE OF GOODS ON INSTALMENT CREDIT TERMS ' ' WITHIN THE MEANING OF ARTICLE 13 OF THE SAID CONVENTION OF 27 SEPTEMBER 1968 ,

1BY JUDGMENT OF 8 NOVEMBER 1977 , WHICH WAS RECEIVED AT THE COURT REGISTRY ON 15 DECEMBER 1977 , THE FRENCH COUR DE CASSATION REFERRED TO THE COURT

OF JUSTICE A QUESTION , PURSUANT TO ARTICLES 1 TO 3 OF THE PROTOCOL OF 3 JUNE 1971 (JOURNAL OFFICIEL L 204 , P. 28) 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 (JOURNAL OFFICIEL L 299 OF 31 DECEMBER 1972 , P . 32), HEREINAFTER REFERRED TO AS ' ' THE CONVENTION ' ' , FOR A PRELIMINARY RULING CONCERNING THE INTERPRETATION OF ARTICLES 13 , 14 AND 28 OF THE SAID CONVENTION.

2THAT QUESTION HAS BEEN RAISED IN THE CONTEXT OF A DISPUTE BETWEEN TWO COMMERCIAL UNDERTAKINGS , ONE HAVING ITS REGISTERED OFFICE IN GERMANY , THE OTHER IN FRANCE , CONCERNING A CONTRACT , DATED 12 FEBRUARY 1972 , FOR THE SALE OF A MACHINE TOOL , THE PRICE OF WHICH , FIXED AT DM 74 205 , WAS TO BE PAID BY THE FRENCH COMPANY BY WAY OF TWO EQUAL BILLS OF EXCHANGE PAYABLE AT 60 AND 90 DAYS , WHICH WERE ONLY PARTIALLY DISCHARGED.

3BY JUDGMENT OF 10 MAY 1974 THE LANDGERICHT STUTTGART ORDERED THE FRENCH COMPANY , IN ITS ABSENCE , TO PAY THE SUM OF DM 7 139 , PLUS INTEREST .

4THAT DECISION WAS DECLARED TO BE ENFORCEABLE IN FRANCE , FIRST BY ORDER OF THE TRIBUNAL DE GRANDE INSTANCE , LE MANS , OF 30 JUNE 1975 , AND THEN BY CONFORMATORY JUDGMENT OF THE COUR D ' APPEL , ANGERS , OF 20 MAY 1976 .

5AN APPEAL WAS MADE AGAINST THAT JUDGMENT ON A POINT OF LAW.

6THE COUR DE CASSATION HELD THAT THE JUDGMENT OF THE COUR D ' APPEL , ANGERS , ' ' WOULD BE VALID UNDER THE THIRD PARAGRAPH OF ARTICLE 28 OF THE BRUSSELS CONVENTION , BY VIRTUE OF WHICH THE JURISDICTION OF THE COURTS OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN MAY NOT BE REVIEWED BY THE COURT BEFORE WHICH ENFORCEMENT IS SOUGHT UNLESS THE SALE CAN BE HELD TO BE A SALE OF GOODS ON INSTALMENT CREDIT TERMS WITHIN THE MEANING OF ARTICLE 13 OF THE CONVENTION , IN WHICH CASE , UNDER THE SECOND PARAGRAPH OF ARTICLE 14 AND THE FIRST PARAGRAPH OF ARTICLE 28 , PROCEEDINGS MAY BE BROUGHT ONLY IN THE COURTS OF THE STATE IN WHICH THE RESPONDENT COMPANY IS DOMICILED , NAMELY , THE COURTS OF FRANCE , AND EXECUTION MUST BE WITHHELD FROM THE DECISION OF A GERMAN COURT ' '.

7THE COUR DE CASSATION DEDUCED FROM THIS THAT THE SOLUTION TO THE PROBLEM DEPENDED UPON THE STATUS TO BE ACCORDED TO THE CONTRACT AND IT THEREFORE REFERRED THE CASE TO THE COURT OF JUSTICE IN ORDER TO ASCERTAIN BY WAY OF A PRELIMINARY RULING ' ' WHETHER THE SALE OF A MACHINE WHICH ONE COMPANY AGREES TO MAKE TO ANOTHER COMPANY ON THE BASIS OF A PRICE TO BE PAID BY WAY OF TWO EQUAL BILLS OF EXCHANGE PAYABLE AT 60 AND 90 DAYS CAN BE HELD TO BE A SALE OF GOODS ON INSTALMENT CREDIT TERMS WITHIN THE MEANING OF ARTICLE 13 OF THE BRUSSELS CONVENTION ' '.

8IN RELATION TO THE SALE OF GOODS ON INSTALMENT CREDIT TERMS , THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION PROVIDES THAT ' ' PROCEEDINGS MAY BE BROUGHT BY A SELLER AGAINST A BUYER... ONLY IN THE COURTS OF THE STATE IN WHICH THE DEFENDANT IS DOMICILED ' '.

9IN CONSEQUENCE OF THAT IMPERATIVE RULE OF JURIDICTION THE LANDGERICHT STUTTGART , THE COURT IN WHICH THE ORIGINAL JUDGMENT WAS GIVEN , THE TRIBUNAL DE GRANDE INSTANCE , LE MANS , AND THE COUR D ' APPEL , ANGERS , THE COURTS IN WHICH ENFORCEMENT WAS SOUGHT , REFUSED , WHETHER BY IMPLICATION OR

EXPRESSLY , IN DEFINING THEIR JURISDICTION , TO CLASSIFY THE CONTRACT OF SALE IN QUESTION AS A CONTRACT FOR THE SALE OF GOODS ON INSTALMENT CREDIT TERMS.

10THE RESERVATIONS OF THE COUR DE CASSATION REGARDING THE PRECISE STATUS OF THE SAID CONTRACT PERSUADED IT TO REFER THE ABOVE-MENTIONED QUESTION TO THE COURT OF JUSTICE.

11BY THAT QUESTION THE COURT IS ASKED WHETHER A CONTRACT OF SALE SUCH AS THAT DESCRIBED IS ENTITLED TO THE PRIVILEGED POSITION WITH REGARD TO JURISDICTION CREATED BY THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION.

12THE CONCEPT OF A CONTRACT OF SALE ON INSTALMENT CREDIT TERMS VARIES FROM ONE MEMBER STATE TO ANOTHER , IN ACCORDANCE WITH THE OBJECTIVES PURSUED BY THEIR RESPECTIVE LAWS.

13ALTHOUGH ALL OF THOSE LAWS INCORPORATE THE IDEA OF PROTECTION FOR THE BUYER ' ' ON INSTALMENTS ' ' BECAUSE , IN GENERAL , HE IS THE WEAKER PARTY IN ECONOMIC TERMS IN COMPARISON WITH THE SELLER , CERTAIN OF THEM ARE ALSO BASED ON CONSIDERATIONS OF ECONOMIC , MONETARY AND SAVINGS POLICY , WHICH ARE INTENDED TO CONTROL THE PRACTICE OF SALES ON INSTALMENT CREDIT TERMS , IN PARTICULAR IN RELATION TO CONSUMER DURABLE GOODS (CARS , HOUSEHOLD ELECTRICAL AND AUDIO-VISUAL EQUIPMENT , ETC .), MOST OFTEN BY THE INDIRECT EXPEDIENT OF PROVISIONS RELATING TO MINIMUM DEPOSITS OR TO THE MAXIMUM DURATION OF CREDIT OR BY LAYING DOWN MINIMUM OR MAXIMUM VALUES FOR THE TOTAL SALE PRICE.

14SINCE THESE VARIOUS OBJECTIVES HAVE LED TO THE CREATION OF DIFFERENT RULES IN THE VARIOUS MEMBER STATES IT IS NECESSARY , FOR THE PURPOSE OF ELIMINATING OBSTACLES TO LEGAL RELATIONS AND TO THE SETTLEMENT OF DISPUTES IN THE CONTEXT OF INTRA-COMMUNITY RELATIONS IN MATTERS OF THE SALE OF GOODS ON INSTALMENT CREDIT TERMS , TO CONSIDER THAT CONCEPT AS BEING INDEPENDENT AND THEREFORE COMMON TO ALL THE MEMBER STATES.

15IN FACT , IT WOULD NOT BE POSSIBLE TO GUARANTEE THE HARMONIOUS OPERATION OF ARTICLE 13 ET SEQ. OF THE CONVENTION IF THE EXPRESSION IN QUESTION WERE GIVEN DIFFERENT MEANINGS IN THE VARIOUS MEMBER STATES ACCORDING TO THE COURT FIRST SEISED OF A DISPUTE CONCERNING A CONTRACT FOR THE SALE OF GOODS ON INSTALMENT CREDIT TERMS OR THE COURT HAVING JURISDICTION TO ORDER ENFORCEMENT.

16IT IS THEREFORE INDISPENSABLE , FOR THE COHERENCE OF THE PROVISIONS OF SECTION 4 OF THE CONVENTION , TO GIVE THAT EXPRESSION A UNIFORM SUBSTANTIVE CONTENT ALLIED TO THE COMMUNITY ORDER.

17TO THIS FINDING MUST BE ADDED THE FACT THAT THE COMPULSORY JURISDICTION PROVIDED FOR IN THE SECOND PARAGRAPH OF ARTICLE 14 OF THE CONVENTION MUST , BECAUSE IT DEROGATES FROM THE GENERAL PRINCIPLES OF THE SYSTEM LAID DOWN BY THE CONVENTION IN MATTERS OF CONTRACT , SUCH AS MAY BE DERIVED IN PARTICULAR FROM ARTICLES 2 AND 5 (1), BE STRICTLY LIMITED TO THE OBJECTIVES PROPER TO SECTION 4 OF THE SAID CONVENTION .

18THOSE OBJECTIVES , AS ENSHRINED IN ARTICLES 13 AND 14 OF THE CONVENTION , WERE INSPIRED SOLELY BY A DESIRE TO PROTECT CERTAIN CATEGORIES OF BUYERS

WHO , HAVING BEEN PARTIES TO CONTRACTS FOR THE ' ' SALE OF GOODS ON INSTALMENT CREDIT TERMS ' ' , MAY BE SUED BY THE SELLER ONLY IN THE COURTS OF THE STATE ON THE TERRITORY OF WHICH THE SAID BUYERS ARE DOMICILED , WHEREAS SELLERS DOMICILED ON THE TERRITORY OF A CONTRACTING STATE MAY BE SUED EITHER IN THE COURTS OF THAT STATE OR IN THE COURTS OF THE CONTRACTING STATE IN WHICH THE BUYER IS DOMICILED .

19IN ORDER TO REPLY TO THE QUESTION REFERRED TO THE COURT AN ATTEMPT MUST BE MADE TO ELABORATE AN INDEPENDENT CONCEPT OF THE CONTRACT OF SALE ON INSTALMENT CREDIT TERMS IN VIEW OF THE GENERAL PRINCIPLES WHICH ARE APPARENT IN THIS FIELD FROM THE BODY OF LAWS OF THE MEMBER STATES AND BEARING IN MIND THE OBJECTIVE OF THE PROTECTION OF A CERTAIN CATEGORY OF BUYERS.

20IT IS CLEAR FROM THE RULES COMMON TO THE LAWS OF THE MEMBER STATES THAT THE SALE OF GOODS ON INSTALMENT CREDIT TERMS IS TO BE UNDERSTOOD AS A TRANSACTION IN WHICH THE PRICE IS DISCHARGED BY WAY OF SEVERAL PAYMENTS OR WHICH IS LINKED TO A FINANCING CONTRACT.

21A RESTRICTIVE INTERPRETATION OF THE SECOND PARAGRAPH OF ARTICLE 14 , IN CONFORMITY WITH THE OBJECTIVES PURSUED BY SECTION 4 , ENTAILS THE RESTRICTION OF THE JURISDICTIONAL ADVANTAGE DESCRIBED ABOVE TO BUYERS WHO ARE IN NEED OF PROTECTION , THEIR ECONOMIC POSITION BEING ONE OF WEAKNESS IN COMPARISON WITH SELLERS BY REASON OF THE FACT THAT THEY ARE PRIVATE FINAL CONSUMERS AND ARE NOT ENGAGED , WHEN BUYING THE PRODUCT ACQUIRED ON INSTALMENT CREDIT TERMS , IN TRADE OR PROFESSIONAL ACTIVITIES .

22THE ANSWER TO BE GIVEN TO THE NATIONAL COURT SHOULD THEREFORE BE THAT THE CONCEPT OF THE SALE OF GOODS ON INSTALMENT CREDIT TERMS WITHIN THE MEANING OF ARTICLE 13 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 IS NOT TO BE UNDERSTOOD TO EXTEND TO THE SALE OF A MACHINE WHICH ONE COMPANY AGREES TO MAKE TO ANOTHER COMPANY ON THE BASIS OF A PRICE TO BE PAID BY WAY OF BILLS OF EXCHANGE SPREAD OVER A PERIOD .

COSTS

23THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES AND BY THE GOVERNMENTS OF THE FEDERAL REPUBLIC OF GERMANY , THE ITALIAN REPUBLIC AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE .

24SINCE THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE FRENCH COUR DE CASSATION BY JUDGMENT OF 8 NOVEMBER 1977 , HEREBY RULES :

THE CONCEPT OF THE SALE OF GOODS ON INSTALMENT CREDIT TERMS WITHIN THE MEANING OF ARTICLE 13 OF THE BRUSSELS CONVENTION OF 27 SEPTEMBER 1968 IS NOT TO BE UNDERSTOOD TO EXTEND TO THE SALE OF A MACHINE WHICH ONE COMPANY AGREES TO MAKE TO ANOTHER COMPANY ON THE BASIS OF A PRICE TO BE PAID BY

WAY OF BILLS OF EXCHANGE SPREAD OVER A PERIOD.

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TREATY	European Economic Community
PUBREF	European Court reports 1978 Page 01431 Greek special edition Page 00441 Portuguese special edition Page 00487 Spanish special edition Page 00421
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JURCIT	41968A0927(01)-A13 : N 1 6 7 15 18 22 41968A0927(01)-A14 : N 1 18 41968A0927(01)-A28 : N 1 41968A0927(01)-A28L3 : N 6 41968A0927(01)-A28L1 : N 6 41968A0927(01)-A14L2 : N 6 8 11 17 21 41968A0927(01)-A02 : N 17 41968A0927(01)-A05PT1 : N 17
CONCERNS	Interprets 41968A0927(01) -A13
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	French
OBSERV	Commission ; Federal Republic of Germany ; United Kingdom ; Italy ; Member States ; Institutions
NATIONA	France
NATCOUR	*A8* Cour d'appel d'Angers, 1re chambre, arrêt du 20/05/76 (847/75) ; *A9* Cour de cassation (France), 1re chambre civile, arrêt du 08/11/77 (76-13.547 751) ; *P1* Cour de cassation (France), 1re chambre civile, arrêt du 23/01/79 (76-13.547 89) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 1979 I no 28 ; - Journal du droit international 1979 p.373-375 ; - La Semaine juridique - édition générale 1979 IV p.105 ; - Revue trimestrielle de droit européen 1979 p.181-182 ; ºNOTESº ;

- Gulphe, Pierre: Revue trimestrielle de droit européen 1979 p.182-183 ; - Fadlallah, Ibrahim: Journal du droit international 1979 p.375-379 ; - Vasseur, Michel: Recueil Dalloz Sirey 1980 IR. p.16

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PROCEDU Reference for a preliminary ruling

ADVGEN Capotorti

JUDGRAP Touffait

DATES of document: 21/06/1978
of application: 15/12/1977

**Judgment of the Court
of 14 December 1977
Theodorus Engelbertus Sanders v Ronald van der Putte. Reference for a preliminary ruling: Hoge Raad - Netherlands. Convention on jurisdiction. Case 73-77.**

CONVENTION OF 27 SEPTEMBER 1968 - EXCLUSIVE JURISDICTION - MATTERS RELATING TO TENANCIES OF IMMOVABLE PROPERTY - STRICT INTERPRETATION - BUSINESS CARRIED ON IN IMMOVABLE PROPERTY RENTED FROM A THIRD PARTY BY THE LESSOR - AGREEMENT TO RUN THE BUSINESS - APPLICATION OF ARTICLE 16 EXCLUDED - DISPUTE AS TO THE EXISTENCE OF SUCH AN AGREEMENT

THE ASSIGNMENT , IN THE INTERESTS OF THE PROPER ADMINISTRATION OF JUSTICE , OF EXCLUSIVE JURISDICTION TO THE COURTS OF ONE CONTRACTING STATE IN ACCORDANCE WITH ARTICLE 16 OF THE CONVENTION RESULTS IN DEPRIVING THE PARTIES OF THE CHOICE OF THE FORUM WHICH WOULD OTHERWISE BE THEIRS AND , IN CERTAIN CASES , RESULTS IN THEIR BEING BROUGHT BEFORE A COURT WHICH IS NOT THAT OF THE DOMICILE OF ANY OF THEM. HAVING REGARD TO THAT CONSIDERATION THE PROVISIONS OF ARTICLE 16 MUST NOT BE GIVEN A WIDER INTERPRETATION THAN IS REQUIRED BY THEIR OBJECTIVE . THEREFORE , THE CONCEPT OF ' MATTERS RELATING TO... TENANCIES OF IMMOVABLE PROPERTY ' WITHIN THE CONTEXT OF ARTICLE 16 OF THE CONVENTION MUST NOT BE INTERPRETED AS INCLUDING AN AGREEMENT TO RENT UNDER A USUFRUCTUARY LEASE A RETAIL BUSINESS (VERPACHTING VAN EEN WINKELBEDRIJF) CARRIED ON IN IMMOVABLE PROPERTY RENTED FROM A THIRD PERSON BY THE LESSOR. THE FACT THAT THERE IS A DISPUTE AS TO THE EXISTENCE OF SUCH AN AGREEMENT DOES NOT AFFECT THE REPLY GIVEN AS REGARDS THE APPLICABILITY OF ARTICLE 16 OF THE CONVENTION.

IN CASE 73/77

REFERENCE TO THE COURT UNDER ARTICLES 2 AND 3 OF THE PROTOCOL OF 3 JUNE 1971 (OJ L 204 OF 2. 8. 1975 , P. 28) CONCERNING 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 (JO L 299 OF 31. 12. 1972 , P. 32) BY THE HOGE RAAD DER NEDERLANDEN (SUPREME COURT OF THE NETHERLANDS) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

THEODORUS ENGELBERTUS SANDERS , ARNHEM ,

AND

RONALD VAN DER PUTTE , NOORDWIJKERHOUT ,

ON THE INTERPRETATION OF ARTICLE 16 DOWN TO THE END OF SUBPARAGRAPH (1) OF THE SAID CONVENTION ,

1 BY JUDGMENT OF 10 JUNE 1977 , RECEIVED AT THE COURT ON 15 JUNE 1977 , THE HOGE RAAD DER NEDERLANDEN REFERRED FOR A PRELIMINARY RULING UNDER ARTICLES 2 AND 3 OF THE PROTOCOL OF 3 JUNE 1971 (OJ L 204 OF 2. 8 . 1975 , P. 28) CONCERNING 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 (JO L 299 OF 31 . 12 . 1972 , P. 32) CERTAIN QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 16 DOWN TO THE END OF SUBPARAGRAPH (1) OF THE SAID CONVENTION.

2 THE QUESTIONS WERE RAISED WITHIN THE CONTEXT OF A DISPUTE BETWEEN TWO NETHERLANDS CITIZENS , AT PRESENT DOMICILED IN THE NETHERLANDS , IN RELATION TO AN AGREEMENT MADE IN 1973 BY WHICH THEY ARRANGED THAT ONE WOULD TAKE OVER FROM THE OTHER THE RUNNING OF A FLORIST ' S BUSINESS IN A SHOP WHICH THE LATTER HAD LEASED AT WUPPERTAL-ELBERFELD IN THE FEDERAL REPUBLIC OF GERMANY.

3 A DISPUTE HAVING ARISEN BETWEEN THE PARTIES TO THE MAIN ACTION AS REGARDS THE AGREEMENT WHICH THEY HAD CONCLUDED AND EVEN AS REGARDS ITS EXISTENCE THE ' SUBTENANT ' , SANDERS , WHO HAD REFUSED TO START RUNNING THE BUSINESS , WAS ORDERED TO DO SO BY JUDGMENT DELIVERED IN SUMMARY PROCEEDINGS BY THE PRESIDENT OF THE ARRONDISSEMENTSRECHTBANK , ARNHEM .

4 ON APPEAL , THE GERECHTSHOF , ARNHEM , FOUND THAT THE AGREEMENT IN DISPUTE DID EXIST AND THAT SANDERS OWED TO HIS LESSOR , VAN DER PUTTE , A SUM REPRESENTING THE RENT DUE UNDER THE HEAD-LEASE OF THE SHOP AND A FURTHER SUM REPRESENTING THE USUFRUCTUARY LEASE AS SUCH OF THE BUSINESS , AND ALSO THE ' GOODWILL ' (THE INTANGIBLE ELEMENTS OF THE BUSINESS).

5 SANDERS PLEADED THAT THE GERECHTSHOF HAD NO JURISDICTION ON THE BASIS , IN PARTICULAR , OF ARTICLE 16 OF THE CONVENTION OF 27 SEPTEMBER 1968 , THE FIRST PARAGRAPH OF WHICH PROVIDES THAT THE FOLLOWING COURTS SHALL HAVE EXCLUSIVE JURISDICTION , REGARDLESS OF DOMICILE :

' (1) IN MATTERS RELATING TO RIGHTS IN REM IN , OR TENANCIES OF , IMMOVABLE PROPERTY , THE COURTS OF THE CONTRACTING STATE IN WHICH THE PROPERTY IS SITUATED ;

'

6 SANDERS WAS UNSUCCESSFUL ON THE GROUND THAT IN THE AGREEMENT IN QUESTION THE EMPHASIS FELL LESS ON THE RENT OR LEASE OF IMMOVABLE PROPERTY THAN ON THE RUNNING OF A BUSINESS AND THAT IN THAT CONNEXION THE JUSTIFICATION FOR THE EXCLUSIVE JURISDICTION PROVIDED FOR IN ARTICLE 16 (1), NAMELY THAT TENANCIES AND RENTS OF IMMOVABLE PROPERTY ARE GENERALLY GOVERNED BY SPECIAL LEGAL PROVISIONS AND IT IS PREFERABLE THAT SUCH PROVISIONS SHOULD BE APPLIED BY THE COURTS OF THE STATE IN WHICH THEY ARE IN FORCE , DOES NOT APPLY.

7 SANDERS APPEALED FROM THAT JUDGMENT ON A POINT OF LAW TO THE HOGE RAAD , WHICH ASKS THE FOLLOWING QUESTIONS :

1 . MUST ' TENANCIES OF IMMOVABLE PROPERTY ' WITHIN THE MEANING OF ARTICLE 16 DOWN TO THE END OF SUBPARAGRAPH (1) OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ALSO INCLUDE AN AGREEMENT TO RENT UNDER A USUFRUCTUARY LEASE A RETAIL BUSINESS CARRIED ON IN IMMOVABLE PROPERTY RENTED FROM A THIRD PERSON BY THE LESSOR?

2 . IF SO DOES THE EXCLUSIVE JURISDICTION OF THE COURTS OF THE STATE WHERE THE IMMOVABLE PROPERTY IS SITUATED ALSO APPLY TO A CLAIM ON THE BASIS OF SUCH AN AGREEMENT FOR

(A) PAYMENT OF THE RENT OF THE RETAIL PREMISES UNDER THE USUFRUCTUARY LEASE ; OR

(B) PAYMENT BY THE TENANT UNDER THE USUFRUCTUARY LEASE OF THE HEAD-RENT

OWED BY THE LESSOR TO THE OWNER OF THE IMMOVABLE PROPERTY ; OR

(C) PAYMENT OF CONSIDERATION FOR THE GOODWILL OF THE RETAIL BUSINESS?

3 . IS THE ANSWER TO THE QUESTIONS SET OUT ABOVE AFFECTED BY THE FACT THAT IN THE PROCEEDINGS THE DEFENDANT (THE TENANT UNDER THE USUFRUCTUARY LEASE (PACHTER)) HAS CONTESTED THE EXISTENCE OF THE AGREEMENT?

THE FIRST TWO QUESTIONS

8 UNDER THE TERMS OF ARTICLE 2 OF THE CONVENTION AND SUBJECT TO ANY OTHER PROVISIONS THEREOF , PERSONS DOMICILED IN A CONTRACTING STATE SHALL , WHATEVER THEIR NATIONALITY , BE SUED IN THE COURTS OF THAT STATE .

9 THE CONVENTION ADMITS OF EXCEPTIONS TO THE GENERAL RULE BY ALLOWING THE PLAINTIFF IN CERTAIN CASES TO SUE THE DEFENDANT BEFORE THE COURT OF THE STATE IN WHICH THE LATTER IS DOMICILED OR BEFORE THE COURT OF ANOTHER CONTRACTING STATE , ACCORDING TO THE SPECIAL PROVISIONS IN ARTICLES 5 , 6 , 8 , 9 , 10 , 13 AND 14 OF THE CONVENTION .

10 ON THE OTHER HAND , ARTICLE 16 OF THE CONVENTION PROVIDES FOR EXCLUSIVE JURISDICTION , REGARDLESS OF DOMICILE.

11 AS REGARDS THE MATTERS LISTED UNDER SUBPARAGRAPHS (2), (3), (4) AND (5) OF THAT ARTICLE IT IS CLEAR THAT THE COURTS WHICH ARE GIVEN EXCLUSIVE JURISDICTION ARE THOSE WHICH ARE THE BEST PLACED TO DEAL WITH THE DISPUTES IN QUESTION.

12 THE SAME APPLIES TO THE ASSIGNMENT OF EXCLUSIVE JURISDICTION TO THE COURTS OF THE CONTRACTING STATE IN WHICH THE PROPERTY IS SITUATED IN MATTERS RELATING TO RIGHTS IN REM IN , OR TENANCIES OF , IMMOVABLE PROPERTY .

13 IN FACT , ACTIONS CONCERNING RIGHTS IN REM IN IMMOVABLE PROPERTY ARE TO BE JUDGED ACCORDING TO THE RULES OF THE STATE IN WHICH THE IMMOVABLE PROPERTY IS SITUATED SINCE THE DISPUTES WHICH ARISE RESULT FREQUENTLY IN CHECKS , INQUIRIES AND EXPERT ASSESSMENTS WHICH MUST BE CARRIED OUT ON THE SPOT , WITH THE RESULT THAT THE ASSIGNMENT OF EXCLUSIVE JURISDICTION SATISFIES THE NEED FOR THE PROPER ADMINISTRATION OF JUSTICE.

14 TENANCIES OF IMMOVABLE PROPERTY ARE GENERALLY GOVERNED BY SPECIAL RULES AND IT IS PREFERABLE , IN THE LIGHT OF THEIR COMPLEXITY , THAT THEY BE APPLIED ONLY BY THE COURTS OF THE STATES IN WHICH THEY ARE IN FORCE .

15 THE FOREGOING CONSIDERATIONS EXPLAIN THE ASSIGNMENT OF EXCLUSIVE JURISDICTION TO THE COURTS OF THE STATE IN WHICH THE IMMOVABLE PROPERTY IS SITUATED IN THE CASE OF DISPUTES RELATING TO TENANCIES OF IMMOVABLE PROPERTY PROPERLY SO-CALLED , THAT IS TO SAY , IN PARTICULAR , DISPUTES BETWEEN LESSORS AND TENANTS AS TO THE EXISTENCE OR INTERPRETATION OF LEASES OR TO COMPENSATION FOR DAMAGE CAUSED BY THE TENANT AND TO GIVING UP POSSESSION OF THE PREMISES.

16 THE SAME CONSIDERATIONS DO NOT APPLY WHERE THE PRINCIPAL AIM OF THE AGREEMENT IS OF A DIFFERENT NATURE , IN PARTICULAR , WHERE IT CONCERNS THE OPERATION OF A BUSINESS.

17 FURTHERMORE , THE ASSIGNMENT , IN THE INTERESTS OF THE PROPER ADMINISTRATION OF JUSTICE , OF EXCLUSIVE JURISDICTION TO THE COURTS OF ONE CONTRACTING STATE IN ACCORDANCE WITH ARTICLE 16 OF THE CONVENTION RESULTS IN DEPRIVING

THE PARTIES OF THE CHOICE OF THE FORUM WHICH WOULD OTHERWISE BE THEIRS AND , IN CERTAIN CASES , RESULTS IN THEIR BEING BROUGHT BEFORE A COURT WHICH IS NOT THAT OF THE DOMICILE OF ANY OF THEM .

18 HAVING REGARD TO THAT CONSIDERATION THE PROVISIONS OF ARTICLE 16 MUST NOT BE GIVEN A WIDER INTERPRETATION THAN IS REQUIRED BY THEIR OBJECTIVE .

19 THEREFORE , THE CONCEPT OF ' MATTERS RELATING TO... TENANCIES OF IMMOVABLE PROPERTY ' WITHIN THE CONTEXT OF ARTICLE 16 OF THE CONVENTION MUST NOT BE INTERPRETED AS INCLUDING AN AGREEMENT TO RENT UNDER A USUFRUCTUARY LEASE A RETAIL BUSINESS (VERPACHTING VAN EEN WINKELBEDRIJF) CARRIED ON IN IMMOVABLE PROPERTY RENTED FROM A THIRD PERSON BY THE LESSOR.

20 IN THE LIGHT OF THE REPLY TO THE FIRST QUESTION , THE SECOND QUESTION DOES NOT CALL FOR AN ANSWER.

THE THIRD QUESTION

21 THE THIRD QUESTION ASKS WHETHER THE REPLY TO THE QUESTIONS SET OUT ABOVE IS AFFECTED BY THE FACT THAT IN THE PROCEEDINGS THE DEFENDANT (THE TENANT UNDER THE USUFRUCTUARY LEASE (PACHTER)) HAS CONTESTED THE EXISTENCE OF THE AGREEMENT.

22 IT EMERGES FROM THE CLEAR TERMS OF ARTICLE 16 OF THE CONVENTION THAT THE FACT THAT THERE IS A DISPUTE AS TO THE EXISTENCE OF THE AGREEMENT WHICH FORMS THE SUBJECT OF THE ACTION DOES NOT AFFECT THE REPLY GIVEN AS REGARDS THE APPLICABILITY OF THAT ARTICLE.

COSTS

23 THE COSTS INCURRED BY THE GOVERNMENT OF THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE AND AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION 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

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE HOGE RAAD DER NEDERLANDEN BY ORDER OF 10 JUNE 1977 , HEREBY RULES :

1 . THE CONCEPT OF ' MATTERS RELATING TO TENANCIES OF IMMOVABLE PROPERTY ' WITHIN THE CONTEXT OF ARTICLE 16 OF THE CONVENTION MUST NOT BE INTERPRETED AS INCLUDING AN AGREEMENT TO RENT UNDER A USUFRUCTUARY LEASE A RETAIL BUSINESS (VERPACHTING VAN EEN WINKELBEDRIJF) CARRIED ON IN IMMOVABLE PROPERTY RENTED FROM A THIRD PERSON BY THE LESSOR ;

2 . THE FACT THAT THERE IS A DISPUTE AS TO THE EXISTENCE OF THE AGREEMENT WHICH FORMS THE SUBJECT OF THE ACTION DOES NOT AFFECT THE REPLY GIVEN AS REGARDS THE APPLICABILITY OF ARTICLE 16 OF THE CONVENTION .

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JURCIT	41968A0927(01)-A16PT1 : N 1 5 - 7 12 19 41968A0927(01)-A02 : N 8 41968A0927(01)-A05 : N 9 41968A0927(01)-A06 : N 9 41968A0927(01)-A08 : N 9 41968A0927(01)-A09 : N 9 41968A0927(01)-A10 : N 9 41968A0927(01)-A13 : N 9 41968A0927(01)-A14 : N 9 41968A0927(01)-A16 : N 10 17 18 22 41968A0927(01)-A16PT2 : N 11 41968A0927(01)-A16PT3 : N 11 41968A0927(01)-A16PT4 : N 11 41968A0927(01)-A16PT5 : N 11
CONCERNS	Interprets 41968A0927(01) -A16PT1
SUB	Brussels Convention of 27 September 1968 ; Jurisdiction
AUTLANG	Dutch
OBSERV	Commission ; United Kingdom ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A8* Gerechtshof Arnhem, 1e civiele kamer, arrest van 04/05/1976 (66/74) ; *A9* Hoge Raad, arrest van 10/06/1977 (11.119) ; - Rechtspraak van de week 1977 no 78 ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1979 no 416 ; - Netherlands International Law Review 1978 p.83 (résumé) ; *P1* Hoge Raad, arrest van 31/03/1978 (11.119) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1979 no 418
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PROCEDU	Reference for a preliminary ruling
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JUDGRAP	O'Keeffe
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**Judgment of the Court
of 22 November 1977
Industrial Diamond Supplies v Luigi Riva. Reference for a preliminary ruling: Rechtbank van eerste aanleg Antwerpen - Belgium. Convention of 27 September 1968 - Stay of proceedings (Articles 30 and 38). Case 43-77.**

CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - RECOGNITION OR GRANT OF AN ORDER FOR ENFORCEMENT IN ONE CONTRACTING STATE OF A JUDGMENT GIVEN IN ANOTHER CONTRACTING STATE - STAY OF THE PROCEEDINGS FOR RECOGNITION OR ENFORCEMENT - APPEAL LODGED IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN AGAINST THE FOREIGN JUDGMENT - CONCEPT OF ' ORDINARY APPEAL ' WITHIN THE MEANING OF ARTICLES 30 AND 38 OF THE CONVENTION - DIFFERENCES IN THE LEGAL CONCEPTS OF THE VARIOUS CONTRACTING STATES WITH REGARD TO THE DISTINCTION BETWEEN ' ORDINARY ' AND ' EXTRAORDINARY ' APPEALS - DEFINITION OF THE CONCEPT OF ' ORDINARY APPEAL ' SOLELY WITHIN THE FRAMEWORK OF THE CONVENTION - MEANING

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLES 30 AND 38)

1 . BECAUSE OF THE DIFFERENCES IN THE LEGAL CONCEPTS OF THE MEMBER STATES WHICH ARE PARTIES TO THE CONVENTION OF 27 SEPTEMBER 1968 WITH REGARD TO THE DISTINCTION BETWEEN ' ORDINARY ' AND ' EXTRAORDINARY ' APPEALS , THE MEANING OF THE CONCEPT OF ' ORDINARY APPEAL ' CANNOT BE DETERMINED BY REFERENCE TO A NATIONAL LEGAL SYSTEM , WHETHER THAT OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN OR THAT OF THE STATE IN WHICH RECOGNITION OR ENFORCEMENT IS SOUGHT. THIS CONCEPT MAY THEREFORE BE DEFINED SOLELY WITHIN THE FRAMEWORK OF THE CONVENTION ITSELF .

2 . IN VIEW OF THE STRUCTURE OF ARTICLES 30 AND 38 AND OF THEIR FUNCTION IN THE SYSTEM OF THE CONVENTION , ANY APPEAL WHICH IS SUCH THAT IT MAY RESULT IN THE ANNULMENT OR THE AMENDMENT OF THE JUDGMENT WHICH IS THE SUBJECT-MATTER OF THE PROCEDURE FOR RECOGNITION OR ENFORCEMENT UNDER THE CONVENTION AND THE LODGING OF WHICH IS BOUND , IN THE STATE IN WHICH JUDGMENT WAS GIVEN , TO A PERIOD WHICH IS LAID DOWN BY THE LAW AND STARTS TO RUN BY VIRTUE OF THAT SAME JUDGMENT CONSTITUTES AN ' ORDINARY APPEAL ' WHICH HAS BEEN LODGED OR MAY BE LODGED AGAINST A FOREIGN JUDGMENT.

IN CASE 43/77

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 RECHTBANK VAN EERSTE AANLEG (COURT OF FIRST INSTANCE) OF THE JUDICIAL DISTRICT OF ANTWERP FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN :

INDUSTRIAL DIAMOND SUPPLIES , A PARTNERSHIP WITH LIMITED LIABILITY HAVING ITS REGISTERED OFFICE IN ANTWERP ,

AND

LUIGI RIVA , A COMMERCIAL REPRESENTATIVE RESIDING IN TURIN ,

ON THE INTERPRETATION OF ARTICLES 30 AND 38 OF THE CONVENTION OF 27 SEPTEMBER

1968 ,

1 BY JUDGMENT OF 7 APRIL 1977 , WHICH WAS RECEIVED AT THE COURT ON 18 APRIL 1977 , THE RECHTBANK VAN EERSTE AANLEG (COURT OF FIRST INSTANCE), ANTWERP , REFERRED TO THE COURT OF JUSTICE UNDER ARTICLES 2 (3) AND 3 (2) OF THE PROTOCOL OF 3 JUNE 1971 TWO QUESTIONS ON THE INTERPRETATION OF THE EXPRESSION ' ORDINARY APPEAL ' USED IN ARTICLES 30 AND 38 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 ').

2 THE FILE SHOWS THAT INDUSTRIAL DIAMOND SUPPLIES , THE PLAINTIFF IN THE MAIN ACTION , HAVING ITS REGISTERED OFFICE IN ANTWERP , WAS ORDERED BY THE TRIBUNALE CIVILE E PENALE (CIVIL AND CRIMINAL COURT), TURIN , TO PAY TO LUIGI RIVA , THE DEFENDANT IN THE MAIN ACTION , A COMMERCIAL REPRESENTATIVE RESIDING IN TURIN , THE SUM OF LIT 53 052 980 , AS COMMISSION OWED BY THE PLAINTIFF TO THE DEFENDANT IN THE CONTEXT OF A CONTRACTUAL RELATIONSHIP BETWEEN THE PARTIES , TOGETHER WITH INTEREST AND LEGAL COSTS.

3 THE JUDGMENT , WHICH WAS GIVEN ON 23 SEPTEMBER 1976 BY THE TURIN COURT ON APPEAL FROM A DECISION OF THE PRETORE OF THE SAME CITY , IS AT PRESENT ENFORCEABLE.

4 ON 25 NOVEMBER 1976 MR RIVA OBTAINED FROM THE ANTWERP COURT A JUDGMENT AUTHORIZING THE ENFORCEMENT IN BELGIUM OF THE JUDGMENT OF THE TURIN COURT , IN ACCORDANCE WITH THE PROVISIONS OF ARTICLE 31 ET SEQ. OF THE CONVENTION.

5 ON 15 DECEMBER 1976 , INDUSTRIAL DIAMOND SUPPLIES LODGED AN APPEAL AGAINST THE ORDER FOR ENFORCEMENT BEFORE THE ANTWERP COURT UNDER ARTICLES 36 AND 37 OF THE CONVENTION.

6 ON 27 DECEMBER 1976 INDUSTRIAL DIAMOND SUPPLIES LODGED AN APPEAL IN CASSATION BEFORE THE ITALIAN CORTE SUPREMA DI CASSAZIONE (SUPREME COURT OF APPEAL) AGAINST THE JUDGMENT GIVEN ON APPEAL BY THE TURIN COURT .

7 IT IS NOT IN DISPUTE THAT THAT APPEAL DOES NOT HAVE THE EFFECT OF SUSPENDING THE ENFORCEABILITY OF THE JUDGMENT GIVEN BY THE TURIN COURT

8 IT IS ALSO ESTABLISHED THAT INDUSTRIAL DIAMOND SUPPLIES HAS NOT SOUGHT A STAY OF EXECUTION IN ITALY.

9 INDUSTRIAL DIAMOND SUPPLIES REQUESTED THE ANTWERP COURT PRINCIPALLY TO SUSPEND THE PROCEEDINGS RELATING TO THE ENFORCEMENT OF THE JUDGMENT GIVEN BY THE TURIN COURT UNTIL FINAL JUDGMENT HAS BEEN DELIVERED BETWEEN THE PARTIES IN ITALY.

10 SO AS TO BE ABLE TO REACH A DECISION ON THAT REQUEST , THE ANTWERP COURT SUBMITTED TO THE COURT OF JUSTICE THE FOLLOWING TWO QUESTIONS ON THE INTERPRETATION OF ARTICLES 30 AND 38 OF THE CONVENTION :

' 1 . WHAT APPEALS ARE REGARDED AS ' ORDINARY ' APPEALS IN ARTICLES 30 AND 38 OF THE CONVENTION OF 27 SEPTEMBER 1968 OR , IN OTHER WORDS , TO WHAT JUDGMENTS ARE ARTICLES 30 AND 38 OF THE CONVENTION APPLICABLE? OR

2 . IS THE NATURE OF THE APPEAL LODGED AGAINST THE JUDGMENT IN THE STATE IN WHICH THAT JUDGMENT WAS GIVEN TO BE DETERMINED SOLELY IN ACCORDANCE WITH THE LAW OF THAT STATE?

'

11 THESE QUESTIONS ASK IN SUBSTANCE WHETHER THE EXPRESSION ' ORDINARY APPEAL ' USED IN ARTICLES 30 AND 38 OF THE CONVENTION MUST BE UNDERSTOOD AS A REFERENCE TO NATIONAL LAW OR AS AN INDEPENDENT CONCEPT , THE INTERPRETATION OF WHICH MUST BE SOUGHT WITHIN THE CONVENTION ITSELF.

12 IN THE SECOND CASE , THE QUESTIONS SUBMITTED BY THE COURT ASK WHAT THE MEANING OF THAT EXPRESSION IS WITHIN THE CONTEXT OF THE CONVENTION .

13 DURING THE PROCEDURE THE VIEW WAS EXPRESSED THAT ARTICLE 30 OF THE CONVENTION , WHICH RELATES TO THE RECOGNITION AND NOT THE ENFORCEMENT OF JUDGMENTS , IS NOT RELEVANT TO THE PROCEEDINGS AND THAT THE INTERPRETATION REQUESTED CONCERNS ONLY THE MEANING OF THE EXPRESSION ' ORDINARY APPEAL ' WITHIN THE CONTEXT OF ARTICLE 38 , WHICH RELATES TO ENFORCEMENT.

14 THERE IS NO NEED TO EXAMINE THIS QUESTION , ESPECIALLY SINCE THE CONNEXITY OF THE PROVISIONS OF TITLE III OF THE CONVENTION MAKE IT NECESSARY TO INTERPRET THE EXPRESSION IN QUESTION IN THE TWO ABOVEMENTIONED ARTICLES IN THE SAME WAY.

THE NATURE OF THE EXPRESSION ' ORDINARY APPEAL ' AS A REFERENCE TO NATIONAL LAW OR AS AN INDEPENDENT CONCEPT

15 UNDER ARTICLE 30 OF THE CONVENTION , ' A COURT OF A CONTRACTING STATE IN WHICH RECOGNITION IS SOUGHT OF A JUDGMENT GIVEN IN ANOTHER CONTRACTING STATE MAY STAY THE PROCEEDINGS IF AN ORDINARY APPEAL AGAINST THE JUDGMENT HAS BEEN LODGED '.

16 UNDER THE FIRST PARAGRAPH OF ARTICLE 38 , ' THE COURT WITH WHICH THE APPEAL UNDER THE FIRST PARAGRAPH OF ARTICLE 37 IS LODGED MAY , ON THE APPLICATION OF THE APPELLANT , STAY THE PROCEEDINGS IF AN ORDINARY APPEAL HAS BEEN LODGED AGAINST THE JUDGMENT IN THE STATE IN WHICH THAT JUDGMENT WAS GIVEN OR IF THE TIME FOR SUCH AN APPEAL HAS NOT YET EXPIRED ; IN THE LATTER CASE , THE COURT MAY SPECIFY THE TIME WITHIN WHICH SUCH AN APPEAL IS TO BE LODGED '.

17 ACCORDING TO INDUSTRIAL DIAMOND SUPPLIES , IT IS NECESSARY TO CLASSIFY ANY APPEAL CONSIDERED TO BE AN ORDINARY APPEAL IN THE CONTRACTING STATE IN WHICH THE JUDGMENT THE RECOGNITION OR ENFORCEMENT OF WHICH IS SOUGHT WAS GIVEN AS AN ' ORDINARY APPEAL ' WITHIN THE MEANING OF THE ABOVEMENTIONED PROVISIONS.

18 UNDER THE LAW OF THE ITALIAN REPUBLIC , THE STATE IN WHICH THE JUDGMENT IN QUESTION WAS GIVEN , THERE IS NO DOUBT THAT AN APPEAL IN CASSATION (RICORSO PER CASSAZIONE) MUST IN FACT BE CONSIDERED AS AN ORDINARY APPEAL.

19 THIS VIEW HAS BEEN SUPPORTED BY THE GOVERNMENT OF THE UNITED KINGDOM AND BY THE COMMISSION , WHICH BOTH AGREE THAT THE NATURE OF AN APPEAL FOR THE PURPOSES OF ARTICLES 30 AND 38 MUST BE DETERMINED BY REFERENCE TO THE NATIONAL LAW OF THE CONTRACTING STATE IN WHICH THE ORIGINAL JUDGMENT WAS GIVEN.

20 MR RIVA , WITHOUT CONTESTING THE FACT THAT IN ITALY AN APPEAL IN CASSATION IS CONSIDERED TO BE AN ORDINARY APPEAL , TAKES THE VIEW THAT IN ANY CASE A JUDGMENT WHICH IS ENFORCEABLE IN ITALY MUST ALSO BE CONSIDERED AS ENFORCEABLE

IN BELGIUM SO LONG AS THE ENFORCEABILITY OF THAT JUDGMENT HAS NOT BEEN SUSPENDED IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN.

21 FINALLY , IT IS NECESSARY TO NOTE THAT THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY EXPRESSED THE OPINION THAT THE EXPRESSION ' ORDINARY APPEAL ' USED IN ARTICLES 30 AND 38 MUST BE INTERPRETED WITHIN THE CONTEXT OF THE CONVENTION ITSELF , REGARDLESS OF THE CLASSIFICATION OF APPEALS BY THE NATIONAL LAW OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN.

22 IT FOLLOWS FROM A COMPARISON OF THE LEGAL CONCEPTS OF THE VARIOUS MEMBER STATES OF THE COMMUNITY THAT ALTHOUGH IN SOME STATES THE DISTINCTION BETWEEN ' ORDINARY ' AND ' EXTRAORDINARY ' APPEALS IS BASED ON THE LAW ITSELF , IN OTHER LEGAL SYSTEMS THE CLASSIFICATION IS MADE PRIMARILY OR EVEN PURELY IN THE WORKS OF LEARNED AUTHORS WHILE IN A THIRD GROUP OF STATES THIS DISTINCTION IS COMPLETELY UNKNOWN.

23 IT IS ESTABLISHED MOREOVER THAT IN THE LEGAL SYSTEMS IN WHICH THE DISTINCTION BETWEEN ' ORDINARY ' AND ' EXTRAORDINARY ' APPEALS IS ACKNOWLEDGED BY LEGISLATION OR BY LEARNED AUTHORS , THE CLASSIFICATION OF THE VARIOUS APPEALS FOR THE PURPOSES OF THAT DISTINCTION GIVES RISE TO VARYING CLASSIFICATIONS.

24 IT SEEMS THEREFORE THAT IF THE CONCEPT OF ' ORDINARY APPEAL ' WERE INTERPRETED BY REFERENCE TO A NATIONAL LEGAL SYSTEM , WHETHER THE LEGAL SYSTEM OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN OR THAT OF THE STATE IN WHICH ENFORCEMENT OR RECOGNITION IS SOUGHT , IT WOULD IN CERTAIN CASES BE IMPOSSIBLE TO CLASSIFY A SPECIFIC APPEAL WITH THE REQUIRED DEGREE OF CERTAINTY FOR THE PURPOSES OF ARTICLES 30 AND 38 OF THE CONVENTION.

25 MOREOVER , REFERENCE TO A PARTICULAR NATIONAL LEGAL SYSTEM MIGHT PERHAPS OBLIGE THE COURT REQUIRED TO MAKE A DECISION UNDER ARTICLES 30 AND 38 OF THE CONVENTION TO CLASSIFY APPEALS OF THE SAME TYPE INCONSISTENTLY ACCORDING TO WHETHER THEY BELONGED TO THE LEGAL SYSTEM OF ONE OR OTHER OF THE CONTRACTING STATES.

26 THE EFFECT OF THE APPLICATION OF THAT CRITERION OF INTERPRETATION WOULD THEREFORE BE TO CREATE EVEN GREATER LEGAL UNCERTAINTY SINCE ARTICLE 38 REQUIRES THE COURT BEFORE WHICH AN ORDER FOR ENFORCEMENT OF THE JUDGMENT IS SOUGHT TO TAKE INTO CONSIDERATION NOT ONLY APPEALS WHICH HAVE BEEN LODGED AT PRESENT BUT IN ADDITION APPEALS WHICH MAY BE LODGED WITHIN SPECIFIC PERIODS.

27 IT FOLLOWS FROM THESE CONSIDERATIONS THAT THE INTERPRETATION OF THE CONCEPT OF ' ORDINARY APPEAL ' MAY ONLY BE USEFULLY SOUGHT WITHIN THE FRAMEWORK OF THE CONVENTION ITSELF.

28 IT IS THEREFORE NECESSARY TO REPLY TO THE NATIONAL COURT THAT THE EXPRESSION ' ORDINARY APPEAL ' WITHIN THE MEANING OF ARTICLES 30 AND 38 OF THE CONVENTION MUST BE DETERMINED SOLELY WITHIN THE FRAMEWORK OF THE SYSTEM OF THE CONVENTION ITSELF AND NOT ACCORDING TO THE LAW EITHER OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN OR OF THE STATE IN WHICH THE RECOGNITION OR ENFORCEMENT OF THAT JUDGMENT IS SOUGHT.

THE MEANING OF THE EXPRESSION ' ORDINARY APPEAL ' WITHIN THE FRAMEWORK OF THE CONVENTION

29 THE MEANING OF THE EXPRESSION ' ORDINARY APPEAL ' MAY BE DEDUCED FROM THE ACTUAL STRUCTURE OF ARTICLES 30 AND 38 AND FROM THEIR FUNCTION IN THE SYSTEM OF THE CONVENTION.

30 ALTHOUGH , AS A WHOLE , THE CONVENTION IS INTENDED TO ENSURE THE RAPID ENFORCEMENT OF JUDGMENTS WITH A MINIMUM OF FORMALITIES WHEN THOSE JUDGMENTS ARE ENFORCEABLE IN THE STATE IN WHICH THEY WERE GIVEN , THE SPECIFIC PURPOSE OF ARTICLES 30 AND 38 IS TO PREVENT THE COMPULSORY RECOGNITION OR ENFORCEMENT OF JUDGMENTS IN OTHER CONTRACTING STATES WHEN THE POSSIBILITY THAT THEY MIGHT BE ANNULLED OR AMENDED IN THE STATE IN WHICH THEY WERE GIVEN STILL EXISTS.

31 FOR THIS PURPOSE ARTICLES 30 AND 38 RESERVE TO THE COURT BEFORE WHICH A REQUEST FOR RECOGNITION OR AN APPEAL AGAINST A DECISION AUTHORIZING ENFORCEMENT HAS BEEN BROUGHT IN PARTICULAR THE POSSIBILITY OF STAYING THE PROCEEDINGS WHERE , IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN , THE JUDGMENT IS BEING CONTESTED OR MAY BE CONTESTED WITHIN SPECIFIC PERIODS.

32 ACCORDING TO THE CONVENTION , THE COURT BEFORE WHICH RECOGNITION OR ENFORCEMENT IS SOUGHT IS NOT UNDER A DUTY TO STAY THE PROCEEDINGS BUT MERELY HAS THE POWER TO DO SO.

33 THIS FACT PRESUPPOSES A SUFFICIENTLY BROAD INTERPRETATION OF THE CONCEPT OF ' ORDINARY APPEAL ' TO ENABLE THAT COURT TO STAY THE PROCEEDINGS WHENEVER REASONABLE DOUBT ARISES WITH REGARD TO THE FATE OF THE DECISION IN THE STATE IN WHICH IT WAS GIVEN.

34 IT IS POSSIBLE BY APPLYING THIS CRITERION ALONE TO DECIDE THE OUTCOME OF A REQUEST FOR RECOGNITION OR ENFORCEMENT BASED ON A JUDGMENT WHICH , IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN , IS AT PRESENT THE SUBJECT OF AN APPEAL WHICH MAY LEAD TO THE ANNULMENT OR AMENDMENT OF THE JUDGMENT IN QUESTION.

35 A COURT MAY BE REQUIRED TO MAKE A MORE DIFFICULT APPRAISAL WHENEVER A REQUEST FOR A STAY OF THE PROCEEDINGS IS LODGED BEFORE IT UNDER ARTICLE 38 OF THE CONVENTION WHEN THE PERIODS FOR LODGING APPEALS HAVE NOT YET EXPIRED IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN .

36 IN THAT CASE , IT IS ALSO NECESSARY TO BEAR IN MIND , IN ADDITION TO THE CRITERION BASED ON THE POSSIBLE EFFECT OF AN APPEAL , ALL THE RELEVANT CONSIDERATIONS ARISING FROM THE NATURE AND CONDITIONS FOR THE APPLICATION OF THE JUDICIAL REMEDIES IN QUESTION.

37 CONSIDERED FROM THIS POINT OF VIEW , THE EXPRESSION ' ORDINARY APPEAL ' MUST BE UNDERSTOOD AS MEANING ANY APPEAL WHICH FORMS PART OF THE NORMAL COURSE OF AN ACTION AND WHICH , AS SUCH , CONSTITUTES A PROCEDURAL DEVELOPMENT WHICH ANY PARTY MUST REASONABLE EXPECT.

38 IT IS NECESSARY TO CONSIDER THAT ANY APPEAL BOUND BY THE LAW TO A SPECIFIC PERIOD OF TIME WHICH STARTS TO RUN BY VIRTUE OF THE ACTUAL DECISION WHOSE ENFORCEMENT IS SOUGHT CONSTITUTES SUCH A DEVELOPMENT.

39 CONSEQUENTLY IT IS IMPOSSIBLE TO CONSIDER AS ' ORDINARY APPEALS ' WITHIN THE MEANING OF ARTICLES 30 AND 38 OF THE CONVENTION IN PARTICULAR APPEALS WHICH ARE DEPENDENT EITHER UPON EVENTS WHICH WERE UNFORESEEABLE AT THE

DATE OF THE ORIGINAL JUDGMENT OR UPON THE ACTION TAKEN BY PERSONS WHO ARE EXTRANEOUS TO THE CASE , AND WHO ARE NOT BOUND BY THE PERIOD FOR ENTERING AN APPEAL WHICH STARTS TO RUN FROM THE DATE OF THE ORIGINAL JUDGMENT.

40 IT IS FOR A COURT BEFORE WHICH A REQUEST IS SUBMITTED UNDER ARTICLE 36 AT A DATE ON WHICH THE PERIOD FOR ENTERING AN APPEAL IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN HAS NOT YET EXPIRED TO EXERCISE ITS DISCRETION IN THIS RESPECT.

41 THIS FREEDOM OF DISCRETION IS IMPLICIT IN THE ACTUAL SYSTEM OF ARTICLE 38 WHICH GIVES THE COURT BEFORE WHICH AN ORDER FOR ENFORCEMENT IS SOUGHT THE POWER TO SPECIFY WITH REGARD TO A PARTY WHICH IS OPPOSED TO ENFORCEMENT , ALTHOUGH IT HAS NOT YET TAKEN ADVANTAGE OF THE POSSIBILITY OF LODGING AN APPEAL IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN , A TIME WITHIN WHICH ITS APPEAL IS TO BE LODGED.

42 IT IS THEREFORE NECESSARY TO REPLY THAT , WITHIN THE MEANING OF ARTICLES 30 AND 38 OF THE CONVENTION , ANY APPEAL WHICH IS SUCH THAT IT MAY RESULT IN THE ANNULMENT OR THE AMENDMENT OF THE JUDGMENT WHICH IS THE SUBJECT-MATTER OF THE PROCEDURE FOR RECOGNITION OR ENFORCEMENT ACCORDING TO THE CONVENTION AND THE LODGING OF WHICH IS BOUND , IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN , TO A PERIOD WHICH IS LAID DOWN BY THE LAW AND STARTS TO RUN BY VIRTUE OF THAT SAME JUDGMENT CONSTITUTES AN ' ORDINARY APPEAL ' WHICH HAS BEEN LODGED OR MAY BE LODGED AGAINST A FOREIGN JUDGMENT.

COSTS

43 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , THE GOVERNMENT OF THE UNITED KINGDOM AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

44 SINCE THE PROCEEDINGS ARE , SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , 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 ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE RECHTBANK VAN EERSTE AANLEG OF THE JUDICIAL DISTRICT OF ANTWERP BY JUDGMENT OF 7 APRIL 1977 , HEREBY RULES :

1 . THE EXPRESSION ' ORDINARY APPEAL ' WITHIN THE MEANING OF ARTICLES 30 AND 38 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS MUST BE DEFINED SOLELY WITHIN THE FRAMEWORK OF THE SYSTEM OF THE CONVENTION ITSELF AND NOT ACCORDING TO THE LAW EITHER OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN OR OF THE STATE IN WHICH RECOGNITION OF ENFORCEMENT OF THAT JUDGMENT IS SOUGHT.

2 . WITHIN THE MEANING OF ARTICLES 30 AND 38 OF THE CONVENTION , ANY APPEAL WHICH IS SUCH THAT IT MAY RESULT IN THE ANNULMENT OR THE AMENDMENT OF THE JUDGMENT WHICH IS THE SUBJECT-MATTER OF THE PROCEDURE FOR RECOGNITION

OR ENFORCEMENT UNDER THE CONVENTION AND THE LODGING OF WHICH IS BOUND , IN THE STATE IN WHICH THE JUDGMENT WAS GIVEN , TO A PERIOD WHICH IS LAID DOWN BY THE LAW AND STARTS TO RUN BY VIRTUE OF THAT SAME JUDGMENT CONSTITUTES AN ' ORDINARY APPEAL ' WHICH HAS BEEN LODGED OR MAY BE LODGED AGAINST A FOREIGN JUDGMENT.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1977 Page 02175 Greek special edition Page 00691 Portuguese special edition Page 00791 Spanish special edition Page 00679
DOC	1977/11/22
LODGED	1977/04/18
JURCIT	41968A0927(01)-A30 : N 1 10 - 42 41968A0927(01)-A38 : N 1 10 - 42 41968A0927(01)-A31 : N 4 41968A0927(01)-A36 : N 5 40 41968A0927(01)-A37 : N 5 41968A0927(01)-A38L1 : N 16
CONCERNS	Interprets 41968A0927(01) -A30 Interprets 41968A0927(01) -A38
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	Dutch
OBSERV	Commission ; Federal Republic of Germany ; United Kingdom ; Member States ; Institutions
NATIONA	Belgium
NATCOUR	*A7* Tribunale civile e penale di Torino, sentenza del 23/09/1976 07/10/1976 (24/76) ; *A8* Rechtbank van 1e aanleg Antwerpen, 1e kamer, vonnis van 25/11/1976 (V24492) ; *A9* Rechtbank van 1e aanleg Antwerpen, 1e kamer, vonnis van 07/04/1977 (40.680) ; - Rechtspraak der Haven van Antwerpen

1977-78 p.70-74 ; - Jurisprudence du port d'Anvers 1977-78 p.70-74 (résumé) ; *P1* Rechtbank van 1e aanleg Antwerpen, 1e kamer, vonnis van 01/06/1978 (40.680)

NOTES Laenens, Jean: Rechtskundig weekblad 1977-78 Col.1499-1500 ; Vandersanden, G.: Journal des tribunaux 1978 p.226-227 ; Hartley, Trevor: Procedure for Enforcement: Effect of Appeal in Judgment-granting State, European Law Review 1978 p.160-164 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1978 no 338 ; Mari, Luigi: Diritto comunitario e degli scambi internazionali 1978 p.89-90 ; Huet, André: Journal du droit international 1978 p.398-408 ; Pesce, Angelo: Le funzioni di legislatore comunitario delle sentenze interpretative della Corte di giustizia, Il Foro padano 1978 IV Col.1-4 ; Verheul, Hans: Netherlands International Law Review 1978 p.90-91 ; Gaudemet-Tallon, H.: Revue critique de droit international privé 1979 p.433-443 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a12-a13 (PM)

PROCEDU Reference for a preliminary ruling

ADVGEN Reischl

JUDGRAP Pescatore

DATES of document: 22/11/1977
of application: 18/04/1977

**Judgment of the Court
of 14 July 1977
Bavaria Fluggesellschaft Schwabe & Co. KG and Germanair Bedarfsluftfahrt GmbH & Co. KG v Eurocontrol. References for a preliminary ruling: Bundesgerichtshof - Germany. Joined cases 9 and 10-77.**

1 . CONVENTION OF 27 SEPTEMBER 1968 - CONCEPTS AND LEGAL CLASSIFICATIONS LAID DOWN BY THE COURT - UNIFORM APPLICATION IN THE MEMBER STATES

2 . CONVENTION OF 27 SEPTEMBER 1968 - JUDGMENTS EXCLUDED FROM THE SCOPE OF THE LATTER - BILATERAL AGREEMENTS - APPLICATION - EXCLUSIVE JURISDICTION OF NATIONAL COURT

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 55 , FIRST PARAGRAPH OF ARTICLE 56 , PROTOCOL ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 1)

1 . THE PRINCIPLE OF LEGAL CERTAINTY IN THE COMMUNITY LEGAL SYSTEM AND THE OBJECTIVES OF THE BRUSSELS CONVENTION IN ACCORDANCE WITH ARTICLE 220 OF THE EEC TREATY , WHICH IS AT ITS ORIGIN , REQUIRE IN ALL MEMBER STATES A UNIFORM APPLICATION OF THE LEGAL CONCEPTS AND LEGAL CLASSIFICATIONS DEVELOPED BY THE COURT IN THE CONTEXT OF THE BRUSSELS CONVENTION.

2 . A NATIONAL COURT MUST NOT APPLY THE BRUSSELS CONVENTION SO AS TO RECOGNIZE OR ENFORCE JUDGMENTS WHICH ARE EXCLUDED FROM ITS SCOPE AS DETERMINED BY THE COURT OF JUSTICE. ON THE OTHER HAND , IT IS NOT PREVENTED FROM APPLYING TO THE SAME JUDGMENTS ONE OF THE SPECIAL AGREEMENTS REFERRED TO IN ARTICLE 55 OF THE BRUSSELS CONVENTION , WHICH MAY CONTAIN RULES FOR THE RECOGNITION AND ENFORCEMENT OF SUCH JUDGMENTS . AS THE FIRST PARAGRAPH OF ARTICLE 56 OF THE BRUSSELS CONVENTION RECOGNIZES , THESE AGREEMENTS CONTINUE TO HAVE EFFECT IN RELATION TO JUDGMENTS TO WHICH THE BRUSSELS CONVENTION DOES NOT APPLY . SINCE ARTICLE 1 OF THE PROTOCOL OF 3 JUNE 1971 GIVES THE COURT JURISDICTION TO INTERPRET ONLY THE BRUSSELS CONVENTION AND THE PROTOCOL , IT IS SOLELY FOR THE NATIONAL COURTS TO JUDGE THE SCOPE OF THE ABOVEMENTIONED AGREEMENTS IN RELATION TO JUDGMENTS TO WHICH THE BRUSSELS CONVENTION DOES NOT APPLY. THIS MAY LEAD TO THE SAME EXPRESSION IN THE BRUSSELS CONVENTION AND IN A BILATERAL AGREE- MENT BEING INTERPRETED DIFFERENTLY.

IN JOINED CASES 9/77 AND 10/77

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 VIIITH SENATE OF THE BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE) FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

1 . BAVARIA FLUGGESELLSCHAFT SCHWABE & CO., KG , MUNICH (CASE 9/77),

2 . GERMANAIR BEDARFSLUFTFAHRT GMBH & CO., KG , FRANKFURT AM MAIN (CASE 10/77),

V THE EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (' EUROCONTROL '), BRUSSELS ,

ON THE INTERPRETATION OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS SIGNED AT BRUSSELS ON 27 SEPTEMBER 1968 ,

1 BY ORDERS DATED 22 DECEMBER 1976 , RECEIVED AT THE COURT ON 25 JANUARY 1977 , THE BUNDESGERICHTSHOF REFERRED TO THE COURT PURSUANT TO 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 BRUSSELS CONVENTION ') THE QUESTION WHETHER UNDER ARTICLE 56 OF THE BRUSSELS CONVENTION THE TREATY AND CONVENTIONS REFERRED TO IN ARTICLE 55 CONTINUE TO HAVE EFFECT IN RELATION TO JUDGMENTS WHICH DO NOT FALL UNDER THE SECOND PARAGRAPH OF ARTICLE 1 OF THE BRUSSELS CONVENTION BUT ARE EXCLUDED FROM ITS SCOPE.

2 THE QUESTION HAS ARISEN IN TWO ACTIONS CONCERNED WITH THE ENFORCEMENT IN THE FEDERAL REPUBLIC OF GERMANY OF TWO JUDGMENTS BY THE TRIBUNAL DE COMMERCE , BRUSSELS ; THE JUDGMENTS CONCERN CLAIMS BY EUROCONTROL AGAINST BAVARIA AND GERMANAIR FOR CHARGES DUE FOR THE USE OF THE EQUIPMENT AND SERVICES OF EUROCONTROL. IN ITS JUDGMENT OF 14 OCTOBER 1976 IN CASE 29/76 , LUFTTRANSPORTUNTERNEHMEN GMBH & CO. KG V EUROCONTROL (1976) ECR 1541 , THE COURT ON A REFERENCE BY THE OBERLANDESGERICHT DUSSELDORF IN AN ACTION PENDING BEFORE THAT COURT IN RELATION TO CHARGES OF A SIMILAR NATURE TO THOSE IN THE PRESENT CASE RULED AS FOLLOWS :

' 1 . IN THE INTERPRETATION OF THE CONCEPT ' ' CIVIL AND COMMERCIAL MATTERS ' ' FOR THE PURPOSES OF THE APPLICATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , IN PARTICULAR TITLE III THEREOF , REFERENCE MUST NOT BE MADE TO THE LAW OF ONE OF THE STATES CONCERNED BUT , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS ;

2 . A JUDGMENT GIVEN IN AN ACTION BETWEEN A PUBLIC AUTHORITY AND A PERSON GOVERNED BY PRIVATE LAW , IN WHICH THE PUBLIC AUTHORITY HAS ACTED IN THE EXERCISE OF ITS POWERS , IS EXCLUDED FROM THE AREA OF APPLICATION OF THE CONVENTION. '

THE BUNDESGERICHTSHOF REFERRED ITS QUESTION TO THE COURT WITH PARTICULAR REGARD TO THAT JUDGMENT AND TO THE CONVENTION BETWEEN THE FEDERAL REPUBLIC OF GERMANY AND THE KINGDOM OF BELGIUM ON THE MUTUAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS , ARBITRATION AWARDS AND AUTHENTIC INSTRUMENTS IN CIVIL AND COMMERCIAL MATTERS , SIGNED AT BONN ON 30 JUNE 1958. A RULING IS SOUGHT WHETHER AND HOW FAR THE LEGAL CONCEPTS LAID DOWN BY THE COURT IN RELATION TO THE BRUSSELS CONVENTION ARE BINDING ON NATIONAL COURTS IN RESPECT OF THE APPLICATION OF A BILATERAL AGREEMENT SUCH AS THE ONE MENTIONED ABOVE IN MATTERS EXCLUDED FROM THE SCOPE OF THE BRUSSELS CONVENTION. IT APPEARS FROM THE ORDERS FOR REFERENCE THAT IN GERMAN LAW THE QUESTION WHETHER A CASE CONCERNS A CIVIL OR COMMERCIAL MATTER HAS FOR PURPOSES OF THE RECOGNITION AND ENFORCEMENT OF A FOREIGN JUDGMENT TRADITIONALLY BEEN DECIDED ACCORDING TO THE LAW OF THE STATE IN WHICH THE JUDGMENT WAS GIVEN .

3 ARTICLE 55 OF THE BRUSSELS CONVENTION PROVIDES '... THIS CONVENTION SHALL , FOR THE STATES WHICH ARE PARTIES TO IT , SUPERSEDE THE FOLLOWING CONVENTIONS CONCLUDED BETWEEN TWO OR MORE OF THEM... ' . THE FIFTH CONVENTION TO BE LISTED IS THE SAID GERMAN-BELGIAN CONVENTION OF 30 JUNE 1958. THE FIRST PARAGRAPH OF ARTICLE 56 OF THE BRUSSELS CONVENTION HOWEVER MAKES CLEAR THAT THESE CONVENTIONS ' SHALL CONTINUE TO HAVE EFFECT IN RELATION TO MATTERS TO WHICH THIS CONVENTION DOES NOT APPLY '. THE FIRST PARAGRAPH OF ARTICLE 1 OF THE BRUSSELS CONVENTION PROVIDES THAT IT SHALL APPLY ' IN CIVIL AND COMMERCIAL MATTERS ' ; ON THE OTHER HAND THE GERMAN-BELGIAN CONVENTION OF 30 JUNE 1958 , AS SHOWN BY THE FIRST PARAGRAPH OF ARTICLE 1 THEREOF , COVERS THE RECOGNITION OF ' JUDGMENTS GIVEN IN CIVIL AND COMMERCIAL MATTERS ' ACCORDING TO THE CRITERIA LAID DOWN BY THAT CONVENTION ITSELF .

4 THE COURT IN THE ABOVEMENTIONED JUDGMENT OF 14 OCTOBER 1976 HAS DETERMINED THE SCOPE OF THE BRUSSELS CONVENTION IN RELATION TO A JUDGMENT OF THE PRESENT KIND BY INTERPRETING ' CIVIL AND COMMERCIAL MATTERS ' AS AN INDEPENDENT CONCEPT AND NOT AS A REFERENCE TO THE INTERNAL LAW OF ONE OR OTHER OF THE STATES CONCERNED. THIS INTERPRETATION IS BASED ON THE DESIRE TO ENSURE IN RELATION TO COMMUNITY LAW THAT THE CONTRACTING STATES AND PARTIES CONCERNED HAVE EQUAL AND UNIFORM RIGHTS AND DUTIES UNDER THE BRUSSELS CONVENTION. THE PRINCIPLE OF LEGAL CERTAINTY IN THE COMMUNITY LEGAL SYSTEM AND THE OBJECTIVES OF THE BRUSSELS CONVENTION IN ACCORDANCE WITH ARTICLE 220 OF THE EEC TREATY , WHICH IS AT ITS ORIGIN , REQUIRE IN ALL MEMBER STATES A UNIFORM APPLICATION OF THE LEGAL CONCEPTS AND LEGAL CLASSIFICATIONS DEVELOPED BY THE COURT IN THE CONTEXT OF THE BRUSSELS CONVENTION .

5 FOR THIS REASON A NATIONAL COURT MUST NOT APPLY THE BRUSSELS CONVENTION SO AS TO RECOGNIZE OR ENFORCE JUDGMENTS WHICH ARE EXCLUDED FROM ITS SCOPE AS DETERMINED BY THE COURT OF JUSTICE. ON THE OTHER HAND IT IS NOT PREVENTED FROM APPLYING TO THE SAME JUDGMENTS ONE OF THE SPECIAL AGREEMENTS REFERRED TO IN ARTICLE 55 OF THE BRUSSELS CONVENTION , WHICH MAY CONTAIN RULES FOR THE RECOGNITION AND ENFORCEMENT OF SUCH JUDGMENTS. AS THE FIRST PARAGRAPH OF ARTICLE 56 OF THE BRUSSELS CONVENTION RECOGNIZES , THESE AGREEMENTS CONTINUE TO HAVE EFFECT IN RELATION TO JUDGMENTS TO WHICH THE BRUSSELS CONVENTION DOES NOT APPLY. SINCE ARTICLE 1 OF THE PROTOCOL OF 3 JUNE 1971 GIVES THE COURT JURISDICTION TO INTERPRET ONLY THE BRUSSELS CONVENTION AND THE PROTOCOL , IT IS SOLELY FOR THE NATIONAL COURTS TO JUDGE THE SCOPE OF THE ABOVEMENTIONED AGREEMENTS IN RELATION TO JUDGMENTS TO WHICH THE BRUSSELS CONVENTION DOES NOT APPLY. THE JURISDICTION THUS LEFT TO THE NATIONAL COURTS IS THE MORE READILY JUSTIFIABLE IN SO FAR AS THE SUPPLEMENTARY APPLICATION OF THESE BILATERAL AGREEMENTS CONTRIBUTES TO THE OBJECTIVE PURSUED BY THE BRUSSELS CONVENTION OF FACILITATING THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS BETWEEN MEMBER STATES.

6 THE ANSWER MUST THEREFORE BE THAT THE FIRST PARAGRAPH OF ARTICLE 56 OF THE BRUSSELS CONVENTION DOES NOT PREVENT A BILATERAL AGREEMENT SUCH AS THE GERMAN-BELGIAN CONVENTION , WHICH IS THE FIFTH TO BE LISTED IN ARTICLE 55 , FROM CONTINUING TO HAVE EFFECT IN RELATION TO JUDGMENTS WHICH DO NOT FALL UNDER THE SECOND PARAGRAPH OF ARTICLE 1 OF THE BRUSSELS CONVENTION , BUT TO WHICH NEVERTHELESS THAT CONVENTION DOES NOT APPLY.

7 ALTHOUGH THIS RESULT MAY LEAD TO THE SAME EXPRESSION IN THE BRUSSELS CONVENTION AND IN A BILATERAL AGREEMENT BEING INTERPRETED DIFFERENTLY , THIS IS DUE TO THE DIFFERENT SYSTEMS IN WHICH THE CONCEPT ' CIVIL AND COMMERCIAL MATTERS ' IS USED. IN RELATION TO A BILATERAL AGREEMENT THE ACCEPTANCE OF A CLASSIFICATION , MADE BY THE COURT FIRST GIVING JUDGMENT , BY THE COURTS OF ANOTHER STATE COULD LEAD TO AN APPROPRIATE RESULT HAVING REGARD TO THE FACT THAT THE COURTS OF THE VARIOUS STATES ARE INDEPENDENT ONE OF ANOTHER. ON THE OTHER HAND IF THIS OCCURRED IN A SYSTEM SUCH AS THE BRUSSELS CONVENTION , THE INTERPRETATION OF WHICH IS ENTRUSTED TO A COURT COMMON TO ALL PARTIES , IT WOULD LEAD TO UNDESIRABLE DIVERGENCIES.

COSTS

8 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE AND AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE COURT MAKING THE REFERENCE , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT .

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE BUNDESGERICHTSHOF BY ORDERS DATED 22 DECEMBER 1976 , HEREBY RULES :

THE FIRST PARAGRAPH OF ARTICLE 56 OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS DOES NOT PREVENT A BILATERAL AGREEMENT SUCH AS THE GERMAN-BELGIAN CONVENTION , WHICH IS THE FIFTH TO BE LISTED IN ARTICLE 55 , FROM CONTINUING TO HAVE EFFECT IN RELATION TO JUDGMENTS WHICH DO NOT FALL UNDER THE SECOND PARAGRAPH OF ARTICLE 1 OF THE CONVENTION FIRST ABOVEMENTIONED , BUT TO WHICH NEVERTHELESS THAT CONVENTION DOES NOT APPLY .

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1977 Page 01517 Greek special edition Page 00457 Portuguese special edition Page 00535 Spanish special edition Page 00415
DOC	1977/07/14

LODGED	1977/01/25
JURCIT	41968A0927(01)-A56 : N 1 41968A0927(01)-A55 : N 1 5 41968A0927(01)-A01L2 : N 1 6 41968A0927(01)-A55L6 : N 3 6 41968A0927(01)-A56L1 : N 3 5 6 41968A0927(01)-A01L1 : N 3 41971A0603(02)-A01 : N 5 61976J0029 : N 2 4 11957E220 : N 4
CONCERNS	Interprets 41968A0927(01) -A56L1
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	German
MISCINF	AFFAIRE : 61977J0010
OBSERV	Commission ; Federal Republic of Germany ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	** AFFAIRE 10/1977 ** ; *A1* Tribunal de commerce de Bruxelles, 17e chambre, jugement du 07/03/1974 (7.910/72) ; *A2* Cour d'appel de Bruxelles, 5e chambre, arrêt du 16/12/1974 (16.937) ; *A3* Landgericht Frankfurt/Main, Beschluß vom 16/06/1975 (2/21 O 282/75) ; *A4* Cour de cassation (Belgique), 1re chambre, arrêt du 30/10/1975 (5305) ; - Journal des tribunaux 1976 p.24-25 ; - Pasicrisie belge 1976 I p.267-270 ; - Rechtskundig weekblad 1975-76 Col.2039 ; *A5* Oberlandesgericht Frankfurt/Main, Beschluß vom 05/03/1976 (20 W 437/75) ; *A6* Oberlandesgericht Frankfurt/Main, Vollstreckungsklausel vom 17/03/1976 (20 W 437/75) ; *A7* Bundesgerichtshof, Beschluß vom 26/04/1976 (VIII ZB 10/76) ; *A8* Bundesverfassungsgericht, Beschluß vom 23/06/1976 (2 BvR 498/76) ; *A9* Bundesgerichtshof, Vorlagebeschluß vom 22/12/1976 (VIII ZB 10/76) ; *P1* Bundesgerichtshof, Beschluß vom 10/10/1977 (VIII ZB 10/76) ; - Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1977 p.56-58 ; - Neue Juristische Wochenschrift 1978 p.1113-1114 ; *P2* Landgericht Frankfurt/Main, Beschluß vom 28/09/1978 (2/21 O 282/75) ; *P3* Landgericht Frankfurt/Main, Beschluß vom 05/06/1979 (2/21 O 490/78) ; *A5* Tribunal de commerce de Bruxelles, 17e chambre, jugement du 07/03/1974 (7.909/72) ; *A6* Cour d'appel de Bruxelles, 5e chambre, arrêt du 16/12/1974 (16.938) ; *A7* Landgericht München I, Vollstreckungsklausel vom 25/06/1975 (33 O 8234/75) ; *A8* Oberlandesgericht München, Beschluß vom 03/11/1975 (5 W 1517/75) ; *A9* Bundesgerichtshof, Vorlagebeschluß vom 22/12/1976 (VIII ZB 44/75) ; *P1* Bundesgerichtshof, Beschluß vom 10/10/1977 (VIII ZB 44/75)
NOTES	Schwenk, Walter: Rechtsstreitigkeiten über die Erhebung von Flugsicherungsgebühren, Zeitschrift für Luft- und Weltraumrecht 1975 p.171-182 1978 p.71-75 ; Hartley, Trevor: Effect of the Judgments Convention on Bilateral Conventions, European Law Review 1977 p.461-462 ; Mari, Luigi: Convenzione di Bruxelles del 27 settembre 1968 ed accordi bilaterali sul riconoscimento e l'esecuzione

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PROCEDU Reference for a preliminary ruling

ADVGEN Mayras

JUDGRAP Bosco

DATES of document: 14/07/1977
of application: 25/01/1977

**Judgment of the Court
of 30 November 1976
Jozef de Wolf v Harry Cox BV. Reference for a preliminary ruling: Hoge Raad - Netherlands.
Case 42-76.**

CONVENTION OF 27 SEPTEMBER 1968 - JUDGMENT OBTAINED IN A MEMBER STATE - ENFORCEMENT IN ANOTHER CONTRACTING STATE POSSIBLE BY VIRTUE OF ARTICLE 31 OF THE CONVENTION - APPLICATION CONCERNING THE SAME SUBJECT-MATTER AND BETWEEN THE SAME PARTIES BROUGHT BEFORE A COURT OF THAT STATE - PROHIBITION - COSTS OF PROCEDURE

(CONVENTION OF 27 SEPTEMBER 1968 , ART. 31)

THE PROVISIONS OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS OF 27 SEPTEMBER 1968 PREVENT A PARTY WHO HAS OBTAINED A JUDGMENT IN HIS FAVOUR IN A CONTRACTING STATE , BEING A JUDGMENT FOR WHICH AN ORDER FOR ENFORCEMENT UNDER ARTICLE 31 OF THE CONVENTION MAY ISSUE IN ANOTHER CONTRACTING STATE , FROM MAKING AN APPLICATION TO A COURT IN THAT OTHER STATE FOR A JUDGMENT AGAINST THE OTHER PARTY IN THE SAME TERMS AS THE JUDGMENT DELIVERED IN THE FIRST STATE. THE FACT THAT THERE MAY BE OCCASIONS ON WHICH , ACCORDING TO THE NATIONAL LAW APPLICABLE , THE PROCEDURE SET OUT IN ARTICLES 31 ET SEQ. OF THE CONVENTION MAY BE FOUND TO BE MORE EXPENSIVE THAN BRINGING FRESH PROCEEDINGS ON THE SUBSTANCE OF THE CASE DOES NOT INVALIDATE THESE CONSIDERATIONS.

IN CASE 42/76

REFERENCE TO THE COURT UNDER ARTICLES 2 AND 3 OF THE PROTOCOL OF 3 JUNE 1971 (OJ L 204 OF 2 AUGUST 1975 , P. 28) CONCERNING 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 (JO L 299 OF 31 DECEMBER 1972 , P. 32) BY THE HOGE RAAD OF THE NETHERLANDS FOR A PRELIMINARY RULING IN THE APPEAL BEFORE THAT COURT LODGED BY THE ATTORNEY GENERAL TO THE HOGE RAAD AGAINST A JUDGMENT OF THE KANTONRECHTER OF BOXMEER DELIVERED IN PROCEEDINGS BETWEEN

JOZEF DE WOLF , TURNHOUT (BELGIUM)

AND

HARRY COX B.V., BOXMEER (THE NETHERLANDS)

ON THE INTERPRETATION OF THE SAID CONVENTION , AND IN PARTICULAR OF ARTICLE 31 THEREOF.

1 BY JUDGMENT OF 7 MAY 1976 , RECEIVED AT THE COURT REGISTRY ON THE FOLLOWING 14 MAY , THE HOGE RAAD OF THE NETHERLANDS HAS REFERRED TO THE COURT A QUESTION ON THE INTERPRETATION , IN PARTICULAR , OF ARTICLE 31 OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS OF 27 SEPTEMBER 1968 , HEREINAFTER REFERRED TO AS ' THE CONVENTION '.

2 IT APPEARS FROM THE FILE THAT THE PLAINTIFF IN THE MAIN ACTION , RESIDENT IN BELGIUM , HAVING OBTAINED A JUDGMENT FROM THE JUGE DE PAIX OF TURNHOUT

(BELGIUM) ORDERING THE DEFENDANT IN THE MAIN ACTION , HAVING ITS HEAD OFFICE IN THE NETHERLANDS , TO PAY AN INVOICE , LODGED AN APPLICATION BEFORE THE KANTONRECHTER (JUGE DE PAIX) OF BOXMEER (THE NETHERLANDS) AGAINST THE SAME DEFENDANT AND IN RESPECT OF THE SAME MATTER .

3 THE KANTONRECHTER , HAVING HEARD THE DEFENDANT , HELD THAT THE APPLICATION WAS ADMISSIBLE AND GAVE JUDGMENT ON THE SUBSTANCE OF THE CASE IN THE SAME TERMS AS THE BELGIAN COURT.

4 IN SO DOING , THE DUTCH COURT TOOK THE VIEW , INTER ALIA , ON THE ONE HAND , THAT IT WAS REQUIRED TO RECOGNIZE THE BELGIAN JUDGMENT UNDER ARTICLE 26 OF THE CONVENTION BUT THAT , ON THE OTHER , UNDER THE LEGISLATION OF THE NETHERLANDS , THE PROCEDURE CHOSEN BY THE APPLICANT WAS LESS EXPENSIVE FOR THE PARTIES THAN THE PROCEDURE UNDER ARTICLES 31 ET SEQ . OF THE CONVENTION WOULD HAVE BEEN. UNDER THE LATTER PROCEDURE AN APPLICATION FOR AN ORDER FOR THE ENFORCEMENT OF THE JUDGMENT DELIVERED BY THE BELGIAN COURT WOULD HAVE BEEN BROUGHT BEFORE THE PRESIDENT OF THE ARRONDISSEMENTRECHTBANK WHICH HAD JURISDICTION.

5 THE ATTORNEY-GENERAL OF THE HOGE RAAD BROUGHT AN APPEAL AGAINST THE JUDGMENT OF THE KANTONRECHTER BEFORE THE HOGE RAAD ON THE GROUND THAT THE KANTONRECHTER OUGHT TO HAVE DECLARED THE APPLICATION INADMISSIBLE , BECAUSE THE PROCEDURE UNDER ARTICLE 31 OF THE CONVENTION IS THE ONLY MEANS AVAILABLE TO THE APPLICANT FOR THE PURPOSE OF ENFORCING THE JUDGMENT OF THE BELGIAN COURT.

6 THE HOGE RAAD IS ASKING THE COURT , IN SUBSTANCE , TO RULE WHETHER THE CONVENTION PREVENTS A PLAINTIFF WHO HAS OBTAINED A JUDGMENT IN HIS FAVOUR IN A CONTRACTING STATE , BEING A JUDGMENT FOR WHICH AN ORDER FOR ENFORCEMENT UNDER ARTICLE 31 OF THE CONVENTION MAY ISSUE IN ANOTHER CONTRACTING STATE , FROM MAKING AN APPLICATION TO A COURT IN THAT OTHER STATE FOR A JUDGMENT AGAINST THE OTHER PARTY IN THE SAME TERMS AS THE JUDGMENT DELIVERED IN THE FIRST STATE.

7 THE FIRST PARAGRAPH OF ARTICLE 26 OF THE CONVENTION PROVIDES : ' A JUDGMENT GIVEN IN A CONTRACTING STATE SHALL BE RECOGNIZED IN THE OTHER CONTRACTING STATES WITHOUT ANY SPECIAL PROCEDURE BEING REQUIRED '.

8 ALTHOUGH ARTICLES 27 AND 28 LAY DOWN CERTAIN EXCEPTIONS TO THIS DUTY OF RECOGNITION , ARTICLE 29 NEVERTHELESS PROVIDES THAT ' UNDER NO CIRCUMSTANCES MAY A FOREIGN JUDGMENT BE REVIEWED AS TO ITS SUBSTANCE '

9 WHEN AN APPLICATION FOR A REVIEW AS TO SUBSTANCE IS DECLARED ADMISSIBLE , THE COURT BEFORE WHICH THE APPLICATION IS HEARD IS REQUIRED TO DECIDE WHETHER IT IS WELL FOUNDED , A SITUATION WHICH COULD LEAD THAT COURT TO CONFLICT WITH A PREVIOUS FOREIGN JUDGMENT AND , THEREFORE , TO FAIL IN ITS DUTY TO RECOGNIZE THE LATTER.

10/11 TO ACCEPT THE ADMISSIBILITY OF AN APPLICATION CONCERNING THE SAME SUBJECT-MATTER AND BROUGHT BETWEEN THE SAME PARTIES AS AN APPLICATION UPON WHICH JUDGMENT HAS ALREADY BEEN DELIVERED BY A COURT IN ANOTHER CONTRACTING STATE WOULD THEREFORE BE INCOMPATIBLE WITH THE MEANING OF THE PROVISIONS QUOTED. IT ALSO RESULTS FROM ARTICLE 21 OF THE CONVENTION , WHICH COVERS CASES IN WHICH PROCEEDINGS ' INVOLVING THE SAME CAUSE OF ACTION AND BETWEEN

THE SAME PARTIES ARE BROUGHT IN THE COURTS OF DIFFERENT CONTRACTING STATES ' AND REQUIRES THAT A COURT OTHER THAN THE FIRST SEISED SHALL DECLINE JURISDICTION IN FAVOUR OF THAT COURT , THAT PROCEEDINGS SUCH AS THOSE BROUGHT BEFORE THE KANTONRECHTER OF BOXMEER ARE INCOMPATIBLE WITH THE OBJECTIVES OF THE CONVENTION .

12 THAT PROVISION IS EVIDENCE OF THE CONCERN TO PREVENT THE COURTS OF TWO CONTRACTING STATES FROM GIVING JUDGMENT IN THE SAME CASE.

13 FINALLY , TO ACCEPT THE DUPLICATION OF MAIN ACTIONS SUCH AS HAS OCCURRED IN THE PRESENT CASE MIGHT RESULT IN A CREDITOR ' S POSSESSING TWO ORDERS FOR ENFORCEMENT ON THE BASIS OF THE SAME DEBT.

14 THE FACT THAT THERE MAY BE OCCASIONS ON WHICH , ACCORDING TO THE NATIONAL LAW APPLICABLE , THE PROCEDURE SET OUT IN ARTICLES 31 ET SEQ . OF THE CONVENTION MAY BE FOUND TO BE MORE EXPENSIVE THAN BRINGING FRESH PROCEEDINGS ON THE SUBSTANCE OF THE CASE DOES NOT INVALIDATE THESE CONSIDERATIONS.

15 IN THIS RESPECT , IT MUST BE OBSERVED THAT THE CONVENTION , WHICH , IN THE WORDS OF THE PREAMBLE THERETO , IS INTENDED ' TO SECURE THE SIMPLIFICATION OF FORMALITIES GOVERNING THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS OF COURTS OR TRIBUNALS ' , OUGHT TO INDUCE THE CONTRACTING STATES TO ENSURE THAT THE COSTS OF THE PROCEDURE DESCRIBED IN THE CONVENTION ARE FIXED SO AS TO ACCORD WITH THAT CONCERN FOR SIMPLIFICATION.

16 THE QUESTION RAISED BY THE HOGE RAAD OF THE NETHERLANDS SHOULD THEREFORE BE ANSWERED IN THE AFFIRMATIVE.

COSTS

17 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

18 AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , A STEP IN THE ACTION PENDING BEFORE THE HOGE RAAD OF THE NETHERLANDS , 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 HOGE RAAD OF THE NETHERLANDS BY JUDGMENT OF 7 MAY 1976 , HEREBY RULES :

THE PROVISIONS OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS OF 27 SEPTEMBER 1968 PREVENT A PARTY WHO HAS OBTAINED A JUDGMENT IN HIS FAVOUR IN A CONTRACTING STATE , BEING A JUDGMENT FOR WHICH AN ORDER FOR ENFORCEMENT UNDER ARTICLE 31 OF THE CONVENTION MAY ISSUE IN ANOTHER CONTRACTING STATE , FROM MAKING AN APPLICATION TO A COURT IN THAT OTHER STATE FOR A JUDGMENT AGAINST THE OTHER PARTY IN THE SAME TERMS AS THE JUDGMENT DELIVERED IN THE FIRST STATE.

DOCNUM	61976J0042
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 1976 Page 01759 Greek special edition Page 00631 Portuguese special edition Page 00695 Spanish special edition Page 00577
DOC	1976/11/30
LODGED	1976/05/14
JURCIT	41968A0927(01)-A31 : N 1 4 - 6 14 41968A0927(01)-A26 : N 4 41968A0927(01)-A26L1 : N 7 41968A0927(01)-A27 : N 8 41968A0927(01)-A28 : N 8 41968A0927(01)-A29 : N 8 41968A0927(01)-A21 : N 11
CONCERNS	Interprets 41968A0927(01) -A31
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	Dutch
OBSERV	Commission ; Federal Republic of Germany ; Member States ; Institutions
NATIONA	Netherlands
NATCOUR	*A6* Kantongerecht Tilburg, vonnis van 24/10/74 (1189/1974) ; *A7* Kantongerecht Boxmeer, vonnis van 07/01/75 (203/74) ; *A8* Kantongerecht Boxmeer, vonnis van 08/07/75 (203/74) ; *A9* Hoge Raad, arrest van 07/05/76 (11.033) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1976 no 455 ; - Common Market Law Reports 1977 Vol.1 p.19-25 ; *I1* Vredegerecht Turnhout, 1e kanton, vonnis van 28/05/76 (16.932 - 1185) ; *P1* Hoge Raad, arrest van 14/01/77 (11.033) ; - Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1978 no 102 ; - European Commercial Cases 1979 p.82
NOTES	Hartley, Trevor: Enforcement: Alternative Methods, European Law Review 1976 p.146-147 ; Jochem, Reiner: Juristische Schulung 1977 p.614-616 ; Huet, André: Journal du droit international 1977 p.253-257 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1977 no 484 ; Geimer, Reinhold: Neue juristische Wochenschrift 1977 p.2023-2024 ; Audit, Bernard: Recueil Dalloz Sirey 1977 IR. p.350-351 ; Verheul, Hans: The EEC Convention on Jurisdiction and Judgments of 27 September 1968 in Netherlands Legal Practice, Netherlands International Law Review 1978 p.88 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a8 (PM)

PROCEDU	Reference for a preliminary ruling
ADVGEN	Mayras
JUDGRAP	Kutscher
DATES	of document: 30/11/1976 of application: 14/05/1976

Judgment of the Court
of 14 October 1976
LTU Lufttransportunternehmen GmbH Co. KG v Eurocontrol.
Reference for a preliminary ruling: Oberlandesgericht Düsseldorf - Germany.
Case 29-76.

1 . CONVENTION OF 27 SEPTEMBER 1968 - AREA OF APPLICATION - CIVIL AND COMMERCIAL MATTERS - INTERPRETATION

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 1)

2 . CONVENTION OF 27 SEPTEMBER 1968 - AREA OF APPLICATION - ACTION BETWEEN A PUBLIC AUTHORITY AND A PERSON GOVERNED BY PRIVATE LAW - EXERCISE OF THE POWERS OF THE PUBLIC AUTHORITY - JUDGMENT - EXCLUSION

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 1)

1 . IN THE INTERPRETATION OF THE CONCEPT ' CIVIL AND COMMERCIAL MATTERS ' FOR THE PURPOSES OF THE APPLICATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , IN PARTICULAR TITLE III THEREOF , REFERENCE MUST BE MADE NOT TO THE LAW OF ONE OF THE STATES CONCERNED BUT , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS.

2 . ALTHOUGH CERTAIN JUDGMENTS GIVEN IN ACTIONS BETWEEN A PUBLIC AUTHORITY AND A PERSON GOVERNED BY PRIVATE LAW MAY FALL WITHIN THE AREA OF APPLICATION OF THE CONVENTION , THIS IS NOT SO WHERE THE PUBLIC AUTHORITY ACTS IN THE EXERCISE OF ITS POWERS. SUCH IS THE CASE IN A DISPUTE WHICH CONCERNS THE RECOVERY OF CHARGES PAYABLE BY A PERSON GOVERNED BY PRIVATE LAW TO A NATIONAL OR INTERNATIONAL BODY GOVERNED BY PUBLIC LAW FOR THE USE OF EQUIPMENT AND SERVICES PROVIDED BY SUCH BODY , IN PARTICULAR WHERE SUCH USE IS OBLIGATORY AND EXCLUSIVE . THIS APPLIES IN PARTICULAR WHERE THE RATE OF CHARGES , THE METHODS OF CALCULATION AND THE PROCEDURES FOR COLLECTION ARE FIXED UNILATERALLY IN RELATION TO THE USERS.

IN CASE 29/76

REFERENCE TO THE COURT UNDER ARTICLE 1 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 OBERLANDESGERICHT DUSSELDORF FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

FIRMA LTU LUFTTRANSPORTUNTERNEHMEN GMBH CO. KG , DUSSELDORF ,

AND

EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL), BRUSSEL ,

ON THE INTERPRETATION OF THE CONCEPT ' CIVIL AND COMMERCIAL MATTERS ' WITHIN THE MEANING OF THE FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY ORDER DATED 16 FEBRUARY 1976 RECEIVED AT THE COURT REGISTRY ON THE FOLLOWING 18 MARCH , THE OBERLANDESGERICHT DUSSELDORF REFERRED TO THE COURT OF JUSTICE PURSUANT TO THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION

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 ') THE QUESTION WHETHER , FOR THE PURPOSES OF INTERPRETING THE CONCEPT ' CIVIL AND COMMERCIAL MATTERS ' WITHIN THE MEANING OF THE FIRST PARAGRAPH OF ARTICLE 1 OF THE CONVENTION , THE LAW TO BE APPLIED IS THE LAW OF THE STATE IN WHICH JUDGMENT WAS GIVEN OR THE LAW OF THE STATE IN WHICH PROCEEDINGS FOR AN ORDER FOR ENFORCEMENT WERE ISSUED.

2 THE FILE SHOWS THAT THE QUESTION AROSE WITHIN THE CONTEXT OF PROCEEDINGS UNDER TITLE III , SECTION 2 , OF THE CONVENTION IN WHICH EUROCONTROL ASKED THE COMPETENT GERMAN COURTS TO AUTHORIZE THE ENFORCEMENT OF AN ORDER BY THE BELGIAN COURTS THAT LTU PAY TO IT CERTAIN SUMS BY WAY OF CHARGES IMPOSED BY EUROCONTROL FOR THE USE OF ITS EQUIPMENT AND SERVICES.

3 UNDER ARTICLE 1 , THE CONVENTION ' SHALL APPLY IN CIVIL AND COMMERCIAL MATTERS WHATEVER THE NATURE OF THE COURT OR TRIBUNAL '. THE SECOND PARAGRAPH OF ARTICLE 1 STATES THAT IT SHALL NOT APPLY TO ' (1) THE STATUS OR LEGAL CAPACITY OF NATURAL PERSONS , RIGHTS IN PROPERTY ARISING OUT OF A MATRIMONIAL RELATIONSHIP , WILLS AND SUCCESSION ; (2) BANKRUPTCY , PROCEEDINGS RELATING TO THE WINDING-UP OF INSOLVENT COMPANIES OR OTHER LEGAL PERSONS , JUDICIAL ARRANGEMENTS , COMPOSITIONS AND ANALOGOUS PROCEEDINGS ; (3) SOCIAL SECURITY ; (4) ARBITRATION '.

APART FROM PROVIDING THAT THE CONVENTION SHALL APPLY WHATEVER THE NATURE OF THE COURT OR TRIBUNAL TO WHICH THE MATTER IS REFERRED AND EXCLUDING CERTAIN MATTERS FROM ITS AREA OF APPLICATION , ARTICLE 1 GIVES NO FURTHER DETAILS AS TO THE MEANING OF THE CONCEPT IN QUESTION

AS ARTICLE 1 SERVES TO INDICATE THE AREA OF APPLICATION OF THE CONVENTION IT IS NECESSARY , IN ORDER TO ENSURE , AS FAR AS POSSIBLE , THAT THE RIGHTS AND OBLIGATIONS WHICH DERIVE FROM IT FOR THE CONTRACTING STATES AND THE PERSONS TO WHOM IT APPLIES ARE EQUAL AND UNIFORM , THAT THE TERMS OF THAT PROVISION SHOULD NOT BE INTERPRETED AS A MERE REFERENCE TO THE INTERNAL LAW OF ONE OR OTHER OF THE STATES CONCERNED .

BY PROVIDING THAT THE CONVENTION SHALL APPLY ' WHATEVER THE NATURE OF THE COURT OR TRIBUNAL ' ARTICLE 1 SHOWS THAT THE CONCEPT ' CIVIL AND COMMERCIAL MATTERS ' CANNOT BE INTERPRETED SOLELY IN THE LIGHT OF THE DIVISION OF JURISDICTION BETWEEN THE VARIOUS TYPES OF COURTS EXISTING IN CERTAIN STATES.

THE CONCEPT IN QUESTION MUST THEREFORE BE REGARDED AS INDEPENDENT AND MUST BE INTERPRETED BY REFERENCE , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS.

4 IF THE INTERPRETATION OF THE CONCEPT IS APPROACHED IN THIS WAY , IN PARTICULAR FOR THE PURPOSE OF APPLYING THE PROVISIONS OF TITLE III OF THE CONVENTION , CERTAIN TYPES OF JUDICIAL DECISION MUST BE REGARDED AS EXCLUDED FROM THE AREA OF APPLICATION OF THE CONVENTION , EITHER BY REASON OF THE LEGAL RELATIONSHIPS BETWEEN THE PARTIES TO THE ACTION OR OF THE SUBJECT-MATTER OF THE ACTION.

ALTHOUGH CERTAIN JUDGMENTS GIVEN IN ACTIONS BETWEEN A PUBLIC AUTHORITY

AND A PERSON GOVERNED BY PRIVATE LAW MAY FALL WITHIN THE AREA OF APPLICATION OF THE CONVENTION , THIS IS NOT SO WHERE THE PUBLIC AUTHORITY ACTS IN THE EXERCISE OF ITS POWERS.

SUCH IS THE CASE IN A DISPUTE WHICH , LIKE THAT BETWEEN THE PARTIES TO THE MAIN ACTION , CONCERNS THE RECOVERY OF CHARGES PAYABLE BY A PERSON GOVERNED BY PRIVATE LAW TO A NATIONAL OR INTERNATIONAL BODY GOVERNED BY PUBLIC LAW FOR THE USE OF EQUIPMENT AND SERVICES PROVIDED BY SUCH BODY , IN PARTICULAR WHERE SUCH USE IS OBLIGATORY AND EXCLUSIVE .

THIS APPLIES IN PARTICULAR WHERE THE RATE OF CHARGES , THE METHODS OF CALCULATION AND THE PROCEDURES FOR COLLECTION ARE FIXED UNILATERALLY IN RELATION TO THE USERS , AS IS THE POSITION IN THE PRESENT CASE WHERE THE BODY IN QUESTION UNILATERALLY FIXED THE PLACE OF PERFORMANCE OF THE OBLIGATION AT ITS REGISTERED OFFICE AND SELECTED THE NATIONAL COURTS WITH JURISDICTION TO ADJUDICATE UPON THE PERFORMANCE OF THE OBLIGATION.

5 THE ANSWER TO BE GIVEN TO THE QUESTION REFERRED MUST THEREFORE BE THAT IN THE INTERPRETATION OF THE CONCEPT ' CIVIL AND COMMERCIAL MATTERS ' FOR THE PURPOSES OF THE APPLICATION OF THE CONVENTION AND IN PARTICULAR OF TITLE III THEREOF , REFERENCE MUST NOT BE MADE TO THE LAW OF ONE OF THE STATES CONCERNED BUT , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS.

ON THE BASIS OF THESE CRITERIA , A JUDGMENT GIVEN IN AN ACTION BETWEEN A PUBLIC AUTHORITY AND A PERSON GOVERNED BY PRIVATE LAW , IN WHICH A PUBLIC AUTHORITY HAS ACTED IN THE EXERCISE OF ITS POWERS , IS EXCLUDED FROM THE AREA OF APPLICATION OF THE CONVENTION.

COSTS

6 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE OBERLANDESGERICHT DUSSELDORF , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE OBERLANDESGERICHT DUSSELDORF , BY ORDER DATED 16 FEBRUARY 1976 , HEREBY RULES :

1 . IN THE INTERPRETATION OF THE CONCEPT ' CIVIL AND COMMERCIAL MATTERS ' FOR THE PURPOSES OF THE APPLICATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , IN PARTICULAR TITLE III THEREOF , REFERENCE MUST NOT BE MADE TO THE LAW OF ONE OF THE STATES CONCERNED BUT , FIRST , TO THE OBJECTIVES AND SCHEME OF THE CONVENTION AND , SECONDLY , TO THE GENERAL PRINCIPLES WHICH STEM FROM THE CORPUS OF THE NATIONAL LEGAL SYSTEMS ;

2 . A JUDGMENT GIVEN IN AN ACTION BETWEEN A PUBLIC AUTHORITY AND A PERSON GOVERNED BY PRIVATE LAW , IN WHICH THE PUBLIC AUTHORITY HAS ACTED IN THE EXERCISE OF ITS POWERS , IS EXCLUDED FROM THE AREA OF APPLICATION OF THE CONVENTION.

DOCNUM	61976J0029
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1976 ; J ; judgment
PUBREF	European Court reports 1976 Page 01541 Greek special edition 1976 Page 00577 Portuguese special edition 1976 Page 00629 Spanish special edition 1976 Page 00539 Swedish special edition III Page 00195 Finnish special edition III Page 00203
DOC	1976/10/14
LODGED	1976/03/18
JURCIT	41968A0927(01)-A01L1 : N 1 3 41968A0927(01)-A01L2 : N 3 41968A0927(01)-TIT3 : N 2 5
CONCERNS	Interprets 41968A0927(01)-A01L1
SUB	Brussels Convention of 27 September 1968 ; Enforcement of judgments
AUTLANG	German
OBSERV	Commission ; Federal Republic of Germany ; Italy ; Member States ; Institutions
NATIONA	Federal Republic of Germany
NATCOUR	*A6* Landgericht Düsseldorf, Beschluß vom 13/08/74 (25 AR 13/74) *A7* Oberlandesgericht Düsseldorf, Beschluß vom 24/03/75 (19 W 10/74) *A8* Bundesgerichtshof, Beschluß vom 26/11/75 (VIII ZB 26/75) - Entscheidungen des Bundesgerichtshofes in Zivilsachen Bd.65 p.291-299 - Der Betrieb 1976 p.193-194 - Neue Juristische Wochenschrift 1976 p.478-480

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A9 Oberlandesgericht Düsseldorf, Vorlagebeschluß vom 16/02/76 (19 W 18/75)
P1 Oberlandesgericht Düsseldorf, Beschluß vom 20/01/78 (19 W 18/75)
P2 Landgericht Düsseldorf, Beschluß vom 01/10/79 (25 AR 13/74)

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Geimer, Reinhold: Neue juristische Wochenschrift 1977 p.492-493
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Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a6 (PM)

PROCEDU Reference for a preliminary ruling

ADVGEN Reischl

JUDGRAP Donner

DATES of document: 14/10/1976
of application: 18/03/1976

**Judgment of the Court
of 14 December 1976
Galeries Segoura SPRL v Rahim Bonakdarian. Reference for a preliminary ruling:
Bundesgerichtshof - Germany. 'Convention of 27 September 1968 on Jurisdiction and the
Enforcement of Judgments in Civil and Commercial Matters, Article 17 (jurisdiction by consent)'.
Case 25-76.**

1 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - CONFERMENT OF JURISDICTION BY CONSENT - EFFECT - VALIDITY - REQUIREMENTS - STRICT CONSTRUCTION - CONSENSUS BETWEEN PARTIES

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 17)

2 . CONVENTION OF 27 SEPTEMBER 1968 - JURISDICTION - CONFERMENT OF JURISDICTION BY CONSENT - FORM - ORALLY CONCLUDED CONTRACT - VENDOR ' S CONFIRMATION IN WRITING - NOTIFICATION OF GENERAL CONDITIONS OF SALE - CLAUSE CONFERRING JURISDICTION - NEED FOR ACCEPTANCE IN WRITING BY THE PURCHASER - ORAL AGREEMENT WITHIN THE FRAMEWORK OF A CONTINUING TRADING RELATIONSHIP - IMPLIED ACCEPTANCE OF THE CLAUSE CONFERRING JURISDICTION

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 17)

1 . THE WAY IN WHICH ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 IS TO BE APPLIED MUST BE INTERPRETED IN THE LIGHT OF THE EFFECT OF THE CONFERMENT OF JURISDICTION BY CONSENT , WHICH IS TO EXCLUDE BOTH THE JURISDICTION DETERMINED BY THE GENERAL PRINCIPLE LAID DOWN IN ARTICLE 2 AND THE SPECIAL JURISDICTIONS PROVIDED FOR IN ARTICLES 5 AND 6 OF THE CONVENTION. IN VIEW OF THE CONSEQUENCES THAT SUCH AN OPTION MAY HAVE ON THE POSITION OF THE PARTIES TO THE ACTION , THE REQUIREMENTS SET OUT IN ARTICLE 17 GOVERNING JURISDICTION MUST BE STRICTLY CONSTRUED. BY MAKING SUCH VALIDITY SUBJECT TO THE EXISTENCE OF AN ' AGREEMENT ' BETWEEN THE PARTIES , ARTICLE 17 IMPOSES UPON THE COURT BEFORE WHICH THE MATTER IS BROUGHT THE DUTY OF EXAMINING , FIRST , WHETHER THE CLAUSE CONFERRING JURISDICTION UPON IT WAS IN FACT THE SUBJECT OF A CONSENSUS BETWEEN THE PARTIES , WHICH MUST BE CLEARLY AND PRECISELY DEMONSTRATED , THE PURPOSE OF THE FORMAL REQUIREMENTS IMPOSED BY ARTICLE 17 BEING TO ENSURE THAT THE CONSENSUS BETWEEN THE PARTIES IS IN FACT ESTABLISHED.

2 . IN THE CASE OF AN ORALLY CONCLUDED CONTRACT , THE REQUIREMENTS OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 AS TO FORM ARE SATISFIED ONLY IF THE VENDOR ' S CONFIRMATION IN WRITING ACCOMPANIED BY NOTIFICATION OF THE GENERAL CONDITIONS OF SALE HAS BEEN ACCEPTED IN WRITING BY THE PURCHASER. THE FACT THAT THE PURCHASER DOES NOT RAISE ANY OBJECTIONS AGAINST A CONFIRMATION ISSUED UNILATERALLY BY THE OTHER PARTY DOES NOT AMOUNT TO ACCEPTANCE ON HIS PART OF THE CLAUSE CONFERRING JURISDICTION , UNLESS THE ORAL AGREEMENT COMES WITHIN THE FRAMEWORK OF A CONTINUING TRADING RELATIONSHIP BETWEEN THE PARTIES WHICH IS BASED ON THE GENERAL CONDITIONS OF ONE OF THEM , AND THOSE CONDITIONS CONTAIN A CLAUSE CONFERRING JURIDICTION.

IN CASE 25/76 ,

REFERENCE TO THE COURT UNDER ARTICLE 1 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 IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

GALERIES SEGOURA , A LIMITED PARTNERSHIP HAVING ITS REGISTERED OFFICE IN BRUSSELS ,

AND

RAHIM BONAKDARIAN , AN IMPORT-EXPORT COMPANY , HAVING ITS REGISTERED OFFICE IN HAMBURG ,

FOR A PRELIMINARY RULING ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY AN ORDER OF 18 FEBRUARY 1976 , RECEIVED AT THE COURT REGISTRY ON 11 MARCH 1976 , THE BUNDESGERICHTSHOF REFERRED TO THE COURT OF JUSTICE , PURSUANT TO THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION 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 CONCERNING THE INTERPRETATION OF ARTICLE 17 OF THE SAID CONVENTION.

2 IT APPEARS FROM THE ORDER MAKING THE REFERENCE THAT AT THE PRESENT STAGE THE ACTION , WHICH WAS BROUGHT BEFORE THE BUNDESGERICHTSHOF BY WAY OF APPEAL ON A POINT OF LAW , CONCERNS THE JURISDICTION OF THE LANDGERICHT HAMBURG TO HEAR AN ACTION BROUGHT BY A TRADING UNDERTAKING ESTABLISHED WITHIN THE AREA OF ITS JURISDICTION AGAINST A TRADING COMPANY HAVING ITS REGISTERED OFFICE IN BRUSSELS , FOR PAYMENT OF THE BALANCE OF THE PRICE OF A BATCH OF CARPETS BOUGHT IN HAMBURG BY THE BRUSSELS FIRM.

THE CONTRACT WAS CONCLUDED ORALLY BETWEEN THE PARTIES , AND THE VENDOR PERFORMED HIS SIDE OF IT ON THE SAME DAY IN CONSIDERATION OF A PART-PAYMENT MADE BY THE PURCHASER.

ON HANDING OVER THE GOODS , THE VENDOR DELIVERED TO THE PURCHASER A DOCUMENT DESCRIBED AS ' CONFIRMATION OF ORDER AND INVOICE ' , WHICH STATED THAT THE SALE AND THE DELIVERY HAD TAKEN PLACE ' SUBJECT TO THE CONDITIONS STATED ON THE REVERSE '.

THE ' CONDITIONS OF SALE , DELIVERY AND PAYMENT ' PRINTED ON THE REVERSE OF THIS DOCUMENT CONTAINED INTER ALIA A CLAUSE STIPULATING THAT ALL DISPUTES WERE TO BE DECIDED EXCLUSIVELY BY THE HAMBURG COURTS

THIS DOCUMENT WAS NOT CONFIRMED BY THE PURCHASER.

3 AFTER THE PURCHASER HAD RECEIVED FORMAL NOTICE TO PAY THE BALANCE OF THE PURCHASE PRICE , THE VENDOR BROUGHT AN ACTION BEFORE THE LANDGERICHT HAMBURG WHICH , BY A JUDGMENT IN DEFAULT DELIVERED ON 16 MAY 1973 , ORDERED THE PURCHASER TO PAY THE BALANCE WITH INTEREST THEREON FOR DELAY.

ON THE PURCHASER ' S ENTERING AN OBJECTION , THE LANDGERICHT , BY A JUDGMENT OF 17 DECEMBER 1973 , WITHDREW ITS FIRST JUDGMENT AND DECLARED THAT IT HAD NO JURISDICTION , ON THE GROUND THAT THE PARTIES HAD NOT CONCLUDED ANY AGREEMENT CONFERRING JURISDICTION WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION.

THE VENDOR BROUGHT AN APPEAL BEFORE THE HANSEATISCHES OBERLANDESGERICHT WHICH QUASHED THE DECISION OF THE LANDGERICHT AND REMITTED THE CASE TO THAT COURT , HOLDING THAT AN AGREEMENT CONFERRING JURISDICTION HAD BEEN VALIDLY CONCLUDED BETWEEN THE PARTIES UNDER ARTICLE 17 OF THE CONVENTION.

4 AN APPEAL ON A POINT OF LAW BY THE PURCHASER AGAINST THIS JUDGMENT IS AT PRESENT BEFORE THE BUNDESGERICHTSHOF.

IN THIS CONNEXION , THE BUNDESGERICHTSHOF HAS REFERRED TO THE COURT TWO QUESTIONS CONCERNING THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 17 .

THE INTERPRETATION OF ARTICLE 17 OF THE CONVENTION IN GENERAL

5 THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION PROVIDES :

' IF THE PARTIES , ONE OR MORE OF WHOM IS DOMICILED IN A CONTRACTING STATE , HAVE , BY AGREEMENT IN WRITING OR BY AN ORAL AGREEMENT CONFIRMED IN WRITING , 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 CONNEXION WITH A PARTICULAR LEGAL RELATIONSHIP , THAT COURT OR THOSE COURTS SHALL HAVE EXCLUSIVE JURISDICTION '.

6 THE WAY IN WHICH THAT PROVISION IS TO BE APPLIED MUST BE INTERPRETED IN THE LIGHT OF THE EFFECT OF THE CONFERMENT OF JURISDICTION BY CONSENT , WHICH IS TO EXCLUDE BOTH THE JURISDICTION DETERMINED BY THE GENERAL PRINCIPLE LAID DOWN IN ARTICLE 2 AND THE SPECIAL JURISDICTIONS PROVIDED FOR IN ARTICLES 5 AND 6 OF THE CONVENTION .

IN VIEW OF THE CONSEQUENCES THAT SUCH AN OPTION MAY HAVE ON THE POSITION OF THE PARTIES TO THE ACTION , THE REQUIREMENTS SET OUT IN ARTICLE 17 GOVERNING THE VALIDITY OF CLAUSES CONFERRING JURISDICTION MUST BE STRICTLY CONSTRUED.

BY MAKING SUCH VALIDITY SUBJECT TO THE EXISTENCE OF AN ' AGREEMENT ' BETWEEN THE PARTIES , ARTICLE 17 IMPOSES UPON THE COURT BEFORE WHICH THE MATTER IS BROUGHT THE DUTY OF EXAMINING , FIRST , WHETHER THE CLAUSE CONFERRING JURISDICTION UPON IT WAS IN FACT THE SUBJECT OF A CONSENSUS BETWEEN THE PARTIES , WHICH MUST BE CLEARLY AND PRECISELY DEMONSTRATED.

THE PURPOSE OF THE FORMAL REQUIREMENTS IMPOSED BY ARTICLE 17 IS TO ENSURE THAT THE CONSENSUS BETWEEN THE PARTIES IS IN FACT ESTABLISHED.

THE QUESTIONS REFERRED TO THE COURT BY THE BUNDESGERICHTSHOF MUST BE EXAMINED IN THE LIGHT OF THESE CONSIDERATIONS.

THE QUESTIONS REFERRED BY THE BUNDESGERICHTSHOF

7 THE FIRST QUESTION IS WHETHER THE REQUIREMENTS OF ARTICLE 17 OF THE CONVENTION ARE SATISFIED IF , AT THE ORAL CONCLUSION OF A CONTRACT OF SALE , A VENDOR HAS STATED THAT HE WISHES TO RELY ON HIS GENERAL CONDITIONS OF SALE AND IF HE SUBSEQUENTLY CONFIRMS THE CONTRACT IN WRITING TO THE PURCHASER AND ANNEXES TO THIS CONFIRMATION HIS GENERAL CONDITIONS OF SALE WHICH CONTAIN A CLAUSE CONFERRING JURISDICTION.

8 IN ACCORDANCE WITH THE FOREGOING GENERAL CONSIDERATIONS , IT CANNOT BE PRESUMED THAT ONE OF THE PARTIES WAIVES THE ADVANTAGE OF THE PROVISIONS OF THE CONVENTION CONFERRING JURISDICTION.

EVEN IF , IN AN ORALLY CONCLUDED CONTRACT , THE PURCHASER AGREES TO ABIDE BY THE VENDOR ' S GENERAL CONDITIONS , HE IS NOT FOR THAT REASON TO BE DEEMED TO HAVE AGREED TO ANY CLAUSE CONFERRING JURISDICTION WHICH MIGHT APPEAR IN THOSE GENERAL CONDITIONS.

IT FOLLOWS THAT A CONFIRMATION IN WRITING OF THE CONTRACT BY THE VENDOR , ACCOMPANIED BY THE TEXT OF HIS GENERAL CONDITIONS , IS WITHOUT EFFECT , AS REGARDS ANY CLAUSE CONFERRING JURISDICTION WHICH IT MIGHT CONTAIN , UNLESS THE PURCHASER AGREES TO IT IN WRITING.

9 THE SECOND QUESTION THEN ASKS WHETHER ARTICLE 17 OF THE CONVENTION APPLIES IF , IN DEALINGS BETWEEN MERCHANTS , A VENDOR , AFTER THE ORAL CONCLUSION OF A CONTRACT OF SALE , CONFIRMS IN WRITING TO THE PURCHASER THE CONCLUSION OF THE CONTRACT SUBJECT TO HIS GENERAL CONDITIONS OF SALE AND ANNEXES TO THIS DOCUMENT HIS CONDITIONS OF SALE WHICH INCLUDE A CLAUSE CONFERRING JURISDICTION AND IF THE PURCHASER DOES NOT CHALLENGE THIS WRITTEN CONFIRMATION.

10 IT EMERGES FROM A COMPARISON OF THE WORDING OF THE TWO QUESTIONS AND FROM THE EXPLANATIONS GIVEN DURING THE PROCEEDINGS BEFORE THE COURT THAT THE SECOND OF THE TWO QUESTIONS CONCERNS THE HYPOTHETICAL SITUATION OF A SALE BEING CONCLUDED WITHOUT ANY REFERENCE BEING MADE AT ALL TO THE EXISTENCE OF GENERAL CONDITIONS OF SALE.

IN SUCH A CASE , IT IS PATENT THAT A CLAUSE CONFERRING JURISDICTION WHICH MIGHT BE INCLUDED IN THOSE GENERAL CONDITIONS DID NOT FORM PART OF THE SUBJECT-MATTER OF THE CONTRACT CONCLUDED ORALLY BETWEEN THE PARTIES .

THEREFORE SUBSEQUENT NOTIFICATION OF GENERAL CONDITIONS CONTAINING SUCH A CLAUSE IS NOT CAPABLE OF ALTERING THE TERMS AGREED BETWEEN THE PARTIES , EXCEPT IF THOSE CONDITIONS ARE EXPRESSLY ACCEPTED IN WRITING BY THE PURCHASER.

11 IT FOLLOWS FROM THE FOREGOING , IN BOTH OF THE ALTERNATIVE CASES SUGGESTED BY THE BUNDESGERICHTSHOF , THAT A UNILATERAL DECLARATION IN WRITING SUCH AS THE ONE IN THE PRESENT CASE IS NOT SUFFICIENT TO CONSTITUTE AN AGREEMENT ON JURISDICTION BY CONSENT.

HOWEVER , IT WOULD BE OTHERWISE WHERE AN ORAL AGREEMENT FORMS PART OF A CONTINUING TRADING RELATIONSHIP BETWEEN THE PARTIES , PROVIDED ALSO THAT IT IS ESTABLISHED THAT THE DEALINGS TAKEN AS A WHOLE ARE GOVERNED BY THE GENERAL CONDITIONS OF THE PARTY GIVING THE CONFIRMATION , AND THESE CONDITIONS CONTAIN A CLAUSE CONFERRING JURISDICTION.

INDEED , IN SUCH A CONTEXT , IT WOULD BE CONTRARY TO GOOD FAITH FOR THE RECIPIENT OF THE CONFIRMATION TO DENY THE EXISTENCE OF A JURISDICTION CONFERRED BY CONSENT , EVEN IF HE HAD GIVEN NO ACCEPTANCE IN WRITING .

12 IT IS THEREFORE POSSIBLE TO GIVE A SINGLE ANSWER TO THE TWO QUESTIONS REFERRED TO THE COURT AS FOLLOWS : IN THE CASE OF AN ORALLY CONCLUDED CONTRACT , THE REQUIREMENTS OF THE FIRST PARAGRAPH OF ARTICLE 17 AS TO FORM ARE SATISFIED ONLY IF THE VENDOR ' S CONFIRMATION IN WRITING ACCOMPANIED BY NOTIFICATION OF THE GENERAL CONDITIONS OF SALE HAS BEEN ACCEPTED IN WRITING BY THE PURCHASER.

THE FACT THAT THE PURCHASER DOES NOT RAISE ANY OBJECTIONS AGAINST A CONFIRMATION

ISSUED UNILATERALLY BY THE OTHER PARTY DOES NOT AMOUNT TO ACCEPTANCE ON HIS PART OF THE CLAUSE CONFERRING JURISDICTION , UNLESS THE ORAL AGREEMENT COMES WITHIN THE FRAMEWORK OF A CONTINUING TRADING RELATIONSHIP BETWEEN THE PARTIES WHICH IS BASED ON THE GENERAL CONDITIONS OF ONE OF THEM , AND THOSE CONDITIONS CONTAIN A CLAUSE CONFERRING JURISDICTION.

COSTS

13 THE COSTS INCURRED BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAS SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE

AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE BUNDESGERICHTSHOF , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT ,

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 18 FEBRUARY 1976 , HEREBY RULES :

IN THE CASE OF AN ORALLY CONCLUDED CONTRACT , THE REQUIREMENTS OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS AS TO FORM ARE SATISFIED ONLY IF THE VENDOR ' S CONFIRMATION IN WRITING ACCOMPANIED BY NOTIFICATION OF THE GENERAL CONDITIONS OF SALE HAS BEEN ACCEPTED IN WRITING BY THE PURCHASER.

THE FACT THAT THE PURCHASER DOES NOT RAISE ANY OBJECTIONS AGAINST A CONFIRMATION ISSUED UNILATERALLY BY THE OTHER PARTY DOES NOT AMOUNT TO ACCEPTANCE ON HIS PART OF THE CLAUSE CONFERRING JURISDICTION UNLESS THE ORAL AGREEMENT COMES WITHIN THE FRAMEWORK OF A CONTINUING TRADING RELATIONSHIP BETWEEN THE PARTIES WHICH IS BASED ON THE GENERAL CONDITIONS OF ONE OF THEM , AND THOSE CONDITIONS CONTAIN A CLAUSE CONFERRING JURISDICTION.

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NOTES	Audit, Bernard: Jurisprudence en droit international privé, Recueil Dalloz Sirey 1977 IR. p.349-350 ; Mezger, Ernst: Revue critique de droit international privé 1977 p.585-593 ; Hartley, Trevor: Article 17: Choice of Jurisdiction, European Law Review 1977 p.148-149 ; Müller, Gerd: Schriftformerfordernis nach Art.17 EG-Zuständigkeits- und Vollstreckungsübereinkommen, Recht der Internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1977 p.163-165 ; Bischoff, Jean-Marc: Journal du droit international 1977 p.734-739 ; Bonell, Michael Joachim: L'art. 17 della Convenzione di Bruxelles sulla competenza giurisdizionale ed il diritto transnazionale, Rivista del diritto commerciale 1977 II p.214-230 ; Schultsz, J.C.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 1977 no 447 ; Krings, E.: Reflexion au sujet de la prorogation de compétence territoriale et du for contractuel, Revue de droit international et de droit comparé 1978 p.99-107 ; Anton, A.E. ; Beaumont, P.R.: The Scots Law Times 1984 p.a10 (PM)
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Judgment of the Court
of 14 December 1976
Estasis Salotti di Colzani Aimo et Gianmario Colzani v Rüwa Polstereimaschinen GmbH.
Reference for a preliminary ruling: Bundesgerichtshof - Germany.
Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Article 17 (jurisdiction by consent).
Case 24-76.

1 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - JURISDICTION BY CONSENT - EFFECT - VALIDITY - MANNER IN WHICH APPLIED - STRICT INTERPRETATION - CONSENSUS BETWEEN THE PARTIES

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 17)

2 . CONVENTION OF 27 SEPTEMBER 1968 - COURTS HAVING JURISDICTION - JURISDICTION BY CONSENT - IN WRITING - CONTRACT SIGNED BY THE PARTIES - GENERAL CONDITIONS OF SALE PRINTED ON THE BACK - CLAUSE CONFERRING JURISDICTION - NECESSITY FOR AN EXPRESS REFERENCE TO THOSE CONDITIONS IN THE CONTRACT

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 17)

3 . CONVENTION OF 27 SEPTEMBER 1968 - COURTS HAVING JURISDICTION - JURISDICTION BY CONSENT - IN WRITING - CONTRACT - ENTERED INTO BY REFERENCE TO PRIOR OFFERS - REFERENCE TO GENERAL CONDITIONS OF SALE - CLAUSE CONFERRING JURISDICTION - NECESSITY FOR AN EXPRESS REFERENCE

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 17)

1 . THE WAY IN WHICH ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 IS TO BE APPLIED MUST BE INTERPRETED IN THE LIGHT OF THE EFFECT OF THE CONFERMENT OF JURISDICTION BY CONSENT , WHICH IS TO EXCLUDE BOTH THE JURISDICTION DETERMINED BY THE GENERAL PRINCIPLE LAID DOWN IN ARTICLE 2 AND THE SPECIAL JURISDICTIONS PROVIDED FOR IN ARTICLES 5 AND 6 OF THAT CONVENTION. IN VIEW OF THE CONSEQUENCES THAT SUCH AN OPTION MAY HAVE ON THE POSITION OF THE PARTIES TO THE ACTION , THE REQUIREMENTS SET OUT IN ARTICLE 17 GOVERNING THE VALIDITY OF CLAUSES CONFERRING JURISDICTION MUST BE STRICTLY CONSTRUED.

BY MAKING THE VALIDITY OF CLAUSES CONFERRING JURISDICTION SUBJECT TO THE EXISTENCE OF AN ' AGREEMENT ' BETWEEN THE PARTIES , ARTICLE 17 IMPOSES ON THE COURT BEFORE WHICH THE MATTER IS BROUGHT THE DUTY OF EXAMINING , FIRST , WHETHER THE CLAUSE CONFERRING JURISDICTION UPON IT WAS IN FACT THE SUBJECT OF A CONSENSUS BETWEEN THE PARTIES , WHICH MUST BE CLEARLY AND PRECISELY DEMONSTRATED , FOR THE PURPOSE OF THE FORMAL REQUIREMENTS IMPOSED BY ARTICLE 17 IS TO ENSURE THAT THE CONSENSUS BETWEEN THE PARTIES IS IN FACT ESTABLISHED.

2 . IN THE CASE OF A CLAUSE CONFERRING JURISDICTION , WHICH IS INCLUDED AMONG THE GENERAL CONDITIONS OF SALE OF ONE OF THE PARTIES , PRINTED ON THE BACK OF THE CONTRACT , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 IS ONLY FULFILLED IF THE CONTRACT SIGNED BY THE TWO PARTIES INCLUDES AN EXPRESS REFERENCE TO THOSE GENERAL CONDITIONS.

3 . IN THE CASE OF A CONTRACT CONCLUDED BY REFERENCE TO EARLIER OFFERS , WHICH WERE THEMSELVES MADE WITH REFERENCE TO THE GENERAL CONDITIONS

OF ONE OF THE PARTIES INCLUDING A CLAUSE CONFERRING JURISDICTION , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 IS SATISFIED ONLY IF THE REFERENCE IS EXPRESS AND CAN THEREFORE BE CHECKED BY A PARTY EXERCISING REASONABLE CARE.

IN CASE 24/76

REFERENCE TO THE COURT FOR A PRELIMINARY RULING PURSUANT TO ARTICLE 1 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) IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

ESTASIS SALOTTI DI COLZANI AIMO E GIANMARIO COLZANI , HAVING ITS REGISTERED OFFICE AT MEDA (MILAN),

AND

RUWA POLSTEREIMASCHINEN GMBH , HAVING ITS REGISTERED OFFICE AT COLOGNE ,

ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY AN ORDER OF 18 FEBRUARY 1976 , RECEIVED AT THE COURT REGISTRY ON 11 MARCH 1976 , THE BUNDESGERICHTSHOF REFERRED TO THE COURT OF JUSTICE PURSUANT TO THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION 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 ' , CERTAIN QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 17 OF THE SAID CONVENTION.

2 IT APPEARS FROM THE ORDER MAKING THE REFERENCE THAT AT THE PRESENT STAGE THE ACTION , WHICH WAS BROUGHT BEFORE THE BUNDESGERICHTSHOF BY WAY OF APPEAL ON A POINT OF LAW , CONCERNS THE JURISDICTION OF THE LANDGERICHT KOLN TO HEAR AN ACTION BROUGHT BY AN UNDERTAKING ESTABLISHED WITHIN THE AREA OF JURISDICTION OF THAT COURT AGAINST AN ITALIAN UNDERTAKING WHOSE REGISTERED OFFICE IS AT MEDA (MILAN), FOR FAILURE TO PERFORM A CONTRACT RELATING TO THE SUPPLY BY THE GERMAN UNDERTAKING TO THE ITALIAN UNDERTAKING OF MACHINES FOR THE MANUFACTURE OF UPHOLSTERED FURNITURE.

3 IT APPEARS FROM THE FACTS STATED IN THE ORDER MAKING THE REFERENCE THAT THE DELIVERY IN QUESTION HAD BEEN AGREED IN A WRITTEN CONTRACT , SIGNED AT MILAN ON COMMERCIAL PAPER BEARING THE LETTER-HEAD OF THE GERMAN UNDERTAKING , ON THE REVERSE OF WHICH THE GENERAL CONDITIONS OF SALE OF THAT UNDERTAKING WERE PRINTED.

THOSE GENERAL CONDITIONS INCLUDE A CLAUSE CONFERRING JURISDICTION ON THE COURTS OF COLOGNE TO SETTLE ANY DISPUTE WHICH MIGHT ARISE BETWEEN THE PARTIES CONCERNING THE CONTRACT.

ALTHOUGH IT IS TRUE THAT THE TEXT OF THE CONTRACT DOES NOT EXPRESSLY MENTION THE SAID GENERAL CONDITIONS , IT REFERS TO PREVIOUS OFFERS MADE BY THE GERMAN UNDERTAKING WHICH CONTAINED AN EXPRESS REFERENCE TO THE SAME GENERAL CONDITIONS , WHICH WERE ALSO PRINTED ON THE REVERSE OF THE PAPERS IN QUESTION.

4 IN A JUDGMENT DELIVERED ON 9 APRIL 1974 , THE LANDGERICHT KOLN , BEFORE WHICH THE MATTER WAS BROUGHT BY THE GERMAN UNDERTAKING , DECLARED THAT IT HAD NO JURISDICTION TO HEAR THE DISPUTE.

IT HELD THAT THE CLAUSE CONFERRING JURISDICTION HAD NOT VALIDLY BEEN AGREED BETWEEN THE PARTIES , HAVING REGARD TO THE PROVISIONS OF ITALIAN LAW , TO WHICH , IN THE VIEW OF THAT COURT , THE CONTRACT BETWEEN THE PARTIES IS SUBJECT.

THAT JUDGMENT WAS REVERSED BY A JUDGMENT OF 18 NOVEMBER 1974 OF THE OBERLANDESGERICHT KOLN WHICH , TAKING THE VIEW THAT THE CONTRACT IN QUESTION IS SUBJECT TO THE PROVISIONS OF GERMAN LAW , OVERRULED THE JUDGMENT OF THE LOWER COURT , DECLARED THAT THE LANDGERICHT HAD JURISDICTION AND REMITTED THE CASE TO IT.

5 THE ITALIAN UNDERTAKING APPEALED ON A POINT OF LAW TO THE BUNDESGERICHTSHOF , AND THAT COURT IS OF THE OPINION THAT THE QUESTION AT ISSUE MUST BE RESOLVED ON THE BASIS OF ARTICLE 17 OF THE CONVENTION

IN THIS CONNEXION , THE BUNDESGERICHTSHOF HAS REFERRED TWO QUESTIONS ON THE INTERPRETATION OF THE FIRST PARAGRAPH OF THAT ARTICLE.

ON THE INTERPRETATION OF ARTICLE 17 OF THE CONVENTION IN GENERAL

6 THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION PROVIDES : ' IF THE PARTIES , ONE OR MORE OF WHOM IS DOMICILED IN A CONTRACTING STATE , HAVE , BY AGREEMENT IN WRITING OR BY AN ORAL AGREEMENT CONFIRMED IN WRITING , 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 CONNEXION WITH A PARTICULAR LEGAL RELATIONSHIP , THAT COURT OR THOSE COURTS SHALL HAVE EXCLUSIVE JURISDICTION '.

7 THE WAY IN WHICH THAT PROVISION IS TO BE APPLIED MUST BE INTERPRETED IN THE LIGHT OF THE EFFECT OF THE CONFERMENT OF JURISDICTION BY CONSENT , WHICH IS TO EXCLUDE BOTH THE JURISDICTION DETERMINED BY THE GENERAL PRINCIPLE LAID DOWN IN ARTICLE 2 AND THE SPECIAL JURISDICTIONS PROVIDED FOR IN ARTICLES 5 AND 6 OF THE CONVENTION .

IN VIEW OF THE CONSEQUENCES THAT SUCH AN OPTION MAY HAVE ON THE POSITION OF THE PARTIES TO THE ACTION , THE REQUIREMENTS SET OUT IN ARTICLE 17 GOVERNING THE VALIDITY OF CLAUSES CONFERRING JURISDICTION MUST BE STRICTLY CONSTRUED.

BY MAKING SUCH VALIDITY SUBJECT TO THE EXISTENCE OF AN ' AGREEMENT ' BETWEEN THE PARTIES , ARTICLE 17 IMPOSES ON THE COURT BEFORE WHICH THE MATTER IS BROUGHT THE DUTY OF EXAMINING , FIRST , WHETHER THE CLAUSE CONFERRING JURISDICTION UPON IT WAS IN FACT THE SUBJECT OF A CONSENSUS BETWEEN THE PARTIES , WHICH MUST BE CLEARLY AND PRECISELY DEMONSTRATED.

THE PURPOSE OF THE FORMAL REQUIREMENTS IMPOSED BY ARTICLE 17 IS TO ENSURE THAT THE CONSENSUS BETWEEN THE PARTIES IS IN FACT ESTABLISHED.

THE QUESTIONS REFERRED TO THE COURT BY THE BUNDESGERICHTSHOF MUST BE EXAMINED IN THE LIGHT OF THESE CONSIDERATIONS.

ON THE QUESTION REFERRED BY THE BUNDESGERICHTSHOF

8 THE FIRST QUESTION ASKS WHETHER A CLAUSE CONFERRING JURISDICTION , WHICH

IS INCLUDED AMONG GENERAL CONDITIONS OF SALE PRINTED ON THE BACK OF A CONTRACT SIGNED BY BOTH PARTIES , FULFILS THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION.

9 TAKING INTO ACCOUNT WHAT HAS BEEN SAID ABOVE , IT SHOULD BE STATED THAT THE MERE FACT THAT A CLAUSE CONFERRING JURISDICTION IS PRINTED AMONG THE GENERAL CONDITIONS OF ONE OF THE PARTIES ON THE REVERSE OF A CONTRACT DRAWN UP ON THE COMMERCIAL PAPER OF THAT PARTY DOES NOT OF ITSELF SATISFY THE REQUIREMENTS OF ARTICLE 17 , SINCE NO GUARANTEE IS THEREBY GIVEN THAT THE OTHER PARTY HAS REALLY CONSENTED TO THE CLAUSE WAIVING THE NORMAL RULES OF JURISDICTION.

IT IS OTHERWISE IN THE CASE WHERE THE TEXT OF THE CONTRACT SIGNED BY BOTH PARTIES ITSELF CONTAINS AN EXPRESS REFERENCE TO GENERAL CONDITIONS INCLUDING A CLAUSE CONFERRING JURISDICTION.

10 THUS IT SHOULD BE ANSWERED THAT WHERE A CLAUSE CONFERRING JURISDICTION IS INCLUDED AMONG THE GENERAL CONDITIONS OF SALE OF ONE OF THE PARTIES , PRINTED ON THE BACK OF A CONTRACT , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS FULFILLED ONLY IF THE CONTRACT SIGNED BY BOTH PARTIES CONTAINS AN EXPRESS REFERENCE TO THOSE GENERAL CONDITIONS.

11 THE SECOND QUESTION ASKS WHETHER THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS FULFILLED IF THE PARTIES EXPRESSLY REFER IN THE CONTRACT TO A PRIOR OFFER IN WRITING IN WHICH REFERENCE WAS MADE TO GENERAL CONDITIONS OF SALE INCLUDING A CLAUSE CONFERRING JURISDICTION.

12 IN PRINCIPLE , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 IS FULFILLED IF THE PARTIES HAVE REFERRED IN THE TEXT OF THEIR CONTRACT TO AN OFFER IN WHICH REFERENCE WAS EXPRESSLY MADE TO GENERAL CONDITIONS INCLUDING A CLAUSE CONFERRING JURISDICTION.

THIS VIEW OF THE MATTER , HOWEVER , IS VALID ONLY IN THE CASE OF AN EXPRESS REFERENCE , WHICH CAN BE CHECKED BY A PARTY EXERCISING REASONABLE CARE , AND ONLY IF IT IS ESTABLISHED THAT THE GENERAL CONDITIONS INCLUDING THE CLAUSE CONFERRING JURISDICTION HAVE IN FACT BEEN COMMUNICATED TO THE OTHER CONTRACTING PARTY WITH THE OFFER TO WHICH REFERENCE IS MADE.

BUT THE REQUIREMENT OF A WRITING IN ARTICLE 17 WOULD NOT BE FULFILLED IN THE CASE OF INDIRECT OR IMPLIED REFERENCES TO EARLIER CORRESPONDENCE , FOR THAT WOULD NOT YIELD ANY CERTAINTY THAT THE CLAUSE CONFERRING JURISDICTION WAS IN FACT PART OF THE SUBJECT-MATTER OF THE CONTRACT PROPERLY SO-CALLED.

13 THUS IT SHOULD BE ANSWERED THAT IN THE CASE OF A CONTRACT CONCLUDED BY REFERENCE TO EARLIER OFFERS , WHICH WERE THEMSELVES MADE WITH REFERENCE TO THE GENERAL CONDITIONS OF ONE OF THE PARTIES INCLUDING A CLAUSE CONFERRING JURISDICTION , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS SATISFIED ONLY IF THE REFERENCE IS EXPRESS AND CAN THEREFORE BE CHECKED BY A PARTY EXERCISING REASONABLE CARE.

COSTS

14 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

, THE GOVERNMENT OF THE ITALIAN REPUBLIC AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE BUNDESGERICHTSHOF , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE BUNDESGERICHTSHOF BY ORDER OF 18 FEBRUARY 1976 , HEREBY RULES :

WHERE A CLAUSE CONFERRING JURISDICTION IS INCLUDED AMONG THE GENERAL CONDITIONS OF SALE OF ONE OF THE PARTIES , PRINTED ON THE BACK OF A CONTRACT , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IS FULFILLED ONLY IF THE CONTRACT SIGNED BY BOTH PARTIES CONTAINS AN EXPRESS REFERENCE TO THOSE GENERAL CONDITIONS.

IN THE CASE OF A CONTRACT CONCLUDED BY REFERENCE TO EARLIER OFFERS , WHICH WERE THEMSELVES MADE WITH REFERENCE TO THE GENERAL CONDITIONS OF ONE OF THE PARTIES INCLUDING A CLAUSE CONFERRING JURISDICTION , THE REQUIREMENT OF A WRITING UNDER THE FIRST PARAGRAPH OF ARTICLE 17 OF THE CONVENTION IS SATISFIED ONLY IF THE REFERENCE IS EXPRESS AND CAN THEREFORE BE CHECKED BY A PARTY EXERCISING REASONABLE CARE.

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NATCOUR *A7* Landgericht Köln, Urteil vom 09/04/74 (29 O 19/73)
A8 Oberlandesgericht Köln, Urteil vom 18/11/74 (1 U 88/74)
A9 Bundesgerichtshof, Vorlagebeschluß vom 18/02/76 (VIII ZR 14/75)
- Recht der internationalen Wirtschaft / Außenwirtschaftsdienst des Betriebs-Beraters 1976 p.295-296
P1 Bundesgerichtshof, Urteil vom 04/05/77 (VIII ZR 14/75)
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PROCEDU Reference for a preliminary ruling

ADVGEN Capotorti

JUDGRAP Pescatore

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**Judgment of the Court
of 30 November 1976
Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA. Reference for a preliminary ruling: Gerechtshof 's-Gravenhage - Netherlands. Brussels Convention on jurisdiction and the enforcement of Judgment, article 5 (3) (liability in tort, delict or quasi-delict). Case 21-76.**

' CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENT , ARTICLE 5 (3) (LIABILITY IN TORT , DELICT OR QUASI-DELICT ')

CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS - POLLUTION OF THE ATMOSPHERE OR OF WATER - DISPUTE OF AN INTERNATIONAL CHARACTER - MATTERS RELATING TO TORT , DELICT OR QUASI-DELICT - COURTS HAVING JURISDICTION - SPECIAL JURISDICTION - PLACE WHERE THE HARMFUL EVENT OCCURRED - PLACE OF THE EVENT GIVING RISE TO THE DAMAGE AND PLACE WHERE THE DAMAGE OCCURRED - CONNECTING FACTORS OF SIGNIFICANCE AS REGARDS JURISDICTION - RIGHT OF PLAINTIFF TO ELECT

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 5 (3))

WHERE THE PLACE OF THE HAPPENING OF THE EVENT WHICH MAY GIVE RISE TO LIABILITY IN TORT , DELICT OR QUASI-DELICT AND THE PLACE WHERE THAT EVENT RESULTS IN DAMAGE ARE NOT IDENTICAL , THE EXPRESSION ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' , IN ARTICLE 5 (3) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , MUST BE UNDERSTOOD AS BEING INTENDED TO COVER BOTH THE PLACE WHERE THE DAMAGE OCCURRED AND THE PLACE OF THE EVENT GIVING RISE TO IT. THE RESULT IS THAT THE DEFENDANT MAY BE SUED , AT THE OPTION OF THE PLAINTIFF , EITHER IN THE COURTS FOR THE PLACE WHERE THE DAMAGE OCCURRED OR IN THE COURTS FOR THE PLACE OF THE EVENT WHICH GIVES RISE TO AND IS AT THE ORIGIN OF THAT DAMAGE .

IN CASE 21/76

REFERENCE TO THE COURT PURSUANT TO ARTICLE 1 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 GERECHTSHOF (APPEAL COURT) OF THE HAGUE FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

HANDELSKWEKERIJ G. J. BIER B.V., OF NIEUWERKERK AAN DEN IJSSEL (THE NETHERLANDS), AND THE REINWATER FOUNDATION , HAVING ITS REGISTERED OFFICE AT AMSTERDAM ,

AND

MINES DE POTASSE D ' ALSACE S.A., HAVING ITS REGISTERED OFFICE AT MULHOUSE ,

ON THE INTERPRETATION OF THE MEANING OF ' THE PLACE WHERE THE HARMFUL EVENT OCCURRED ' IN ARTICLE 5 (3) OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY JUDGMENT OF 27 FEBRUARY 1976 , WHICH REACHED THE COURT REGISTRY ON THE FOLLOWING 2 MARCH , THE GERECHTSHOF (APPEAL COURT) OF THE HAGUE HAS REFERRED

A QUESTION , PURSUANT TO THE PROTOCOL ON 3 JUNE 1971 ON THE INTERPRETATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (HEREINAFTER CALLED ' THE CONVENTION '), ON THE INTERPRETATION OF ARTICLE 5 (3) OF THE SAID CONVENTION.

2 IT APPEARS FROM THE JUDGMENT MAKING THE REFERENCE THAT AT THE PRESENT STAGE THE MAIN ACTION , WHICH HAS COME BEFORE THE GERECHTSHOF BY WAY OF APPEAL , CONCERNS THE JURISDICTION OF THE COURT OF FIRST INSTANCE AT ROTTERDAM , AND IN GENERAL , OF THE NETHERLANDS COURTS , TO ENTERTAIN AN ACTION BROUGHT BY AN UNDERTAKING ENGAGED IN HORTICULTURE , ESTABLISHED WITHIN THE AREA FOR WHICH THE COURT BEFORE WHICH THE ACTION WAS FIRST BROUGHT HAS JURISDICTION , AND BY THE REINWATER FOUNDATION , WHICH EXISTS TO PROMOTE THE IMPROVEMENT OF THE QUALITY OF THE WATER IN THE RHINE BASIN , AGAINST MINES DE POTASSE D ' ALSACE , ESTABLISHED AT MULHOUSE (FRANCE), CONCERNING THE POLLUTION OF THE WATERS OF THE RHINE BY THE DISCHARGE OF SALINE WASTE FROM THE OPERATIONS OF THE DEFENDANT INTO THAT INLAND WATERWAY.

3 IT APPEARS FROM THE FILE THAT AS REGARDS IRRIGATION THE HORTICULTURAL BUSINESS OF THE FIRST-NAMED APPELLANT DEPENDS MAINLY ON THE WATERS OF THE RHINE , THE HIGH SALT CONTENT OF WHICH , ACCORDING TO THE SAID APPELLANT , CAUSES DAMAGE TO ITS PLANTATIONS AND OBLIGES IT TO TAKE EXPENSIVE MEASURES IN ORDER TO LIMIT THAT DAMAGE.

4 THE APPELLANTS CONSIDER THAT THE EXCESSIVE SALINIZATION OF THE RHINE IS DUE PRINCIPALLY TO THE MASSIVE DISCHARGES CARRIED OUT BY MINES DE POTASSE D ' ALSACE AND THEY DECLARE THAT IT IS FOR THAT REASON THAT THEY HAVE CHOSEN TO BRING AN ACTION FOR THE PURPOSES OF ESTABLISHING THE LIABILITY OF THAT UNDERTAKING.

5 BY JUDGMENT DELIVERED ON 12 MAY 1975 , THE COURT AT ROTTERDAM HELD THAT IT HAD NO JURISDICTION TO ENTERTAIN THE ACTION , TAKING THE VIEW THAT UNDER ARTICLE 5 (3) OF THE CONVENTION THE CLAIM DID NOT COME WITHIN ITS JURISDICTION BUT UNDER THAT OF THE FRENCH COURT FOR THE AREA IN WHICH THE DISCHARGE AT ISSUE TOOK PLACE.

6 BIER AND REINWATER BROUGHT AN APPEAL AGAINST THAT JUDGMENT BEFORE THE GERECHTSHOF , THE HAGUE , WHICH SUBSEQUENTLY REFERRED THE FOLLOWING QUESTION TO THE COURT :

' ARE THE WORDS ' ' THE PLACE WHERE THE HARMFUL EVENT OCCURRED ' ' , APPEARING IN THE TEXT OF ARTICLE 5 (3) OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , CONCLUDED AT BRUSSELS ON 27 SEPTEMBER 1968 , TO BE UNDERSTOOD AS MEANING ' ' THE PLACE WHERE THE DAMAGE OCCURRED (THE PLACE WHERE THE DAMAGE TOOK PLACE OR BECAME APPARENT) ' ' OR RATHER ' ' THE PLACE WHERE THE EVENT HAVING THE DAMAGE AS ITS SEQUEL OCCURRED (THE PLACE WHERE THE ACT WAS OR WAS NOT PERFORMED) ' ' ?

'

7 ARTICLE 5 OF THE CONVENTION PROVIDES : ' A PERSON DOMICILED IN A CONTRACTING STATE MAY , IN ANOTHER CONTRACTING STATE , BE SUED :... (3) IN MATTERS RELATING TO TORT , DELICT OR QUASI-DELICT , IN THE COURTS FOR THE PLACE WHERE THE HARMFUL EVENT OCCURRED '.

8 THAT PROVISION MUST BE INTERPRETED IN THE CONTEXT OF THE SCHEME OF CONFERMENT OF JURISDICTION WHICH FORMS THE SUBJECT-MATTER OF TITLE II OF THE CONVENTION.

9 THAT SCHEME IS BASED ON A GENERAL RULE , LAID DOWN BY ARTICLE 2 , THAT THE COURTS OF THE STATE IN WHICH THE DEFENDANT IS DOMICILED SHALL HAVE JURISDICTION.

10 HOWEVER , ARTICLE 5 MAKES PROVISION IN A NUMBER OF CASES FOR A SPECIAL JURISDICTION , WHICH THE PLAINTIFF MAY OPT TO CHOOSE.

11 THIS FREEDOM OF CHOICE WAS INTRODUCED HAVING REGARD TO THE EXISTENCE , IN CERTAIN CLEARLY DEFINED SITUATIONS , OF A PARTICULARLY CLOSE CONNECTING FACTOR BETWEEN A DISPUTE AND THE COURT WHICH MAY BE CALLED UPON TO HEAR IT , WITH A VIEW TO THE EFFICACIOUS CONDUCT OF THE PROCEEDINGS .

12 THUS IN MATTERS OF TORT , DELICT OR QUASI-DELICT ARTICLE 5 (3) ALLOWS THE PLAINTIFF TO BRING HIS CASE BEFORE THE COURTS FOR ' THE PLACE WHERE THE HARMFUL EVENT OCCURRED '.

13 IN THE CONTEXT OF THE CONVENTION , THE MEANING OF THAT EXPRESSION IS UNCLEAR WHEN THE PLACE OF THE EVENT WHICH IS AT THE ORIGIN OF THE DAMAGE IS SITUATED IN A STATE OTHER THAN THE ONE IN WHICH THE PLACE WHERE THE DAMAGE OCCURRED IS SITUATED , AS IS THE CASE INTER INTER ALIA WITH ATMOSPHERIC OR WATER POLLUTION BEYOND THE FRONTIERS OF A STATE .

14 THE FORM OF WORDS ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' , USED IN ALL THE LANGUAGE VERSIONS OF THE CONVENTION , LEAVES OPEN THE QUESTION WHETHER , IN THE SITUATION DESCRIBED , IT IS NECESSARY , IN DETERMINING JURISDICTION , TO CHOOSE AS THE CONNECTING FACTOR THE PLACE OF THE EVENT GIVING RISE TO THE DAMAGE , OR THE PLACE WHERE THE DAMAGE OCCURRED , OR TO ACCEPT THAT THE PLAINTIFF HAS AN OPTION BETWEEN THE ONE AND THE OTHER OF THOSE TWO CONNECTING FACTORS.

15 AS REGARDS THIS , IT IS WELL TO POINT OUT THAT THE PLACE OF THE EVENT GIVING RISE TO THE DAMAGE NO LESS THAN THE PLACE WHERE THE DAMAGE OCCURRED CAN , DEPENDING ON THE CASE , CONSTITUTE A SIGNIFICANT CONNECTING FACTOR FROM THE POINT OF VIEW OF JURISDICTION.

16 LIABILITY IN TORT , DELICT OR QUASI-DELICT CAN ONLY ARISE PROVIDED THAT A CAUSAL CONNEXION CAN BE ESTABLISHED BETWEEN THE DAMAGE AND THE EVENT IN WHICH THAT DAMAGE ORIGINATES.

17 TAKING INTO ACCOUNT THE CLOSE CONNEXION BETWEEN THE COMPONENT PARTS OF EVERY SORT OF LIABILITY , IT DOES NOT APPEAR APPROPRIATE TO OPT FOR ONE OF THE TWO CONNECTING FACTORS MENTIONED TO THE EXCLUSION OF THE OTHER , SINCE EACH OF THEM CAN , DEPENDING ON THE CIRCUMSTANCES , BE PARTICULARLY HELPFUL FROM THE POINT OF VIEW OF THE EVIDENCE AND OF THE CONDUCT OF THE PROCEEDINGS.

18 TO EXCLUDE ONE OPTION APPEARS ALL THE MORE UNDESIRABLE IN THAT , BY ITS COMPREHENSIVE FORM OF WORDS , ARTICLE 5 (3) OF THE CONVENTION COVERS A WIDE DIVERSITY OF KINDS OF LIABILITY.

19 THUS THE MEANING OF THE EXPRESSION ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' IN ARTICLE 5 (3) MUST BE ESTABLISHED IN SUCH A WAY AS TO ACKNOWLEDGE THAT THE PLAINTIFF HAS AN OPTION TO COMMENCE PROCEEDINGS EITHER AT THE

PLACE WHERE THE DAMAGE OCCURRED OR THE PLACE OF THE EVENT GIVING RISE TO IT.

20 THIS CONCLUSION IS SUPPORTED BY THE CONSIDERATION , FIRST , THAT TO DECIDE IN FAVOUR ONLY OF THE PLACE OF THE EVENT GIVING RISE TO THE DAMAGE WOULD , IN AN APPRECIABLE NUMBER OF CASES , CAUSE CONFUSION BETWEEN THE HEADS OF JURISDICTION LAID DOWN BY ARTICLES 2 AND 5 (3) OF THE CONVENTION , SO THAT THE LATTER PROVISION WOULD , TO THAT EXTENT , LOSE ITS EFFECTIVENESS.

21 SECONDLY , A DECISION IN FAVOUR ONLY OF THE PLACE WHERE THE DAMAGE OCCURRED WOULD , IN CASES WHERE THE PLACE OF THE EVENT GIVING RISE TO THE DAMAGE DOES NOT COINCIDE WITH THE DOMICILE OF THE PERSON LIABLE , HAVE THE EFFECT OF EXCLUDING A HELPFUL CONNECTING FACTOR WITH THE JURISDICTION OF A COURT PARTICULARLY NEAR TO THE CAUSE OF THE DAMAGE .

22 MOREOVER , IT APPEARS FROM A COMPARISON OF THE NATIONAL LEGISLATIVE PROVISIONS AND NATIONAL CASE-LAW ON THE DISTRIBUTION OF JURISDICTION - BOTH AS REGARDS INTERNAL RELATIONSHIPS , AS BETWEEN COURTS FOR DIFFERENT AREAS , AND IN INTERNATIONAL RELATIONSHIPS - THAT , ALBEIT BY DIFFERING LEGAL TECHNIQUES , A PLACE IS FOUND FOR BOTH OF THE TWO CONNECTING FACTORS HERE CONSIDERED AND THAT IN SEVERAL STATES THEY ARE ACCEPTED CONCURRENTLY.

23 IN THESE CIRCUMSTANCES , THE INTERPRETATION STATED ABOVE HAS THE ADVANTAGE OF AVOIDING ANY UPHEAVAL IN THE SOLUTIONS WORKED OUT IN THE VARIOUS NATIONAL SYSTEMS OF LAW , SINCE IT LOOKS TO UNIFICATION , IN CONFORMITY WITH ARTICLE 5 (3) OF THE CONVENTION , BY WAY OF A SYSTEMATIZATION OF SOLUTIONS WHICH , AS TO THEIR PRINCIPLE , HAVE ALREADY BEEN ESTABLISHED IN MOST OF THE STATES CONCERNED.

24 THUS IT SHOULD BE ANSWERED THAT WHERE THE PLACE OF THE HAPPENING OF THE EVENT WHICH MAY GIVE RISE TO LIABLITY IN TORT , DELICT OR QUASIDELICT AND THE PLACE WHERE THAT EVENT RESULTS IN DAMAGE ARE NOT IDENTICAL , THE EXPRESSON ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' , IN ARTICLE 5 (3) OF THE CONVENTION , MUST BE UNDERSTOOD AS BEING INTENDED TO COVER BOTH THE PLACE WHERE THE DAMAGE OCCURRED AND THE PLACE OF THE EVENT GIVING RISE TO IT.

25 THE RESULT IS THAT THE DEFENDANT MAY BE SUED , AT THE OPTION OF THE PLAINTIFF , EITHER IN THE COURTS FOR THE PLACE WHERE THE DAMAGE OCCURRED OR IN THE COURTS FOR THE PLACE OF THE EVENT WHICH GIVES RISE TO AND IS AT THE ORIGIN OF THAT DAMAGE.

COSTS

26 THE COSTS INCURRED BY THE GOVERNMENT OF THE FRENCH REPUBLIC , THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS AND THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

27 AS THESE PROCEEDINGS ARE , SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , A STEP IN THE ACTION PENDING BEFORE THE GERECHTSHOF , THE HAGUE , 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 GERECHTSHOF , THE HAGUE , BY JUDGMENT OF 27 FEBRUARY 1976 , HEREBY RULES :

WHERE THE PLACE OF THE HAPPENING OF THE EVENT WHICH MAY GIVE RISE TO LIABILITY IN TORT , DELICT OR QUASIDELICT AND THE PLACE WHERE THAT EVENT RESULTS IN DAMAGE ARE NOT IDENTICAL , THE EXPRESSION ' PLACE WHERE THE HARMFUL EVENT OCCURRED ' , IN ARTICLE 5 (3) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS , MUST BE UNDERSTOOD AS BEING INTENDED TO COVER BOTH THE PLACE WHERE THE DAMAGE OCCURRED AND THE PLACE OF THE EVENT GIVING RISE TO IT.

THE RESULT IS THAT THE DEFENDANT MAY BE SUED , AT THE OPTION OF THE PLAINTIFF , EITHER IN THE COURTS FOR THE PLACE WHERE THE DAMAGE OCCURRED OR IN THE COURTS FOR THE PLACE OF THE EVENT WHICH GIVES RISE TO AND IS AT THE ORIGIN OF THAT DAMAGE.

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AUTLANG	Dutch
OBSERV	Commission ; France ; Netherlands ; Member States ; Institutions
NATIONA	Netherlands

NATCOUR *A9* Gerechtshof 's-Gravenhage, 2e kamer, arrest van 27/02/1976 (62R/75)

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Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Article 5 (1).
Case 14-76.

1 . CONVENTION OF 27 SEPTEMBER 1968 - SPECIAL POWERS - MATTERS RELATING TO A CONTRACT - OBLIGATION - CONCEPT

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 5 (1))

2 . CONVENTION OF 27 SEPTEMBER 1968 - SPECIAL POWERS - MATTERS RELATING TO A CONTRACT - EXCLUSIVE CONCESSION - ACTION BROUGHT BY THE GRANTEE AGAINST THE GRANTOR - CONTRACTUAL OBLIGATION - CONCEPT - COMPENSATION BY WAY OF DAMAGES - ACTION FOR PAYMENT - POWERS OF THE NATIONAL COURT

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 5 (1))

3 . CONVENTION OF 27 SEPTEMBER 1968 - SPECIAL POWERS - GRANTEE OF AN EXCLUSIVE SALES CONCESSION - CONTROL OF BRANCH , AGENCY OR OTHER ESTABLISHMENT - CRITERIA FOR DISTINCTION

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 5 (5))

1 . FOR THE PURPOSE OF DETERMINING THE PLACE OF PERFORMANCE WITHIN THE MEANING OF ARTICLE 5 OF THE CONVENTION OF 27 SEPTEMBER 1968 THE OBLIGATION TO BE TAKEN INTO ACCOUNT IS THAT WHICH CORRESPONDS TO THE CONTRACTUAL RIGHT ON WHICH THE PLAINTIFF ' S ACTION IS BASED. IN A CASE WHERE THE PLAINTIFF ASSERTS THE RIGHT TO BE PAID DAMAGES OR SEEKS THE DISSOLUTION OF THE CONTRACT BY REASON OF THE WRONGFUL CONDUCT OF THE OTHER PARTY , THE OBLIGATION REFERRED TO IN ARTICLE 5 (1) IS STILL THAT WHICH ARISES UNDER THE CONTRACT AND THE NON-PERFORMANCE OF WHICH IS RELIED UPON TO SUPPORT SUCH CLAIMS.

2 . IN DISPUTES IN WHICH THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION CHARGES THE GRANTOR WITH HAVING INFRINGED THE EXCLUSIVE CONCESSION , THE WORD ' OBLIGATION ' CONTAINED IN ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS REFERS TO THE OBLIGATION FORMING THE BASIS OF THE LEGAL PROCEEDINGS , NAMELY THE CONTRACTUAL OBLIGATION OF THE GRANTOR WHICH CORRESPONDS TO THE CONTRACTUAL RIGHT RELIED UPON BY THE GRANTEE IN SUPPORT OF THE APPLICATION .

IN DISPUTES CONCERNING THE CONSEQUENCES OF THE INFRINGEMENT BY THE GRANTOR OF A CONTRACT CONFERRING AN EXCLUSIVE CONCESSION , SUCH AS THE PAYMENT OF DAMAGES OR THE DISSOLUTION OF THE CONTRACT , THE OBLIGATION TO WHICH REFERENCE MUST BE MADE FOR THE PURPOSES OF APPLYING ARTICLE 5 (1) OF THE CONVENTION IS THAT WHICH THE CONTRACT IMPOSES ON THE GRANTOR AND THE NON-PERFORMANCE OF WHICH IS RELIED UPON BY THE GRANTEE IN SUPPORT OF THE APPLICATION FOR DAMAGES OR FOR THE DISSOLUTION OF THE CONTRACT.

IN THE CASE OF ACTIONS FOR THE PAYMENT OF COMPENSATION BY WAY OF DAMAGES , IT IS FOR THE NATIONAL COURT TO ASCERTAIN WHETHER , UNDER THE LAW APPLICABLE TO THE CONTRACT , AN INDEPENDENT CONTRACTUAL OBLIGATION OR AN OBLIGATION REPLACING THE UNPERFORMED CONTRAC- TUAL OBLIGATION IS INVOLVED.

3 . WHEN THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION IS NOT SUBJECT EITHER TO THE CONTROL OR TO THE DIRECTION OF THE GRANTOR , HE CANNOT BE REGARDED AS BEING AT THE HEAD OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT OF THE GRANTOR WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968.

IN CASE 14/76

REFERENCE TO THE COURT UNDER ARTICLE 1 OF THE PROTOCOL CONCERNING 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 OF MONS , FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

ETS . A . DE BLOOS , S.P.R.L., LEUZE , BELGIUM ,

AND

SOCIETE EN COMMANDITE PAR ACTIONS BOUYER , TOMBLAINE (MEURTHE-ET-MOSELLE), FRANCE ,

ON THE INTERPRETATION OF ARTICLE 5 OF THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS SIGNED IN BRUSSELS ON 27 SEPTEMBER 1968 BY THE SIX ORIGINAL MEMBER STATES OF THE COMMUNITY ,

1 BY ORDER OF 9 DECEMBER 1975 , RECEIVED AT THE COURT REGISTRY ON 13 FEBRUARY 1976 , THE COUR D ' APPEL , MONS , HAS REFERRED TO THE COURT UNDER THE PROTOCOL OF 3 JUNE 1971 CONCERNING THE INTERPRETATION 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 ') QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE 5 (1) AND (5) OF THE SAID CONVENTION.

2 FROM THE ORDER MAKING THE REFERENCE IT APPEARS THAT THE CASE IS AT THIS STAGE CONCERNED WITH THE QUESTION WHETHER THE BELGIAN COURT HAS JURISDICTION TO HEAR AN ACTION WHICH THE GRANTEE OF AN EXCLUSIVE DISTRIBUTORSHIP CONTRACT , WHOSE REGISTERED OFFICE IS IN BELGIUM , HAS BROUGHT AGAINST THE GRANTOR , WHO IS ESTABLISHED IN FRANCE.

3 COMPLAINING OF A UNILATERAL BREACH , WITHOUT NOTICE , OF THE SAID CONTRACT , THE GRANTEE BROUGHT PROCEEDINGS AGAINST THE GRANTOR BEFORE THE BELGIAN COURT SEEKING , IN ACCORDANCE WITH BELGIAN LAW , THE DISSOLUTION OF THE CONTRACT BY THE COURT , ON THE GROUND OF THE GRANTOR ' S WRONGFUL CONDUCT , AND THE PAYMENT OF DAMAGES.

4 WHEN THE BELGIAN COURT OF FIRST INSTANCE DECIDED THAT IT HAD NO JURISDICTION TO HEAR THE CASE , THE GRANTEE APPEALED BEFORE THE COUR D ' APPEL , MONS.

5 IN THE FIRST QUESTION , THE COURT IS ASKED WHETHER , IN AN ACTION BROUGHT BY THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION AGAINST THE GRANTOR IN WHICH HE CLAIMS THAT THE LATTER HAS INFRINGED THE EXCLUSIVE CONCESSION , THE TERM ' OBLIGATION ' IN ARTICLE 5 (1) OF THE CONVENTION IS TO BE INTERPRETED AS APPLYING WITHOUT DISTINCTION TO ANY OBLIGATION ARISING OUT OF THE OUTLINE CONTRACT GRANTING AN EXCLUSIVE SALES CONCESSION OR EVEN ARISING OUT OF THE SUCCESSIVE SALES CONCLUDED IN PERFORMANCE OF THE SAID CONTRACT , OR AS REFERRING EXCLUSIVELY TO THE OBLIGATION FORMING THE BASIS OF THE

LEGAL PROCEEDINGS.

6 IF THE LAST-MENTIONED POSSIBILITY IS THE CORRECT ONE , THE COURT IS FURTHER ASKED TO RULE WHETHER THE WORD ' OBLIGATION ' IN THE AFOREMENTIONED ARTICLE 5 (1) REFERS TO THE ORIGINAL OBLIGATION , THE OBLIGATION TO PROVIDE THE EQUIVALENT OF THE ORIGINAL OBLIGATION OR TO OBLIGATION TO PAY DAMAGES WHERE THE EFFECT OF THE DISSOLUTION OR TERMINATION OF THE CONTRACT IS TO RENDER VOID THE ORIGINAL OBLIGATION , OR , FINALLY , TO THE OBLIGATION TO PAY ' FAIR COMPENSATION ' OR EVEN ' ADDITIONAL COMPENSATION ' WITHIN THE MEANING OF THE BELGIAN LAW OF 27 JULY 1961.

7 UNDER ARTICLE 5 (1) OF THE CONVENTION , A PERSON DOMICILED IN A CONTRACTING STATE MAY , IN ANOTHER CONTRACTING STATE , BE SUED :

' IN MATTERS RELATING TO A CONTRACT , IN THE COURTS FOR THE PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION. '

8 AS STATED IN ITS PREAMBLE , THE CONVENTION IS INTENDED TO DETERMINE THE INTERNATIONAL JURISDICTION OF THE COURTS OF THE CONTRACTING STATES , TO FACILITATE THE RECOGNITION AND TO INTRODUCE AN EXPEDITIOUS PROCEDURE FOR SECURING THE ENFORCEMENT OF JUDGMENTS.

9 THESE OBJECTIVES IMPLY THE NEED 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.

10 BECAUSE OF THIS , ARTICLE 5 (1) OF THE CONVENTION CANNOT BE INTERPRETED AS REFERRING TO ANY OBLIGATION WHATSOEVER ARISING UNDER THE CONTRACT IN QUESTION.

11 ON THE CONTRARY , THE WORD ' OBLIGATION ' IN THE ARTICLE REFERS TO THE CONTRACTUAL OBLIGATION FORMING THE BASIS OF THE LEGAL PROCEEDINGS .

12 THIS INTERPRETATION IS , MOREOVER , CLEARLY CONFIRMED BY THE ITALIAN AND GERMAN VERSIONS OF THE ARTICLE.

13 IT FOLLOWS THAT FOR THE PURPOSES OF DETERMINING THE PLACE OF PERFORMANCE WITHIN THE MEANING OF ARTICLE 5 , QUOTED ABOVE , THE OBLIGATION TO BE TAKEN INTO ACCOUNT IS THAT WHICH CORRESPONDS TO THE CONTRACTUAL RIGHT ON WHICH THE PLAINTIFF ' S ACTION IS BASED.

14 IN A CASE WHERE THE PLAINTIFF ASSERTS THE RIGHT TO BE PAID DAMAGES OR SEEKS A DISSOLUTION OF THE CONTRACT ON THE GROUND OF THE WRONGFUL CONDUCT OF THE OTHER PARTY , THE OBLIGATION REFERRED TO IN ARTICLE 5 (1) IS STILL THAT WHICH ARISES UNDER THE CONTRACT AND THE NON-PERFORMANCE OF WHICH IS RELIED UPON TO SUPPORT SUCH CLAIMS.

15 FOR THESE REASONS , THE ANSWER TO THE FIRST QUESTION MUST BE THAT , IN DISPUTES IN WHICH THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION CHARGES THE GRANTOR WITH HAVING INFRINGED THE EXCLUSIVE CONCESSION , THE WORD ' OBLIGATION ' CONTAINED IN ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS REFERS TO THE OBLIGATION FORMING THE BASIS OF THE LEGAL PROCEEDINGS , NAMELY THE CONTRACTUAL OBLIGATION OF THE GRANTOR WHICH CORRESPONDS TO THE CONTRACTUAL RIGHT RELIED UPON BY THE GRANTEE IN SUPPORT OF THE APPLICATION.

16 IN DISPUTES CONCERNING THE CONSEQUENCES OF THE INFRINGEMENT BY THE GRANTOR OF A CONTRACT CONFERRING AN EXCLUSIVE CONCESSION , SUCH AS THE PAYMENT OF DAMAGES OR THE DISSOLUTION OF THE CONTRACT , THE OBLIGATION TO WHICH REFERENCE MUST BE MADE FOR THE PURPOSES OF APPLYING ARTICLE 5 (1) OF THE CONVENTION IS THAT WHICH THE CONTRACT IMPOSES ON THE GRANTOR AND THE NON-PERFORMANCE OF WHICH IS RELIED UPON BY THE GRANTEE IN SUPPORT OF THE APPLICATION FOR DAMAGES OR FOR THE DISSOLUTION OF THE CONTRACT.

17 IN THE CASE OF ACTIONS FOR THE PAYMENT OF COMPENSATION BY WAY OF DAMAGES , IT IS FOR THE NATIONAL COURT TO ASCERTAIN WHETHER , UNDER THE LAW APPLICABLE TO THE CONTRACT , AN INDEPENDENT CONTRACTUAL OBLIGATION OR AN OBLIGATION REPLACING THE UNPERFORMED CONTRACTUAL OBLIGATION IS INVOLVED.

18 IN THE SECOND QUESTION , THE COURT IS ASKED TO RULE WHETHER , IN CIRCUMSTANCES WHERE , ON THE ONE HAND , THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION IS NOT EMPOWERED EITHER TO NEGOTIATE IN THE NAME OF THE GRANTOR OR TO BIND HIM AND , ON THE OTHER HAND , IS NOT SUBJECT EITHER TO THE CONTROL OR DIRECTION OF THE GRANTOR , HE SHOULD BE REGARDED AS BEING AT THE HEAD OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT OF THE GRANTOR WITHIN THE MEANING OF ARTICLE 5 (5) OF THE BRUSSELS CONVENTION.

19 UNDER ARTICLE 5 (5) OF THE CONVENTION , A PERSON DOMICILED IN A CONTRACTING STATE MAY , IN ANOTHER CONTRACTING STATE , BE SUED :

' AS REGARDS A DISPUTE ARISING OUT OF THE OPERATIONS OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT , IN THE COURTS FOR THE PLACE IN WHICH THE BRANCH , AGENCY OR OTHER ESTABLISHMENT IS SITUATED. '

20 ONE OF THE ESSENTIAL CHARACTERISTICS OF THE CONCEPTS OF BRANCH OR AGENCY IS THE FACT OF BEING SUBJECT TO THE DIRECTION AND CONTROL OF THE PARENT BODY.

21 IT IS CLEAR FROM BOTH THE OBJECT AND THE WORDING OF THIS PROVISION THAT THE SPIRIT OF THE CONVENTION REQUIRES THAT THE CONCEPT OF ' ESTABLISHMENT ' APPEARING IN THE SAID ARTICLE SHALL BE BASED ON THE SAME ESSENTIAL CHARACTERISTICS AS A BRANCH OR AGENCY.

22 IT IS , IN CONSEQUENCE , IMPOSSIBLE TO EXTEND THE CONCEPTS OF BRANCH , AGENCY OR OTHER ESTABLISHMENT TO THE GRANTEE OF AN EXCLUSIVE CONCESSION WHOSE OPERATIONS ARE OF THE KIND INDICATED BY THE NATIONAL COURT .

23 FOR THE FOREGOING REASONS , THE ANSWER TO THE SECOND QUESTION MUST BE THAT , WHEN THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION IS SUBJECT NEITHER TO THE CONTROL NOR TO THE DIRECTION OF THE GRANTOR , HE CANNOT BE REGARDED AS BEING AT THE HEAD OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT OF THE GRANTOR WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968.

COSTS

24 THE COSTS INCURRED BY THE GOVERNMENT OF THE UNITED KINGDOM AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE.

25 AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , 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

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE COUR D ' APPEL , MONS , BY ORDER OF 9 DECEMBER 1975 , HEREBY RULES :

1 . IN DISPUTES IN WHICH THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION IS CHARGING THE GRANTOR WITH HAVING INFRINGED THE EXCLUSIVE CONCESSION , THE WORD ' OBLIGATION ' CONTAINED IN ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS REFERS TO THE CONTRACTUAL OBLIGATION FORMING THE BASIS OF THE LEGAL PROCEEDINGS NAMELY THE OBLIGATION OF THE GRANTOR WHICH CORRESPONDS TO THE CONTRACTUAL RIGHT RELIED UPON BY THE GRANTEE IN SUPPORT OF THE APPLICATION .

IN DISPUTES CONCERNING THE CONSEQUENCES OF THE INFRINGEMENT BY THE GRANTOR OF A CONTRACT CONFERRING AN EXCLUSIVE CONCESSION , SUCH AS THE PAYMENT OF DAMAGES OR THE DISSOLUTION OF THE CONTRACT , THE OBLIGATION TO WHICH REFERENCE MUST BE MADE FOR THE PURPOSES OF APPLYING ARTICLE 5 (1) OF THE CONVENTION IS THAT WHICH THE CONTRACT IMPOSES ON THE GRANTOR AND THE NON-PERFORMANCE OF WHICH IS RELIED UPON BY THE GRANTEE IN SUPPORT OF THE APPLICATION FOR DAMAGES OR FOR THE DISSOLUTION OF THE CONTRACT.

IN THE CASE OF ACTIONS FOR PAYMENT OF COMPENSATION BY WAY OF DAMAGES , IT IS FOR THE NATIONAL COURT TO ASCERTAIN WHETHER , UNDER THE LAW APPLICABLE TO THE CONTRACT , AN INDEPENDENT CONTRACTUAL OBLIGATION OR AN OBLIGATION REPLACING THE UNPERFORMED CONTRACTUAL OBLIGATION IS INVOLVED .

2 . WHEN THE GRANTEE OF AN EXCLUSIVE SALES CONCESSION IS NOT SUBJECT EITHER TO THE CONTROL OR TO THE DIRECTION OF THE GRANTOR , HE CANNOT BE REGARDED AS BEING AT THE HEAD OF A BRANCH , AGENCY OR OTHER ESTABLISHMENT OF THE GRANTOR WITHIN THE MEANING OF ARTICLE 5 (5) OF THE CONVENTION OF 27 SEPTEMBER 1968.

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NATCOUR *A8* Tribunal de commerce de Tournai, 1re chambre, jugement du 26/03/74 (301/73)
A9 Cour d'appel de Mons, 1re chambre, arrêt du 09/12/75 (1.290)
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Judgment of the Court
of 6 October 1976
Industrie Tessili Italiana Como v Dunlop AG.
Reference for a preliminary ruling: Oberlandesgericht Frankfurt am Main - Germany.
Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Article 5 (1).
Case 12-76.

1 . PROCEDURE - CONVENTIONS FOR WHICH PROVISION IS MADE IN ARTICLE 220 OF THE EEC TREATY - INTERPRETATION - NEW MEMBER STATES - OBSERVATIONS - PERMISSIBILITY

(ACT OF ACCESSION , ARTICLE 3 (2)

2 . CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS - INTERPRETATION - GENERAL RULES.

3 . CONVENTION OF 27 SEPTEMBER 1968 - SPECIAL JURISDICTION - DISPUTE HAVING AN INTERNATIONAL CHARACTER - MATTER RELATING TO A CONTRACT - COURT HAVING JURISDICTION - PLACE OF PERFORMANCE OF THE OBLIGATION

(CONVENTION OF 27 SEPTEMBER 1968 , ARTICLE 5 (1)

1 . THE NEW MEMBER STATES ARE ENTITLED TO SUBMIT OBSERVATIONS IN THE CONTEXT OF PROCEEDINGS RELATING TO THE INTER- PRETATION OF ONE OF THE CONVENTIONS , FOR WHICH PROVISION IS MADE IN ARTICLE 220 OF THE TREATY , TO WHICH THEY ARE REQUIRED BY ARTICLE 3 (2) OF THE ACT OF ACCESSION TO BECOME PARTIES.

2 . THE CONVENTION OF 27 SEPTEMBER 1968 MUST BE INTERPRETED HAVING REGARD BOTH TO ITS PRINCIPLES AND OBJECTIVES AND TO ITS RELATIONSHIP WITH THE TREATY. AS REGARDS THE QUESTION WHETHER THE WORDS AND CONCEPTS USED IN THE CONVENTION MUST BE REGARDED AS HAVING THEIR OWN INDEPENDENT MEANING AND AS BEING THUS COMMON TO ALL THE MEMBER STATES OR AS REFERRING TO SUBSTANTIVE RULES OF THE LAW APPLICABLE IN EACH CASE UNDER THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS FIRST BROUGHT , THE APPROPRIATE CHOICE CAN ONLY BE MADE IN RESPECT OF EACH OF THE PROVISIONS OF THE CONVENTION TO ENSURE THAT IT IS FULLY EFFECTIVE HAVING REGARD TO THE OBJECTIVES OF ARTICLE 220 OF THE TREATY .

3 . THE ' PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION ' WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 IS TO BE DETERMINED IN ACCORDANCE WITH THE LAW WHICH GOVERNS THE OBLIGATION IN QUESTION ACCORDING TO THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS BROUGHT.

IN CASE 12/76

REFERENCE UNDER ARTICLE 1 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 OBERLANDESGERICHT FRANKFURT AM MAIN FOR A PRELIMINARY RULING IN THE ACTION PENDING BEFORE THAT COURT BETWEEN

INDUSTRIE TESSILI ITALIANA COMO , WHOSE REGISTERED OFFICE IS IN COMO , ITALY ,

AND

DUNLOP AG , WHOSE REGISTERED OFFICE IS IN HANAU AM MAIN (FEDERAL REPUBLIC OF GERMANY),

ON THE INTERPRETATION OF THE CONCEPT OF ' PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION ' WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ,

1 BY ORDER DATED 14 JANUARY 1976 , RECEIVED AT THE COURT REGISTRY ON 13 FEBRUARY 1976 , THE OBERLANDESGERICHT FRANKFURT AM MAIN REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER THE PROTOCOL OF 3 JUNE 1971 ON THE INTERPRETATION OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (HEREINAFTER REFERRED TO AS ' THE CONVENTION ') A QUESTION ON THE INTERPRETATION OF ARTICLE 5 (1) OF THE CONVENTION.

2 IT APPEARS FROM THE ORDER OF REFERENCE THAT AT THIS STAGE THE CASE , WHICH HAS BEEN BROUGHT AS AN APPEAL TO THE OBERLANDESGERICHT , RELATES TO THE JURISDICTION OF THE COURT OF FIRST INSTANCE AT HANAU TO HEAR A CASE BROUGHT BY AN UNDERTAKING ESTABLISHED WITHIN THE JURISDICTION OF THAT COURT AGAINST AN ITALIAN UNDERTAKING WITH ITS REGISTERED OFFICE AT COMO IN CONNEXION WITH THE PERFORMANCE OF A CONTRACT RELATING TO THE DELIVERY BY THE ITALIAN UNDERTAKING TO THE GERMAN UNDERTAKING OF A CONSIGNMENT OF WOMEN ' S SKI SUITS. IT APPEARS FROM THE FILE THAT THE GOODS WERE MANUFACTURED BY THE ITALIAN UNDERTAKING IN ACCORDANCE WITH INSTRUCTIONS GIVEN BY THE GERMAN UNDERTAKING AND DELIVERED TO A CARRIER IN COMO APPOINTED BY THE GERMAN UNDERTAKING .

3 THE GERMAN UNDERTAKING AFTER TAKING DELIVERY OF THE GOODS AND SELLING SOME OF THEM CONSIDERS AS A RESULT OF COMPLAINTS FROM ITS CUSTOMERS THAT THE SUITS DELIVERED BY THE MANUFACTURER ARE DEFECTIVE AND DO NOT CORRESPOND TO THE SPECIFICATIONS AGREED BETWEEN THE PARTIES . FOR THIS REASON IT BROUGHT AN ACTION IN ITS LOCAL COURT AGAINST THE ITALIAN MANUFACTURER.

4 THE COURT BY INTERLOCUTORY JUDGMENT DATED 10 MAY 1974 DECLARED ITSELF TO HAVE JURISDICTION TO HEAR THE CASE WHEREUPON THE ITALIAN UNDERTAKING BROUGHT AN APPEAL BEFORE THE OBERLANDESGERICHT FRANKFURT AM MAIN . IN THE VIEW OF THIS LATTER COURT THE QUESTION OF JURISDICTION RAISED MUST BE SETTLED IN ACCORDANCE WITH THE PROVISIONS OF THE CONVENTION. IN ITS VIEW THERE IS NO VALID AGREEMENT BETWEEN THE PARTIES CONFERRING JURISDICTION WITHIN THE MEANING OF ARTICLE 17 OF THE CONVENTION. ON THE OTHER HAND THE OBERLANDESGERICHT DOES NOT RULE OUT THE POSSIBILITY THAT THE COURT OF FIRST INSTANCE MAY HAVE JURISDICTION UNDER ARTICLE 5 (1) OF THE CONVENTION AS BEING THE PLACE ' OF PERFORMANCE OF THE OBLIGATION IN QUESTION '. TO SETTLE THIS QUESTION IT ASKS THE COURT OF JUSTICE TO RULE ON THE INTERPRETATION OF THAT PROVISION.

PROCEDURE

5 THE REPUBLIC OF IRELAND AND THE UNITED KINGDOM SUBMITTED OBSERVATIONS DURING THE WRITTEN PROCEDURE AND THE COURT THEREFORE REQUESTED THE PARTIES IN THE MAIN ACTION , THE MEMBER STATES AND THE COMMISSION TO GIVE THEIR VIEWS ON THE QUESTION WHETHER THE NEW MEMBER STATES WHICH ARE NOT YET PARTIES TO THE CONVENTION ARE ENTITLED TO PARTICIPATE IN PROCEEDINGS

RELATING TO ITS INTERPRETATION.

6 ARTICLE 3 (2) OF THE ACT OF ACCESSION PROVIDES THAT ' THE NEW MEMBER STATES UNDERTAKE TO ACCEDE TO THE CONVENTIONS PROVIDED FOR IN ARTICLE 220 OF THE EEC TREATY , AND TO THE PROTOCOLS ON THE INTERPRETATION OF THOSE CONVENTIONS BY THE COURT OF JUSTICE , SIGNED BY THE ORIGINAL MEMBER STATES , AND TO THIS END THEY UNDERTAKE TO ENTER INTO NEGOTIATIONS WITH THE ORIGINAL MEMBER STATES IN ORDER TO MAKE THE NECESSARY ADJUSTMENTS THERETO '. THE FIRST PARAGRAPH OF ARTICLE 63 OF THE CONVENTION PROVIDES THAT ' THE CONTRACTING STATES RECOGNIZE THAT ANY STATE WHICH BECOMES A MEMBER OF THE EUROPEAN ECONOMIC COMMUNITY SHALL BE REQUIRED TO ACCEPT THIS CONVENTION AS A BASIS FOR THE NEGOTIATIONS BETWEEN THE CONTRACTING STATES AND THAT STATE NECESSARY TO ENSURE THE IMPLEMENTATION OF THE LAST PARAGRAPH OF ARTICLE 220 OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY ' . THE NEW MEMBER STATES THUS HAVE AN INTEREST IN EXPRESSING THEIR VIEWS WHEN THE COURT IS CALLED UPON TO INTERPRET A CONVENTION TO WHICH THEY ARE REQUIRED TO BECOME PARTIES.

7 IT SHOULD FURTHER BE OBSERVED THAT ARTICLE 5 (1) OF THE PROTOCOL OF 3 JUNE 1971 STIPULATES THAT , EXCEPT AS OTHERWISE PROVIDED , ' THE PROVISIONS OF THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY AND THOSE OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE ANNEXED THERETO , WHICH ARE APPLICABLE WHEN THE COURT IS REQUESTED TO GIVE A PRELIMINARY RULING , SHALL ALSO APPLY TO ANY PROCEEDINGS FOR THE INTERPRETATION OF THE CONVENTION '.

8 AS A RESULT THE NEW MEMBER STATES TO WHICH ARTICLE 177 OF THE EEC TREATY AND ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE APPLY ARE ENTITLED TO SUBMIT OBSERVATIONS IN ACCORDANCE WITH THE SAID ARTICLES IN PROCEEDINGS FOR THE INTERPRETATION OF THE CONVENTION . NO VALID OBJECTION TO THIS CONCLUSION IS CONSTITUTED BY ARTICLE 4 (4) OF THE PROTOCOL OF 3 JUNE 1971 ON A SPECIAL PROCEDURE WHICH IS NOT RELEVANT FOR THE PRESENT PURPOSES. FURTHER IN THE CONTEXT OF THAT PROTOCOL , WHICH ORIGINATED BEFORE THE ENLARGEMENT OF THE EUROPEAN COMMUNITIES , THE WORDS ' CONTRACTING STATES ' REFER TO ALL THE MEMBER STATES.

THE INTERPRETATION OF THE CONVENTION IN GENERAL

9 ARTICLE 220 OF THE EEC TREATY PROVIDES THAT MEMBER STATES SHALL , SO FAR AS NECESSARY , ENTER INTO NEGOTIATIONS WITH EACH OTHER WITH A VIEW TO SECURING FOR THE BENEFIT OF THEIR NATIONALS THE ESTABLISHMENT OF RULES INTENDED TO FACILITATE THE ACHIEVEMENT OF THE COMMON MARKET IN THE VARIOUS SPHERES LISTED IN THAT PROVISION. THE CONVENTION WAS ESTABLISHED TO IMPLEMENT ARTICLE 220 AND WAS INTENDED ACCORDING TO THE EXPRESS TERMS OF ITS PREAMBLE TO IMPLEMENT THE PROVISIONS OF THAT ARTICLE ON THE SIMPLIFICATION OF FORMALITIES GOVERNING THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS OF COURTS OR TRIBUNALS AND TO STRENGTHEN IN THE COMMUNITY THE LEGAL PROTECTION OF PERSONS THEREIN ESTABLISHED . IN ORDER TO ELIMINATE OBSTACLES TO LEGAL RELATIONS AND TO SETTLE DISPUTES WITHIN THE SPHERE OF INTRA-COMMUNITY RELATIONS IN CIVIL AND COMMERCIAL MATTERS THE CONVENTION CONTAINS , INTER ALIA , RULES ENABLING THE JURISDICTION IN THESE MATTERS OF COURTS OF MEMBER STATES TO BE DETERMINED AND FACILITATING THE RECOGNITION

AND EXECUTION OF COURTS ' JUDGMENTS. ACCORDINGLY THE CONVENTION MUST BE INTERPRETED HAVING REGARD BOTH TO ITS PRINCIPLES AND OBJECTIVES AND TO ITS RELATIONSHIP WITH THE TREATY.

10 THE CONVENTION FREQUENTLY USES WORDS AND LEGAL CONCEPTS DRAWN FROM CIVIL , COMMERCIAL AND PROCEDURAL LAW AND CAPABLE OF A DIFFERENT MEANING FROM ONE MEMBER STATE TO ANOTHER. THE QUESTION THEREFORE ARISES WHETHER THESE WORDS AND CONCEPTS MUST BE REGARDED AS HAVING THEIR OWN INDEPENDENT MEANING AND AS BEING THUS COMMON TO ALL THE MEMBER STATES OR AS REFERRING TO SUBSTANTIVE RULES OF THE LAW APPLICABLE IN EACH CASE UNDER THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS FIRST BROUGHT.

11 NEITHER OF THESE TWO OPTIONS RULES OUT THE OTHER SINCE THE APPROPRIATE CHOICE CAN ONLY BE MADE IN RESPECT OF EACH OF THE PROVISIONS OF THE CONVENTION TO ENSURE THAT IT IS FULLY EFFECTIVE HAVING REGARD TO THE OBJECTIVES OF ARTICLE 220 OF THE TREATY. IN ANY EVENT IT SHOULD BE STRESSED THAT THE INTERPRETATION OF THE SAID WORDS AND CONCEPTS FOR THE PURPOSE OF THE CONVENTION DOES NOT PREJUDGE THE QUESTION OF THE SUBSTANTIVE RULE APPLICABLE TO THE PARTICULAR CASE.

THE QUESTION RAISED BY THE NATIONAL COURT

12 ARTICLE 5 OF THE CONVENTION PROVIDES : ' 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 '. THIS PROVISION MUST BE INTERPRETED WITHIN THE FRAMEWORK OF THE SYSTEM OF CONFERMENT OF JURISDICTION UNDER TITLE II OF THE CONVENTION. IN ACCORDANCE WITH ARTICLE 2 THE BASIS OF THIS SYSTEM IS THE GENERAL CONFERMENT OF JURISDICTION ON THE COURT OF THE DEFENDANT ' S DOMICILE. ARTICLE 5 HOWEVER PROVIDES FOR A NUMBER OF CASES OF SPECIAL JURISDICTION AT THE OPTION OF THE PLAINTIFF.

13 THIS FREEDOM OF CHOICE WAS INTRODUCED IN VIEW OF THE EXISTENCE IN CERTAIN WELL-DEFINED CASES OF A PARTICULARLY CLOSE RELATIONSHIP BETWEEN A DISPUTE AND THE COURT WHICH MAY BE MOST CONVENIENTLY CALLED UPON TO TAKE COGNIZANCE OF THE MATTER. THUS IN THE CASE OF AN ACTION RELATING TO CONTRACTUAL OBLIGATIONS ARTICLE 5 (1) ALLOWS A PLAINTIFF TO BRING THE MATTER BEFORE THE COURT FOR THE PLACE ' OF PERFORMANCE ' OF THE OBLIGATION IN QUESTION. IT IS FOR THE COURT BEFORE WHICH THE MATTER IS BROUGHT TO ESTABLISH UNDER THE CONVENTION WHETHER THE PLACE OF PERFORMANCE IS SITUATE WITHIN ITS TERRITORIAL JURISDICTION. FOR THIS PURPOSE IT MUST DETERMINE IN ACCORDANCE WITH ITS OWN RULES OF CONFLICT OF LAWS WHAT IS THE LAW APPLICABLE TO THE LEGAL RELATIONSHIP IN QUESTION AND DEFINE IN ACCORDANCE WITH THAT LAW THE PLACE OF PERFORMANCE OF THE CONTRACTUAL OBLIGATION IN QUESTION.

14 HAVING REGARD TO THE DIFFERENCES OBTAINING BETWEEN NATIONAL LAWS OF CONTRACT AND TO THE ABSENCE AT THIS STAGE OF LEGAL DEVELOPMENT OF ANY UNIFICATION IN THE SUBSTANTIVE LAW APPLICABLE , IT DOES NOT APPEAR POSSIBLE TO GIVE ANY MORE SUBSTANTIAL GUIDE TO THE INTERPRETATION OF THE REFERENCE MADE BY ARTICLE 5 (1) TO THE ' PLACE OF PERFORMANCE ' OF CONTRACTUAL OBLIGATIONS. THIS IS ALL THE MORE TRUE SINCE THE DETERMINATION OF THE PLACE OF PERFORMANCE OF OBLIGATIONS DEPENDS ON THE CONTRACTUAL CONTEXT TO WHICH THESE OBLIGATIONS BELONG.

15 IN THESE CIRCUMSTANCES THE REFERENCE IN THE CONVENTION TO THE PLACE OF PERFORMANCE OF CONTRACTUAL OBLIGATIONS CANNOT BE UNDERSTOOD OTHERWISE THAN BY REFERENCE TO THE SUBSTANTIVE LAW APPLICABLE UNDER THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS BROUGHT .

COSTS

16 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE COMMISSION OF THE EUROPEAN COMMUNITIES WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT ARE NOT RECOVERABLE AND , AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN ACTION ARE CONCERNED , IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE OBERLANDESGERICHT FRANKFURT AM MAIN , THE DECISION AS TO COSTS IS A MATTER FOR THAT COURT.

ON THOSE GROUNDS ,

THE COURT

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE OBERLANDESGERICHT FRANKFURT AM MAIN BY ORDER DATED 14 JANUARY 1976 , HEREBY RULES :

THE ' PLACE OF PERFORMANCE OF THE OBLIGATION IN QUESTION ' WITHIN THE MEANING OF ARTICLE 5 (1) OF THE CONVENTION OF 27 SEPTEMBER 1968 ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS IS TO BE DETERMINED IN ACCORDANCE WITH THE LAW WHICH GOVERNS THE OBLIGATIONS IN QUESTION ACCORDING TO THE RULES OF CONFLICT OF LAWS OF THE COURT BEFORE WHICH THE MATTER IS BROUGHT.

DOCNUM	61976J0012
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
TYPDOC	6 ; CJUS ; cases ; 1976 ; J ; judgment
PUBREF	European Court reports 1976 Page 01473 Greek special edition 1976 Page 00533 Portuguese special edition 1976 Page 00585 Spanish special edition 1976 Page 00495 Swedish special edition III Page 00177 Finnish special edition III Page 00185
DOC	1976/10/06
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11957E/PRO/CJ/20 : N 8
11957E177 : N 8
11957E220 : N 6 9 11
41968A0927(01)-A02 : N 12
41968A0927(01)-A05PT1 : N 1 4 12 - 14
41968A0927(01)-A17 : N 4
41968A0927(01)-A63L1 : N 6
41971A0603(02)-A05 : N 7
11972B003-P2 : N 6

CONCERNS Interprets 41968A0927(01)-A05PT1

SUB Brussels Convention of 27 September 1968 ; Jurisdiction ; Accession

AUTLANG German

OBSERV Commission ; Federal Republic of Germany ; United Kingdom ; Member States ; Institutions

NATIONA Federal Republic of Germany

NATCOUR
A8 Landgericht Hanau, Zwischenurteil vom 10/05/74 (5/2 aO 158/73)
A9 Oberlandesgericht Frankfurt/Main, Vorlagebeschluß vom 14/01/76 (21 U 158/74)
- Common Market Law Reports 1977 Vol.1 p.29-39 p.53-55
P1 Oberlandesgericht Frankfurt/Main, Urteil vom 23/03/77 (21 U 158/74)

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PROCEDU Reference for a preliminary ruling

ADVGEN Mayras

JUDGRAP Pescatore

DATES
of document: 06/10/1976
of application: 13/02/1976

Reference for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 19 May 2008 - Peter Rehder v Air Baltic Corporation

(Case C-204/08)

Language of the case: German

Referring court

Bundesgerichtshof

Parties to the main proceedings

Applicant: Peter Rehder

Defendant: Air Baltic Corporation

Questions referred

Is the second indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1] to be interpreted as meaning that in the case of journeys by air from one Member State to another the single place of performance for all contractual obligations must be taken to be the place of the main provision of services, determined according to economic criteria?

Where a single place of performance is to be determined: What criteria are relevant for its determination; is the single place of performance determined, in particular, by the place of departure or the place of arrival?

_____

[1] - OJ 2001 L 12, p. 1.

Haase ua ./. Superfast Ferries SA ua

not yet on ECJ web-site

Reference for a preliminary ruling from Supreme Court (Ireland) made on 6 August 2007 - Nicole Hassett and Cheryl Doherty / The Medical Defence Union Limited and MDU Services Limited v Raymond Howard and Brian Davidson

(Case C-372/07)

Language of the case: English

Referring court

Supreme Court, Ireland

Parties to the main proceedings

Applicants: Nicole Hassett and Cheryl Doherty / The Medical Defence Union Limited and MDU Services Limited

Defendants: Raymond Howard and Brian Davidson

Questions referred

Where medical practitioners form a mutual defence organisation taking the form of a company, incorporated under the laws of one Member State, for the purpose of providing assistance and indemnity to its members practising in that and another Member State in respect of their professional practice, and the provision of such assistance or indemnity is dependant on the making of a decision by the Board of Management of that company, in accordance with its articles of association, in its absolute discretion, are proceedings in which a decision refusing assistance or indemnity to a medical practitioner practising in the other Member State pursuant to that provision is challenged by that medical practitioner as involving a breach by the company of contractual or other legal rights of the medical practitioner concerned to be considered to be proceedings which have as their object the validity of a decision of an organ of that company for the purposes of Article 22, paragraph 2 of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[1] so that the courts of the Member State in which that company has its seat have exclusive jurisdiction?

_____

[1] - Council Regulation (EC) No 44/2201 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, p. 1

Reference for a preliminary ruling from House of Lords (United Kingdom) made on 2 April 2007 - Riunione Adriatica Di Sicurta SpA (RAS) v West Tankers Inc.

(Case C-185/07)

Language of the case: English

Referring court

House of Lords

Parties to the main proceedings

Applicant: Riunione Adriatica Di Sicurta SpA (RAS)

Defendant: West Tankers Inc.

Question referred

Is it consistent with EC Regulation 44/2001[1] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?

_____

[1] - Council Regulation (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12, p. 1

Judgment of the Court (Second Chamber)
of 13 December 2007
FBTO Schadeverzekeringen NV v Jack Odenbreit. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Regulation (EC) No 44/2001- Jurisdiction in matters relating to insurance - Liability insurance - Action brought by the injured party directly against the insurer - Rule of jurisdiction of the courts for the place where the plaintiff is domiciled. Case C-463/06.

In Case C463/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 26 September 2006, received at the Court on 20 November 2006, in the proceedings

FBTO Schadeverzekeringen NV

v

Jack Odenbreit,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, P. Kris, J.-C. Bonichot and C. Toader (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Odenbreit, by N. Meier-van Laak, Rechtsanwältin,

- the German Government, by A. Dittrich and M. Lumma, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, and by W. Ferrante, avvocato dello Stato,

- the Polish Government, by E. Oniecka-Tamecka, acting as Agent,

- the Commission of the European Communities, by W. Bogensberger and A.-M. Rouchaud-Joet, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

On those grounds, the Court (Second Chamber) hereby rules:

The reference in Article 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.

1. This reference for a preliminary ruling concerns the interpretation of Articles 9(1)(b) and 11(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2. The reference was made in the course of proceedings between Jack Odenbreit, domiciled in Germany, the injured party in a road traffic accident which occurred in the Netherlands, and the insurance company of the person responsible for that accident, the private limited liability company FBTO Schadeverzekeringen NV (FBTO'), established in the Netherlands.

Legal context of the dispute

Regulation No 44/2001

3. Recital 13 in the preamble to Regulation No 44/2001 states, [i]n relation to insurance... contracts..., the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.'

4. The rules of jurisdiction in matters relating to insurance are established in Chapter II, Section 3, of Regulation No 44/2001, which comprises Articles 8 to 14 of that regulation.

5. Article 9(1)(a) and (b) of Regulation No 44/2001 provides:

1. An insurer domiciled in a Member State may be sued:

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

(b) 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...'

6. Article 11 of that regulation states:

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them. "

Directive 2000/26/EC

7. Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (OJ 2000 L 181, p. 65), as amended by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 (OJ 2005 L 149, p. 14) (Directive 2000/26'), provides in Article 3, entitled Direct right of action':

Each Member State shall ensure that injured parties referred to in Article 1 in accidents within the meaning of that provision enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability.'

8. In addition, Recital 16a in the preamble to Directive 2000/26 states as follows:

Under Article 11(2) read in conjunction with Article 9(1)(b) of... Regulation ... No 44/2001..., injured parties may bring legal proceedings against the civil liability insurance provider in the Member State in which they are domiciled.'

The dispute in the main proceedings and the question referred for a preliminary ruling

9. On 28 December 2003 Mr Odenbreit was involved in a road traffic accident in the Netherlands with a person insured with FBTO. As the injured party he brought a direct action against the insurer before the Amtsgericht Aachen (Aachen Local Court), which is the court for the place

where he is domiciled, on the basis of Articles 11(2) and 9(1)(b) of Regulation No 44/2001.

10. By judgment of 27 April 2005 that court dismissed the action as inadmissible on account of the lack of jurisdiction of the German courts. Mr Odenbreit brought an appeal against that judgment before the Oberlandesgericht Köln (Higher Regional Court, Cologne). By interlocutory judgment of 12 September 2005 that appeal court recognised the jurisdiction of German courts over an action to establish liability, on the basis of the same provisions of Regulation No 44/2001.

11. FBTO brought an appeal on a point of law (Revision') against that interlocutory judgment before the Bundesgerichtshof (Federal Court of Justice).

12. As is clear from the order for reference, the interpretation of Articles 11(2) and 9(1)(b) of Regulation No 44/2001 relating to jurisdiction in actions brought by an injured party directly against the insurer is a controversial subject in German legal literature.

13. Thus, according to the prevailing view, such direct actions are not matters relating to insurance within the meaning of Article 8 et seq. of Regulation No 44/2001, since the right of action of the injured party in German private international law is regarded as a right in tort and not as a right under an insurance contract. According to that interpretation, Article 9(1)(b) of the regulation covers only matters relating to the insurance policy, in the strict sense, and the concept of beneficiary' appearing in that provision does not include the injured party. The latter cannot become a main party to the proceedings under Article 11(2) of the regulation. Against that academic opinion it is argued that, on account of the reference to Article 9 of Regulation No 44/2001 in Article 11(2) of Regulation No 44/2001, the courts for the place where the injured party is domiciled has jurisdiction to hear an action brought by the injured party directly against a liability insurance provider.

14. The Bundesgerichtshof shares that latter interpretation. In its view, there are cogent grounds for allowing an injured party to bring an action directly against the insurer before the courts for the place where that injured party is domiciled.

15. However, taking into account the differences in academic interpretation of those provisions of Regulation No 44/2001, the Bundesgerichtshof decided to stay proceedings and to refer to the Court the following question for a preliminary ruling:

Is the reference to Article 9(1)(b) in Article 11(2) of... Regulation ... No 44/2001... to be understood as meaning that the injured party may bring an action directly against the insurer in the courts for the place in a Member State where the injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State?'

The question referred for a preliminary ruling

Observations submitted to the Court

16. The defendant in the main proceedings, all the Member States which submitted observations to the Court and the Commission of the European Communities consider that the reference made in Article 11(2) of Regulation No 44/2001 to Article 9(1)(b) of that regulation should be interpreted as meaning that an injured party can bring an action directly against an insurer in the courts for the place where he is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.

17. On the basis of a literal interpretation of the provisions of Regulation No 44/2001, the German Government and the Commission submit that, in so far as the reference in Article 11(2) of Regulation No 44/2001 makes all the content of Article 9(1)(b) of that regulation applicable to actions brought by an injured party, it is not necessary for the latter to be mentioned in the article referred to, since otherwise the reference made by Article 11(2) would be superfluous. On the basis of the same interpretation, the Polish Government considers, by contrast, that the injured party must

be classified as a beneficiary' within the meaning of Article 9(1)(b) of that regulation. When the contract of insurance is concluded, the potential injured party to whom compensation would be paid if the event for which the contract was entered into occurred is unknown. The injured party cannot therefore be named in it as a beneficiary.

18. The defendant in the main proceedings, all the Member States which submitted observations to the Court and the Commission maintain that the provisions of Regulation No 44/2001 on jurisdiction in matters relating to insurance reflect the need to protect the economically weaker party, a principle of interpretation which is set out in Recital 13 in the preamble to that regulation and established in the case-law of the Court (Case 201/82 Gerling Konzern Speziale Kreditversicherung and Others [1983] ECR 2503, Case C-412/98 Group Josi [2000] ECR I-5925, paragraph 64, and Case C-112/03 Société financière et industrielle de Peloux [2005] ECR I-3707, paragraph 30). The very aim of Article 11(2) is therefore to extend to the injured party the arrangements provided for the benefit of plaintiffs by Article 9(1)(b) of that regulation.

19. In that regard, the German Government and the Commission submit that the inclusion of Article 11(2) in Regulation No 44/2001 shows the intention of the Community legislature, in accordance with the Commission's proposal, to give greater protection than that provided for by the Convention, of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36) (the Brussels Convention').

20. Finally, the defendant in the main proceedings, all the Member States which submitted observations to the Court and the Commission state that such an interpretation is confirmed by Directive 2000/26 and particularly by Recital 16a in the preamble to that directive. In inserting that recital, after Regulation No 44/2001 was adopted, the Community legislature did not prescribe a binding interpretation of the provisions of that regulation, but provided an argument of considerable force in favour of recognising the jurisdiction of the courts for the place where the injured party is domiciled.

Reply of the Court

21. It should be recalled, at the outset, that Section 3 of Chapter II of Regulation No 44/2001, containing Articles 8 to 14, provides rules of jurisdiction in matters relating to insurance, which are additional to the general rules contained in Section 1 of the same chapter of that regulation.

22. Section 3 lays down a number of rules of jurisdiction in relation to actions brought against an insurer. It provides, inter alia, that an insurer, domiciled in a Member State may be sued in the courts of the Member State where it is domiciled [Article 9(1)(a)], in the courts for the place where the plaintiff is domiciled if the action is brought by the policy holder, the insured or a beneficiary [Article 9(1)(b)] and, finally, in the courts for the place where the harmful event occurred, in respect of liability insurance or insurance of immovable property (Article 10).

23. As regards liability insurance, Article 11(2) of Regulation No 44/2001 refers back to those rules of jurisdiction in the case of actions brought by the injured party directly against the insurer.

24. Therefore, in order to reply to the question referred by the national court, it is necessary to define the scope of the reference made in Article 11(2) of Regulation No 44/2001 to Article 9(1)(b) of that regulation. It is necessary, in particular, to establish whether that reference should be interpreted as recognising only those courts designated in the latter provision, that is, those of the place of domicile of the policy holder, of the insured or of a beneficiary, as having jurisdiction to hear a direct action brought by the injured party against the insurer, or whether that reference allows the rule of jurisdiction of the courts for the place where the plaintiff is domiciled, set out in Article 9(1)(b) of Regulation No 44/2001, to be applied to that action.

25. It is necessary to point out, in that regard, that Article 9(1)(b) does not merely attribute

jurisdiction to the courts for the place where the persons listed therein are domiciled, but, on the contrary, it lays down that the courts for the place where the plaintiff is domiciled have jurisdiction, thereby giving such persons the option of suing the insurer before the courts for the place of their own domicile.

26. Thus, to interpret the reference in Article 11(2) of Regulation No 44/2001 to Article 9(1)(b) of that regulation as permitting the injured party to bring proceedings only before the courts having jurisdiction under that latter provision, that is to say, the courts for the place of domicile of the policy holder, the insured or the beneficiary, would run counter to the actual wording of Article 11(2). The reference leads to a widening of the scope of that rule to categories of plaintiff other than the policy holder, the insured or the beneficiary of the insurance contract who sue the insurer. Thus, the role of that reference is to add injured parties to the list of plaintiffs contained in Article 9(1)(b).

27. In that regard, the application of that rule of jurisdiction to a direct action brought by the injured party cannot depend upon the classification of that injured party as a beneficiary' within the meaning of Article 9(1)(b) of Regulation No 44/2001, since the reference to that provision in Article 11(2) thereof allows that rule of jurisdiction to be extended to such disputes without the plaintiff having to belong to one of categories in Article 9(1)(b).

28. That line of reasoning is also based on a teleological interpretation of the provisions at iss ue in the main proceedings. According to Recital 13 in the preamble to Regulation No 44/2001, the regulation aims to guarantee more favourable protection to the weaker party than the general rules of jurisdiction provide for (see, to that effect, Group Josi , paragraph 64, Société financière et industrielle du Peloux , paragraph 40, and Case C-77/04 GIE Réunion européenne and Others [2005] ECR I-4509, paragraph 17). To deny the injured party the right to bring an action before the courts for the place of his own domicile would deprive him of the same protection as that afforded by the regulation to other parties regarded as weak in disputes in matters relating to insurance and would thus be contrary to the spirit of the regulation. Moreover, as the Commission correctly observes, Regulation No 44/2001 strengthened such protection as compared with the protection resulting from application of the Brussels Convention.

29. Such an interpretation is supported by the wording of Directive 2000/26 on matters relating to insurance against civil liability in respect of the use of motor vehicles, as amended - after the entry into force of Regulation No 44/2001 - by Directive 2005/14. In Directive 2000/26 the Community legislature not only provided, in Article 3, that injured parties should have a direct right of action against the insurance undertaking in the legal systems of the Member States, but also referred expressly, in Recital 16a to Articles 9(1)(b) and 11(2) of Regulation No 44/2001 in mentioning the right of injured parties to bring proceedings against the insurer in the courts for the place where they are domiciled.

30. As regards the consequences of allowing an injured party to bring a direct action against the insurer which, as is clear from the order for reference, is a controversial subject in Germany, it is necessary to point out that the application of the rule of jurisdiction provided for by Article 9(1)(b) of Regulation No 44/2001 to such an action is not precluded by the latter's classification, in national law, as an action in tort relating to a right extrinsic to legal relations of a contractual nature. The nature of that action in national law is of no relevance for the application of the provisions of the regulation, since those rules of jurisdiction are contained in a section (namely Section 3 of Chapter II of the regulation) which concerns, in general, matters relating to insurance and is distinct from those relating to special jurisdiction in matters relating to a contract or to tort or delict (namely Section 2 of that chapter). The only condition which Article 11(2) of Regulation No 44/2001 lays down for the application of that rule of jurisdiction is that such a

direct action must be permitted under the national law.

31. In light of all the foregoing considerations the reply to the question referred for a preliminary ruling must be that the reference in Article 11(2) of Regulation No 44/2001 to Article 9(1)(b) of that regulation is to be interpreted as meaning that the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that a direct action is permitted and the insurer is domiciled in a Member State.

Costs

32. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page 00000
DOC	2007/12/13
LODGED	2006/11/20
JURCIT	32000L0026 : N 29 32001R0044-A08 : N 21 32001R0044-A09 : N 21 32001R0044-A09P1LA : N 22 32001R0044-A09P1LB : N 1 22 24 - 31 32001R0044-A10 : N 21 32001R0044-A11 : N 21 32001R0044-A11P2 : N 1 23 - 31 32001R0044-A12 : N 21 32001R0044-A13 : N 21 32001R0044-A14 : N 21 32005L0014-A03 : N 29 61998J0412 : N 28 62003J0112 : N 28 62004J0077 : N 28
SUB	COJC
AUTLANG	German

NATIONA Federal Republic of Germany

NATCOUR *A9* Bundesgerichtshof, Beschluß vom 26/09/2006 (VI ZR 200/05) ; - Versicherungsrecht 2006 p.1677-1679 ; - Deutsches Autorecht 2007 no 01 p.19-20 ; - Europäische Zeitschrift für Wirtschaftsrecht 2007 p.159-160 ; - Neue juristische Wochenschrift 2007 p.71-73 ; - Praxis des internationalen Privat- und Verfahrensrechts 2007 p.324-325 ; - Recht der internationalen Wirtschaft 2007 p.72-73 ; - Zeitschrift für Wirtschaftsrecht 2007 p.96 (résumé) ; - International Litigation Procedure 2007 p.528-532 ; - Staudinger, Ansgar: Gerichtsstand für Direktklage bei Verkehrsunfall innerhalb der EU, Neue juristische Wochenschrift 2007 p.73 ; - Rothley, Willi: Deutsches Autorecht 2007 no 01 p.20-21 ; - Heiss, Helmut: Die Direktklage vor dem EuGH - Sechs Antithesen zu BGH vom 26. 9. 2006 VersR 2006, 1677 -, Versicherungsrecht 2007 p.327-331 ; - Fuchs, Angelika: Gerichtsstand für die Direktklage am Wohnsitz des Verkehrsunfallopfers?, Praxis des internationalen Privat- und Verfahrensrechts 2007 p.302-307

NOTES Idot, Laurence: Compétence en matière d'assurances, Europe 2008 Février Comm. no 73 p.32 ; Leible, Stefan: Neue juristische Wochenschrift 2008 p.821 ; Sujecki, Bartosz: Europäische Zeitschrift für Wirtschaftsrecht 2008 p.126-127 ; Fuchs, Angelika: Internationale Zuständigkeit für Direktklagen, Praxis des internationalen Privat- und Verfahrensrechts 2008 p.104-107 ; Thiede, Thomas ; Ludwichowska, Katarzyna: Kfz-Haftpflichtversicherung, Versicherungsrecht 2008 p.631-634 ; Wasserer, Simone: Paradigmenwechsel in der internationalen Zuständigkeit für Direktklagen: Wohnsitzgerichtsstand des Geschädigten bei Klagen gegen ausländische Kfz-Haftpflichtversicherungen, European Law Reporter 2008 p.143-147

PROCEDU Reference for a preliminary ruling

ADVGEN Trstenjak

JUDGRAP Toader

DATES of document: 13/12/2007
of application: 20/11/2006

**Judgment of the Court (First Chamber)
of 22 May 2008
Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard. Reference for a preliminary ruling: Cour de cassation - France. Regulation (EC) No 44/2001 - Section 5 of Chapter II - Jurisdiction over individual contracts of employment - Section 2 of Chapter II - Special jurisdiction - Article 6, point 1 - More than one defendant. Case C-462/06.**

In Case C462/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Cour de cassation (France), made by decision of 7 November 2006, received at the Court on 20 November 2006, in the proceedings

Glaxosmithkline,

Laboratoires Glaxosmithkline

v

Jean-Pierre Rouard,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, A. Tizzano, A. Borg Barthet, M. Ilei and E. Levits, Judges,

Advocate General: M. Poiares Maduro,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 15 November 2007,

after considering the observations submitted on behalf of:

- Glaxosmithkline and Laboratoires Glaxosmithkline, by B. Soltner, avocat,

- M. Rouard, by C. Waquet, avocat,

- the French Government, by G. de Bergues and A.-L. During, acting as Agents,

- the German Government, by M. Lumma, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as Agent, and by W. Ferrante, avvocato dello Stato,

- the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, and by A. Howard, barrister,

- the Commission of the European Communities, by A.M. Rouchaud-Joet, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 17 January 2008,

gives the following

Judgment

On those grounds, the Court (First Chamber) hereby rules:

The rule of special jurisdiction provided for in Article 6, point 1, of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters cannot be applied to a dispute falling under Section 5 of Chapter II of that regulation concerning the jurisdiction rules applicable to individual contracts of employment.

1. This reference for a preliminary ruling relates to the interpretation of Article 6, point 1,

and Section 5 of Chapter II of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1; the Regulation').

2. The reference was made in the course of proceedings between Mr Rouard and Glaxosmithkline and Laboratoires Glaxosmithkline, established in the United Kingdom and France respectively, considered by Mr Rouard, by virtue of a term in his contract of employment, to have been his joint employers and from which he seeks the payment of various amounts by way of compensation for dismissal and damages for wrongful breach of that contract.

Legal context

3. Article 2, point 1, in Section 1, entitled General provisions' of Chapter II of the Regulation, provides:

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

4. Article 6 of the Regulation, in Section 2 of Chapter II thereof, entitled Special jurisdiction', states:

A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

...

(3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

...'

5. Among the objectives of the Regulation, recital 13 states:

In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.'

6. Section 5 of Chapter II of the Regulation, entitled Jurisdiction over individual contracts of employment', contains in particular the following provisions:

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

...

Article 19

An employer domiciled in a Member State may be sued:

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

(2) in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.'

The dispute in the main proceedings and the question referred to the Court

7. Mr Rouard was engaged in 1977 by the company Laboratoires Beecham Sévigné, the seat of which was in France, and he was posted to various African States.

8. Pursuant to a new contract of employment concluded in 1984 with Beecham Research UK, another company in the group, which was registered in the United Kingdom, Mr Rouard was engaged by that company and sent to Morocco. Under that contract of employment, his new employer undertook to maintain the contractual rights acquired by Mr Rouard under his initial contract of employment with Laboratoires Beecham Sévigné, and in particular to preserve his rights derived from length of service and his entitlement to compensation in the event of dismissal.

9. Mr Rouard was dismissed in 2001. In 2002 he brought an action before the Conseil de prud'hommes de Saint-Germain-en-Laye (Employment Tribunal, Saint-Germain-en-Laye) against Laboratoires Glaxosmithkline, which has assumed the rights of Laboratoires Beecham Sévigné, the seat of which is in France, and Glaxosmithkline, which has assumed the rights of Beecham Research UK, the seat of which is in the United Kingdom. Mr Rouard requests that those companies be ordered jointly and severally to pay him various amounts of compensation and damages for non-compliance with the dismissal procedure, dismissal without genuine and serious cause and wrongful breach of his employment contract.

10. Mr Rouard submits that those two companies were his joint employers. Since the French courts have jurisdiction in respect of Laboratoires Glaxosmithkline, the seat of which is in France, those courts, he submits, also have jurisdiction, pursuant to Article 6, point 1, of the Regulation, in respect of Glaxosmithkline.

11. Those companies disputed the jurisdiction of the Conseil de prud'hommes de SaintGermainenLaye, which upheld that objection of lack of jurisdiction. After the Cour d'appel de Versailles (Court of Appeal, Versailles) set aside the first instance judgment, those companies appealed in cassation against the judgment of 6 April 2004 of that latter court.

12. It is in those circumstances that the Cour de cassation decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Does the rule of special jurisdiction stated in Article 6, point 1, of [the] Regulation..., by virtue of which a person domiciled in a Member State may be sued where he is one of a number of defendants, in the courts for the place where any of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk

of irreconcilable judgments resulting from separate proceedings, apply to proceedings brought by an employee before a court of a Member State against two companies belonging to the same group, one of which, being the one which engaged that employee for the group and refused to re-employ him, is domiciled in that Member State and the other, for which the employee last worked in non-Member States and which dismissed him, in another Member State, when that applicant relies on a clause in the employment contract to claim that the two [companies] were his coemployers from whom he claims compensation for his dismissal or does the rule in Article 18, point 1, of [R]egulation [No 44/2001], by virtue of which, in matters relating to individual contracts of employment, jurisdiction is to be determined by Section 5 of Chapter II [of that regulation], exclude the application of Article 6, point 1, [of that regulation], so that each of the two companies must be sued before the courts of the Member State where it is domiciled[?]'

The question

13. By this question the national court essentially asks whether the rule of special jurisdiction in Article 6, point 1, of the Regulation in respect of co-defendants is applicable to the action brought by an employee against two companies established in different Member States which he considers to have been his joint employers.

14. It should be pointed out, at the outset, that the Regulation now replaces in Member States' relations the 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 version - 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) (the Brussels Convention').

15. The rules of jurisdiction over individual contracts of employment contained in the Regulation differ appreciably from the rules applicable in that field under the Brussels Convention.

16. In the Brussels Convention the only specific rule concerning contracts of employment was introduced in 1989. That rule appeared in Section 2 of Title II of that convention, concerning special jurisdiction, and had been added in the form of a particular case of the jurisdiction rule laid down in Article 5, point 1, of the Brussels Convention in matters relating to a contract.

17. In the Regulation, jurisdiction over individual contracts of employment is the subject of a specific section, namely Section 5 of Chapter II. That section, which contains Articles 18 to 21 of the Regulation, seeks to ensure that employees are afforded the protection referred to in recital 13 of the preamble thereto.

18. As maintained, or at least acknowledged, by Glaxosmithkline and Laboratoires Glaxosmithkline, the French, German, Italian and United Kingdom Governments and the Commission of the European Communities, it is apparent from the wording of the provisions of Section 5 that they are not only specific but also exhaustive.

19. Thus, it is clear from Article 18, point 1, of the Regulation, first, that any dispute concerning an individual contract of employment must be brought before a court designated in accordance with the jurisdiction rules laid down in Section 5 of Chapter II of that regulation and, second, that those jurisdiction rules cannot be amended or supplemented by other rules of jurisdiction laid down in that regulation unless specific reference is made thereto in Section 5 itself.

20. Article 6, point 1, of the Regulation falls not within Section 5 of Chapter II of the Regulation

but within Section 2 thereof.

21. Article 6, point 1, of the Regulation is not referred to at all in Section 5, unlike Article 4 and Article 5, point 5, of the Regulation, the application of which is preserved expressly by Article 18(1) thereof.

22. The rule of jurisdiction laid down in Article 6, point 1, of the Regulation is also not the subject of a corresponding provision in Section 5, unlike the rule laid down in Article 6, point 3, concerning the case of counterclaims, which has been incorporated in Article 20, point 2, of that regulation.

23. It is therefore clear that a literal interpretation of Section 5 of Chapter II of the Regulation leads to the conclusion that that section precludes any recourse to Article 6, point 1, thereof.

24. That interpretation is, moreover, supported by the travaux préparatoires'. The proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 1999 C 376 E, p. 1) states, in relation to Section 5 of Chapter II of the proposed regulation, which was adopted as it stood by the Community legislature, that [t]he jurisdiction conferred by this Section is substituted for that conferred by Sections 1 [General provisions] and 2 [Special jurisdiction]'.

25. In their written observations, the French, German and Italian Governments claim, none the less, that a teleological interpretation of the Regulation, taking account of its objectives, could lead to allowing Article 6, point 1, of the Regulation to apply in matters relating to contracts of employment.

26. Thus, the Italian Government submits that the purpose of Article 6, point 1, of the Regulation, which is to preclude the risk of irreconcilable judgments, implies that that provision should be applicable to all types of disputes, including therefore those concerning contracts of employment.

27. It is true that the application of Article 6, point 1, of the Regulation to contracts of employment would make it possible to extend to disputes relating to such contracts the possibility of bringing, before the same court, related claims concerning more than one defendant. Such an extension, like that effected expressly by the Community legislature in Article 20, point 2, of the Regulation in relation to counter-claims, would reflect the general objective of sound administration of justice, which implies observance of the principle of economy of procedure.

28. However, it is settled case-law that the rules of special jurisdiction must be interpreted strictly and cannot be given an interpretation going beyond the cases expressly envisaged by the Regulation (see, inter alia, in relation to Article 6, point 1, of the Regulation, Case C103/05 Reisch Montage [2006] ECR I6827, paragraph 23, and Case C98/06 Freeport [2007] ECR I0000, paragraph 35). As has been noted in paragraph 23 of this judgment, the wording of the provisions of Section 5 of Chapter II of the Regulation precludes the application of Article 6, point 1, in disputes concerning matters relating to contracts of employment.

29. Moreover, sound administration of justice would imply that any possibility of relying on Article 6, point 1, of the Regulation should be open, as in the case of counter-claims, both to employees and to employers.

30. Such an application of Article 6, point 1, of the Regulation could give rise to consequences contrary to the objective of protection, which the insertion in that regulation of a specific section for contracts of employment sought specifically to ensure.

31. Reliance by an employer on Article 6, point 1, of the Regulation could thus deprive the employee of the protection afforded to him by Article 20, point 1, of that regulation, according to which proceedings can be brought against an employee only in the courts of the Member State in which

he is domiciled.

32. As regards the possibility, suggested by the French and German Governments, of interpreting Article 6, point 1, of the Regulation as meaning that only an employee should be able to rely on that provision, it must be pointed out that that would run counter to the wording of the provisions of both Article 6, point 1, and Section 5 of Chapter II of that regulation. In addition, there would be no reason to restrict the protective logic of such an argument to Article 6, point 1, alone, and it would be necessary to accept that employees, and they alone, should be able to rely on any rule of special jurisdiction provided for in that regulation which could serve their individual interests. The transformation by the Community courts of the rules of special jurisdiction, aimed at facilitating sound administration of justice, into rules of unilateral jurisdiction protecting the party deemed to be weaker would go beyond the balance of interests which the Community legislature has established in the law as it currently stands.

33. Therefore, as regards the Community provisions currently in force, an interpretation such as that suggested by the French and German Governments would be difficult to reconcile with the principle of legal certainty, which is one of the objectives of the Regulation and which requires, in particular, that rules of jurisdiction be interpreted in such a way as to be highly predictable, as stated in recital 11 in the preamble to the Regulation, (see, inter alia, as regards Article 6, point 1, of the Regulation, Reisch Montage , paragraphs 24 and 25, and Freeport , paragraph 36).

34. It must also be pointed out that the Regulation, in its current version, notwithstanding the objective of protection referred to in recital 13 in the preamble thereto, does not afford particular protection to an employee in a situation such as Mr Rouard's since, as a claimant before the national courts, there is no rule of jurisdiction available to him that is more favourable than the general rule laid down in Article 2, point 1, of the Regulation.

35. In those circumstances, the answer to the question referred must be that the rule of special jurisdiction provided for in Article 6, point 1, of the Regulation cannot be applied to a dispute falling under Section 5 of Chapter II of that regulation concerning the jurisdiction rules applicable to individual contracts of employment.

Costs

36. 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. Costs incurred in submitting observations to the Court, other that the costs of those parties, are not recoverable.

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JURCIT	32001R0044-A02P1 : N 3 34 32001R0044-A04 : N 21 32001R0044-A05P5 : N 21 32001R0044-A06PT1 : N 1 4 12 13 20 - 23 27 - 33 35 32001R0044-A06PT3 : N 22 32001R0044-A18 : N 6 32001R0044-A18P1 : N 12 19 21 32001R0044-A19 : N 6 17 32001R0044-A20 : N 6 32001R0044-A20P1 : N 31 32001R0044-A20P2 : N 22 27 32001R0044-A21 : N 17 32001R0044-C11 : N 33 32001R0044-C13 : N 5 17 34 41968A0927(01) : N 14 15 41968A0927(01)-A05PT1 : N 16 41978A1009(01) : N 14 41982A1025(01) : N 14 41989A0535 : N 14 41997A0115(01) : N 14 51999PC0348 : N 24 62005J0103 : N 28 62006J0098 : N 28 33
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SUB	COJC
AUTLANG	French
OBSERV	France ; Federal Republic of Germany ; Italy ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	France
NATCOUR	*A9* Cour de cassation (France), Chambre sociale, arrêt du 07/11/2006 (04-44713) ; - Bulletin des arrêts de la Cour de Cassation - Chambres civiles 2006 V no 323 ; - La Semaine juridique - édition générale 2006 IV 3383 p.2300 (résumé) ; - La Semaine juridique - entreprise et affaires 2006 no 2851 p.2227 (résumé) ; - Droit social 2007 p.123-124 ; - La semaine juridique - Social 2007 no 1011 p.44-45 ; - The European Legal Forum 2007 p.II47-II49 ; - The European Legal Forum 2007 p.95 ; - Coursier, Philippe: Détermination de la juridiction compétente lorsque la prestation de travail est fournie au sein d'un groupe international, La semaine juridique - Social 2007 no 1011 p.45 ; - Lhernould, Jean-Philippe: Droit social 2007 p.124-125
PROCEDU	Reference for a preliminary ruling
ADVGEN	Poiares Maduro
JUDGRAP	Jann

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Judgment of the Court (Third Chamber)
of 11 October 2007
Freeport plc v Olle Arnoldsson. Reference for a preliminary ruling: Högsta domstolen - Sweden. Regulation (EC) No 44/2001 - Article 6(1) - Special jurisdiction - More than one defendant - Legal bases of the actions - Abuse - Likelihood of success of an action brought in the courts for the place where one of the defendants is domiciled. Case C-98/06.

In Case C98/06,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Högsta domstolen (Sweden), made by decision of 8 February 2006, received at the Court on 20 February 2006, in the proceedings

Freeport plc,

v

Olle Arnoldsson,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lohmus, J. Kluka (Rapporteur), P. Lindh and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

- Freeport plc, by M. Tagaeus and C. Björndal, advokater,

- Mr Arnoldsson, by A. Bengtsson, advokat,

- the Commission of the European Communities, by L. Parpala, V. Bottka and A.-M. Rouchaud-Joet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2007,

gives the following

Judgment

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that the fact that claims brought against a number of defendants have different legal bases does not preclude application of that provision.

2. Article 6(1) of Regulation No 44/2001 applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.

1. This reference for a preliminary ruling concerns the interpretation of Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2. The reference has been made in the context of proceedings between a company incorporated under English law, Freeport plc (Freeport'), and Mr Arnoldsson, who has sued the company before a court other than that for the place where it has its head office.

Legal context

3. Recitals 2, 11, 12 and 15 in the preamble to Regulation No 44/2001 state:

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

...

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor....

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

...

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States....'

4. Article 2(1) of the Regulation, which forms part of Chapter II, Section 1 thereof, under the heading General provisions', provides:

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

5. Pursuant to Article 3 of the Regulation, which also forms part of Chapter II, Section 1 thereof:

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.'

6. Article 5 of Regulation No 44/2001, which forms part of Chapter II, Section 2, headed Special jurisdiction', provides that a person domiciled in a Member State may be sued in another Member State on certain conditions.

7. In addition, Article 6(1) and (2) of that regulation, which also forms part of Section 2 thereof, provides:

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings,

in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

8. A company with which Mr Arnoldsson worked has, since 1996, carried out, factory shop' retail centre development projects in various places in Europe. Freeport acquired a number of those projects from that company, in particular the most advanced of them, in Kungsbacka (Sweden).

9. At a meeting on 11 August 1999 between Mr Arnoldsson and the managing director of Freeport, an oral agreement was concluded between them that the former would personally receive a GBP 500 000 success fee when the Kungsbacka factory shop opened.

10. By a written undertaking of 27 August 1999, Freeport confirmed that oral agreement but added three conditions to payment of the fee. Mr Arnoldsson accepted those conditions, one of which provided for the payment which he would receive to be made by the company which was to become the owner of the Kungsbacka site. After fresh negotiations, on 13 September 1999 Freeport sent Mr Arnoldsson written confirmation of the agreement concluded with him (the agreement').

11. Inaugurated on 15 November 2001, the Kungsbacka factory shop is owned by a company incorporated under Swedish law, Freeport Leisure (Sweden) AB (Freeport AB'), which manages it. The company is held by one of Freeport's subsidiaries, of which Freeport AB is a wholly owned subsidiary.

12. Mr Arnoldsson has asked both Freeport AB and Freeport to pay the fee on which he agreed with Freeport. Freeport AB refused the request on the ground that it is not a party to the agreement and that, furthermore, it did not exist when the agreement was concluded.

13. Since he had still not received payment, on 5 February 2003 Mr Arnoldsson brought an action before the Göteborgs tingsrätt (Göteborg District Court) seeking an order against both companies jointly to pay him the sum of GBP 500 000 or its equivalent in Swedish currency, together with interest.

14. To establish that that court had jurisdiction with regard to Freeport, Mr Arnoldsson based his action on Article 6(1) of Regulation No 44/2001.

15. Freeport pleaded that it was not established in Sweden and that the claims were not so closely connected as to confer jurisdiction on the Göteborgs tingsrätt pursuant to that provision. In that regard, Freeport maintained that the action against it had a contractual basis, whereas the action against Freeport AB was based in tort, delict or quasi-delict, since there was no contractual relationship between Mr Arnoldsson and that company. The difference in the legal bases of the actions against Freeport AB and Freeport was such as to exclude application of Article 6(1) of Regulation No 44/2001, since it could not be shown that the two actions were connected.

16. The plea of inadmissibility was rejected by the Göteborgs tingsrätt.

17. Freeport appealed before the Hovrätten för Västra Sverige (Western Sweden Court of Appeal), which dismissed its appeal.

18. The company then took the case to the Högsta domstolen (Supreme Court), which points out, in its decision for reference, that the Court of Justice held in Case 189/87 Kalfelis [1988] ECR 5565 that a court which has jurisdiction under Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36; the Brussels Convention') 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. According to the national court, the Court of Justice concluded therefrom, in Case C51/97 Réunion Européenne and Others [1998] ECR I6511, paragraph 50, that two claims in one action for compensation, directed against

different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected. Thus, the national court wishes to ascertain whether the claim against Freeport AB is contractual in nature despite the fact that the undertaking was not given by either the company's legal representative or its agent.

19. Furthermore, that court points out that, in paragraphs 8 and 9 of the judgments in Kalfelis , the Court held that the exception laid down in Article 6(1) of the Brussels Convention, derogating from the principle that the courts of the State of domicile of the defendant have jurisdiction, must be interpreted in such a way that it cannot call into question the very existence of that principle, inter alia by allowing the plaintiff 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. However, the national court observes that, although Article 6(2) of Regulation No 44/2001 expressly envisages such a situation, that is not true of Article 6(1). It asks how Article 6(1) should be interpreted in that regard.

20. In addition, the national court has doubts as to whether the question of the probability of the action brought against the defendant before the courts of the Member State where he is domiciled succeeding must be assessed differently when examining the question of the likelihood of irreconcilable judgments referred to in Article 6(1) of Regulation No 44/2001. Before that court, Freeport submitted that there was no likelihood of irreconcilable judgments. In its view, under Swedish law agreements cannot require a third party, in the present case Freeport AB, to make a payment. Freeport concluded therefrom that the action brought against Freeport AB was devoid of legal basis and was brought solely for the purpose of suing Freeport before a Swedish court.

21. In those circumstances, the Högsta domstolen decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

1. Is an action based on an alleged obligation on the part of a joint-stock company to make a payment as a consequence of an undertaking given to be regarded as being based on contract for the application of Article 6(1) of... Regulation [No 44/2001], even though the party which gave the undertaking was neither a representative nor an agent of the company at the relevant time?

2. If the answer to the first question is in the affirmative: is it a precondition for jurisdiction under Article 6(1), in addition to the conditions expressly laid down therein, that the action against a defendant before the courts of the State where he is domiciled was not brought solely in order to have a claim against another defendant heard by a court other than that which would otherwise have had jurisdiction to hear the case?

3. If the answer to the second question is in the negative: should the likelihood of success of an action against a party before the courts of the State where he is domiciled otherwise be taken into account in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 6(1)?'

The questions referred for a preliminary ruling

The first question

22. By its first question, the national court asks whether an action based on an alleged obligation on the part of a joint-stock company to make a payment, as a consequence of an undertaking given, is contractual in nature as regards application of Article 6(1) of Regulation No 44/2001, even though the party which gave the undertaking was neither a representative nor an agent of the company.

Observations submitted to the Court

23. Both the parties to the main proceedings and the Commission of the European Communities note that the expression matters relating to contract' is not to be understood as covering a situation

in which there is no obligation freely assumed by one party towards another. In that regard, they refer to the case-law of the Court relating to Article 5(1) of the Brussels Convention, the provisions of which are essentially identical to those of Regulation No 44/2001 (see, inter alia, Case C26/91 Handte [1992] ECR I3967, paragraph 15; Réunion Européenne and Others , paragraph 17; and C334/00 Tacconi [2002] ECR I7357, paragraph 23).

24. On the basis of that observation, Freeport pleads that there was no contractual relationship between Freeport AB and Mr Arnoldsson, the former having given no undertaking to the latter. It submits that no legal representative or agent of Freeport AB gave any undertaking to him and nor did the company ratify the agreement for payment of the sum due.

25. Mr Arnoldsson agrees that, at the date of conclusion of the agreement, no company owned the Kungsbacka factory shop, which was not yet open. He states that on that date there could have been no legal representative or agent in a position to represent Freeport AB. However, he submits, firstly, that Freeport concluded the agreement both on its own account and for the company which would own that shop in the future and, secondly, that under such an agreement Freeport gave instructions to the future company, that is to say Freeport AB, to pay Mr Arnoldsson the sum due. Furthermore, by joining the Freeport group, Freeport AB accepted its obligation to make the payment.

26. Accordingly, Mr Arnoldsson takes the view that the obligation set out in the agreement, freely accepted by Freeport AB, is not, it is true, non-contractual in nature but, nevertheless, forms part of a contractual relationship. Thus he pleads that, for the purposes of application of Article 6(1) of Regulation No 44/2001, the action brought against both Freeport AB and Freeport is an action to establish contractual liability.

27. The Commission takes the view that it is for the national court to examine the legal relationship between Freeport AB and Mr Arnoldsson in order to determine whether it may be regarded as contractual. That court could have regard to all the factual and legal circumstances of the case in the main proceedings in order to establish whether Freeport was, when the agreement was concluded, the legal representative or agent of Freeport AB.

28. However, the Commission takes the view that the first question referred is not relevant to an interpretation of Article 6(1) of Regulation No 44/2001, so that an answer to that question is redundant.

29. In its view, the first question seeks to ascertain whether Article 6(1) of Regulation No 44/2001 may be interpreted in the light of the considerations in paragraph 50 of the judgment in Réunion Européenne and Others. The factual and legal context of the dispute in the main proceedings is completely different from of that of that judgment. Unlike the latter case, where the main proceedings had been brought before a court of a Member State in which none of the defendants was domiciled, the dispute in the main proceedings concerns the application of Article 6(1) of Regulation No 44/2001, since Mr Arnoldsson brought his action before a Swedish court in whose jurisdiction Freeport AB has its head office. According to the Commission, paragraph 50 of the judgment in Réunion Européenne and Others constitutes merely a reminder of the general rule that an exception to the principle of jurisdiction based on the defendant's domicile must be interpreted strictly.

30. In the event that the Court should consider it necessary to answer the first question referred, the Commission submits that the difference between a claim based on contract and a claim based on tort or delict does not exclude application of Article 6(1) of Regulation No 44/2001, but may be taken into consideration by the national court in the context of its assessment of the condition that there be a degree of connection between the claims that justifies their being heard and determined together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Answer of the Court

31. It is established case-law that, in the procedure laid down by Article 234 EC providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end the Court of Justice may have to reformulate the questions referred to it (Case C210/04 FCE Bank [2006] ECR I2803, paragraph 21, and the case-law cited).

32. The national court asks whether an action such as that brought by Mr Arnoldsson against Freeport AB is contractual in nature, since that court takes as its premise that Article 6(1) of Regulation No 44/2001 applies only where actions brought against different defendants before the courts for the place where any one of them is domiciled have identical legal bases.

33. Consequently, it is appropriate to consider whether that premise is in accordance with Regulation No 44/2001 by examining, essentially, whether Article 6(1) of that regulation applies where actions brought against a number of defendants before the courts for the place where any one of them is domiciled have different legal bases.

34. In that regard, the jurisdiction provided for in Article 2 of Regulation No 44/2001, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general principle and it is only by way of derogation from that principle that that regulation provides for special rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State (see, Case C103/05 Reisch Montage [2006] ECR I6827, paragraph 22, and the case-law cited).

35. Moreover, it is settled case-law that those special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by Regulation No 44/2001 (Reisch Montage , paragraph 23, and the case-law cited).

36. As stated in recital 11 in the preamble to Regulation No 44/2001, the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.

37. With regard to the special jurisdiction laid down in Article 6(1) of Regulation No 44/2001, that provision states that a defendant may be sued, where there are a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

38. It is not apparent from the wording of Article 6(1) of Regulation No 44/2001 that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have identical legal bases.

39. As the Court has already held, for Article 6(1) of the Brussels Convention to apply, it must be ascertained whether, between various claims brought by the same plaintiff against different defendants, there is 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 (Kalfelis , paragraph 13).

40. The Court has had occasion to point out that, in order that decisions may be regarded as contradictory, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact (Case C539/03 Roche Nederland and Others [2006] ECR I6535, paragraph 26).

41. It is for the national court to assess whether there is a connection between the different

claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case-file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court.

42. That interpretation cannot be called into question by paragraph 50 of the judgment in Réunion Européenne and Others.

43. As the Commission has rightly pointed out, that judgment has a factual and legal context different from that of the dispute in the present main proceedings. Firstly, it was the application of Article 5(1) and (3) of the Brussels Convention which was at issue in that judgment and not that of Article 6(1) of the Convention.

44. Secondly, that judgment, unlike the present case, concerned overlapping special jurisdiction based on Article 5(3) of the Brussels Convention to hear an action in tort or delict and special jurisdiction to hear an action based in contract, on the ground that there was a connection between the two actions. In other words, the judgment in Réunion Européenne and Others relates to an action brought before a court in a Member State where none of the defendants to the main proceedings was domiciled, whereas in the present case the action was brought, in application of Article 6(1) of Regulation No 44/2001, before the court for the place where one of the defendants in the main proceedings has its head office.

45. It was in the context of Article 5(3) of the Brussels Convention that the Court of Justice was able to conclude that two claims in one action, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected (Réunion Européenne and Others , paragraph 50).

46. To accept that jurisdiction based on Article 5 of Regulation No 44/2001, which constitutes special jurisdiction limited to an exhaustive list of cases, could serve as the basis on which to hear other actions would undermine the scheme of the Regulation. Conversely, where a court's jurisdiction is based on Article 2 of that regulation, as is the case in the main proceedings, application of Article 6(1) of the Regulation becomes possible if the conditions set out in that provision and referred to in paragraphs 39 and 40 of this judgment are met, without there being any need for the actions brought to have identical legal bases.

47. Having regard to the foregoing considerations, the answer to the first question must be that Article 6(1) of Regulation No 44/2001 is to be interpreted as meaning that the fact that claims brought against a number of defendants have different legal bases does not preclude application of that provision.

The second question

48. By its second question, the national court asks essentially whether application of Article 6(1) of Regulation No 44/2001 presupposes that the action was not brought against a number of defendants with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.

Observations submitted to the Court

49. Mr Arnoldsson and the Commission are of the opinion that the special jurisdiction laid down in Article 6(1) of Regulation No 44/2001, unlike that laid down in Article 6(2), is not subject to the condition that the action must not have been brought for the sole purpose of ousting the jurisdiction of the courts for the place where one of the defendants is domiciled. They consider, essentially, that the condition referred to in Article 6(1) of Regulation No 44/2001 concerning the existence of a connection between the claims is sufficiently strict to avoid the risk of misuse

of the rules on jurisdiction.

50. However, Freeport takes the view that that risk justifies application of Article 6(1) of Regulation No 44/2001 being subject to the same condition as that set out in Article 6(2). Firstly, the latter condition, prohibiting misuse of the rules on jurisdiction laid down by that regulation, is a general principle which must also be observed in the application of Article 6(1) of the Regulation. Secondly, application of such a condition is justified, inter alia, by the principle of legal certainty and by the requirement that the principle that a defendant may be sued only before the courts for the place where he is domiciled should not be undermined.

Answer of the Court

51. As the national court rightly pointed out, Article 6(1) of Regulation No 44/2001, unlike Article 6(2), does not expressly make provision for a case in which an action is brought solely in order to remove the party sued from the jurisdiction of the court which would be competent in his case. The Commission stated on that point that, when amending the Brussels Convention, the Member States had refused to include the proviso contained in Article 6(2) in Article 6(1), taking the view that the general condition that the claims be connected was more objective.

52. It should be recalled that, after mentioning the possibility that a plaintiff could bring a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants was domiciled, the Court ruled, in Kalfelis , that it was necessary, in order to exclude such a possibility, for there to be a connection between the claims brought against each of the defendants. It held that the rule laid down in Article 6(1) of the Brussels Convention applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

53. Thus, that requirement of a connection did not derive from the wording of Article 6(1) of the Brussels Convention but was inferred from that provision by the Court in order to prevent the exception to the principle that jurisdiction is vested in the courts of the State of the defendant's domicile laid down in Article 6(1) from calling into question the very existence of that principle (Kalfelis , paragraph 8). That requirement, subsequently confirmed by the judgment in Réunion Européenne and Others , paragraph 48, was expressly enshrined in the drafting of Article 6(1) of Regulation No 44/2001, the successor to the Brussels Convention (Roche Nederland and Others , paragraph 21).

54. In those circumstances, the answer to the question referred must be that Article 6(1) of Regulation No 44/2001 applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.

The third question

55. By its third question, the national court asks essentially whether the likelihood of success of an action against a party before the courts of the State where he is domiciled is relevant in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 6(1).

56. However, it is apparent from the account given by the national court that the question was referred on the premise that, for there to be connection between a number of claims, those claims should have the same legal basis. Such was the context in which Freeport submitted that there was

no risk of irreconcilable judgments since, under Swedish law, agreements cannot oblige a third party to make a payment and, consequently, the action brought against Freeport AB was devoid of legal basis.

57. As has been stated in answer to the first question, Article 6(1) of Regulation No 44/2001 may apply where actions brought against different defendants have different legal bases.

58. In view of that answer, there is no need to give a reply to the third question.

Costs

59. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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Alexander: Internationale Zuständigkeit bei Streitgenossenschaft auf Grund unterschiedlicher Rechtsgrundlagen, European Law Reporter 2007 p.464-465 ; Polak, M.V.: "Als u begrijpt wat ik bedoel": het Hof van Justitie herinterpreteert zijn rechtspraak over rechterlijke bevoegdheid bij pluraliteit van verweerders, Ars aequi 2007 p.990-995 ; Idot, Laurence: Pluralité de défendeurs et fraude à la compétence juridictionnelle, Europe 2007 Décembre Comm. no 364 p.35-36 ; Würdinger, Markus: Recht der internationalen Wirtschaft 2008 p.71-72 ; Althammer, Christoph: Die Auslegung der Europäischen Streitgenossenzuständigkeit durch den EuGH - Quelle nationaler Fehlinterpretation?, Praxis des internationalen Privat- und Verfahrensrechts 2008 p.228-233 ; Saf, Carolina: Mål C-98/06 Freeport plc mot Olle Arnoldsson - domsrätt över en utländsk medsvaranden med hemvist i medlemsstat enligt Bryssel I-förordningens artikel 6.1, Europarättslig tidskrift 2008 p.477-488

PROCEDU Reference for a preliminary ruling

ADVGEN Mengozzi

JUDGRAP Kluka

DATES of document: 11/10/2007
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Judgment of the Court (Fourth Chamber)
of 3 May 2007
Color Drack GmbH v Lexx International Vertriebs GmbH. Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - Regulation (EC) No 44/2001 - Special jurisdiction - First indent of Article 5(1)(b) - Court for the place of performance of the contractual obligation in question - Sale of goods - Goods delivered in different places between a single Member State. Case C-386/05.

1. Judicial cooperation in civil matters - Jurisdiction and the enforcement of judgments in civil and commercial matters - Regulation No 44/2001 - Special jurisdiction - Court for the place of performance of the contractual obligation in question

(Council Regulation No 44/2001, Art. 5(1)(b), first indent)

2. Judicial cooperation in civil matters - Jurisdiction and the enforcement of judgments in civil and commercial matters - Regulation No 44/2001 - Special jurisdiction - Court for the place of performance of the contractual obligation in question

(Council Regulation No 44/2001, Art. 5(1)(b), first indent)

1. The reason for the rule of special jurisdiction in matters relating to a contract contained in Article 5(1) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which reflects an objective of proximity, is the existence of a close link between the contract and the court called upon to hear and determine the case.

Under that rule the defendant may be sued in the court for the place of performance of the obligation in question, since that court is presumed to have a close link to the contract.

In order to reinforce the primary objective of unification of the rules of jurisdiction whilst ensuring their predictability, Regulation No 44/2001 defines that criterion of a link autonomously in the case of the sale of goods.

Pursuant to the first indent of Article 5(1)(b) of that regulation, the place of performance of the obligation in question is the place in a Member State where, under the contract, the goods were delivered or should have been delivered.

(see paras 22-25)

2. The first indent of Article 5(1)(b) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as applying where there are several places of delivery within a single Member State. That provision seeks to unify the rules of conflict of jurisdiction and, accordingly, to designate the court having jurisdiction directly, without reference to the domestic rules of the Member States, while protecting the regulation's objectives of predictability of the rules of jurisdiction and of proximity between the dispute and the court called upon to hear and determine the case. However, the applicability of that provision does not necessarily confer concurrent jurisdiction on a court for any place where goods were or should have been delivered. By designating autonomously as the place of performance' the place where the obligation which characterises the contract is to be performed, the Community legislature sought to centralise at its place of performance jurisdiction over disputes concerning all the contractual obligations and to determine sole jurisdiction for all claims arising out of the contract. Since the special jurisdiction under that provision is warranted, in principle, by the existence of a particularly close linking factor between the contract and the court called upon to hear the litigation, with a view to the efficient organisation of the proceedings, where there are several places of delivery of the goods, place of performance' must be understood, for the purposes of application of the provision under consideration, as the place with the closest linking factor between the contract

and the court having jurisdiction.

In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of the former's choice.

(see paras 30-34, 37, 39-40, 42, 45, operative part)

In Case C-386/05,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Oberster Gerichtshof (Austria), made by decision of 28 September 2005, received at the Court on 24 October 2005, in the proceedings

Color Drack GmbH

v

Lexx International Vertriebs GmbH,

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, E. Juhasz, R. Silva de Lapuerta, G. Arestis and T. von Danwitz, Judges,

Advocate General: Y. Bot,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 23 November 2006,

after considering the observations submitted on behalf of:

- Lexx International Vertriebs, by H. Weben, Rechtsanwalt,

- the German Government, by A. Dittrich and M. Lumma, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

- the United Kingdom Government, by S. Nwaokolo, acting as Agent, and by A. Henshaw, Barrister,

- the Commission of the European Communities, by A.M. Rouchaud-Joet and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

Judgment

On those grounds, the Court (Fourth Chamber) hereby rules:

The first indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as applying where there are several places of delivery within a single Member State. In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal

place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice.

1. This reference for a preliminary ruling concerns the interpretation of the first indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

Regulation No 44/2001

2. According to recital 2 in the preamble to Regulation No 44/2001, [p]rovisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential'.

3. Recital 11 in the preamble to Regulation No 44/2001 states: [t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor'.

4. The rules on jurisdiction laid down by Regulation No 44/2001 are set out in Chapter II thereof, consisting of Articles 2 to 31.

5. Article 2(1) of Regulation No 44/2001, which forms part of Chapter II, Section 1, entitled General provisions', states:

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

6. Article 3(1) which appears in the same section, provides:

Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

7. Article 5, which appears in Section 2, entitled Special jurisdiction', of Chapter II of Regulation No 44/2001, provides:

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

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

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if Article 5(b) does not apply then Article 5(a) applies;

...'

The dispute in the main proceedings and the question referred for a preliminary ruling

8. This reference for a preliminary ruling has been submitted in the context of proceedings between Color Drack GmbH (Color Drack'), a company established in Schwarzach (Austria), and Lexx International

Vertriebs GmbH (Lexx'), a company established in Nuremberg (Germany), concerning the performance of a contract for the sale of goods, under which Lexx undertook to deliver goods to various retailers of Color Drack in Austria, inter alia in the area of the registered office of Color Drack, which undertook to pay the price of those goods.

9. The dispute concerns in particular the non-performance of the obligation to which Lexx was subject under the contract to take back unsold goods and to reimburse the price to Color Drack.

10. By reason of that non-performance, on 10 May 2004 Color Drack brought an action for payment against Lexx before the Bezirksgericht St Johann im Pongau (Austria) within whose jurisdiction its registered office is located. That court accepted jurisdiction on the basis of the first indent of Article 5(1)(b) of Regulation No 44/2001.

11. Lexx appealed to the Landesgericht Salzburg (Austria), which set aside that judgment on the ground that the first instance court did not have jurisdiction. The appeal court took the view that a single linking place, as provided for in the first indent of Article 5(1)(b) of Regulation No 44/2001 for all claims arising from a contract for the sale of goods, could not be determined where there were several places of delivery.

12. Color Drack appealed against the decision of the Landesgericht Salzburg, to the Oberster Gerichtshof, which considers that an interpretation of the first indent of Article 5(1)(b) of Regulation No 44/2001 is necessary in order to resolve the question of the jurisdiction of the Austrian court first seised.

13. The Oberster Gerichtshof notes that that provision specifies a single linking place for all claims arising out of a contract for the sale of goods, that is to say the place of delivery, and that that provision, which lays down a rule of special jurisdiction, must in principle be given a restrictive interpretation. In those circumstances, the Oberster Gerichtshof asks whether the court first seised on the basis of that provision has jurisdiction since, in this case, the goods were delivered not only in the area of that court's jurisdiction but at different places in the Member State concerned.

14. The Oberster Gerichtshof therefore decided to stay the proceedings and to refer the following question to the Court:

Is Article 5(1)(b) of [Regulation No 44/2001] to be interpreted as meaning that a seller of goods domiciled in one Member State who, as agreed, has delivered the goods to the purchaser, domiciled in another Member State, at various places within that other Member State, can be sued by the purchaser regarding a claim under the contract relating to all the (part) deliveries - if need be, at the plaintiff's choice - before the court of one of those places (of performance)?'

The question referred for a preliminary ruling

15. By its question, the national court is essentially asking whether the first indent of Article 5(1)(b) of Regulation No 44/2001 applies in the case of a sale of goods involving several places of delivery within a single Member State and, if so, whether, where the claim relates to all those deliveries, the plaintiff may sue the defendant in the court for the place of delivery of its choice.

16. As a preliminary point, it must be stated that the considerations that follow apply solely to the case where there are several places of delivery within a single Member State and are without prejudice to the answer to be given where there are several places of delivery in a number of Member States.

17. First of all, it should be noted that the wording of the first indent of Article 5(1)(b) of Regulation No 44/2001 does not by itself enable an answer to be given to the question referred since it does not refer expressly to a case such as that to which the question relates.

18. Consequently, the first indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted in the light of the origins, objectives and scheme of that regulation (see, to that effect, Case C103/05 Reisch Montage [2006] ECR I6827, paragraph 29, and Case C283/05 ASML [2006] ECR I0000, paragraph 22).

19. In that regard, it is clear from recitals 2 and 11 in its preamble that Regulation No 44/2001 seeks to unify the rules of conflict of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable.

20. In that context, the regulation seeks to strengthen the legal protection of persons established in the Community, by enabling the plaintiff to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see Reisch Montage , paragraphs 24 and 25).

21. To that end the rules of jurisdiction set out in Regulation No 44/2001 are founded on the principle that jurisdiction is generally based on the defendant's domicile, as provided for in Article 2 thereof, complemented by the rules of special jurisdiction (see Reisch Montage , paragraph 22).

22. Thus, the rule that jurisdiction is generally based on the defendant's domicile is complemented, in Article 5(1), by a rule of special jurisdiction in matters relating to a contract. The reason for that rule, which reflects an objective of proximity, is the existence of a close link between the contract and the court called upon to hear and determine the case.

23. Under that rule the defendant may also be sued in the court for the place of performance of the obligation in question, since that court is presumed to have a close link to the contract.

24. In order to reinforce the primary objective of unification of the rules of jurisdiction whilst ensuring their predictability, Regulation No 44/2001 defines that criterion of a link autonomously in the case of the sale of goods.

25. Pursuant to the first indent of Article 5(1)(b) of that regulation, the place of performance of the obligation in question is the place in a Member State where, under the contract, the goods were delivered or should have been delivered.

26. In the context of Regulation No 44/2001, contrary to Lexx's submissions, that rule of special jurisdiction in matters relating to a contract establishes the place of delivery as the autonomous linking factor to apply to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself.

27. It is in the light of those considerations that it must be determined whether, where there are several places of delivery in a single Member State, the first indent of Article 5(1)(b) of Regulation No 44/2001 applies and, if so, whether, where the claim relates to all the deliveries, the plaintiff may sue the defendant in the courts for the place of delivery of its choice.

28. First of all, the first indent of Article 5(1)(b) of the regulation must be regarded as applying whether there is one place of delivery or several.

29. By providing for a single court to have jurisdiction and a single linking factor, the Community legislature did not intend generally to exclude cases where a number of courts may have jurisdiction nor those where the existence of that linking factor can be established in different places.

30. The first indent of Article 5(1)(b) of Regulation No 44/2001, determining both international and local jurisdiction, seeks to unify the rules of conflict of jurisdiction and, accordingly, to designate the court having jurisdiction directly, without reference to the domestic rules of the Member States.

31. In that regard, an answer in the affirmative to the question whether the provision under consideration

applies where there are several places of delivery within a single Member State does not call into question the objectives of the rules on the international jurisdiction of the courts of the Member States set out in that regulation.

32. Firstly, the applicability of the first indent of Article 5(1)(b) of Regulation No 44/2001 where there are several places of delivery within a single Member State complies with the regulation's objective of predictability.

33. In that case, the parties to the contract can easily and reasonably foresee before which Member State's courts they can bring their dispute.

34. Secondly, the applicability of the first indent of Article 5(1)(b) of Regulation No 44/2001 where there are several places of delivery within a single Member State also complies with the objective of proximity underlying the rules of special jurisdiction in matters relating to a contract.

35. Where there are several places of delivery within a single Member State, that objective of proximity is met since, in application of the provision under consideration, it will in any event be the courts of that Member State which will have jurisdiction to hear the case.

36. Conseq uently, the first indent of Article 5(1)(b) of Regulation No 44/2001 is applicable where there are several places of delivery within a single Member State.

37. However, it cannot be inferred from the applicability of the first indent of Article 5(1)(b) of Regulation No 44/2001 in circumstances such as those of the main proceedings that that provision necessarily confers concurrent jurisdiction on a court for any place where goods were or should have been delivered.

38. With regard, secondly, to the question whether, where there are several places of delivery within a single Member State and the claim relates to all those deliveries, the plaintiff may sue the defendant in the court for the place of delivery of its choice on the basis of the first indent of Article 5(1)(b) of Regulation No 44/2001, it is necessary to point out that one court must have jurisdiction to hear all the claims arising out of the contract.

39. In that regard, it is appropriate to take into consideration the origins of the provision under consideration. By that provision, the Community legislature intended, in respect of sales contracts, expressly to break with the earlier solution under which the place of performance was determined, for each of the obligations in question, in accordance with the private international rules of the court seised of the dispute. By designating autonomously as the place of performance' the place where the obligation which characterises the contract is to be performed, the Community legislature sought to centralise at its place of performance jurisdiction over disputes concerning all the contractual obligations and to determine sole jurisdiction for all claims arising out of the contract.

40. In that regard it is necessary to take account of the fact that the special jurisdiction under the first indent of Article 5(1)(b) of Regulation No 44/2001 is warranted, in principle, by the existence of a particularly close linking factor between the contract and the court called upon to hear the litigation, with a view to the efficient organisation of the proceedings. It follows that, where there are several places of delivery of the goods, place of performance' must be understood, for the purposes of application of the provision under consideration, as the place with the closest linking factor between the contract and the court having jurisdiction. In such a case, the closest linking factor will, as a general rule, be at the place of the principal delivery, which must be determined on the basis of economic criteria.

41. To that end, it is for the national court seised to determine whether it has jurisdiction in the light of the evidence submitted to it.

42. If it is not possible to determine the principal place of delivery, each of the places of delivery

has a sufficiently close link of proximity to the material elements of the dispute and, accordingly, a significant link as regards jurisdiction. In such a case, the plaintiff may sue the defendant in the court for the place of delivery of its choice on the basis of the first indent of Article 5(1)(b) of Regulation No 44/2001.

43. Giving the plaintiff such a choice enables it easily to identify the courts in which it may sue and the defendant reasonably to foresee in which courts it may be sued.

44. That conclusion cannot be called into question by the fact that the defendant cannot foresee the particular court of that Member State in which it may be sued; it is sufficiently protected since it can only be sued, in application of the provision under consideration, where there are several places of performance in a single Member State, in the courts of that Member State for the place where a delivery has been made.

45. In the light of all the foregoing considerations, the answer to the question referred must be that the first indent of Article 5(1)(b) of Regulation No 44/2001 applies where there are several places of delivery within a single Member State. In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the applicant may sue the plaintiff in the court for the place of delivery of its choice.

Costs

46. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

DOCNUM	62005J0386
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2007 Page I-03699
DOC	2007/05/03
LODGED	2005/10/24
JURCIT	32001R0044-A05PT1LBT1 :
CONCERNS	Interprets 32001R0044 -A05PT1LBT1
SUB	COJC
AUTLANG	German

OBSERV	Federal Republic of Germany ; Italy ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Austria
NATCOUR	*A9* Oberster Gerichtshof, Beschluß vom 28/09/2005 ; - The European Legal Forum 2005 p.233 (résumé) (EN) ; - Europäische Zeitschrift für Wirtschaftsrecht 2007 p.370-373 ; - European Law Reporter 2007 p.243-245 ; - De Franceschi, Alberto: Compravendita internazionale di beni mobili con pluralità di luoghi di consegna, Il Corriere giuridico 2007 p.120-125
NOTES	Carpus-Carcea, Mihaela: C-386/05, Color Drack v Lexx International - jurisdiction for crossborder sale of goods involving several places of delivery, Bulletin of international legal developments 2007 Vol.11 p.121-122 ; Piltz, Burghard: Neue juristische Wochenschrift 2007 p.1801-1802 ; Leible, Stefan ; Reinert, Christian: Europäische Zeitschrift für Wirtschaftsrecht 2007 p.372-373 ; Markus, Alexander R.: Der Vertragsgerichtsstand gemäss Verordnung "Brüssel I" und revidiertem LugÜ nach der EuGH-Entscheidung Color Drack, Zeitschrift für Schweizerisches Recht 2007 p.319-336 ; Wittwer, Alexander: Der autonom bestimmte Erfüllungsort nach Art. 5 Nr. 1 lit. b EuGVO, European Law Reporter 2007 p.243-245 ; Uyen Do, T.: La jurisprudence de la Cour de justice et du Tribunal de première instance. Chronique des arrêts. Arrêt "Color Drack", Revue du droit de l'Union européenne 2007 no 2 p.469-471 ; Mankowski, Peter: Mehrere Lieferorte beim Erfüllungsortgerichtsstand unter Art. 5 Nr. 1 lit. b EuGVVO, Praxis des internationalen Privat- und Verfahrensrechts 2007 p.404-414 ; Idot, Laurence: Premières précisions sur les nouvelles règles de compétence en matière contractuelle, Europe 2007 Juillet no 196 p.24 ; Queguiner, Jean-Sébastien: Simplification et centralisation de la compétence territoriale interne: première interprétation communautaire de l'article 5, paragraphe 1, b) du règlement "Bruxelles I", Revue Lamy droit des affaires 2007 no 19 p.73-75 ; Bartosz, Sujecki: Bestimmung des zuständigen Gerichts gem. Art. 5 Nr. 1 lit. b EUGVO bei mehreren Erfüllungsorten in einem Mitgliedstaat, Europäisches Wirtschafts- & Steuerrecht - EWS 2007 p.398-402 ; Markus, Alexander R.: La compétence en matière contractuelle selon le règlement 44/2001 "Bruxelles I" et la Convention de Lugano révisée à la suite de l'arrêt CJCE Color Drack, La Convention de Lugano: passé, présent et devenir : actes de la 19e jurnée de droit international privé du 16 mars 2007 à Lausanne 2007 p.23-39 ; Adobati, Enrica: In caso di consegna di beni mobili in più luoghi di uno stesso Stato membro è competente a dirimere le controversie il giudice del luogo della consegna principale, Diritto comunitario e degli scambi internazionali 2007 p.746-747 ; Tzakas, D.-P.: Dikaio Epicheiriseon & Etairion 2008 p.84-88 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2008 no 237
PROCEDU	Reference for a preliminary ruling
ADVGEN	Bot
JUDGRAP	Lenaerts
DATES	of document: 03/05/2007

of application: 24/10/2005

Judgment of the Court (First Chamber)
of 14 December 2006
ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS). Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - Regulation (EC) No 44/2001 - Recognition and enforcement - Article 34(2) - Judgment given in default of appearance - Ground for refusal - Meaning of the requirement that it must be "possible' for a defendant in default of appearance to commence proceedings to challenge the judgment - Failure to serve the judgment. Case C-283/05.

Judicial cooperation in civil matters - Jurisdiction and the enforcement of judgments in civil and commercial matters - Regulation No 44/2001

(Council Regulation No 44/2001, Art. 34, para. 2)

Article 34(2) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that it is possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.

In order for the defendant to have the opportunity to mount a challenge, he should be able to acquaint himself with grounds of the default judgment in order to challenge them effectively, the mere fact that the person concerned is aware of the existence of that judgment being insufficient in that regard.

However, due service of a default judgment, that is to say, compliance with all the rules applicable to those formalities, does not constitute a necessary condition in order to justify the conclusion that it was possible for the defendant to bring proceedings. In that regard, the broad logic of Regulation No 44/2001 does not require service of a default judgment to be subject to conditions more stringent than those provided for as regards service of the document instituting proceedings. It is service of the document instituting proceedings and the default judgment, as in sufficient time and in such a way as to enable the defendant to arrange for his defence which afford him the opportunity to ensure that his rights are respected before the courts of the State in which the judgment was given. As far as concerns the document instituting proceedings, Article 34(2) of Regulation No 44/2001 removes the necessary condition for due service laid down in Article 27(2) of the Brussels Convention. Therefore, a mere formal irregularity, which does not adversely affect the rights of defence, is not sufficient to prevent the application of the exception to the ground justifying non-recognition and non-enforcement.

(see paras 34-35, 41, 43-47, 49, operative part)

In Case C-283/05,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC, by the Oberster Gerichtshof (Austria), made by decision of 30 June 2005, received at the Court on 14 July 2005, in the proceedings

ASML Netherlands BV

v

Semiconductor Industry Services GmbH (SEMIS),

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), J.N. Cunha Rodrigues, M. Ilei and E. Levits, Judges,

Advocate General: P. Léger,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2006,

after considering the observations submitted on behalf of:

- ASML Netherlands BV, by J. Leon, Rechtsanwalt,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the German Government, by M. Lumma, acting as Agent,

- the Netherlands Government, by H.G. Sevenster, C. ten Dam and M. de Grave, acting as Agents,

- the Polish Government, by T. Nowakowski, acting as Agent,

- the United Kingdom Government, by T. Harris, acting as Agent and K. Bacon, Barrister,

- the Commission of the European Communities, by A.-M. Rouchaud-Joet, W. Bogensberger and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2006,

gives the following

Judgment

On those grounds, the Court (First Chamber) hereby rules:

Article 34(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that it is possible' for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.

1. This reference for a preliminary ruling concerns the interpretation of Article 34(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, p. 1).

2. The reference was made in the course of proceedings between ASML Netherlands BV (ASML'), a company established in Veldhoven (Netherlands), and Semiconductor Industry Services GmbH (SEMIS'), a company established in Feistritz-Drau (Austria), concerning the enforcement in Austria of a judgment given in default of appearance by the Rechtbank 's-Hertogenbosch (Netherlands) ordering SEMIS to pay ASML the sum of EUR 219 918.60 together with interest and the costs of the proceedings.

Legal background

Regulation No 44/2001

3. Article 26(1) and (2) of Regulation No 44/2001 provides:

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this

end'.

4. By virtue of Article 26(3) of that regulation, Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37) is to apply instead of the provisions of Article 26(2) if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that regulation.

5. Under Article 33(1) of Regulation No 44/2001, [a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'.

6. However, Article 34(2) of Regulation No 44/2001 provides that a judgment is not to be recognised where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

Regulation No 1348/2000

7. Article 19(1) of Regulation No 1348/2000 is worded as follows:

Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory;

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.'

The main proceedings and the questions referred for a preliminary ruling

8. By judgment given in default of appearance of 16 June 2004 the Rechtbank 's-Hertogenbosch ordered SEMIS to pay ASML the sum of EUR 219 918.60 together with interest and the costs of the proceedings (the default judgment').

9. It is apparent from the order for reference, first, that the summons to the hearing before the Rechtbank 's-Hertogenbosch, fixed by the latter for 19 May 2004, was not served on SEMIS until 25 May 2005 and, second, that the default judgment was not served on SEMIS.

10. On the application of ASML, the default judgment was declared enforceable by order of 20 December 2004 of the Bezirksgericht Villach (District Court, Villach) (Austria), the court in which recognition is sought at first instance, on the basis of a certificate drawn up by the Rechtbank 's-Hertogenbosch on 6 July 2004 declaring the judgment provisionally enforceable'. The Bezirksgericht Villach also ordered enforcement of that judgment.

11. A copy of the order was served on SEMIS. The default judgment was not included.

12. On appeal by SEMIS against that order, the Landesgericht Klagenfurt (Regional Court, Klagenfurt) (Austria) dismissed the application for enforcement of the default judgment on the ground that, for it to be possible' to commence proceedings to challenge the judgment, within the meaning of Article 34(2) of Regulation No 44/2001, that the judgment must have been served on the defendant. The Landesgericht Klagenfurt dismissed ASML's argument that the exception to the ground of non-recognition contained in Article 34(2) was applicable because SEMIS was aware both of the proceedings brought

against it in the Netherlands, since it had been served on 25 May 2004 with a summons to the hearing, and of the existence of the default judgment as a result of service of the order of the Bezirksgericht Villach of 20 December 2004 declaring that judgment enforceable.

13. Ruling on the appeal on a point of law brought by ASML, the Oberster Gerichtshof (Supreme Court) observes that, in this case, SEMIS was not served with the document which instituted the proceedings or with an equivalent document in sufficient time for it to arrange for its defence, since the summons to the hearing from the Rechtbank 's-Hertogenbosch was not served on it until after the date on which the hearing took place. According to the referring court, the ground for non-recognition and non-enforcement set out in Article 34(2) of Regulation No 44/2001 is, therefore, applicable in these proceedings, unless the conditions for the exception to that ground are satisfied, that is, it is established, as provided in the last sentence of Article 34(2), that SEMIS failed to commence proceedings to challenge the judgment when it was possible for [it] to do so'.

14. Taking the view that an interpretation of Article 34(2) of Regulation No 44/2001 is necessary in order to resolve the dispute before it, the Oberster Gerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Is the phrase... unless [the defendant] failed to commence proceedings to challenge the judgment when it was possible for him to do so in Article 34(2) of... Regulation... No 44/2001... to be interpreted as meaning that the possibility of such a challenge is in any event dependent on the due service on the defendant in accordance with the applicable law on service of an office copy of an appealable default judgment delivered in a Member State?

2. If Question 1 is answered in the negative:

Would the service of an office copy of the order on the application for a declaration of enforceability in Austria of the default judgment of the Regional Court in 's-Hertogenbosch of 16 July 2004... and for an execution order following the foreign order for execution declared enforceable necessarily already have put the defendant and judgment debtor ... on notice not only of the existence of that judgment but also of the availability of a legal remedy under the legal order of the State in which the judgment was delivered, so that it would be aware as a result of the possibility of challenging the judgment which is a prior condition for the applicability of the exception to the bar to recognition under Article 34(2) of the Regulation?'

The questions referred for a preliminary ruling

15. By its two questions, which should be examined together, the national court asks essentially whether Article 34(2) of Regulation No 44/2001 must be interpreted as meaning that the condition that it must be possible', within the meaning of that provision, to commence proceedings to challenge the default judgment in respect of which enforcement is sought, requires that the judgment should have been duly served on the defendant, or whether it is sufficient that the latter should have become aware of its existence at the stage of the enforcement proceedings in the State in which enforcement is sought.

16. In that regard, it must be observed first of all that the wording of Article 34(2) of Regulation No 44/2001 does not, in itself, enable an answer to be given to the questions raised.

17. Article 34(2) sets out an express requirement for service on a defendant in default of appearance only with respect to the document which instituted the proceedings or an equivalent document and not as regards the default judgment.

18. Next, it must be observed that the wording of Article 34(2) of Regulation No 44/2001 differs significantly from the equivalent provisions of the Convention of 27 September 1968 on the jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32), 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), 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) (the Brussels Convention').

19. Article 27(2) of the Brussels Convention provides that a judgment is not to be recognised where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence'.

20. By contrast, Article 34(2) of Regulation No 44/2001 does not necessarily require the document which instituted the proceedings to be duly served, but does require that the rights of defence are effectively respected.

21. Finally, Article 34(2) provides an exception to ground for refusal of recognition or enforcement of a judgment, that is to say, in the case where the defendant has failed to commence proceedings to challenge the judgment when it was possible for him to do so.

22. Therefore, Article 34(2) of Regulation No 44/2001 must be interpreted in the light of the objectives and the scheme of that regulation.

23. First, as regards the objectives of that regulation, it is clear from the 2nd, 6th, 16th and 17th recitals in the preamble that it seeks to ensure the free movement of judgments from Member States in civil and commercial matters by simplifying the formalities with a view to their rapid and simple recognition and enforcement.

24. However, that objective cannot be attained by undermining in any way the right to a fair hearing (see, in particular, Case 49/84 Debaecker and Plouvier [1985] ECR 1779, paragraph 10, Case C-522/03 Scania Finance France [2005] ECR I-8639, paragraph 15, and Case C-3/05 Verdoliva [2006] ECR I-1579, paragraph 26).

25. The same requirement appears in the 18th recital in the preamble to Regulation No 44/2001, pursuant to which respect for the rights of defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability of a decision, if he considers one of the grounds for non-enforcement to be present.

26. According to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures (see, in particular, Opinion of the Court 2/94 [1996] ECR I1759, paragraph 33). For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR') has special significance (see, in particular, Case 222/84 Johnston [1986] ECR 1651, paragraph 18, and Case C-7/98 Krombach [2000] ECR I-1935, paragraph 25).

27. It follows from the ECHR, as interpreted by the European Court of Human Rights, that the rights of the defence, which derive from the right to a fair legal process enshrined in Article 6 of that convention, requ ire specific protection intended to guarantee effective exercise of the defendant's rights (see Eur. Court H.R., Artico v Italy judgment of 13 May 1980, Series A No 37, º 33, and Eur. Court H.R., T v Italy judgment of 12 October 1992, Series A No 245 C, º 28).

28. As the Advocate General has pointed out, in point 105 of his Opinion, the European Court of Human Rights also held, albeit in a criminal case, that the defendant's lack of awareness of the grounds of the judgment of an appeal court within the period allowed for bringing an appeal against that judgment before the court of cassation constituted an infringement of the combined provisions of Article 6(1) and (3) of the ECHR, because the person concerned had been unable to bring an appropriate and effective appeal (see Eur. Court H.R. judgment in Hadjianastassiou v Greece of 16 December 1992, Series A. No 252, º 29 to 37).

29. Second, in relation to the scheme established by Regulation No 44/2001 as regards recognition and enforcement, it must be observed, as the Advocate General has done in point 112 of his Opinion, that the observance of the rights of defence of a defendant in default of appearance is ensured by a double review.

30. In the original proceedings in the State in which the judgment was given, it follows from the combined application of Articles 26(2) of Regulation No 44/2001 and Article 19(1) of Regulation No 1348/2000, that the court hearing the case must stay the proceedings so long as it is not shown that the defendant has been able to receive the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

31. If, during recognition and enforcement proceedings in the State in which enforcement is sought, the defendant commences proceedings against a declaration of enforceability issued in the State in which the judgment was given, the court hearing the action may find it necessary to examine a ground for non-recognition or enforcement, such as that referred to in Article 34(2) of Regulation No 44/2001.

32. It is in light of those considerations that it must be established whether, where the default judgment has not been served, the mere fact that the person against whom enforcement of the judgment is sought was aware of its existence at the stage of enforcement is sufficient to justify the conclusion that that it was possible for him, within the meaning of Article 34(2) of Regulation No 44/2001, to commence proceedings to challenge that judgment.

33. It is common ground that, in the case in the main proceedings, the default judgment was not served on the defendant, so that the latter was unaware of its contents.

34. As the Austrian, German, Netherlands and Polish Government and the Commission of the European Communities have rightly argued in their observations submitted to the Court, the commencement of proceedings against a judgment is possible only if the person bringing those proceedings was able to familiarise himself with its contents, the mere fact that the person concerned is aware of the existence of that judgment being insufficient in that regard.

35. In order for the defendant to have the opportunity to bring proceedings enabling him to assert his rights, as provided for in the case-law set out in paragraphs 27 and 28 of this judgment, he should be able to acquaint himself with grounds of the default judgment in order to challenge them effectively.

36. It follows that only knowledge by the defendant of the contents of the default judgment guarantees, in accordance with the requirements of respect for the rights of defence and the effective exercise of those rights, that it is possible for the defendant, within the meaning of Article 34(2) of Regulation No 44/2001, to commence proceedings to challenge that judgment before the courts of the State in which the judgment was given.

37. That conclusion cannot call into question the effectiveness of the amendments made by Article 34(2) of Regulation No 44/2001 to the equivalent provisions in Article 27(2) of the Brussels Convention.

38. As the Advocate General has pointed out, in points 58 and 60 of his Opinion, Article 34(2) of Regulation No 44/2001 is intended, in particular, to prevent a defendant from waiting for the recognition and enforcement proceedings in the State in which enforcement is sought in order to claim infringement of the rights of defence, when it had been possible for him to defend his rights by bringing proceedings against the judgment concerned in the State in which the judgment was given.

39. Article 34(2) of Regulation No 44/2001 does not mean, however, that the defendant is required to take additional steps going beyond normal diligence in the defence of his rights, such as those consisting in becoming acquainted with the contents of a judgment delivered in another Member State.

40. Consequently, in order to justify the conclusion that it was possible for a defendant to commence proceedings to challenge a default judgment against him, within the meaning of Article 34(2) of Regulation No 44/2001, he must have been aware of the contents of that decision, which presupposes that it was served on him.

41. However, it must be observed, as the Austrian, German and United Kingdom Governments have done in their observations submitted to the Court, that due service of a default judgment, that is to say, compliance with all the rules applicable to those formalities, does not constitute a necessary condition in order to justify the conclusion that it was possible for the defendant to bring proceedings.

42. As the Advocate General has observed, in paragraph 65 of his Opinion, Article 34(2) of Regulation No 44/2001 leads to the establishment in that regard of a parallel between the document instituting the proceedings and the judgment delivered in default of appearance.

43. It is service of the document instituting proceedings and the default judgment, as provided for in Article 34(2), in sufficient time and in such a way as to enable the defendant to arrange for his defence which afford him the opportunity to ensure that his rights are respected before the courts of the State in which the judgment was given.

44. Therefore, the broad logic of Regulation No 44/2001 does not require service of a default judgment to be subject to conditions more stringent than those provided for in Article 34(2) as regards service of the document instituting proceedings.

45. As far as concerns the document instituting proceedings or an equivalent document, Article 34(2) of Regulation No 44/2001 removes the necessary condition for due service laid down in Article 27(2) of the Brussels Convention, as has been stated in paragraph 20 of this judgment.

46. The exception to the ground justifying non-recognition and enforcement laid down in that provision is not, therefore, necessarily due service in all respects, but the defendant must, at least, be acquainted with the contents of the judgment in sufficient time to arrange for his defence.

47. Therefore, as the Advocate General has observed, in point 69 of his Opinion, the formal requirements which service must satisfy must be comparable to those provided for by the Community legislature in Article 34(2) of Regulation No 44/2001 as regards documents instituting proceedings, so that a mere formal irregularity, which does not adversely affect the rights of defence, is not sufficient to prevent the application of the exception to the ground justifying non-recognition and non-enforcement.

48. Consequently, in order to justify the conclusion that it was possible', within the meaning of Article 34(3) of Regulation No 44/2001 for the defendant to bring proceedings to challenge a default judgment against him, he must have been aware of its contents so that he could, in sufficient time, have exercised his rights effectively before the courts of the State in which the judgment was given.

49. In the light of all the foregoing considerations, the answer to the questions referred must be that Article 34(2) of Regulation No 44/2001 is to be interpreted as meaning that it is possible'

for a defendant to bring proceedings to challenge a default judgment against him only if he was in fact acquainted with its contents, because it was served on him in sufficient time to enable him to arrange for his defence before the courts of the State in which the judgment was given.

Costs

50. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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OBSERV	Austria ; Federal Republic of Germany ; Netherlands ; Poland ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Austria
NATCOUR	*A9* Oberster Gerichtshof, Beschluß vom 30/06/2005
NOTES	De Cristofaro, Marco: L'onere di impugnazione della sentenza quale limite al rilievo dei vizi nella fase introduttiva del giudizio chiuso da sentenza contumaciale: tra diritto di difesa e full faith and credit, Il Corriere giuridico 2006 p.7-11 ; Vogl, Thorsten: Entscheidungen zum Wirtschaftsrecht 2007 p.79-80 ; Idot, Laurence: Exécution d'un jugement rendu par défaut, Europe 2007 Février Comm. no 78 p.28 ; Anthimos, A.: Armenopoulos 2007 p.801-802 ; D'Adamo, Daniela: La "possibilità" di impugnare la sentenza da parte del convenuto contumace ai sensi dell'art. 34, punto 2, reg. C.E.

n. 44/2001, Rivista di diritto processuale 2007 p.1354-1362 ; Pataut, Etienne: Revue critique de droit international privé 2007 p.642-647 ; Kummer, Joachim: Zur Anerkennung von Versäumnisurteilen in Deutschland nach der EuGVVO, Festschrift für Günter Hirsch zum 65. Geburtstag 2008 p.129-135

PROCEDU Reference for a preliminary ruling

ADVGEN Léger

JUDGRAP Lenaerts

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Judgment of the Court (Second Chamber)
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Reisch Montage AG v Kiesel Baumaschinen Handels GmbH. Reference for a preliminary ruling: Oberster Gerichtshof - Austria. Regulation (EC) No 44/2001 - Article 6(1) - Cases where there is more than one defendant - Action brought in a Member State against a person domiciled in that State who is the subject of bankruptcy proceedings and a co-defendant domiciled in another Member State - Inadmissibility of the action against the person who is the subject of bankruptcy proceedings - Jurisdiction of the court seised in relation to the co-defendant. Case C-103/05.

Judicial cooperation in civil matters - Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - Regulation No 44/2001

(Council Regulation No 44/2001, Art. 6(1))

Article 6(1) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant, such as a rule precluding creditors from bringing individual actions against a debtor who has been declared bankrupt. First, that provision does not include any express reference to the application of domestic rules or any requirement that an action brought against a number of defendants should be admissible, by the time it is brought, in relation to each of those defendants under national law. Second, since it is not one of the provisions which provide expressly for the application of domestic rules and thus serve as a legal basis therefor, that provision cannot be interpreted in such a way as to make its application dependent on the effects of domestic rules. However, that same provision cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled.

(see paras 27, 30-33, operative part)

In Case C-103/05,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC by the Oberster Gerichtshof (Austria), made by decision of 2 February 2005, received at the Court on 28 February 2005, in the proceedings

Reisch Montage AG

v

Kiesel Baumaschinen Handels GmbH,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, P. Kris, G. Arestis and J. Kluka (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the German Government, by M. Lumma, acting as Agent,

- the French Government, by G. de Bergues and A. Bodard-Hermant, acting as Agents,

- the Commission of the European Communities, by A.M. Rouchaud-Joet and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 March 2006,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2. The reference was made in the context of a dispute between Reisch Montage AG (Reisch Montage') and Kiesel Baumaschinen Handels GmbH (Kiesel') concerning repayment of a debt of EUR 8 689.22.

Legal context

Community law

3. Recitals 11, 12 and 15 in the preamble to Regulation No 44/2001 state:

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor....

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

...

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States....'

4. Article 2(1) of the Regulation, which is part of Chapter II, Section 1, thereof, entitled General provisions', provides:

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

5. Under Article 3 of the Regulation, which is also part of Chapter II, Section 1:

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.'

6. Under Article 5 of Regulation No 44/2001, which is part of Chapter II, Section 2, entitled Special jurisdiction', a person domiciled in a Member State may be sued in another Member State under certain conditions.

7. In addition, Article 6 of the Regulation, which is also part of Section 2, provides:

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

...'

National law

8. Article 6(1) of the Konkursordnung (Insolvency Regulations; the KO') provides:

Litigation intended to enforce or secure claims to assets forming part of a bankrupt's estate shall be neither commenced nor pursued after the commencement of bankruptcy proceedings'.

The main proceedings and the question referred

9. On 30 January 2004, Reisch Montage, a company established in Liechtenstein, brought an action for payment before the Bezirksgericht Bezau (Austria) (District Court, Bezau) against Mr Gisinger, who is domiciled in Austria, and against Kiesel, whose registered office is in Germany. Kiesel stood security for Mr Gisinger to the amount of EUR 8 689.22 and Reisch Montage is seeking repayment of that sum.

10. By decision of 24 February 2004 the Bezirksgericht Bezau dismissed, under Article 6(1) of the KO, Reisch Montage's action in so far as it was brought against Mr Gisinger on the ground that bankruptcy proceedings concerning his assets had been instituted on 23 July 2003 and were not completed at the time that action was brought. That decision became final.

11. Kiesel disputed the jurisdiction of the court which was seised of the action, arguing that Reisch Montage could not rely on Article 6(1) of Regulation No 44/2001 to justify the Bezirksgericht Bezau's jurisdiction since the action brought against Mr Gisinger was dismissed as inadmissible under Article 6(1) of the KO.

12. By judgment of 15 April 2004 the Bezirksgericht Bezau upheld the objection of lack of jurisdiction raised by Kiesel and dismissed Reisch Montage's action on the ground that that court lacked international and territorial jurisdiction.

13. Hearing the case on appeal, the Landesgericht Feldkirch (Austria) (Regional Court, Feldkirch) set aside that judgment and dismissed the objection of lack of jurisdiction raised by Kiesel.

14. Kiesel brought an appeal on a point of law (Revision') before the Oberster Gerichtshof (Supreme Court), which decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

Can a claimant rely on Article 6(1) of Regulation... No 44/2001 when bringing a claim against a person domiciled in the forum state and against a person resident in another Member State, but where the claim against the person domiciled in the forum state is already inadmissible by the time the claim is brought because bankruptcy proceedings have been commenced against him, which under national law results in a procedural bar?'

The question referred

15. By its question, the national court is asking in essence whether Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that it may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State where that action is considered, by the time it is brought, to be inadmissible in relation to the first defendant.

Observations submitted to the Court

16. According to the German Government, Article 6(1) of Regulation No 44/2001 must be interpreted strictly in order to preserve the principle, laid down in Article 2(1) of the Regulation, that the courts of the place where the defendant is domiciled should have jurisdiction.

17. In its view, if the proceedings brought against one of the defendants is inadmissible by the time the application is made, because that person is the subject of bankruptcy proceedings, claims brought against both defendants must be regarded as not being so closely connected that it is expedient to hear and determine them together', within the meaning of Article 6(1) of the Regulation. That provision is, therefore, not applicable in a situation such as that in the case in the main proceedings.

18. By contrast, the French Government and the Commission of the European Communities submit that that provision may be relied on in such a case.

19. In the view of the French Government, Article 6(1) of Regulation No 44/2001 provides only that where he is one of a number of defendants he may be sued in the courts of the place where any one of them is domiciled, provided that the claims relating to them are connected. Contrary to Article 6(2), Article 6(1) does not impose any special condition preventing it from being used for the sole purpose of removing a defendant from the jurisdiction of the court where he is domiciled.

20. That Government refers to the case-law of the Court (Case C-365/88 Hagen [1990] ECR I-1845, paragraphs 20 and 21; Case C-159/02 Turner [2004] ECR I-3565, paragraph 29; and Case C-77/04 GIE Réunion européenne and Others [2005] ECR I-4509, paragraph 34), claiming that a national court cannot base the dismissal of an action on a warranty or guarantee on the fact that the guarantor is domiciled in a Member State other than that of the national court, which is also the State in which the debtor, against whom the action is inadmissible, is domiciled.

21. The Commission submits that Reisch Montage cannot, however, bring an inadmissible action against a defendant domiciled in a Member State for the sole purpose of removing another defendant from the jurisdiction in principle enjoyed by the courts of the Member State in which he is domiciled. It is thus for the competent court to examine whether Article 6(1) of Regulation No 44/2001 is being misused.

The Court's reply

22. It must be observed, at the outset, that the jurisdiction provided for in Article 2 of Regulation No 44/2001, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general principle and it is only by way of derogation from that principle that that regulation provides for special rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State (see, in relation to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36; the Brussels Convention'), the provisions of which are essentially identical to those of Regulation No 44/2001, Case C-51/97 Réunion européenne and Others [1998] ECR I-6511, paragraph 16, and Case C-265/02 Frahuil [2004] ECR I-1543, paragraph 23).

23. In that regard, it is settled case-law that those special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by Regulation No 44/2001 (see, in relation to the Brussels Convention, Case C-168/02 Kronhofer [2004] ECR I-6009, paragraph 14 and the case-law cited).

24. It is for the national courts to interpret those rules having regard for the principle of legal certainty, which is one of the objectives of Regulation No 44/2001 (see, in relation to the Brussels Convention, Case C-440/97 GIE Groupe Concorde and Others [1999] ECR I-6307, paragraph 23; Case C-256/00 Besix [2002] ECR I-1699, paragraph 24; and Case C-281/02 Owusu [2005] ECR

I-1383, paragraph 38).

25. That principle requires, in particular, that the special rules on jurisdiction 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 (see GIE Groupe Concorde and Others , paragraph 24; Besix , paragraph 26; and Owusu , paragraph 40).

26. As regards the special jurisdiction provided for in Article 6(1) of Regulation No 44/2001, a defender 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, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.

27. In that regard, it must be found, first, that that provision does not include any express reference to the application of domestic rules or any requirement that an action brought against a number of defendants should be admissible, by the time it is brought, in relation to each of those defendants under national law.

28. Second, independently of that first finding, the question referred seeks to determine whether a national rule introducing an objection of lack of jurisdiction may stand in the way of the application of Article 6(1) of Regulation No 44/2001.

29. It is settled case-law that the provisions of the regulation must be interpreted independently, by reference to its scheme and purpose (see, in relation to the Brussels Convention, Case C-433/01 Blijdenstein [2004] ECR I-981, paragraph 24 and the case-law cited).

30. Consequently, since it is not one of the provisions, such as Article 59 of Regulation No 44/2001, for example, which provide expressly for the application of domestic rules and thus serve as a legal basis therefor, Article 6(1) of the Regulation cannot be interpreted in such a way as to make its application dependent on the effects of domestic rules.

31. In those circumstances, Article 6(1) of Regulation No 44/2001 may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant.

32. However, the special rule on jurisdiction provided for in Article 6(1) of Regulation No 44/2001 cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled (see, in relation to the Brussels Convention, Case 189/87 Kalfelis [1988] ECR 5565, paragraphs 8 and 9, and Réunion européenne and Others , paragraph 47). However, this does not seem to be the case in the main proceedings.

33. In the light of all of the above considerations, the answer to the question referred must be that Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant.

Costs

34. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in a situation such as that in the main proceedings, that provision may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant.

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2005 p.623-629

NOTES Wittwer, Alexander: Das EuGVO-Debüt des EuGH - Strittiges zur Streitgenossenschaft von insolventem Hauptschuldner und seinem Bürgen, European Law Reporter 2006 p.424-425 ; Althammer, Christoph: Die Anforderungen an die "Ankerklage" am forum connexitatis (Art. 6 Nr. 1 EuGVVO), Praxis des internationalen Privat- und Verfahrensrechts 2006 p.558-563 ; Idot, Laurence: Règlement no 44/2001, "Bruxelles I", Europe 2006 Novembre Comm. no 345 p.36 ; Arvanitakis, P.: Armenopoulos 2007 p.145-146 ; Pataut, Etienne: Revue critique de droit international privé 2007 p.181-186

PROCEDU Reference for a preliminary ruling

ADVGEN Ruiz-Jarabo Colomer

JUDGRAP Kluka

DATES of document: 13/07/2006
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Judgment of the Court (First Chamber) of 16 March 2006

Rosmarie Kapferer v Schlank & Schick GmbH. Reference for a preliminary ruling: Landesgericht Innsbruck - Austria. Jurisdiction in civil matters - Regulation (EC) No 44/2001- Interpretation of Article 15 - Jurisdiction over consumer contracts - Prize notification - Misleading advertising - Judgment on jurisdiction - Res judicata - Review on appeal - Legal certainty - Primacy of Community law - Article 10 EC. Case C-234/04.

Member States - Obligations - Obligation to cooperate

(Art. 10 EC)

The principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question.

(see para. 20, operative part)

In Case C-234/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesgericht Innsbruck (Austria), made by decision of 26 May 2004, received at the Court on 3 June 2004, in the proceedings

Rosmarie Kapferer

v

Schlank & Schick GmbH,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric (Rapporteur), K. Lenaerts, E. Juhasz and M. Ilei, Judges,

Advocate General: A. Tizzano,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 September 2005,

after considering the observations submitted on behalf of:

- Schlank & Schick GmbH, by M. Alexander and M. Dreschers, Rechtsanwälte,

- the Republic of Austria, by H. Dossi and S. Pfanner, acting as Agents,

- the Czech Republic, by T. Boek, acting as Agent,

- the Federal Republic of Germany, by A. Tiemann and A. Günther, acting as Agents,

- the French Republic, by A. BodardHermant, R. Abraham, G. de Bergues and J.-C. Niollet, acting as Agents,

- the Republic of Cyprus, by M. Chatzigeorgiou, acting as Agent,

- the Kingdom of the Netherlands, by C.A.H.M. ten Dam, acting as Agent,

- the Republic of Finland, by T. Pynnä, acting as Agent,

- the Kingdom of Sweden, by A. Falk, acting as Agent,

- the United Kingdom of Great Britain and Northern Ireland, by E. O'Neill, acting as Agent, and by D. Lloyd-Jones QC,

- the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2005,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 10 EC and Article 15 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2. The reference was made in the course of proceedings between Ms Kapferer, an Austrian national domiciled in Hall in Tirol (Austria), and Schlank & Schick GmbH (Schlank & Schick'), a mail order company incorporated under German law established in Germany, concerning an action for an order requiring Schlank & Schick to award Ms Kapferer a prize because, in a letter personally addressed to her, it had given Ms Kapferer the impression that she had won a prize.

Legal background

Community law

3. Article 15(1) of Regulation No 44/2001 provides:

In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and Article 5(5), if:

...

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.'

4. In accordance with Article 16(1) of Regulation No 44/2001, [a] consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled'.

5. Article 24 of Regulation No 44/2001 provides:

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.'

National law

6. Paragraph 5j of the Austrian Consumer Protection Law (Konsumentenschutzgesetz), in the version under the law which entered into force on 1 October 1999 (BGBl. I, 185/1999; the KSchG') provides as follows:

Undertakings which send prize notifications or other similar communications to specific consumers,

and by the wording of those communications give the impression that a consumer has won a particular prize, must give that prize to the consumer; that prize may also be claimed in legal proceedings.'

7. Paragraph 530 of the Austrian Code of Civil Procedure (Zivilprozessordnung; the ZPO') on the conditions governing the revision of judgments provides:

(1) Proceedings that have been concluded by a decision resolving the case can be reopened on an application being made by one of the parties,

...

5. if a decision by a criminal court on which the judgment is based has been set aside by a subsequent final judgment;

6. if the applicant discovers the existence of, or is placed in a position to use, a previous judgment concerning the same claim or the same legal relationship which is already final and which determines the rights of and between the parties of the case to be reopened;

7. if that party becomes aware of new facts or discovers or becomes able to use evidence the adducing and use of which in earlier proceedings would have resulted in a decision more favourable to it.

(2) Revision is only permitted in the circumstances stated in point 7 of Paragraph 1 if, due to no fault of its own, the party was unable to plead the new facts or evidence before the close of the oral procedure on the basis of which the decision was pronounced at first instance.'

8. Article 534 of the ZPO provides:

(1) Proceedings must be brought within a deadline of four weeks.

(2) That deadline is calculated:

...

4. in the case of point 7 of Paragraph 530(1), from the date on which the party was capable of bringing before the court the facts and evidence brought to its knowledge.

(3) Proceedings... cannot be issued more than 10 years after the decision has become final.'

The dispute in the main proceedings

9. In her capacity as a consumer, Ms Kapferer received advertising material on a number of occasions from Schlank & Schick containing prize notifications. Two weeks after a further letter addressed to her personally, according to which a prize in the form of a cash credit in the sum of ATS 53 750 (EUR 3 906.16) was waiting for her, Ms Kapferer received an envelope containing, inter alia, an order form, a letter concerning the final notice of that cash credit and a statement of account. According to the participation/award conditions on the reverse side of that notice, participation in the distribution of the prizes was subject to a test order without obligation.

10. Ms Kapferer returned the order form to Schlank & Schick after affixing a credit stamp and signing the reverse side of that order form below the words I have noted the participation conditions', but without having read the participation/award conditions. It is not possible to establish whether she also placed an order on that occasion.

11. Not having received the prize she believed she had won, Ms Kapferer claimed that prize on the basis of Article 5j of the KSchG, seeking an order directing Schlank & Schick to pay her the sum of EUR 3 906.16 plus 5% interest from 27 May 2000 onwards.

12. Schlank & Schick objected that the court seised lacked jurisdiction. It argues that the provisions of Articles 15 and 16 of Regulation No 44/2001 are not applicable because they presuppose

that there should be a contract for valuable consideration. Participation in the prize game was subject to making an order, which Ms Kapferer never did. The right deriving from Paragraph 5j of the KSchG is not, in their view, of a contractual nature.

13. The Bezirksgericht (District Court) dismissed the plea of lack of competence and declared itself to have jurisdiction on the basis of Articles 15 and 16 of Regulation No 44/2001, on the grounds that there is, in its view, a contractual relationship between the parties to the dispute. As regards the merits of the case, the Bezirksgericht dismissed all of Ms Kapferer's heads of claim.

14. Ms Kapferer brought an appeal before the referring court. For its part, Schlank & Schick took the view that the Bezirksgericht's decision relating to its jurisdiction did not adversely affect it because it had, in any event, succeeded on the merits. For that reason Schlank and Schick did not challenge that decision on jurisdiction.

15. The national court observed, however, that Schlank & Schick could have challenged the dismissal of the plea of lack of jurisdiction because it could have been adversely affected by that decision alone.

The questions referred for a preliminary ruling

16. The Landesgericht Innsbruck (Regional Court, Innsbruck) expresses doubts about the international jurisdiction of the Bezirksgericht. Relying on the judgment in Case C-96/00 Gabriel [2002] ECR I-6367, the referring court asks whether a misleading promise of financial benefit calculated to induce a contract, and therefore to prepare the ground for that contract, has a connection with the consumer contract intended to result from it sufficiently close to give rise to consumer contract jurisdiction.

17. Since Schlank & Schick has not challenged the decision to dismiss the defence of lack of jurisdiction, the referring court wonders whether it none the less has an obligation under Article 10 EC to review and set aside a final and conclusive judgment on international jurisdiction if that judgment is proved to be contrary to Community law. The national court envisages the existence of such an obligation, asking specifically whether it is possible to transpose the principles laid down in the judgment in Case C-453/00 Kühne & Heitz [2004] ECR I-837, concerning the obligation imposed on an administrative body to review a final administrative decision which is contrary to Community law, as it has been interpreted in the mean time by the Court.

18. In those circumstances, the Landesgericht Innsbruck decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

(1) The court of first instance's decision as to jurisdiction:

(a) Is the principle of cooperation enshrined in Article 10 EC to be interpreted as meaning that, in the circumstances stated in the judgment of the Court of Justice in Case C-453/00 Kühne & Heitz , a national court is also obliged to review and set aside a final judicial decision if the latter should infringe Community law? Are there any other conditions applicable to the review and setting aside of judicial decisions in contrast to administrative decisions?

(b) If the answer to Question 1(a) should be in the affirmative:

Is the period given under Paragraph 534 of the ZPO for the setting aside of judicial decisions that are contrary to Community law compatible with the principle of full effectiveness of Community law?

(c) Furthermore, if the answer to Question 1(a) should be in the affirmative:

Does a lack of international (or local) jurisdiction that is not remedied by Article 24 of Council

Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters constitute a breach of Community law that, under the principles concerned, can set aside the legal force of a judicial decision?

(d) If the answer to Question 1(c) should be in the affirmative:

Is a court of appeal obliged to review the issue of international (or local) jurisdiction under Regulation No 44/2001 if the jurisdiction decision of the court of first instance has become final but the decision on the merits of the case has not? If so, is that review to be conducted by the court of its own motion or only at the instigation of one of the parties to the proceedings?

(2) Jurisdiction over consumer contracts under Article 15(1)(c) of Regulation No 44/2001:

(a) Does a misleading promise of financial benefit that induces the conclusion of a contract - and, therefore, prepares the ground for a contract - demonstrate a connection with the intended conclusion of a consumer contract sufficiently close for jurisdiction over consumer contracts under Article 15(1)(c) of Regulation No 44/2001 to be afforded to consequent claims?

(b) If the answer to Question 2(a) should be in the negative:

Is jurisdiction over consumer contracts afforded to claims arising out of a pre-contractual obligation and does a misleading promise of financial benefit that helps to prepare the ground for a contract demonstrate a sufficiently close connection with the pre-contractual obligation thereby established for jurisdiction over consumer contracts also to be afforded thereto?

(c) Is jurisdiction over consumer contracts afforded only if the conditions stipulated by the undertaking for participation in the prize game are satisfied, even if those conditions are not to be given any consideration in the substantive claim under Paragraph 5j of the KSchG?

(d) If the answers to Questions 2(a) and (b) should be in the negative:

Is jurisdiction over consumer contracts afforded sui generis to a specific statutory form of contractual performance claim or sui generis to a constructive quasi-contractual performance claim which arises as a result of a promise of financial benefit made by an undertaking and the claiming of the financial benefit by the consumer?'

Question 1(a)

19. By Question 1(a), the referring court asks essentially whether, and, where relevant, in what conditions, the principle of cooperation arising from Article 10 EC imposes on a national court an obligation to review and set aside a final judicial decision if that decision should infringe Community law.

20. In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (Case C-224/01 Köbler [2003] ECR I-10239, paragraph 38).

21. Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraphs 46 and 47).

22. By laying down the procedural rules for proceedings designed to ensure protection of the rights which individuals acquire through the direct effect of Community law, Member States must ensure

that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) (see, to that effect, Case C-78/98 Preston and Others [2000] ECR I-3201, paragraph 31 and the case-law cited). However, compliance with the limits of the power of the Member States in procedural matters has not been called into question in the dispute in the main proceedings as regards appeal proceedings.

23. It should be added that the judgment in Kühne & Heitz , to which the national court refers in Question 1(a), is not such as to call into question the foregoing analysis. Even assuming that the principles laid down in that judgment could be transposed into a context which, like that of the main proceedings, relates to a final judicial decision, it should be recalled that that judgment makes the obligation of the body concerned to review a final decision, which would appear to have been adopted in breach of Community law subject, in accordance with Article 10 EC, to the condition, inter alia, that that body should be empowered under national law to reopen that decision (see paragraphs 26 and 28 of that judgment). In this case it is sufficient to note that it is apparent from the reference for a preliminary ruling that that condition has not been satisfied.

24. Having regard to the foregoing considerations, the answer to Question 1(a) must be that the principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law.

Concerning the other questions

25. Having regard to the answer given to Question 1(a), and the national court indicating that it is unable to review the decision on the Bezirksgericht's jurisdiction, there is no need to answer Question 1(b) to (d) or Question 2(a) to (d).

Costs

26. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law.

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NOTES	Schmidt-Westphal, Oliver ; Sander Dirk: Aufhebungspflicht gemeinschaftsrechtswidriger Urteile, Europäische Zeitschrift für Wirtschaftsrecht 2006 p.242-244 ; Michinel Alvarez, Miguel Angel: La exclusion de la promesa de premio del ambito de aplicacion de las normas sobre consumidores en el reglamento 44/2001 (Comentario a la STJUE Kapferer, de 16 de marzo de 2006, as. C-234/2004), Diario La ley 2006 no 6494 p.1-5 ; X: Il Corriere giuridico 2006 p.13 ; Wasserer, Simone C.: Rechtskraft contra Gemeinschaftstreue: Überprüfbarkeit einer rechtskräftigen, gemeinschaftsrechtswidrigen Entscheidung eines innerstaatlichen Gerichts, European Law Reporter 2006 p.198-200 ; Widdershoven, R.J.G.M.: Administratiefrechtelijke beslissingen ; Rechtspraak bestuursrecht 2006 no 191 ; Van Harten, H.J.: S.E.W. ; Sociaal-economische wetgeving 2006 p.252-254 ; Ortlep, R.: Geen bevoegdheid = Geen verplichting !, Nederlands tijdschrift voor Europees recht 2006 p.138-140 ; Mazak, Jan: Rozsudok "KAPFERER", Vyber z rozhodnutí Sudneho dvora Europskych spolocenstiev 2006 p.16-24 ; losarik, Ivo: Kauza Kapferer: Obecna neexistence povinnosti soudu lenského statu pezkoumat a zruit konené soudní rozhodnutí, i pokud se jeví, e je v rozporu s komunitarním pravem, Jurisprudence : specialista na komentovaní judikatury 2006 p.50-53 ; Idot, Laurence: Protection des consommateurs et interprétation erronée de l'article 15, Europe 2006 Mai Comm. no 181 p.35-36 ; Adobati, Enrica: La sentenza di un giudice nazionale passata in giudicato non puo più essere rimessa in discussione anche se viola il diritto comunitario, Diritto comunitario e degli scambi internazionali 2006 p.83-84 ; Ludwigs, Markus: Der Schutz der Rechtskraft im Gemeinschaftsrecht, Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht 2006 p.191-194 ; Remy-Corlay, Pauline: Sources internationales, Revue trimestrielle de droit civil 2006 p.728-733 ; Broussy, Emmanuelle ; Donnat, Francis ; Lambert, Christian: Stabilité des situations juridiques et droit communautaire, L'actualité juridique ; droit administratif 2006 p.2275-2276 ; Georgopoulos, Th.: Efimerida Dioikitikou Dikaiou 2006 p.365 ; Kostova-Bourgeix, Anna: Un arrêt ayant acquis l'autorité de chose

Opinion of the Court (Full Court)
of 7 February 2006
. Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Opinion 1/03.

1. International agreements - Conclusion - Preliminary Opinion of the Court

(Art. 300(6) EC; Rules of Procedure of the Court, Art. 107(2))

2. International agreements - Conclusion - Competence of the Community - Whether exclusive

3. International agreements - Conclusion - Competence of the Community - Whether exclusive

(Art. 65 EC)

4. International agreements - Conclusion - Competence of the Community - Whether exclusive

5. International agreements - Conclusion - Competence of the Community - New convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters replacing the current Lugano Convention - Whether exclusive

(Council Regulation No 44/2001)

1. The opinion of the Court pursuant to Article 300(6) EC may be obtained on questions concerning the division, between the Community and the Member States, of competence to conclude a given agreement with non-member countries.

(see para. 112)

2. Since the Community enjoys only conferred powers, any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules

In certain cases, analysis and comparison of the areas covered both by the Community rules and by the agreement envisaged suffice to rule out any effect on the former.

However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of an area which is already covered to a large extent by Community rules' set out in Opinion 2/91 is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis.

In short, it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law.

(see paras 124-128)

3. In the context of an international agreement, any initiative seeking to avoid contradictions between Community law and that agreement does not remove the obligation to determine, prior to the conclusion of the agreement envisaged, whether it is capable of affecting the Community rules.

In that regard, the existence in an international agreement of a so-called disconnection clause' providing that the agreement does not affect the application by the Member States of the relevant provisions of Community law, does not constitute a guarantee that the Community rules are not affected by the provisions of the agreement because their respective scopes are properly defined but, on

the contrary, may provide an indication that those rules are affected. Such a mechanism seeking to prevent any conflict in the enforcement of the agreement is not in itself a decisive factor in resolving the question whether the Community has exclusive competence to conclude that agreement or whether competence belongs to the Member States; the answer to that question must be established before the agreement is concluded.

(see paras 129-130)

4. The legal basis for the Community rules and more particularly the condition relating to the proper functioning of the internal market laid down in Article 65 EC are, in themselves, irrelevant in determining whether an international agreement affects Community rules: the legal basis of internal legislation is determined by its principal component, whereas the rule which may possibly be affected may be merely an ancillary component of that legislation. The purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law and the proper functioning of the systems established by its rules, independently of any limits laid down by the provision of the Treaty on which the institutions base the adoption of such rules.

(see para. 131)

5. International provisions containing rules to resolve conflicts between different rules of jurisdiction drawn up by various legal systems using different linking factors may be a particularly complex system which, to be consistent, must be as comprehensive as possible. The smallest lacuna in those rules could give rise to the concurrent jurisdiction of several courts to resolve the same dispute, but also to a complete lack of judicial protection, since no court may have jurisdiction to decide such a dispute.

In international agreements concluded by the Member States or the Community with non-member countries those rules of conflict of jurisdiction necessarily establish criteria of jurisdiction for courts not only in non-member countries but also in the Member States and, consequently, cover matters governed by Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

That regulation contains a set of rules forming a unified system which apply not only to relations between different Member States, since they concern both proceedings pending before the courts of different Member States and judgments delivered by the courts of a Member State for the purposes of their recognition or enforcement in another Member State, but also to relations between a Member State and a non-member country.

Therefore, given the unified and coherent system of rules on jurisdiction for which Regulation No 44/2001 provides, any international agreement also establishing a unified system of rules on conflict of jurisdiction such as the new convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, intended to replace the existing Lugano Convention, is capable of affecting its rules of jurisdiction.

Moreover, since the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, the new Lugano Convention affects the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules.

Furthermore, a number of clauses in the agreement envisaged, such as the exceptions to the disconnection clause laid down by that agreement concerning the jurisdiction of the courts and the principle itself that judicial decisions delivered by courts of countries not members of the Community are to be recognised in the Member States without any special procedure, demonstrate that the agreement envisaged

may have an effect on the Community rules.

Consequently, the conclusion of the new Lugano Convention falls within the Community's exclusive competence.

(see paras 141-142, 144, 151, 156-160, 168, 170, 172-173, operative part)

In Opinion 1/03,

REQUEST for an opinion pursuant to Article 300(6) EC made on 5 March 2003 by the Council of the European Union,

THE COURT (Full Court),

composed of V. Skouris, President, C.W.A. Timmermans, A. Rosas (Rapporteur), K. Schiemann, J. Makarczyk and J. Malenovsku, Presidents of Chambers, J.P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kris, E. Juhasz, G. Arestis, A. Borg Barthet, M. Ilei, J. Kluka, U. Lohmus and E. Levits, Judges,

Registrars: H. von Holstein, Assistant Registrar, and M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 October 2004,

after considering the observations submitted on behalf of:

- the Council of the European Union, by J. Schutte and J.P. Hix, acting as Agents,

- the Czech Government, by T. Boek, acting as Agent,

- the Danish Government, by J. Molde, acting as Agent,

- the German Government, by W.-D. Plessing, A. Dittrich and A. Tiemann, acting as Agents,

- the Greek Government, by A. Samoni-Rantou and S. Chala, acting as Agents,

- the Spanish Government, by N. Díaz Abad, acting as Agent,

- the French Government, by R. Abraham, G. de Bergues and A. Bodard-Hermant, acting as Agents,

- Ireland, by D. O'Hagan and J. Gormley, acting as Agents, and by P. Sreenan SC and N. Hyland BL,

- the Italian Government, by I.M. Braguglia, acting as Agent,

- the Netherlands Government, by S. Terstal, acting as Agent,

- the Polish Government, by S. Krolak, acting as Agent,

- the Portuguese Government, by L. Fernandes and R. Correia, acting as Agents,

- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

- the Swedish Government, by A. Kruse, acting as Agent,

- the United Kingdom Government, by R. Caudwell, acting as Agent, and A. Dashwood, Barrister,

- the European Parliament, by H. Duintjer Tebbens and A. Caiola, acting as Agents,

- the Commission of the European Communities, by J. Iglesias Buhigues, A.M. Rouchaud-Joet and M. Wilderspin, acting as Agents,

after hearing First Advocate General Geelhoed and Advocates General Jacobs, Léger, Ruiz-Jarabo Colomer, Tizzano, Stix-Hackl, Kokott and Poiares Maduro in closed session on 15 April 2005,

gives the following

Opinion

1. The request concerns the exclusive or shared competence of the European Community to conclude the new convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters intended to replace the existing Lugano Convention (the agreement envisaged' or the new Lugano Convention').

2. Pursuant to Article 300(6) EC the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.'

Context of the request for an opinion

Relevant provisions of the EC Treaty

3. Part Three of the EC Treaty includes Title IV, added by the Treaty of Amsterdam and amended by the Treaty of Nice, which provides the legal basis for the adoption inter alia of Community legislation in the field of judicial cooperation in civil matters.

4. Article 61(c) EC provides:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

...

(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65.'

5. Article 65 EC provides as follows:

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:

- the system for cross-border service of judicial and extrajudicial documents;

- cooperation in the taking of evidence;

- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.'

6. Article 67(1) EC provides:

During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.'

7. It should also be noted that under Article 69 EC, Title IV of Part Three of the EC Treaty applies subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark...'. It is clear from the respective wording of

those two Protocols that the Protocol on the position of Denmark (the Danish Protocol') functions differently from the Protocol on the position of the United Kingdom and Ireland since the latter enables the United Kingdom and Ireland to be bound, if they so wish, by instruments adopted pursuant to Article 61(c) EC without thereby being obliged to renounce that protocol as such. By contrast, this option is not open to Denmark. Consequently, the instruments adopted on the basis of Title IV in the field of judicial cooperation in civil matters are not binding on Denmark and do not apply to it.

8. Article 293 EC (formerly Article 220 of the EC Treaty), which falls within Part Six of the Treaty, containing the General and Final Provisions, provides:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

...

- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.'

9. Other provisions of the Treaty were used as the legal basis for sectoral Community instruments which contain ancillary rules on jurisdiction. The Council cites by way of example Title X of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), based on Article 235 of the EC Treaty (now Article 308 EC), and Article 6 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), based on Article 57(2) of the EC Treaty (now, after amendment, Article 47(2) EC) and Article 66 of the EC Treaty (now Article 55 EC).

Community instruments existing at the time of the request for an opinion

Regulation (EC) No 44/2001

10. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) establishes a general scheme for jurisdiction and the recognition and enforcement of judgments applicable in the Community in civil and commercial matters.

11. That regulation replaced, as between all the Member States apart from Denmark, the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters concluded at Brussels on 27 September 1968 (OJ 1978 L 304, p. 34) on the basis of the fourth indent of Article 220 of the EEC Treaty (which became the fourth indent of Article 220 EC, now the fourth indent of Article 293 EC), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, of Ireland and of 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, the Brussels Convention').

12. Pursuant to the Danish Protocol, Regulation No 44/2001 does not apply to Denmark. Pursuant to Article 3 of the Protocol on the position of the United Kingdom and Ireland, by contrast, those Member States notified their intention to adopt and apply that regulation.

13. The Court of Justice has jurisdiction to interpret Regulation No 44/2001 under the conditions defined in Articles 68 EC and 234 EC.

The Brussels Convention

14. Since, under the Danish Protocol, Regulation No 44/2001 does not bind the Kingdom of Denmark and does not apply to it, it is the Brussels Convention which continues to apply to relations between that Member State and the States bound by Regulation No 44/2001. It should, however, be noted that on 19 October 2005, an agreement was signed at Brussels between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the signature of which was approved on behalf of the Community by Council Decision 2005/790/EC of 20 September 2005 (OJ 2005 L 299, p. 61), subject to the Council decision relating to the conclusion of that agreement.

15. Furthermore, the scope of Regulation No 44/2001 is circumscribed by Article 299 EC, which defines the territorial scope of the Treaty, whereas the Brussels Convention as a convention under international law extends to certain overseas territories belonging to various Member States. In the case of the French Republic, these are the French overseas territories and Mayotte, and for the Netherlands, Aruba. The other Member States are not concerned. The Convention therefore continues to apply to those territories.

16. Under the Protocol concerning 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 signed in Luxembourg on 3 June 1971 (OJ 1975 L 204, p. 28), the Court of Justice has jurisdiction to interpret the Brussels Convention.

The Lugano Convention

17. The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9, the Lugano Convention') arose from the creation of the European Free Trade Association (EFTA') and the establishment between the Contracting States of that association and the Member States of the European Union of a system similar to that of the Brussels Convention. It was ratified by the States concerned, apart from the Principality of Liechtenstein. Following the subsequent accession to the European Union of several EFTA Member States, the only Contracting States which are not currently Member States of the European Union are the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation. The Republic of Poland ratified that Convention on 1 November 1999 but became a Member of the European Union on 1 May 2004.

18. The Lugano Convention runs in parallel to the Brussels Convention in that its objective is to apply, in relations between a State which is a party to the Brussels Convention and an EFTA Member State which is a party to the Lugano Convention, and in relations between the EFTA Member States which are parties to the Lugano Convention inter se, a system which is, with some exceptions, the same as that established by the Brussels Convention.

19. The Court of Justice has no jurisdiction to interpret the Lugano Convention. However, a mechanism for the exchange of information in respect of judgments delivered in application of that Convention was established by Protocol No 2 on the uniform interpretation of the Convention and the Member and non-Member States of the European Union signed declarations to ensure as uniform an interpretation as possible of that Convention and of the equivalent provisions in the Brussels Convention. Furthermore, Protocol No 3 to the Lugano Convention on the application of Article 57 thereof provides that if one Contracting State is of the opinion that a provision contained in an act of the institutions of the European Communities is incompatible with the Convention, the Contracting States are promptly to consider amending the Convention, without prejudice to the procedure established by Protocol No 2.

History of the travaux préparatoires for the agreement envisaged

20. At a meeting held on 4 and 5 December 1997, the Council appointed an ad hoc group of representatives of the Member States of the Union and of the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation to work towards a parallel revision of the Brussels and Lugano Conventions. Essentially, the discussions had the twin objectives of modernising the system of those two Conventions and eliminating differences between them.

21. The mandate of the ad hoc group was based on Article 220 of the EC Treaty and the work of that group was completed in April 1999. It had reached agreement on a text revising the Brussels and Lugano Conventions. That agreement was ratified at the political level by the Council at its 2 184 th meeting which took place on 27 and 28 May 1999 (Document 7700/99 JUSTCIV 60 of 30 April 1999).

22. Following the entry into force of the Treaty of Amsterdam, which conferred new powers on the Community in respect of judicial cooperation in civil matters, it was no longer possible to incorporate the amendments proposed by the ad hoc group in respect of the Brussels Convention system by means of a revision of that Convention based on Article 293 EC. The Commission therefore submitted to the Council on 14 July 1999 a proposal for a regulation to incorporate into Community law the result of the work of that group. On 22 December 2000 the Council therefore adopted, on the basis of Article 61(c) EC and Article 67(1) EC, Regulation No 44/2001, which entered into force on 1 March 2002.

23. As regards the Lugano Convention, the Commission submitted on 22 March 2002 a recommendation for a Council decision authorising the Commission to open negotiations for the adoption of a convention between the Community and, in the light of the protocol applicable to it, Denmark, on the one hand, and Iceland, Norway, Switzerland and Poland, on the other, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, to replace the Lugano Convention of 16 September 1988 (Document SEC(2002) 298 final).

24. At its 2 455 th meeting, which took place on 14 and 15 October 2002, the Council authorised the Commission to begin negotiations for the purposes of adopting the new Lugano Convention, without prejudice to the question whether the conclusion of the new Convention falls within the Community's exclusive competence, or within the shared competence of the Community and the Member States. The Council also adopted negotiating directives.

25. At its 2 489 th meeting on 27 and 28 February 2003, the Council decided to submit the present request for an opinion to the Court of Justice.

Purpose of the agreement envisaged and the Council's request for an opinion

26. In paragraphs 8 to 12 of its request for an opinion, the Council describes the purpose of the agreement envisaged as follows:

8. The agreement envisaged would establish a new (Lugano) Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The purpose and content of the agreement envisaged emerge from the negotiating directives, which in turn refer to the text of the revised version (7700/99) and to Council Regulation No 44/2001; the aim is, as far as possible, to align the substantive provisions of the agreement envisaged on the provisions of Regulation No 44/2001.

9. Paragraph 1 of the negotiating directives states that the agreement envisaged should reproduce the text of the revised version on which the Council reached agreement on 27 and 28 May 1999 and that the text of Titles II to V of the agreement should be adapted to correspond, as far as possible, to the text of Regulation No 44/2001, while the texts of the agreement and its Protocols will have to be adapted to allow for the fact that the Community will be a Contracting Party.

10. The substantive provisions of the agreement envisaged are therefore expected to be as follows:

- Title I relating to the scope should reproduce the text of Article 1 of the revised version.

- Title II on jurisdiction should, as far as possible, correspond to Chapter II of Regulation No 44/2001. However, Article 12a(5) of the revised version might if necessary take the place of Article 14(5) of Regulation No 44/2001.

- Title III on recognition and enforcement should, as far as possible, correspond to Chapter III of Regulation No 44/2001. The provision on legal aid would however contain a second paragraph.

- Title IV on authentic instruments and court settlements should, as far as possible, correspond to Chapter IV of Regulation No 44/2001.

- Title V containing general provisions should, as far as possible, correspond to Chapter V of Regulation No 44/2001.

11. Paragraph 2 of the negotiating directives relates to the provisions of Title VII et seq. of the agreement envisaged:

- Paragraph 2(a) of the negotiating directives provides that the Convention must be amplified to establish the relationship with Community law and in particular with Regulation No 44/2001. In this sense, the system already provided for in Article 54B of the 1988 Lugano Convention should be applied. In particular, judgments given in a Member State shall be recognised and enforced in another Member State in accordance with Community law.

- Paragraphs 2(b) and (c) of the negotiating directives relate respectively to agreements on specific matters and to non-recognition agreements.

- Paragraphs 2(d) and (e) of the negotiating directives provide that the envisaged agreement must contain provisions that make it possible to regulate the particular situation of Denmark, the French overseas territories and the Netherlands Antilles and Aruba. While Regulation No 44/2001 does not apply to Denmark, the French overseas territories or the Netherlands Antilles and Aruba, the agreement envisaged should in principle also apply to these countries and territories in the same way as the 1988 Lugano Convention.

- Paragraph 2(f) of the negotiating directives provides that the agreement envisaged must enter into force only after ratification by at least two Contracting Parties. Subject to the application of transitional provisions and to its entry into force with regard to the Contracting Parties concerned, the agreement envisaged will replace the 1988 Lugano Convention between the Contracting Parties concerned.

12. The revised text also provides for certain amendments to the final provisions of the 1988 Lugano Convention, in particular those relating to accession to the Convention and the provisions of Protocols No 1, 2 and 3 annexed to the Convention.'

27. The Council's request for an opinion reads as follows:

Does the conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as described in paragraphs 8 to 12 of this memorandum, fall entirely within the sphere of exclusive competence of the Community or within the sphere of shared competence of the Community and the Member States?'

28. At the hearing, the Council stated that the question of competence to enter into international agreements on judicial cooperation in civil matters, within the meaning of Article 65 EC, frequently arises in practice and that the Member States are divided on the point. In its view, in its request for an opinion, the Council argues in favour neither of exclusive competence nor of shared competence but has endeavoured to analyse as accurately as possible the various aspects of the Court's case-law.

Written observations of the Member States and of the institutions

29. Pursuant to the first subparagraph of Article 107(1) of the Rules of Procedure, the request for an opinion was served on the Commission and on the Parliament, which both submitted observations. Pursuant to the second paragraph of Article 24 of the Statute of the Court of Justice, the Court also requested the Member States to submit observations on that request. Written observations were thus lodged by the German, Greek, Spanish, French, Italian, Netherlands, Portuguese, Finnish, Swedish and United Kingdom Governments and by Ireland.

Admissibility of the request

30. The Council, supported by the Spanish, French and Finnish Governments and the Parliament and Commission, considers that the request for an opinion is admissible.

31. The request complies with the requirements of Article 107(2) of the Rules of Procedure, which states that the Opinion may deal not only with the question whether the envisaged agreement is compatible with the provisions of the EC Treaty but also with the question whether the Community or any Community institution has the power to enter into that agreement'. As regards the sharing of competence between the Community and the Member States, it is settled case-law that a request for an opinion on whether an agreement falls wholly within the exclusive competence of the Community or within shared Community and Member State competence is admissible (Opinion 2/00 [2001] ECR I-9713, paragraph 19). That is precisely the purpose of the question referred by the Council.

32. Furthermore, in order to verify whether the agreement in question is envisaged' within the meaning of Article 300(6) EC, it is noted that, according to the Court, it suffices that the purpose of the agreement be known (Opinion 2/94 [1996] ECR I1759, paragraph 11). That is so in the present case since the negotiating directives sufficiently determine the purpose and content of that agreement and the matters it must govern.

Substance

33. In its request for an opinion, the Council sets out the three aspects of the question of the Community's competence to conclude the agreement envisaged. It considers, first of all, whether there is express external competence, then whether there is implied external competence and, lastly, whether such competence is exclusive.

Existence of express external competence

34. The Council, supported in this respect by all the Member States which submitted observations to the Court and by the Parliament and the Commission, points out that the subject-matter of the agreement envisaged falls within the scope of Article 61(c) EC and Article 67 EC. That legal basis does not expressly give the Community external competence.

Existence of implied external competence

35. The Council, all the Member States which submitted observations to the Court, the Parliament and the Commission maintain that in order to determine whether there is implied external competence reference should be made to Opinion 1/76 [1977] ECR 741, as clarified in Opinion 1/94 [1994] ECR I-5267; the content of those Opinions was summarised by the Court in the Open Skies judgments (Case C-467/98 Commission v Denmark [2002] ECR I-9519, paragraph 56; Case C468/98 Commission v Sweden [2002] ECR I-9575, paragraph 53; Case C469/98 Commission v Finland [2002] ECR I-9627, paragraph 57; Case C471/98 Commission v Belgium [2002] ECR I-9681, paragraph 67; Case C472/98 Commission v Luxembourg [2002] ECR I-9741, paragraph 61; Case C475/98 Commission v Austria [2002] ECR I-9797, paragraph 67; and Case C476/98 Commission v Germany [2002] ECR I-9855, paragraph 82).

36. They state that, according to the principle established in Opinion 1/76, implied external competence exists not only whenever internal competence has already been used in order to adopt measures to implement common policies, but also where internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary in order to attain one of the Community's objectives (see Opinion 1/76, paragraphs 3 and 4, and the Open Skies judgments, in particular Commission v Denmark , paragraph 56).

37. In subsequent cases, the Court stated that with regard to the existence of implied exclusive competence, in particular, the situation envisaged in Opinion 1/76 is that where internal competence may be effectively exercised only at the same time as external competence (Opinion 1/94, paragraph 89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (the wording adopted in the Open Skies judgments, in particular Commission v Denmark , paragraph 57). In the words used by the Court in paragraph 86 of Opinion 1/94, attainment of the Community objective should be inextricably linked' to the conclusion of the international agreement.

38. The Council points out that the Community has already adopted internal rules in respect of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which shows that it must have implied competence to conclude the agreement envisaged. It cites in that regard Regulation No 44/2001, but also, by way of example, Title X of Regulation No 40/94 and Article 6 of Directive 96/71.

39. It observes that neither the Member States nor the Commission claimed that the agreement envisaged was necessary. The Parliament considers that it is not, since the judicial cooperation in civil matters referred to in Article 65 EC can very easily be limited to measures addressed to the courts and authorities of the Member States alone, without those measures concerning relations with non-member countries, as the wording of that article makes plain that the measures envisaged are to be adopted insofar as necessary for the proper functioning of the internal market'.

40. In the German Government's submission such necessity is in any event precluded since the internal legislation does not require the simultaneous participation of non-member countries.

41. The Greek Government, which maintains that jurisdiction and the recognition and enforcement of judgments in civil and commercial matters constitute three separate areas which are only partially covered by Regulation No 44/2001, submits that the part of each of those areas not covered by that regulation is not inextricably linked to the conclusion of the international Convention. To argue the contrary would be inimical to the autonomy of international procedural law. As partial Community legislation, therefore, that regulation does not give rise to exclusive external competence on the basis of the criteria established in Opinion 1/76.

42. The Finnish and United Kingdom Governments submit that the conclusion of the agreement envisaged is not inseparable from the exercise of internal Community competence. The United Kingdom cites in support the fact that the Lugano Convention was concluded 10 years after the signature of the Brussels Convention and that the adoption of Regulation No 44/2001, which occurred long before the Lugano Convention was updated, gave rise to no objection.

Existence of exclusive competence based on the principles arising from the ERTA judgment

43. According to the Council, all the Member States which submitted observations to the Court, the Parliament and the Commission, the relevant case-law whether or not implied external competence of the Community is exclusive is Case 22/70 Commission v Council (ERTA) [1971] ECR 263, as

clarified in Opinion 2/91 [1993] ECR I-1061 and Opinion 1/94; the Court summarised its position in the Open Skies judgments, in which it distinguished three situations.

44. Paragraphs 17 and 18 of the ERTA judgment read as follows:

17 In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.

18 As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.'

45. Paragraphs 81 to 84 of Commission v Denmark read as follows:

81 It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.

82 According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (ERTA judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).

83 Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92 [1995] ECR I-521, paragraph 33).

84 The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the ERTA judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33).'

46. The United Kingdom Government invites the Court to reconsider the statement of principle in paragraph 82 of Commission v Denmark , for reasons related to the general principles of the Treaty governing the limits of Community competences and the internal consistency of the case-law on the effect of an international agreement within the meaning of the ERTA judgment.

47. The United Kingdom Government submits, first, that the second criterion adopted by the Court in paragraph 82 of Commission v Denmark , referring to paragraph 25 of Opinion 2/91, namely in any event within an area which is already largely covered by [common] rules' is neither clear nor precise, which gives rise to uncertainty and is unacceptable when it comes to limiting the competences of the Member States, whereas according to the first paragraph of Article 5 EC the Community enjoys conferred powers only.

48. It points out, second, that it is difficult to reconcile that test with the particular cases of an ERTA effect given as examples of that second test in paragraphs 83 and 84 of Commission v Denmark. That test is not relevant in determining whether there is an ERTA effect where clauses relating to the treatment of third-country nationals are included in a measure, since the exclusivity of the competence is restricted to the specific matters regulated by that measure. It is rather

the first limb of the general test which applies, namely where the international commitments fall within the scope of the common rules'. The same applies in the third case, that of complete harmonisation, which necessarily means that the domain in question is not just largely' covered by the Community rules. Abandoning that test would give greater precision in defining an ERTA effect whilst ensuring that the Member States fulfil their duty of loyal cooperation when acting in the international sphere.

49. Examining the first situation envisaged in paragraph 83 of Commission v Denmark , citing paragraph 95 of Opinion 1/94 and paragraph 33 of Opinion 2/92, namely whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries', the Council, supported by the German and French Governments, considers that it is not relevant in the case of Regulation No 44/2001 since it follows from Articles 2 and 4 of that regulation that the relevant test for the application of that regulation is domicile and not nationality.

50. The Italian Government points out that it is possible to argue in favour of an implied extension of Regulation No 44/2001 with regard to nationals of non-member countries since Article 4 of that regulation provides that, with regard to persons who are not domiciled in the Community, jurisdiction is governed by the law of each Member State and Articles 32 to 37 of that regulation lay down a system of recognition of judgments delivered by the courts of the other Member States.

51. The Commission submits that Regulation No 44/2001 contains provisions relating to the treatment of nationals of non-member countries', in that Articles 2 and 4 of that regulation render it applicable to relations between States, beyond the external frontiers of the Community, without any geographical limit or restriction of personal scope.

52. Regulation No 44/2001 thus incorporates the rules of territorial competence for the Member States as regards defendants domiciled outside the Community, providing the basis for the exclusive competence of the Community to conclude the agreement envisaged.

53. The Swedish Government submits that legislation on judicial cooperation in civil matters is not addressed directly to individuals but to the courts which must apply it. The decisive factor as regards the scope of Regulation No 44/2001 is therefore not whether a national of a non-member country falls within the provisions of that regulation, but whether a court has its seat in the Union.

54. Examining the second situation envisaged in paragraph 83 of Commission v Denmark , citing paragraph 95 of Opinion 1/94 and paragraph 33 of Opinion 2/92, namely whenever the Community has expressly conferred on its institutions powers to negotiate with non-member countries', the Council, supported at least impliedly by most governments which submitted observations to the Court, argues that that is not the position in the present case.

55. The Commission notes that the Council regularly authorised it to enter into international negotiations on the provisions to be included in international instruments and concerning the rules of international jurisdiction and the recognition and enforcement of judgments without the Member States ever claiming that they alone could negotiate the rules of jurisdiction applicable to defendants domiciled outside the Member States.

56. Furthermore, the Italian Government, the Parliament and the Commission point out the difference between the wording of Article 71(1) of Regulation No 44/2001, which provides that this regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments' and that of Article 57(1) of the Brussels Convention, which provides that this Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments'. They infer

from the removal of the words or will be parties' in Article 71 that that regulation is impliedly based on the premiss that the Community is alone competent to conclude agreements concerning civil and commercial matters in general. According to the Parliament, that interpretation applies all the more in the case of the Lugano Convention, which matches entirely the area covered by Regulation No 44/2001.

57. The Portuguese Government challenges such an inference. It submits that the wording of Article 71 of Regulation No 44/2001 shows that the rules set out in that regulation always take precedence over all the other rules laid down by general conventions governing the same situations. In any event, the agreement envisaged regulates in principle situations to which that regulation does not apply.

58. Examining lastly the third case defined in paragraph 84 of Commission v Denmark , citing paragraph 96 of Opinion 1/94 and paragraph 33 of Opinion 2/92, namely where the Community has achieved complete harmonisation in a given area', the Council takes into account, first, the determination of the relevant area, then any effect of a disconnection clause in the agreement envisaged, and, third, the possible impact of the identity between the provisions of the agreement envisaged and the internal Community rules.

- Determination of the relevant area

59. In order to determine the relevant area, the Council, in common with most of the Member States which submitted observations to the Court, suggests that it is not sufficient to have regard only to the title of the area but that it is necessary to compare in detail the material, personal and territorial scope of Regulation No 44/2001 with that of the agreement envisaged and to determine whether the provisions of the latter affect the Community rules. The Italian Government notes, on the other hand, that the Court has never carried out an assessment of the effect on Community provisions of the international undertakings entered into by the Member States, but has always merely compared the areas covered, on the one hand, by an international agreement and on the other by the Community rules.

60. Several of those governments stress that the scope of the area in question must be analysed having regard to the legal basis of Regulation No 44/2001 and to Article 65 EC. Under that provision, the Community is competent to adopt measures in so far as necessary for the proper functioning of the internal market'. Ireland and the Portuguese Government also point out that the expression used in Article 65(b) is not approximating the rules' but promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction', which implies that there is no overall internal conferment of competence in respect of jurisdiction, recognition and enforcement, but rather a conferment subject to a case-by-case analysis. The Swedish Government also stresses the distinction between mutual recognition and harmonisation of the substantive rules, in support of the argument that, in the absence of such harmonisation, the extension to non-member countries of a system of recognition of judgments cannot be imposed on a Member State unless that State records its agreement that the legal system of that non-member country satisfies the requirements of legal certainty so that it can waive the protection which it accords to its own nationals.

61. By contrast, the Italian Government considers that the provisions of Regulation No 44/2001 establish a comprehensive system in the area of jurisdiction and recognition and enforcement of judgments in civil and commercial matters. That interpretation is confirmed by the case-law of the Court on the Brussels Convention to the effect that the Convention created an enforcement procedure which constitutes an autonomous and complete system, including remedies (Case 148/84 Brasserie du Pêcheur [1985] ECR 1981, paragraph 17). Consequently, competence to conclude the agreement envisaged lies exclusively with the Community.

62. The Parliament submits that the concept of area should cover only the material scope of Regulation No 44/2001 and that it is not relevant to take account of its personal and territorial scope. It concludes that the agreement envisaged falls entirely within the subject-matter of that regulation, namely a body of rules for determining, in cross-border disputes, jurisdiction and the conditions for recognition and enforcement, in States bound by that agreement and that regulation, of judgments in civil and commercial matters and that the Community therefore has exclusive competence to conclude such an agreement.

63. The Commission submits that the agreement envisaged falls entirely within the scope of Regulation No 44/2001 since all the situations to which that agreement applies are already included in the scope of the Community rules, the purpose of which is to avoid conflict or absence of jurisdiction. It should be noted that even where they refer to national law, the rules on jurisdiction are nevertheless Community rules. Similarly, situations where the Community courts do not have jurisdiction are not lacunae or gaps which a Member State can fill but definitive choices on the part of the Community legislature.

64. As regards the area covered by Chapter II of Regulation No 44/2001 relating to the jurisdiction of the courts of the Member States, the Council and most of the governments which submitted observations to the Court refer to the wording of Article 4(1) of that regulation, which states that if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State'. They conclude from this that that regulation may be interpreted as meaning that Chapter II thereof in principle applies only where the defendant is domiciled in the territory of a Member State and that, with a few exceptions, the Member States remain competent to determine the jurisdiction of their courts where the defendant is not domiciled in the Community. The agreement envisaged does not therefore encroach upon the Community rule.

65. The French Government points out that Article 4(1) of Regulation No 44/2001 may be interpreted as a delegation of power from the Community to the Member States, so that there is Community competence. However, it does not agree with that interpretation and stresses, in common with the United Kingdom Government, that that provision is declaratory in that it draws the consequence from Article 2(1) of that regulation which restricts the application of the general rule of competence to defendants domiciled in a Member State. That interpretation is confirmed by the use of the indicative in the ninth recital to that regulation, which states that a defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised...'.

66. The Finnish Government also disputes the argument that Article 4(1) of Regulation No 44/2001 amounts to the adoption of common rules within the meaning of the ERTA judgment. Whilst it is true that in Case C-398/92 Mund & Fester [1994] ECR I-467 the Court held that both the Brussels Convention and the national provisions to which it refers are linked to the Treaty, the case giving rise to that judgment did not concern the interpretation of Article 4 of that Convention (which corresponds to Article 4 of the regulation), but a situation in which the two parties were domiciled in a Contracting State. Furthermore, the fact that a provision refers to the Treaty does not automatically mean that the questions concerning the scope of that provision fall within the Community's competence, since the Treaty does not merely transfer a certain competence to the Community but it also fixes the obligations with which the Member States are required to comply in exercising their own competence (see, in particular, Case C-466/98 Commission v United Kingdom [2002] ECR I-9427, paragraph 41). Lastly, the conventions on jurisdiction entered into by the Member States are also included in the concept of the law of [a] Member State' used in Article 4(1) of the same regulation and it cannot be argued that it is only by incorporating a certain rule in that regulation that the Community acquired exclusive competence to conclude international agreements

in the matters falling within the scope of that rule.

67. The Council and most of the Member States which submitted observations to the Court point out that Regulation No 44/2001 lays down a number of cases in which, as an exception to the principle in Article 4(1) thereof, the jurisdiction of the courts of the Member States is determined by the provisions of that regulation even if the defendant is not domiciled in a Member State. These are:

- exclusive jurisdiction as referred to in Article 22 (for example, proceedings relating to immovable property rights, to the validity of decisions of legal persons, to the validity of entries in public registers and to the enforcement of judgments);

- prorogation of jurisdiction as referred to in Article 23 (in the case of the conclusion of a convention conferring jurisdiction);

- provisions of jurisdiction protecting a weak party:

- in relation to insurance (Article 9(2))

- in relation to consumer contracts (Article 15(2))

- in relation to individual employment contracts (Article 18(2));

- provisions relating to lis pendens and related actions (Articles 27 to 30).

68. According to the Council and most of the Member States which submitted observations to the Court, the agreement envisaged might, in respect of those exceptions, alter the part of Regulation No 44/2001 relating to the jurisdiction of the courts. Thus the German Government considers that the rules on jurisdiction laid down by that agreement may alter or modify the scope of the rules on jurisdiction in that regulation and that, in respect of certain parts of the new Lugano Convention, there is thus exclusive competence on the part of the Community. The Portuguese Government submits however that the exception does not disprove the rule and that it is not necessary, in that regard, to envisage all the situations in which there might be exclusive Community competence.

69. That is also the case for a clause such as Article 54B(2) of the Lugano Convention, which provides for a number of situations in which the agreement envisaged applies in any event (exclusive jurisdiction, prorogation of jurisdiction, lis pendens and related actions and, in relation to recognition and enforcement, where either the State of origin or the State in which recognition or enforcement is sought is not a member of the Community).

70. Such a clause could affect the scope of Regulation No 44/2001. Thus, the rules of the agreement envisaged which concern exclusive jurisdiction impose jurisdiction on a court of a non-member country even if the defendant is domiciled in the Community. Those few exceptions cannot however affect the general scope of that regulation and justify exclusive Community competence.

71. Ireland makes three observations in this regard. First of all, it is difficult to know in what specific situation a provision such as Article 54B(2) of the Lugano Convention might entail a conflict between Regulation No 44/2001 and the agreement envisaged since all the situations laid down by that provision are outside the scope of that regulation. Next, since that provision is identical to Article 54B(2) in the version currently in force, and the Community will be a party to the new Lugano Convention, which should be a mixed agreement, it cannot be argued that the Member States enter into obligations with non-member countries which affect Community rules. The situation is therefore different from that in which a Member State enters into obligations with non-member countries without the Community's participation. Lastly, the fact that a clause such as Article 54B(2) affects Community rules means only that the Community has exclusive competence to negotiate that particular provision and the Member States retain competence in relation to the other provisions

of the agreement envisaged.

72. The Parliament submits as regards the jurisdiction of courts that Regulation No 44/2001 does not apply solely to proceedings claimed to be intra-Community since that regulation also applies where a defendant domiciled outside the Community is sued in a court of a Member State. It is the Community which established the rule of jurisdiction set out in Article 4 of that regulation and the Member States have no power to amend it. At most they can amend their applicable national laws with the consent of the Community. The scope of that Article 4 is therefore altered by the agreement envisaged, since defendants domiciled in the Contracting States of the Lugano Convention can no longer be sued in a court of a Member State under the national rules on jurisdiction whereas Article 4 provides that those rules may, in principle, be invoked against any defendant domiciled outside the Community.

73. Adopting the same logic as the Parliament, the Commission submits that the effect on Regulation No 44/2001 is the very subject-matter of the negotiations. As for the rules on jurisdiction, the agreement envisaged also necessarily neutralises the rule laid down by Article 4 of that regulation which confers a residual competence on the courts of the Member States with regard to defendants domiciled in a non-Member State of the Community, but which is a party to the Lugano Convention. Article 4 would therefore be affected if the Member States were able to conclude such clauses in the light of the extension of the effect of that article to non-member countries.

74. The Commission therefore challenges the arguments which base the competence of the Member States on Article 4 of Regulation No 44/2001. It submits, first, supported on that point by the Parliament, that the rule set out in that article was established by the Community legislature and that, accordingly, the Member States no longer have competence to decide that, in their relations with non-member countries, it is no longer the national laws that apply, but different rules. It notes, second, that any rule of jurisdiction negotiated in the context of the agreement envisaged applicable to defendants domiciled outside the Community would affect the harmonised rules of jurisdiction since the objective of those rules is to avoid conflict or absence of jurisdiction and cases of lis pendens or irreconcilable judgments.

75. As regards that part of Regulation No 44/2001 relating to the recognition and enforcement of judgments, namely Chapter III, the Council and most of the Member States which submitted observations to the Court point out that the scope of the agreement envisaged and that of the regulation do not in any way coincide. The German Government in particular submits that that regulation does not apply to judgments which are external to the Community. The Portuguese Government considers the question of how the mutual recognition of judgments of courts of the Member States of the Community could be affected by the establishment of rules on recognition of the judgments of courts of non-member countries: Regulation No 44/2001 covers the recognition and enforcement by a Member State of a judgment delivered by a court of another Member State, whereas the agreement envisaged concerns the recognition and enforcement by a Member State of a judgment delivered by a court of a non-member country and, by a non-member country, of a judgment delivered by a court of a Member State.

76. The Commission, on the other hand, submits that Chapter III of Regulation No 44/2001 is also affected by the provisions negotiated by the Member States. It stresses the fact that that regulation and the agreement envisaged contain a single body of rules applicable in principle irrespective of the State in which the court which delivered the judgment has its seat.

77. The Parliament adopts the same argument. In its view, the rules set out in Regulation No 44/2001 are also affected by the agreement envisaged since the fact of limiting the application of Chapter III thereof to judgments of other Member States is a deliberate choice of the legislature. The duty to treat judgments delivered in the Contracting States of the Lugano Convention in the same way, which is laid down by the new Lugano Convention, alters that legal situation.

- The disconnection clause'

78. The Council and most of the Member States which submitted observations to the Court examine the potential impact of the disconnection clause' provided for in point 2(a) of the negotiating directives, which refers to the principles established in Article 54B of the Lugano Convention. As the Greek Government states, the effect of that clause is to disconnect' a particular matter, capable of providing the basis for exclusive Community competence, from the remainder of the agreement envisaged. The effect of that clause, as formulated in Article 54B(1) of the Lugano Convention, is essentially that the Member States apply inter se Regulation No 44/2001 and not the new Lugano Convention.

79. The Council and those governments adopt their view on the point in the light of the case-law of the Court as set out in the Open Skies judgments, and in particular paragraph 101 of Commission v Denmark , which states as follows:

That finding cannot be called into question by the fact that, in respect of the air transport to which [Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services (OJ 1992 L 240, p. 15] applies,... Article 9 [of the bilateral agreement known as the Open Skies agreement concluded in 1995 in the area of air transport between the Kingdom of Denmark and the United States of America] requires that regulation to be complied with. However praiseworthy that initiative by the Kingdom of Denmark, designed to preserve the application of Regulation No 2409/92, may have been, the fact remains that the failure of that Member State to fulfil its obligations lies in the fact that it was not authorised to enter into such a commitment on its own, even if the substance of that commitment does not conflict with Community law.'

80. The Council notes that in Opinion 2/91 the Court took into account a clause which appears in Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work which authorised its members to apply more restrictive national rules. A fortiori it is appropriate to take account of a rule such as that set out in Article 54B(1) of the Lugano Convention which provides for the application of internal rules instead of those of the agreement envisaged.

81. The United Kingdom Government, in particular, stresses the difference between the clause in question in the Open Skies judgments and Article 54B of the Lugano Convention. Unlike the cases which gave rise to those judgments, in which the scope of the Open Skies' agreement concluded in 1995 with the United States of America and which was challenged by the Commission corresponded to that of the Community rules, the purpose of the clause in Article 54B(1) is to define the respective scope of the two sets of rules, that is, to ensure that the rules contained in the two instruments govern different matters. As the German Government explains, another legal method could just as well have been used and the rules of recognition and enforcement could have been formulated more restrictively so as to apply only to relations between the Member States and the other Contracting States of that Convention.

82. The Parliament on the other hand refers to Commission v Denmark and concludes that even if a provision corresponding to Article 54B of the Lugano Convention were inserted in the agreement envisaged and if there were no contradiction between that and Regulation No 44/2001, it would not be for the Member States to conclude that agreement.

83. Noting that a disconnection clause appears, most often, in a mixed' agreement, the Commission submits that the Council's intention, expressed in the negotiating directives, to include such a clause in the agreement envisaged may be regarded as a misguided attempt to prejudge whether or not such an agreement is mixed. It considers that the exclusivity of the external competence of the Community, like the legal basis for Community legislation, must be founded on objective criteria

which are verifiable by the Court and not on the mere presence of a disconnection clause inserted in the relevant international agreement. If such a requirement is not satisfied, whether or not the Community's competence is exclusive could be subject to manipulation.

84. In this respect the Commission questions the need for a clause the purpose of which is to govern relations between rules establishing a Community system and an international convention the object of which is to extend that system to non-member countries, which ipso facto should not affect the existing Community law. Since the agreement envisaged covers areas where there has been complete harmonisation of the Community rules, the existence of a disconnection clause is wholly irrelevant.

85. The Commission stresses the particular nature of a disconnection clause in an international agreement of private international law, since this is completely different from a classic disconnection clause. In the present case, the purpose is not to ensure that Regulation No 44/2001 is applied each time that it is applicable, but to regulate in a coherent manner the distributive application of that regulation and of the agreement envisaged.

- Identity between the provisions of the agreement envisaged and the internal Community rules

86. Lastly, the Council examines the effect of the identity between the provisions of the agreement envisaged and the internal rules. It does so by reference to the position of Advocate General Tizzano set out in point 72 of his Opinion in the cases giving rise to the Open Skies judgments. According to Advocate General Tizzano... Member States may not conclude international agreements, in matters covered by common rules, even if the texts of the agreements reproduce the common rules verbatim or incorporate them by reference. The conclusion of such agreements could prejudice the uniform application of Community law in two distinct respects. First, because the reception of the common rules into the agreements would be no guarantee... that the rules would then in fact be uniformly applied... Secondly, because in any case such reception would have the effect of distorting the nature and legal regime of the common rules, and entail a real and serious risk that they would be removed from review by the Court under the Treaty.'

87. According to the Council, given the identity between the substantive provisions of the two instruments, namely Regulation No 44/2001 and the agreement envisaged, and the objective of the parallel development of the latter and of the internal Community rules, it appears that it cannot be ruled out that the Community has exclusive competence with regard to that agreement as a whole.

88. However, it may also be considered that, given the difference between the areas in question, identity between the provisions of the agreement envisaged and Regulation No 44/2001 is not relevant. In particular, since Article 4(1) of Regulation No 44/2001 recognises that the Member States have competence to regulate the jurisdiction of courts where the defendant is not domiciled in a Member State, there is nothing to prevent those States from transcribing' the rules of that regulation into their national laws without infringing that regulation. The Council's interpretation in that regard is supported by the German, Greek, Portuguese and Finnish Governments and by Ireland. The German Government in particular states that the existence of Community competence cannot be inferred from the specific formulation of one provision alone. It is the conferment of competence which determines who will decide the wording of that provision.

89. The Parliament refers to the Opinion of Advocate General Tizzano in the Open Skies judgments and concludes that the Community has exclusive competence in the matter.

90. It challenges the Council's argument that identity between the provisions of the agreement envisaged and those of Regulation No 44/2001 excludes any possibility of contradiction between them. It considers, first, that whether or not there is a contradiction is not decisive in assessing the extent of Community competence and, second, that the application of such an agreement could lead to certain rules of that regulation being set aside, and therefore affect them, notwithstanding

the identity between the provisions in question.

91. The Commission considers that the objective of the negotiations relating to the new Lugano Convention, which is purely and simply to export to relations with non-member countries the common rules of Regulation No 44/2001, means that the Community's competence to enter into those negotiations is necessarily exclusive.

92. It points to the parallels and the links between the Brussels and Lugano Conventions and submits that, if a separate convention was concluded, it was only because it was impossible to ask non-member countries to adhere to a convention based on Article 293 EC and conferring jurisdiction on the Court of Justice. It states that various mechanisms have been introduced in order to preserve a consistent interpretation of the two Conventions.

93. The Commission submits that the simple objective of transposing common rules into the new Lugano Convention precludes any competence on the part of the Member States, as that would be incompatible with the unity of the common market and the uniform application of Community law. Only the Community is in a position to ensure the consistency of its own common rules if they are elevated to the international sphere.

94. In addition to the argument based on the Court's case-law and in a wider perspective, the Parliament draws the Court's attention to problems of a legal and practical nature which may arise in the case of a mixed agreement, in particular as regards the need to authorise the ratification of the agreement envisaged by all the Member States. It also stresses the requirement of consistency between the internal and external aspects of the Community policy in the creation of an area of freedom, security and justice.

95. As to the argument based on the fact that the agreement envisaged will not impinge upon the application of Regulation No 44/2001, but on the contrary will reinforce it by extending its application to other European States, the French Government, taking into account the fact that that agreement applies, in addition to some non-member countries, to all the Member States, questions whether the Community should not be regarded as being alone entitled to control its own legislation, regardless of whether that agreement infringes the Community legislation or contributes to its development. The Member States retain competence to conclude other agreements with non-member countries which do not apply to all the Member States, and provided that those agreements do not affect the application of that regulation. The French Government submits that the Community has exclusive competence to conclude specifically the agreement envisaged.

Oral submissions of the Member States and the institutions

96. In order to enable the Member States which acceded to the European Union after the request for an opinion was lodged to submit observations thereon, the Court scheduled a hearing which took place on 19 October 2004. The Council, the Czech, Danish, German, Greek, Spanish, French, Netherlands, Polish, Portuguese, Finnish and United Kingdom Governments, Ireland, the Parliament and the Commission were represented at that hearing. Most of the observations submitted to the Court concerned four questions to which the Court had by letter requested the Member States and the institutions to direct their observations. Those questions concerned:

- the relevance of the wording of Articles 61 EC and 65 EC, in particular the words necessary for the proper functioning of the internal market' in Article 65 EC;

- the relevance of the question of the extent to which a Member State can negotiate, for example, a bilateral agreement with a non-member country governing the problems covered by Regulation No 44/2001, but without necessarily adopting the same criteria as those envisaged in that regulation;

- whether a distinction can be drawn between the provisions on jurisdiction and those on the recognition

and enforcement of judgments, and

- whether there is any need for the existing case-law to be elaborated upon or clarified.

First question put by the Court

97. As regards the relevance of the wording of Articles 61 EC and 65 EC and in particular the phrase in so far as necessary for the proper functioning of the internal market' in Article 65 EC, the German Government, supported by the French Government, the Parliament and the Commission, submits that that phrase is only relevant in assessing whether, in adopting Regulation No 44/2001, the Community correctly exercised its internal competence. In its view, any internal Community measure adopted on the basis of Article 65 EC must satisfy that condition. By contrast, in order to establish the existence of external Community competence in the area covered by that regulation it is not essential that the agreement envisaged be itself necessary for the proper functioning of the internal market. That external competence depends simply on the extent to which such an agreement affects or alters the scope of an internal Community rule. The French Government submits that if the fact that Article 65 EC refers only to measures necessary for the proper functioning of the internal market deprived the Community of competence to conclude international agreements, the case-law arising from the ERTA judgment would be rendered nugatory.

98. By contrast, the United Kingdom Government, supported by several other governments, considers that the express wording of Article 65 EC defines the scope and intensity of the internal Community system. In particular that wording shows that Regulation No 44/2001 does not entail a complete harmonisation of the rules of the Member States on conflict of jurisdiction. Although several rules set out by that regulation may be regarded as having a certain external scope, such as, in particular, the general rule of jurisdiction based on the fact that the domicile of the defendant is located in the Union, the essential point is that those rules form part of an internal system for resolving conflicts of jurisdiction between the courts of a Member State of the Union. Given the internal scope of Articles 61 EC and 65 EC, they cannot provide the legal basis for the establishment of a comprehensive Community code establishing the rules on international competence of the Community.

99. Moreover, the Czech Government, supported by the Greek, Spanish and Finnish Governments, points out that the wording of Articles 61 EC and 65 EC shows that internal Community competence is confined to the specific objective of the proper functioning of the internal market. Consequently, external Community competence should be restricted to the same objective. Furthermore, the Finnish Government considers that in the case of the Lugano Convention, given that the non-member countries of the Union which are a party to that Convention are not concerned by the establishment of an area of freedom, security and justice or the completion of the internal market, it is difficult to see how the agreement envisaged could be necessary for the proper functioning of the internal market.

Second question put by the Court

100. As for the relevance of the question of the extent to which a Member State can negotiate a bilateral agreement with a non-member country governing the problems covered by Regulation No 44/2001, but without necessarily adopting the same criteria as those adopted in that regulation, most of the governments which submitted observations to the Court, and the Parliament, consider that the only relevant question is whether or not the obligations arising from the bilateral agreement fall within the scope of that regulation. Therefore it makes no difference, in terms of its content, whether or not that agreement corresponds to the Community rules.

101. Such an agreement should therefore be drafted with circumspection to ensure that its provisions do not include the matters covered by Regulation No 44/2001, possibly by means of a disconnection clause. The German, Greek and Finnish Governments, in particular, claim that the presence of

such a clause is decisive. The Commission by contrast considers that the very existence of a disconnection clause is clear evidence of an ERTA effect.

102. At the hearing, the Spanish Government noted that, in areas other than those covered by Regulation No 44/2001, a Member State retains the freedom to conclude agreements with non-member countries. In relation to agreements governing areas covered by that regulation, the Spanish Government invited the Court to qualify its case-law, alleging that certain Member States may have a particular interest in negotiating with a non-member country on those areas, either because of geographical proximity or because of historical links between the two States concerned.

103. According to the Parliament, in a bilateral agreement concluded between a Member State and a non-member country the choice of a linking factor other than the domicile of the defendant, the factor adopted by Regulation No 44/2001, necessarily affects the non-member country. Thus, a bilateral agreement using the test of nationality would be incompatible with that regulation since, depending on the text applied and the criterion adopted, two separate courts would have jurisdiction.

Third question put by the Court

104. As regards the possible need to draw a distinction between the provisions on jurisdiction and those on the recognition and enforcement of judgments, several governments, in particular the Czech, German, Greek, Portuguese and Finnish Governments, submit that such a distinction is necessary. According to the Finnish Government, for example, it is clear from the general scheme of Regulation No 44/2001 that the chapter on jurisdiction and that on the recognition and enforcement of judgments are not linked. They are therefore two separate and autonomous sets of rules adopted in the same legal instrument.

105. The Spanish Government, by contrast, considers that there is no need to draw such a distinction. First, it is possible that the two areas of application of those provisions contain elements which are not covered by Community law. Second, the two categories of provision form a whole since the objective of Regulation No 44/2001 is to simplify the recognition and enforcement of judgments.

106. Similarly, the Parliament and the Commission consider that there is no reason to split the agreement envisaged into two separate parts and to find that the Community has exclusive competence in relation to one and shared competence in relation to the other. According to the Commission, the whole simplified mechanism of recognition and enforcement of judgments, whether it be implemented by Regulation No 44/2001 or established by the Lugano Convention, rests on the fact that the rules on jurisdiction are harmonised and that there is between the Member States sufficient mutual trust to preclude the judges of the State in which recognition or enforcement is sought from having to examine, on a case-by-case basis, whether the jurisdiction of the courts of the State of origin has been respected. In this light, jurisdiction cannot be distinguished from the recognition and enforcement of judgments.

Fourth question put by the Court

107. As regards the question whether there is any need for the existing case-law to be elaborated upon or clarified, most of the governments which submitted observations to the Court seek clarification of the case-law arising from the ERTA judgment. Furthermore, the same governments support the position taken by the United Kingdom Government in its written observations, that it is necessary to reconsider one of the tests mentioned in that case-law, namely the fact that the international obligations fall within an area already largely' covered by Community rules. The Spanish Government submits for example that the Court should be extremely careful before applying to the present request for an opinion the doctrine of implied external competence, which was developed in cases within the economic field, in which the criteria applicable are very different from those which apply in private international law. According to Ireland, complete harmonisation should be necessary in

order for there to be implied external Community competence.

108. The French Government and the Commission, by contrast, submit that the Community's exclusive competence arises from the fact that the new Lugano Convention seeks to extend to non-member countries the system of cooperation established by Regulation No 44/2001.

109. Lastly, as regards the relevance of the fact that the agreement envisaged is intended to reproduce the Community rules, most of the governments submit that there is nothing to preclude the Member States from transcribing the provisions of Community law into their international obligations for which there is no external Community competence. The central question is whether the agreement envisaged is capable of affecting the internal Community rules and not whether the competences are parallel as such.

Opinion of the Court

Admissibility of the request

110. The Council's request for an opinion concerns the exclusive or shared competence to conclude the new Lugano Convention.

111. The Council is one of the institutions referred to in Article 300(6) EC. The purpose and broad outline of the agreement envisaged have been sufficiently described as required by the Court (Opinion 1/78 [1979] ECR 2871, paragraph 35, and Opinion 2/94, paragraphs 10 to 18).

112. Furthermore, according to the settled interpretation of the Court, its opinion may be obtained on questions concerning the division, between the Community and the Member States, of competence to conclude a given agreement with non-member countries (see, most recently, Opinion 2/00, paragraph 3). Article 107(2) of the Rules of Procedure supports that interpretation.

113. It follows that the request for an opinion is admissible.

Substance

Competence of the Community to conclude international agreements

114. The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see ERTA , paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76, paragraph 3, and Opinion 2/91, paragraph 7).

115. That competence of the Community may be exclusive or shared with the Member States. As regards exclusive competence, the Court has held that the situation envisaged in Opinion 1/76 is that in which internal competence may be effectively exercised only at the same time as external competence (see Opinion 1/76, paragraphs 4 and 7, and Opinion 1/94, paragraph 85), the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (see, in particular, Commission v Denmark , paragraph 57).

116. In paragraph 17 of the ERTA judgment, the Court established the principle that, where common rules have been adopted, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules. In such a case, the Community also has exclusive competence to conclude international agreements.

117. In the situation addressed by the present opinion, that principle is relevant in assessing

whether or not the Community's external competence is exclusive.

118. In paragraph 11 of Opinion 2/91, the Court stated that that principle also applies where rules have been adopted in areas falling outside common policies and, in particular, in areas where there are harmonising measures.

119. The Court noted in that regard that, in all the areas corresponding to the objectives of the Treaty, Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (Opinion 2/91, paragraph 10).

120. Giving its opinion on Part III of Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work, which is an area already largely covered by Community rules, the Court took account of the fact that those rules had been progressively adopted for more than 25 years with a view to achieving an ever greater degree of harmonisation designed, on the one hand, to remove barriers to trade resulting from differences in legislation from one Member State to another and, on the other hand, to provide, at the same time, protection for human health and the environment. It concluded that that part of that Convention was such as to affect those Community rules and that consequently Member States could not undertake such commitments outside the framework of the Community (Opinion 2/91, paragraphs 25 and 26).

121. In Opinion 1/94, and in the Open Skies judgments, the Court set out three situations in which it recognised exclusive Community competence. Those three situations, which have been the subject of much debate in the course of the present request for an opinion and which are set out in paragraph 45 hereof are, however, only examples, formulated in the light of the particular contexts with which the Court was concerned.

122. Ruling in much more general terms, the Court has found there to be exclusive Community competence in particular where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law (ERTA , paragraph 31), or where, given the nature of the existing Community provisions, such as legislative measures containing clauses relating to the treatment of nationals of non-member countries or to the complete harmonisation of a particular issue, any agreement in that area would necessarily affect the Community rules within the meaning of the ERTA judgment (see, to that effect, Opinion 1/94, paragraphs 95 and 96, and Commission v Denmark , paragraphs 83 and 84).

123. On the other hand, the Court did not find that the Community had exclusive competence where, because both the Community provisions and those of an international convention laid down minimum standards, there was nothing to prevent the full application of Community law by the Member States (Opinion 2/91, paragraph 18). Similarly, the Court did not recognise the need for exclusive Community competence where there was a chance that bilateral agreements would lead to distortions in the flow of services in the internal market, noting that there was nothing in the Treaty to prevent the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings (Opinion 1/94, paragraphs 78 and 79, and Commission v Denmark , paragraphs 85 and 86).

124. It should be noted in that context that the Community enjoys only conferred powers and that, accordingly, any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules.

125. In certain cases, analysis and comparison of the areas covered both by the Community rules

and by the agreement envisaged suffice to rule out any effect on the former (see Opinion 1/94, paragraph 103; Opinion 2/92, paragraph 34, and Opinion 2/00, paragraph 46).

126. However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of an area which is already covered to a large extent by Community rules' (Opinion 2/91, paragraphs 25 and 26) is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis (see, to that effect, Opinion 2/91, paragraph 25).

127. That that assessment must include not only the extent of the area covered but also the nature and content of the Community rules is also clear from the Court's case-law referred to in paragraph 123 of the present opinion, stating that the fact that both the Community rules and the international agreement lay down minimum standards may justify the conclusion that the Community rules are not affected, even if the Community rules and the provisions of the agreement cover the same area.

128. In short, it is essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law.

129. Furthermore, any initiative seeking to avoid contradictions between Community law and the agreement envisaged does not remove the obligation to determine, prior to the conclusion of the agreement, whether it is capable of affecting the Community rules (see in particular, to that effect, Opinion 2/91, paragraph 25, and Commission v Denmark , paragraphs 101 and 105).

130. In that regard, the existence in an agreement of a so-called disconnection clause' providing that the agreement does not affect the application by the Member States of the relevant provisions of Community law does not constitute a guarantee that the Community rules are not affected by the provisions of the agreement because their respective scopes are properly defined but, on the contrary, may provide an indication that those rules are affected. Such a mechanism seeking to prevent any conflict in the enforcement of the agreement is not in itself a decisive factor in resolving the question whether the Community has exclusive competence to conclude that agreement or whether competence belongs to the Member States; the answer to that question must be established before the agreement is concluded (see, to that effect, Commission v Denmark , paragraph 101).

131. Lastly, the legal basis for the Community rules and more particularly the condition relating to the proper functioning of the internal market laid down in Article 65 EC are, in themselves, irrelevant in determining whether an international agreement affects Community rules: the legal basis of internal legislation is determined by its principal component, whereas the rule which may possibly be affected may be merely an ancillary component of that legislation. The purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law and the proper functioning of the systems established by its rules, independently of any limits laid down by the provision of the Treaty on which the institutions base the adoption of such rules.

132. If an international agreement contains provisions which presume a harmonisation of legislative or regulatory measures of the Member States in an area for which the Treaty excludes such harmonisation, the Community does not have the necessary competence to conclude that agreement. Those limits of the external competence of the Community concern the very existence of that competence and not whether or not it is exclusive.

133. It follows from all the foregoing that a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area

covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.

Competence of the Community to conclude the new Lugano Convention

134. The request for an opinion does not concern the actual existence of competence of the Community to conclude the agreement envisaged, but whether that competence is exclusive or shared. Suffice it to note in this regard that the Community has already adopted internal rules relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, whether in the form of Regulation No 44/2001, adopted on the basis of Articles 61(c) EC and 67(1) EC, or the specific provisions which appear in sectoral regulations, such as Title X of Regulation No 40/94 or Article 6 of Directive 96/71.

135. Regulation No 44/2001 was adopted to replace, as between the Member States apart from the Kingdom of Denmark, the Brussels Convention. It applies in civil and commercial matters, within the limits laid down by its scope as defined by Article 1 of that regulation. Since the purpose and the provisions of the regulation are largely reproduced in that Convention, reference will be made, so far as may be necessary, to the Court's interpretation of that Convention.

136. The purpose of the agreement envisaged is to replace the Lugano Convention, described as a parallel Convention to the... Brussels Convention' in the fifth recital to Regulation No 44/2001.

137. Whilst the text resulting from the revision of the two Conventions referred to above and the negotiating directives for the new Lugano Convention are known, it must be stressed that there is no certainty as to the final text which will be adopted.

138. Both Regulation No 44/2001 and the agreement envisaged essentially contain two parts. The first part of that agreement contains the rules on the jurisdiction of courts, such as those which are the subject of Chapter II of Regulation No 44/2001 and the specific provisions referred to in paragraph 134 of the present opinion. The second part contains the rules on the recognition and enforcement of judgments, such as those which are the subject of Chapter III of Regulation No 44/2001. Those two parts will be the subject of separate analysis.

- The rules on the jurisdiction of courts

139. The purpose of a rule of jurisdiction is to determine, in a given situation, which is the competent court to hear a dispute. In order to do so, the rule contains a test enabling the dispute to be linked' to the court which will be recognised as having jurisdiction. The linking factors vary, usually according to the subject-matter of the dispute. But they may also take account of the date when the action was brought, the particular characteristics of the claimant or defendant, or any other factor.

140. The variety of linking factors used by different legal systems generates conflicts between the rules of jurisdiction. These may be resolved by express provisions of the lex fori or by the application of general principles common to several legal systems. It may also happen that a law leaves to the applicant the choice between several courts whose jurisdiction is determined by several separate linking factors.

141. It follows from those factors that international provisions containing rules to resolve conflicts between different rules of jurisdiction drawn up by various legal systems using different linking factors may be a particularly complex system which, to be consistent, must be as comprehensive as possible. The smallest lacuna in those rules could give rise to the concurrent jurisdiction of several courts to resolve the same dispute, but also to a complete lack of judicial protection,

since no court may have jurisdiction to decide such a dispute.

142. In international agreements concluded by the Member States or the Community with non-member countries those rules of conflict of jurisdiction necessarily establish criteria of jurisdiction for courts not only in non-member countries but also in the Member States and, consequently, cover matters governed by Regulation No 44/2001.

143. The purpose of that regulation, and more particularly Chapter II thereof, is to unify the rules on jurisdiction in civil and commercial matters, not only for intra-Community disputes but also for those which have an international element, with the objective of eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject (see the second recital in the preamble to Regulation No 44/2001 and, as regards the Brussels Convention, Case C-281/02 Owusu [2005] ECR I-1383, paragraph 34).

144. That regulation contains a set of rules forming a unified system which apply not only to relations between different Member States, since they concern both proceedings pending before the courts of different Member States and judgments delivered by the courts of a Member State for the purposes of their recognition or enforcement in another Member State, but also to relations between a Member State and a non-member country.

145. Ruling on the Brussels Convention, the Court has held in that connection that the application of the rules on jurisdiction requires an international element and that the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of Article 2 of the Brussels Convention, from the involvement, because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State, for example because the claimant and defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature, as that situation may raise questions in the Contracting State relating to the determination of international jurisdiction, which is precisely one of the objectives of the Brussels Convention, according to the third recital in the preamble (Owusu , paragraphs 25 and 26).

146. The Court has further held that the rules of the Brussels Convention concerning exclusive jurisdiction or express prorogation of jurisdiction are also likely to apply to legal relationships involving only one Contracting State and one or more non-Contracting States (Owusu , paragraph 28). It has also held with regard to the Brussels Convention rules on lis pendens and related actions or recognition and enforcement, which concern proceedings pending before the courts of different Contracting States or judgments delivered by courts of a Contracting State with a view to recognition and enforcement thereof in another Contracting State, that the disputes with which such proceedings or decisions are concerned may be international, involving a Contracting State and a non-Contracting State, and allow recourse, on that ground, to the general rule of jurisdiction laid down by Article 2 of the Brussels Convention (Owusu , paragraph 29).

147. In that context, it must be noted that Regulation No 44/2001 contains provisions governing its relationship to other existing or future provisions of Community law. Thus Article 67 thereof provides that that regulation is without prejudice to the application of provisions governing jurisdiction and the enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments. Article 71(1) also provides that that regulation is without prejudice to the application of any conventions with the same purpose as the preceding provisions to which the Member States are already parties. Article 71(2)(a) provides that that regulation is not to prevent a court of a Member State which is a party to such a convention from assuming jurisdiction in accordance with that Convention, even where the defendant is domiciled in another Member State not party thereto.

148. Given the uniform and coherent nature of the system of rules on conflict of jurisdiction established by Regulation No 44/2001, Article 4(1) thereof, which provides that if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State', must be interpreted as meaning that it forms part of the system implemented by that regulation, since it resolves the situation envisaged by reference to the legislation of the Member State before whose court the matter is brought.

149. As regards that reference to the national legislation in question, even if it could provide the basis for competence on the part of the Member States to conclude an international agreement, it is clear that, on the basis of the wording of Article 4(1), the only criterion which may be used is that of the domicile of the defendant, provided that there is no basis for applying Articles 22 and 23 of the regulation.

150. Moreover, even if it complies with the rule laid down in Article 4(1) of Regulation No 44/2001, the agreement envisaged could still conflict with other provisions of that regulation. Thus, in the case of a legal person which is the defendant in proceedings and not domiciled in a Member State, that agreement could, by using the criterion of domicile of the defendant, conflict with the provisions of that regulation dealing with branches, agencies or other establishments lacking legal personality, such as Article 9(2) for disputes arising from insurance contracts, Article 15(2) for disputes arising from consumer contracts, or Article 18(2) for disputes arising from individual contracts of employment.

151. It is thus apparent from an analysis of Regulation No 44/2001 alone that, given the unified and coherent system of rules on jurisdiction for which it provides, any international agreement also establishing a unified system of rules on conflict of jurisdiction such as that established by that regulation is capable of affecting those rules of jurisdiction. It is necessary however to continue the analysis by assessing the agreement envisaged in order to determine whether it supports that conclusion.

152. The purpose of the new Lugano Convention is the same as that of Regulation No 44/2001, but it has a wider territorial scope. Its provisions implement the same system as that of Regulation No 44/2001, in particular by using the same rules of jurisdiction, which, according to most of the governments which have submitted observations to the Court, ensures consistency between the two legal instruments and thus ensures that the Convention does not affect the Community rules.

153. However, whilst the fact that the purpose and wording of the Community rules and the provisions of the agreement envisaged are the same is a factor to be taken into account in determining whether that agreement affects those rules, that factor alone cannot demonstrate the absence of such an effect. As for the consistency arising from the application of the same rules of jurisdiction, this is not the same as the absence of such an effect since the application of a rule of jurisdiction laid down by the agreement envisaged may result in the choice of a court with jurisdiction other than that chosen pursuant to Regulation No 44/2001. Thus, where the new Lugano Convention contains articles identical to Articles 22 and 23 of Regulation No 44/2001 and leads on that basis to selection as the appropriate forum of a court of a non-member country which is a party to that Convention, where the defendant is domiciled in a Member State, in the absence of the Convention, that latter State would be the appropriate forum, whereas under the Convention it is the non-member country.

154. The new Lugano Convention contains a disconnection clause similar to that in Article 54B of the current Convention. However, as was noted in paragraph 130 of the present opinion, such a clause, the purpose of which is to prevent conflicts in the application of the two legal instruments, does not in itself provide an answer, before the agreement envisaged is even concluded, to the question whether the Community has exclusive competence to conclude that agreement. On the contrary, such a clause may provide an indication that that agreement may affect the Community rules.

155. Furthermore, as the Commission pointed out, a disconnection clause in an international agreement of private international law has a particular nature and is different from a classic disconnection clause. In the present case, the purpose is not to ensure that Regulation No 44/2001 is applied each time that that is possible, but rather to regulate in a consistent manner the relationship between that regulation and the new Lugano Convention.

156. Furthermore, the disconnection clause in Article 54B(1) of the Lugano Convention includes exceptions laid down in Article 54B(2)(a) and (b).

157. Thus, Article 54B(2)(a) of the Lugano Convention provides that the Convention applies in any event where the defendant is domiciled in the territory of a Contracting State which is not a member of the European Union. However, where for example the defendant is a legal person with a branch, agency or other establishment in a Member State, that provision may affect the application of Regulation No 44/2001, in particular Article 9(2), for proceedings concerning insurance contracts, Article 15(2) for proceedings concerning consumer contracts, or Article 18(2) for disputes concerning individual contracts of employment.

158. The same applies in respect of the two other exceptions to the disconnection clause laid down by the Lugano Convention, namely Article 54B(2)(a) in fine , where Articles 16 and 17 of the Convention, which relate to exclusive jurisdiction and the prorogation of jurisdiction respectively, confer a jurisdiction on the courts of a Contracting State which is not a member of the European Union, and Article 54B(2)(b) in relation to lis pendens or related actions as provided for in Articles 21 and 22 of the Convention, when proceedings are instituted in a Contracting State which is not a member of the European Union and in a Contracting State which is a member of the European Union. The application of the Convention in the context of those exceptions may prevent the application of the rules of jurisdiction laid down by Regulation No 44/2001.

159. Some governments, in particular the Portuguese Government, argue that those few exceptions cannot negate the competence of the Member States to conclude the agreement envisaged since that competence must be determined by the main provisions of that agreement. Similarly, Ireland submits that it would be sufficient for the Community alone to negotiate the provision relating to those exceptions, with the Member States retaining competence to conclude the other provisions of that agreement.

160. However, it must be stressed that, as stated in paragraphs 151 to 153 of the present opinion, the main provisions of the agreement envisaged are capable of affecting the unified and coherent nature of the rules of jurisdiction laid down by Regulation No 44/2001. The exceptions to the disconnection clause and the need for a Community presence in the negotiations, envisaged by Ireland, are merely indications that the Community rules are affected in particular circumstances.

161. It follows from the analysis of the provisions of the new Lugano Convention relating to the rules on jurisdiction that those provisions affect the uniform and consistent application of the Community rules on jurisdiction and the proper functioning of the system established by those rules.

- Rules on the recognition and enforcement of judgments in civil and commercial matters

162. Most of the governments which have submitted observations to the Court argue that the rules on the recognition and enforcement of judgments in civil and commercial matters constitute an area dissociable from that of the rules on jurisdiction, which justifies a separate analysis of the effect of the agreement envisaged on the Community rules. They submit in that regard that the scope of Regulation No 44/2001 is limited, since the recognition applies only to judgments delivered in other Member States, and that any agreement having a different scope, insofar as it concerns judgments external to the Community, is not capable of affecting the Community rules.

163. However, as other governments, the Parliament and the Commission submit, the rules of jurisdiction and those relating to the recognition and enforcement of judgments in Regulation No 44/2001 do not constitute distinct and autonomous systems but are closely linked. As the Commission noted at the hearing, the simplified mechanism of recognition and enforcement set out in Article 33(1) of that regulation, to the effect that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required and which leads in principle, pursuant to Article 35(3) of that regulation, to the lack of review of the jurisdiction of courts of the Member State of origin, rests on mutual trust between the Member States and, in particular, by that placed in the court of the State of origin by the court of the State in which enforcement is required, taking account in particular of the rules of direct jurisdiction set out in Chapter II of that regulation. As regards the Brussels Convention, the Report on the Convention submitted by Mr Jenard (OJ 1979 C 59, p. 1, at p. 46) stated as follows: The very strict rules of jurisdiction laid down in Title II, and the safeguards granted in Article 20 to defendants who do not enter an appearance make it possible to dispense with any review, by the court in which recognition or enforcement is sought, of the jurisdiction of the court in which the original judgment was given.'

164. Several provisions of Regulation No 44/2001 confirm the link between the recognition and enforcement of judgments and the rules on jurisdiction. Thus, review of the jurisdiction of the court of origin is, exceptionally, maintained pursuant to Article 35(1) of the regulation where the provisions of that regulation concerning exclusive jurisdiction and jurisdiction in relation to insurance and consumer contracts are in question. Article 71(2)(b) and Article 72 of the regulation also establish such a relationship between the rules on jurisdiction and those on the recognition and enforcement of those judgments.

165. Furthermore, Regulation No 44/2001 makes provision for conflicts which may arise between judgments delivered between the same parties by different courts. Thus, Article 34(3) states that a judgment is not to be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, whilst Article 34(4) provides that a judgment is not to be recognised if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

166. Furthermore, as stated in paragraph 147 of the present opinion, Article 67 of that regulation governs the relationship of the system established by that regulation not only to the other existing and future provisions of Community law but also to the existing Conventions affecting the Community rules on recognition and enforcement, whether those Conventions contain rules on jurisdiction or provisions on the recognition and enforcement of judgments.

167. With regard to conventions to which the Member States are parties, referred to in Article 71 of Regulation No 44/001, the first paragraph of Article 71(2)(b) provides that judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this regulation'. The second paragraph of Article 71(2)(b) provides that where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply'. Lastly, Article 72 provides that the regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention'.

168. It is thus apparent from an analysis of Regulation No 44/2001 alone that, because of the unified and coherent system which it establishes for the recognition and enforcement of judgments, an agreement such as that envisaged, whether it contains provisions on the jurisdiction of courts or on the recognition and enforcement of judgments, is capable of affecting those rules.

169. In the absence of the final text of the new Lugano Convention, the assessment of any effect of that Convention on the Community rules is to be made having regard, by way of illustration, to the provisions of the current Lugano Convention.

170. The first paragraph of Article 26 of that Convention sets out the principle that a judgment given in a Contracting State is to be recognised in the other Contracting States without any special procedure being required. Such a principle affects the Community rules since it enlarges the scope of recognition of judicial decisions without any special procedure, thus increasing the number of cases in which judgments delivered by courts of countries not members of the Community whose jurisdiction does not arise from the application of the provisions of Regulation No 44/2001 will be recognised.

171. As regards the existence of a disconnection clause in the agreement envisaged, such as that in Article 54B(1) of the Lugano Convention, it follows from paragraphs 130 and 154 of the present opinion that its presence would not appear to alter that finding as regards the existence of exclusive competence on the part of the Community to conclude that agreement.

172. All those factors demonstrate that the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, and that the new Lugano Convention would affect the uniform and consistent application of the Community rules as regards both the jurisdiction of courts and the recognition and enforcement of judgments and the proper functioning of the unified system established by those rules.

173. It follows from all those considerations that the Community has exclusive competence to conclude the new Lugano Convention.

In conclusion, the Court (Full Court) gives the following opinion:

The conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as described in paragraphs 8 to 12 of the request for an opinion, reproduced in paragraph 26 of this Opinion, falls entirely within the sphere of exclusive competence of the European Community.

[Signatures]

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TREATY	European Economic Community
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AUTLANG French ; German ; English ; Danish ; Spanish ; Finnish ; Greek ; Italian ; Dutch ; Portuguese ; Swedish

APPLICA Council ; Institutions

OBSERV CZ ; Denmark ; Federal Republic of Germany ; Greece ; Spain ; France ; Ireland ; Italy ; Netherlands ; Poland ; Portugal ; Finland ; Sweden ; United Kingdom ; Member States ; European Parliament ; Commission ; Institutions

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PROCEDU Request for an Opinion

ADVGEN Geelhoed Jacobs Léger Ruiz-Jarabo Colomer Tizzano Stix-Hackl Kokott Poiares Maduro

JUDGRAP Rosas

DATES of document: 07/02/2006
of application: 05/03/2003

**Judgment of the Court (Third Chamber)
of 29 November 2007
Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo. Reference for a preliminary ruling: Högsta domstolen - Sweden. RRegulation (EC) No 2201/2003 - Articles 3, 6 and 7 - Jurisdiction - Recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility - Jurisdiction in divorce proceedings - Respondent not a national or a resident of a Member State - National rules providing for exorbitant jurisdiction. Case C-68/07.**

In Case C68/07,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Högsta domstolen (Sweden), made by decision of 7 February 2007, received at the Court on 12 February 2007, in the proceedings

Kerstin Sundelind Lopez

v

Miguel Enrique Lopez Lizazo,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues, J. Kluka, A. O Caoimh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the German Government, by M. Lumma, acting as Agent,

- the Italian Government, by I.M. Braguglia, acting as agent, and W. Ferrante, avvocato dello Stato,

- the Finnish Government, by J. Himmanen, acting as Agent,

- the Commission of the European Communities, by M. Wilderspin and P. Dejmek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1. The reference for a preliminary ruling concerns the interpretation of Articles 3, 6 and 7 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2000 L 338, p. 1), as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, as regards treaties with the Holy See (OJ 2004 L 367, p. 1) (Regulation No 2201/2003').

2. The reference was made in divorce proceedings brought by Mrs Sundelind Lopez against Mr Lopez Lizazo.

Legal context

Community legislation

3. According to Recitals 4, 8 and 12 in the preamble to Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ 2000 L 160, p. 19), repealed with effect from 1 March 2005 by Regulation No 2201/2003:

(4) Differences between certain national rules governing jurisdiction and enforcement hamper the free movement of persons and the sound operation of the internal market. There are accordingly grounds for enacting provisions to unify the rules of conflict of jurisdiction in matrimonial matters and in matters of parental responsibility so as to simplify the formalities for rapid and automatic recognition and enforcement of judgments.

...

(8) The measures laid down in this Regulation should be consistent and uniform, to enable people to move as widely as possible. Accordingly, it should also apply to nationals of non-member States whose links with the territory of a Member State are sufficiently close, in keeping with the grounds of jurisdiction laid down in the Regulation.

...

(12) The grounds of jurisdiction accepted in this Regulation are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction; the decision to include certain grounds corresponds to the fact that they exist in different national legal systems and are accepted by the other Member States.'

4. Article 3(1) of Regulation No 2201/2003, entitled General Jurisdiction', states:

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:

(a) in whose territory:

- the spouses are habitually resident, or

- the spouses were last habitually resident, in so far as one of them still resides there, or

- the respondent is habitually resident, or

- in the event of a joint application, either of the spouses is habitually resident, or

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

- the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her domicile there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the domicile of both spouses.'

5. Articles 4 and 5 of the regulation lay down the rules of jurisdiction regarding counterclaims and the conversion of legal separation into divorce respectively.

6. Article 6 of that same regulation, entitled Exclusive nature of jurisdiction under Articles 3, 4 and 5', provides:

A spouse who:

(a) is habitually resident in the territory of a Member State; or

(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her domicile in the territory of one of the latter Member States;

may be sued in another Member State only in accordance with Articles 3, 4 and 5.'

7. Under Article 7 of Regulation No 2201/2003, entitled Residual jurisdiction':

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his domicile within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.'

8. Article 17 of the regulation, entitled Examination as to jurisdiction', provides:

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.'

National legislation

9. The Law on certain international legal relationships concerning marriage and guardianship (Lag (1904:26 s. 1) om vissa internationella rättsförhållande rörande äktenskap och förmynderskap, SFS 2005, No 431) provides, in Paragraph 2(2) of its Chapter 3, that matrimonial cases may be heard by the Swedish courts if the plaintiff is a Swedish citizen and is resident in Sweden or has been resident there after attaining the age of 18.

The dispute in the main proceedings and the question referred for a preliminary ruling

10. Mrs Sundelind Lopez, a Swedish national, is married to Mr Lopez Lizazo, a Cuban national. When living together, they were resident in France. Currently, Mrs Sundelind Lopez is still resident in France but her husband is resident in Cuba.

11. Acting on the basis of the Swedish legislation, Mrs Sundelind Lopez petitioned the Stockholms tingsrätt (District Court, Stockholm) (Sweden) for divorce. Her petition was dismissed by decision of 2 December 2005 on the ground that, under Article 3 of Regulation No 2201/2003, only the French courts have jurisdiction and that, accordingly, Article 7 of that regulation precludes Swedish rules on jurisdiction from applying.

12. By judgment of 7 March 2006, the Svea hovrätt (Court of Appeal, Svea) (Sweden) dismissed the appeal brought against that judgment.

13. Mrs Sundelind Lopez appealed against that judgment to the Högsta domstolen (Supreme Court). In her appeal, she submitted that Article 6 of Regulation No 2201/2003, which establishes the exclusive nature of the jurisdiction of the courts of Member States pursuant to Articles 3 to 5 of that regulation where the respondent has his habitual residence in or is a national of a Member State, implies that those courts do not have exclusive jurisdiction where the respondent has neither of those attributes. Consequently, national law is an appropriate basis, in the present case, on which to establish the competence of the Swedish courts.

14. In the order for reference, the Högsta domstolen stated that, in the present case, the Swedish courts, unlike the French courts, cannot base their jurisdiction on Article 3 of Regulation No 2201/2003, but only on their own national law. The interpretation of Article 7 of that regulation therefore has a direct effect on the outcome of the case in the main proceedings. However, the

Court has yet to interpret those provisions.

15. Against that background, the Högsta domstolen decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

Where the respondent in a case concerning divorce is neither resident in a Member State nor a citizen of a Member State, may the case be heard by a court in a Member State which does not have jurisdiction under Article 3 [of Regulation No 2201/2003], even though a court in another Member State may have jurisdiction by application of one of the rules on jurisdiction set out in Article 3?'

The question referred for a preliminary ruling

16. The national court is essentially asking whether Articles 6 and 7 of Regulation No 2201/2003 are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State can base their jurisdiction to hear the petition on their national law, even though the courts of another Member State have jurisdiction under Article 3 of that regulation.

17. In the main proceedings, it is not disputed that, in accordance with Article 3(1)(a) of Regulation No 2201/2003, the French courts have jurisdiction under the regulation to hear Mrs Sundelind Lopez's petition under either the second indent of that provision, as the last place where the spouses were habitually resident, to the extent that she is still resident in France, or the fifth indent of that same provision, as the place where she is habitually resident, since she has resided in France for at least a year immediately before her divorce petition was introduced.

18. According to the clear wording of Article 7(1) of Regulation No 2201/2003, it is only where no court of a Member State has jurisdiction pursuant to Articles 3 to 5 of the regulation that jurisdiction is to be governed, in each Member State, by the laws of that State.

19. Moreover, according to Article 17 of Regulation No 2201/2003, the wording of which is equally unambiguous, where a court of one Member State is seised of a case over which it has no jurisdiction under that regulation and a court of another Member State has jurisdiction pursuant to that regulation, it is to declare of its own motion that it has no jurisdiction.

20. Consequently, since the French courts have jurisdiction to hear the petition in the main proceedings pursuant to the criteria laid down by Article 3(1)(a) of Regulation No 2201/2003, the Swedish courts cannot base their jurisdiction to hear that petition on rules of their national law, pursuant to Article 7(1) of the regulation, but must, in accordance with Article 17 thereof, declare of their own motion that they have no jurisdiction, in favour of the French courts.

21. Contrary to the submission of the Italian Government, that interpretation is not affected by Article 6 of Regulation No 2201/2003.

22. Admittedly, Article 6, which provides that a respondent having his habitual residence in a Member State or being a national of a Member State can, in view of the exclusive nature of the jurisdiction set out in Articles 3 to 5 of Regulation No 2201/2003, be sued in the courts of another Member State only pursuant to those provisions, and consequently not pursuant to the rules of jurisdiction laid down by national law, does not prohibit a respondent who has neither his habitual residence in a Member State nor the nationality of a Member State from being sued before a court of a Member State pursuant to the rules of jurisdiction provided for by the national law of that State.

23. In accordance with Article 7(1) of Regulation No 2201/2003, that may be the case where no court of a Member State has jurisdiction pursuant to Articles 3 to 5 thereof, Article 7(2) of the regulation providing, in such a situation, that, if the petitioner is a national of a Member State and is habitually resident within the territory of another Member State, he may, like the

nationals of that State, avail himself of the rules of jurisdiction applicable in that State against such a respondent.

24. However, it cannot be inferred from this that Article 6 of Regulation No 2201/2003 lays down a general rule that the jurisdiction of the courts of a Member State to hear questions relating to divorce in respect of a respondent who does not have his habitual residence in a Member St ate and is not a national of a Member State is to be determined, in all cases, under national law, including where a Member State has jurisdiction pursuant to Articles 3 to 5 of the regulation.

25. Such an interpretation would in effect be tantamount to ignoring the clear wording of Articles 7(1) and 17 of Regulation No 2201/2003, the application of which does not depend, as is clear from paragraphs 18 to 20 of this judgment, on the position of the respondent, but solely on the question whether the court of a Member State has jurisdiction pursuant to Articles 3 to 5 of Regulation No 2201/2003.

26. That interpretation would, moreover, be contrary to the objective pursued by Regulation No 2201/2003. As is clear from Recitals 4 and 8 in the preamble to Regulation No 1347/2000, whose provisions on the jurisdiction to hear questions relating to divorce are essentially repeated in Regulation No 2201/2003, the latter regulation aims to lay down uniform conflict of law rules for divorce in order to ensure a free movement of persons which is as wide as possible. Consequently, Regulation No 2201/2003 applies also to nationals of nonMember States whose links with the territory of a Member State are sufficiently close, in keeping with the grounds of jurisdiction laid down in that regulation, grounds which, according to Recital 12 in the preamble to Regulation No 1347/2000, are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction.

27. However, in the main proceedings, it is clear from the application of Article 3(1)(a) of Regulation No 2201/2003 that such a link exists with France and not with Sweden.

28. The answer to the question referred must, therefore, be that Articles 6 and 7 of Regulation No 2201/2003 are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation.

Costs

29. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Articles 6 and 7 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, as regards treaties with the Holy See, are to be interpreted as meaning that where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation.

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AUTLANG	Swedish
OBSERV	Federal Republic of Germany ; Italy ; Finland ; Member States ; Commission ; Institutions
NATIONA	Sweden
NATCOUR	*A9* Högsta domstolen, beslut av 07/02/2007 (Mål nr O 1486-06)
NOTES	Idot, Laurence: Champ d'application du règlement et articulation avec le droit national, Europe 2008 Janvier Comm. no 27 p.27 ; Wittwer, Alexander: EuGH-Debüt im europäischen Familienrecht, European Law Reporter 2008 p.67-69 ; Janoíkova, M.: Rozsudok "Rozvod", Vuber z rozhodnutí Sudneho dvora Europskych spoloenstiev 2008 p.35-36 ; Van den Eeckhout, V.: Het Hof van Justitie als steun en toeverlaat in tijden van Europeanisatie van het IPR?, Nederlands tijdschrift voor Europees recht 2008 p.84-90 ; Borras, Algería: "Exclusive" and "Residual" Grounds of Jurisdiction on Divorce in the Brussels IIbis Regulation, Praxis des internationalen Privat- und Verfahrensrechts 2008 p.233-235
PROCEDU	Reference for a preliminary ruling
ADVGEN	Sharpston
JUDGRAP	O Caoimh
DATES	of document: 29/11/2007 of application: 12/02/2007

**Judgment of the Court (Grand Chamber)
of 27 November 2007**

C. Reference for a preliminary ruling: Korkein hallinto-oikeus - Finland. Judicial cooperation in civil matters - Jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility - Regulation (EC) No 2201/2003 - Substantive and temporal scope - Definition of civil matters' - Decision concerning the taking into care and placement of children outside the family home - Public law measures for child protection. Case C-435/06.

In Case C435/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Korkein hallinto-oikeus (Finland), made by decision of 13 October 2006, received at the Court on 17 October 2006, in the proceedings

C

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and A. Tizzano, Presidents of Chambers, R. Schintgen, J.N. Cunha Rodrigues (Rapporteur), R. Silva de Lapuerta, J.C. Bonichot, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Ms C, by M. Fredman, asianajaja,

- the Finnish Government, by A. GuimaraesPurokoski, acting as Agent,

- the German Government, by M. Lumma, acting as Agent,

- the French Government, by G. de Bergues and A.L. During, acting as Agents,

- the Netherlands Government, by H.G. Sevenster, acting as Agent,

- the Slovak Government, by J. orba, acting as Agent,

- the Swedish Government, by A. Kruse, acting as Agent,

- the Commission of the European Communities, by M. Wilderspin and. P. Aalto, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2007,

gives the following

Judgment

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term civil matters' for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

2. Regulation No 2201/2003, as amended by Regulation No 2116/2004, is to be interpreted as meaning

that harmonised national legislation on the recognition and enforcement of administrative decisions on the taking into care and placement of persons, adopted in the context of Nordic Cooperation, may not be applied to a decision to take a child into care that falls within the scope of that regulation.

3. Subject to the factual assessment which is a matter for the national court alone, Regulation No 2201/2003, as amended by Regulation No 2116/2004, is to be interpreted as applying ratione temporis in a case such as that in the main proceedings.

1. This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2000 L 338, p. 1), as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004 (OJ 2004 L 367, p. 1) (Regulation No 2201/2003').

2. The reference was made in the context of an appeal brought by Ms C, the mother of the children A and B, against the decision of the Oulun hallinto-oikeus (Administrative Court of Oulu, Finland) confirming the decision of the Finnish police ordering the handing over of her children to the Swedish authorities.

Legal context

Community law

3. Joint Declaration No 28 on Nordic Cooperation, annexed to the Treaty concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1), provides:

The Contracting Parties record that Sweden, Finland and Norway, as members of the European Union, intend to continue, in full compliance with Community law and the other provisions of the Treaty on European Union, Nordic Cooperation amongst themselves as well as with other countries and territories.'

4. Recital 5 in the preamble to Regulation No 2201/2003 is worded as follows:

In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.'

5. Article 1 of that regulation provides:

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

...

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;

...

(d) the placement of the child in a foster family or in institutional care;

...'

6. Under Article 2 of Regulation No 2201/2003:

For the purposes of this Regulation:

(1) the term court shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

...

(4) the term judgment shall mean... a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

...

(7) the term parental responsibility shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

...

(9) the term rights of custody shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

...'

7. Article 8(1) of that regulation provides:

The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.'

8. Under Article 16(1)(a) of the regulation:

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 applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent.'

9. Article 59 of Regulation No 2201/2003 is worded as follows:

1. Subject to the provisions of Articles 60, 63, 64 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.

2. (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the Official Journal of the European Union. They may be withdrawn, in whole or in part, at any moment by the said Member States.

...'

10. According to Article 64 of that regulation:

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of [Council] Regulation (EC) No 1347/2000 [of

29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ 2000 L 160, p. 19)] shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation... No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

...'

11. In accordance with Article 72 thereof, Regulation No 2201/2003 entered into force on 1 August 2004' and applied from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which applied from 1 August 2004.

The national legal systems

12. The Swedish Care of Young Persons (Special Provisions) Act (lag med särskilda bestämmelser om vård av unga, SFS 1990 No 52) lays down measures for the protection of children, such as taking into care and placement against the will of the parents. If the health or development of the child is at risk, the social welfare board of the municipality may request the Länsrätt (County Administrative Court) to adopt appropriate measures. In urgent cases, that board may itself order those measures, subject to their confirmation by the Länsrätt.

13. Under Paragraph 1(1) of the Finnish Law on handing over persons to Iceland, Norway, Sweden or Denmark for the enforcement of a decision on taking into care or treatment (laki huoltoa tai hoitoa koskevan päätöksen täytäntöönpanoa varten tapahtuvasta luovuttamisesta Islantiin, Norjaan, Ruotsiin tai Tanskaan (761/1970), Law 761/1970'), any person subject to a care or treatment measure pursuant to a decision of the authorities in Iceland, Norway, Sweden or Denmark, may, on request with a view to its enforcement, be transferred from the Republic of Finland to the State concerned.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14. On 23 February 2005, the Social Welfare Board of the town of L (Sweden) ordered the immediate taking into care of the children A and B, who were living in that town, with a view to placing them with a foster family. A, born in 2001, and B, born in 1999, both have Finnish nationality; A also has Swedish nationality.

15. On 1 March 2005, Ms C, accompanied by her children A and B, took up residence in Finland. Her move to that Member State was declared on 2 March 2005. The Finnish authorities registered her new residence on 10 March 2005, with effect from 1 March 2005.

16. The decision of the Social Welfare Board of the town of L was confirmed on 3 March 2005 by the Länsrätten i K län (County Administrative Court of K) (Sweden) before which the case had been brought for that purpose on 25 February 2005. That judicial confirmation procedure is required under Swedish law in all cases where a child is taken into care without the consent of the parents.

17. Having accepted that the case fell within the jurisdiction of the Swedish Courts, the Kammarrätten i M (Administrative Court of Appeal of M) (Sweden) dismissed the appeal brought by Ms C against the decision of the Länsrätten i K län.

18. The jurisdiction of the Swedish courts was confirmed, on 20 June 2006, by the Regeringsrätten (Supreme Administrative Court) (Sweden).

19. On the same day that the Länsrätten i K län delivered its decision, the Swedish police had requested the Finnish police of the town of H, where the two children were staying with their grandmother, to assist them in the enforcement of that decision. That request was submitted pursuant to Law 761/1970.

20. By decision of 8 March 2005, the Finnish police ordered the handing over of the children A and B to the Swedish authorities. Ms C brought an appeal against that decision before the Oulun hallinto-oikeus, which that court dismissed.

21. Ms C subsequently appealed to the Korkein hallinto-oikeus (Supreme Administrative Court) which considered that an interpretation of the scope of Regulation No 2201/2003 was necessary for it to decide the dispute in the main proceedings.

22. Pointing out that decisions on the taking into care and placement of children are governed, in Finland, by public law, the Korkein hallinto-oikeus raised the question whether such decisions fell within the definition of civil matters' in that regulation. Moreover, given that, in Finland, child protection necessitates the adoption of not just one decision, but a whole series of decisions, that court also raised the question whether the regulation covers both the taking into care and the placement of children or solely the placement decision.

23. Against that background, the Korkein hallinto-oikeus decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. (a) Does... Regulation... No 2201/2003... apply, in a case such as the present, to the enforcement of a public law decision in connection with child welfare, relating to the immediate taking into care of a child and his or her placement in a foster family outside the home, taken as a single decision, in its entirety;

(b) or solely to that part of the decision relating to placement outside the home in a foster family, having regard to the provision in Article 1(2)(d) of the regulation;

(c) and, in the latter case, is... Regulation [No 2201/2003] applicable to a decision on placement contained in one on taking into care, even if the latter decision, on which the placement decision is dependent, is itself subject to legislation, based on the mutual rec ognition and enforcement of judgments and administrative decisions that has been harmonised in cooperation between the Member States concerned?

2. If the answer to Question 1(a) is in the affirmative, is it possible, given that... Regulation [No 2201/2003] takes no account of the legislation harmonised by the Nordic Council on the recognition and enforcement of public law decisions on placement, as described above, but solely of a corresponding private law convention, nevertheless to apply this harmonised legislation based on the direct recognition and enforcement of administrative decisions as a form of cooperation between administrative authorities to the taking into care of a child?

3. If the answer to Question 1(a) is in the affirmative and that to Question 2 is in the negative, does... Regulation [No 2201/2003] apply ratio temporis to a case, taking account of Articles 72 and 64(2) of ... [R]egulation [No 2201/2003] and the abovementioned harmonised Nordic legislation on public law decisions on taking into care, if in Sweden the administrative authorities took their decision both on immediate taking into care and on placement with a foster family on 23 February 2005 and submitted their decision on immediate taking into care to the Länsrätt for confirmation on 25 February 2005, and that court accordingly confirmed the decision on 3 March 2005?'

The questions referred for a preliminary ruling

Question 1(a)

24. By this question, the national court asks essentially whether Article 1(1) of Regulation No 2201/2003 is to be interpreted, first, as applying to a single decision which orders the immediate taking into care and placement of a child outside the original home in a foster family and, second, whether that decision falls within the definition of civil matters' for the purposes of that provision, where it was adopted in the context of rules of public law relating to child protection.

25. As regards the decision to take a child into care, it is necessary to determine whether that decision relates to parental responsibility and whether, consequently, it comes within the scope of Regulation No 2201/2003.

26. In that respect, it should be noted that, according to Article 1(1)(b) thereof, Regulation No 2201/2003 is to apply, whatever the nature of the court or tribunal, in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility. Moreover, under Article 2(1) of that regulation, the term court' is to cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of the regulation.

27. Under Article 2(7) of that same regulation, parental responsibility' encompasses all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect, including rights of custody and rights of access.

28. Taking a child into care does not feature expressly amongst the matters which, according to Article 1(2) of the regulation, relate to parental responsibility.

29. That fact cannot, however, exclude a decision to take a child into care from the scope of Regulation No 2201/2003.

30. The use of the words in particular' in Article 1(2) of that regulation implies that the list contained in that provision is only to be used as a guide.

31. Moreover, it is clear from Recital 5 in the preamble to Regulation No 2201/2003 that, in order to ensure equality for all children, that regulation covers all decisions on parental responsibility, including measures for the protection of the child.

32. A decision to take a child into care, such as that at issue in the main proceedings, is inherently a public act the aim of which is to satisfy the need to protect and assist young persons.

33. In addition, it appears from the documents submitted to the Court that, in Finland, taking a child into care has the effect of conferring on the social welfare boards of that Member State the power to determine the child's place of residence. That measure is liable to affect the exercise of rights of custody which, according to Article 2(9) of Regulation No 2201/2003, specifically include the right to determine that place of residence. Therefore, that power concerns parental responsibility, since, according to Article 1(2)(a) of that regulation, rights of custody constitute one of the matters relating to that responsibility.

34. As regards placement, it should be noted that, in accordance with Article 1(2)(d) of Regulation No 2201/2003, the placement of the child in a foster family or in institutional care is one of the matters relating to parental responsibility.

35. As the Advocate General stated at point 28 of her Opinion, taking into care and placement are closely linked acts in the sense, first, that the decision to take into care can be adopted separately only as an interim measure and, secondly, that the placement of a child against the will of the parents is possible only after that child has been taken into care by the competent authority.

36. In those circumstances, the exclusion of a decision to take a child into care from the scope of Regulation No 2201/2003 would be likely to undermine the effectiveness of that regulation in Member States in which the protection of children, including their placement, requires the adoption of several decisions. Moreover since, in other Member States, such protection is afforded by means of a single decision, there is a risk that the equal treatment of the children concerned would be compromised.

37. It must be ascertained whether Regulation No 2201/2003 applies to decisions to take into care

and place a child that are governed by public law.

38. Article 1(1) of Regulation No 2201/2003 sets out the principle that the scope of that regulation is confined to civil matters' without, however, defining the content and scope of that term.

39. In the context of the 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 version - p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and 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) (the Brussels Convention'), the Court has been called upon to interpret the term civil and commercial matters' included in the first sentence of the first paragraph of Article 1 of that convention.

40. The Court has repeatedly held that, in order to ensure, as far as possible, that the rights and obligations which derive from the Brussels Convention for the Contracting States and the persons to whom it applies are equal and uniform, the terms of the provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. Civil and commercial matters' must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of the Brussels Convention and, second, to the general principles which stem from the corpus of the national legal systems (see Case C292/05 Lechouritou and Others [2007] ECR I0000, paragraph 29 and the caselaw cited).

41. The Swedish Government accepts, like the appellant in the main proceedings, the other Member States which submitted observations and the Commission of the European Communities, that civil matters' within the meaning of Article 1(1) of Regulation No 2201/2003 must also be interpreted autonomously in Community law, but contends that a decision to take into care and place a child, which involves the exercise of public powers, does not fall within the scope of that regulation.

42. In support of that argument, the Swedish Government relies on the caselaw of the Court according to which, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers (Case C167/00 Henkel [2002] ECR I8111, paragraphs 26 and 30, and Case C266/01 Préservatrice foncière TIARD [2003] ECR I-4867, paragraph 22).

43. According to the Swedish Government, it is difficult to imagine a decision arising more manifestly from the exercise of public powers than a decision requiring that a child be taken into care, which could, in certain circumstances, even result in that child being deprived of his liberty.

44. That interpretation of Article 1(1) of Regulation No 2201/2003 cannot be accepted.

45. Since the term civil matters' is to be interpreted with regard to the objectives of Regulation No 2201/2003, if decisions on the taking into care and placement of a child, which in some Member States are governed by public law, were for that reason alone to be excluded from the scope of that regulation, the very purpose of mutual recognition and enforcement of decisions in matters of parental responsibility would clearly be compromised. In that context, it should be noted that it is apparent from Articles 1(1) and 2(1) of Regulation No 2201/2003 that neither the judicial organisation of the Member States nor the conferral of powers on administrative authorities can affect the scope of that regulation or the interpretation of civil matters'.

46. Consequently, the term civil matters' must be interpreted autonomously.

47. Only the uniform application of Regulation No 2201/2003 in the Member States, which requires that the scope of that regulation be defined by Community law and not by national law, is capable of ensuring that the objectives pursued by that regulation, one of which is equal treatment for all children concerned, are attained.

48. According to Recital 5 in the preamble to Regulation No 2201/2003, that objective can only be safeguarded if all decisions on parental responsibility fall within the scope of that regulation.

49. Parental responsibility is given a broad definition in Article 2(7) of the regulation, inasmuch as it includes all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect.

50. As the Advocate General pointed out at point 44 of her Opinion, in this regard it does not matter whether parental responsibility is affected by a protective measure taken by the State or by a decision which is taken on the initiative of the person or persons with rights of custody.

51. The term civil matters' must be interpreted as capable of extending to measures which, from the point of view of the legal system of a Member State, fall under public law.

52. That interpretation is, moreover, supported by Recital 10 in the preamble to Regulation No 2201/2003, according to which that regulation is not intended to apply to matters relating to social security, public measures of a general nature in matters of education or health ...' Those exceptions confirm that the Community legislature did not intend to exclude all measures falling under public law from the scope of the regulation.

53. In the light of the foregoing considerations, the answer to Question 1(a) must be that Article 1(1) of Regulation No 2201/2003 is to be interpreted to the effect that a single decision ordering that a child be taken into care and placed outside his original home in a foster family is covered by the term civil matters', for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection.

Question 1(b) and (c)

54. These questions were raised by the national court only in the event that, in its answer to Question 1(a), the Court interpreted the term civil matters' within the meaning of Article 1(1) of Regulation No 2201/2003 as not including a single decision ordering that a child be taken into care and placed outside his original home in a foster family, where that decision was adopted in the context of public law rules relating to child protection.

55. In the light of the answer to Question 1(a), it is not necessary to answer Questions 1(b) and (c).

Question 2

56. By this question, the national court asks essentially whether Regulation No 2201/2003 is to be interpreted as meaning that harmonised national legislation on the recognition and enforcement of administrative decisions on taking into care and placement of persons, adopted in the context of cooperation between the Nordic States, can be applied to a decision to take a child into care which falls within the scope of that legislation, where the latter does not make provision for it.

57. In that regard, it should be pointed out that, according to settled caselaw, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (see, inter alia, Case 106/77 Simmenthal [1978] ECR 629, paragraphs 21 to 24; Case C213/89 Factortame and Others [1990] ECR I2433,

paragraphs 19 to 21; and Case C119/05 Lucchini [2007] ECR I0000, paragraph 61).

58. In accordance with Article 59(1) thereof, Regulation No 2201/2003 is to supersede, for the Member States, the conventions concluded between them which relate to matters governed by the regulation.

59. Under Article 59(2)(a) of the regulation Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation.'

60. This is the only provision derogating from the rule set out in paragraph 58 of this judgment. It is, as such, to be interpreted strictly.

61. Cooperation between the Nordic States on the recognition and enforcement of administrative decisions on the taking into care and placement of persons does not appear amongst the exceptions listed exhaustively in Regulation No 2201/2003.

62. Harmonised national legislation, such as Law 761/1970, cannot therefore be applied to a decision to take into care and place a child that falls within the scope of Regulation No 2201/2003.

63. That conclusion is not invalidated by Joint Declaration No 28 on Nordic Cooperation.

64. According to that declaration, those States which are members of Nordic Cooperation and members of the Union have undertaken to continue that cooperation, in compliance with Community law.

65. Accordingly, that cooperation must respect the principles of the Community legal order.

66. The answer to Question 2 must therefore be that Regulation No 2201/2003 is to be interpreted as meaning that harmonised national legislation on the recognition and enforcement of administrative decisions on the taking into care and placement of persons, adopted in the context of Nordic Cooperation, may not be applied to a decision to take a child into care that falls within the scope of that regulation.

Question 3

67. By this question, the national court asks essentially whether Regulation No 2201/2003 is to be interpreted as applying ratione temporis in a case such as that in the main proceedings.

68. It is clear from Articles 64(1) and 72 of Regulation No 2201/2003 that the regulation applies only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after 1 March 2005.

69. Moreover, Article 64(2) of that regulation provides that [j]udgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation... No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation... No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted'.

70. In a case such as that in the main proceedings, Regulation No 2201/2003 applies only if the three cumulative conditions listed in the preceding paragraph of this judgment are fulfilled.

71. As regards the first of those conditions, it should be noted that, according to the national court, which alone has jurisdiction to assess the facts of the case in the main proceedings, the decision the enforcement of which is at issue in the main proceedings is that of the Länsrätten i K län of 3 March 2005. It was therefore delivered after the date on which Regulation No 2201/2003 came into force.

72. With regard to the second condition laid down, it appears from the order for reference that the procedure for taking the children A and B into care was initiated in autumn 2004', in other words before Regulation No 2201/2003 applied but after the entry into force of Regulation No 1347/2000, which, pursuant to Article 46 thereof, was on 1 March 2001. It is for the national court to verify whether that was actually the case.

73. As regards the third condition referred to in paragraph 69 of this judgment, the following observations must be made.

74. In accordance with Article 8(1) of Regulation No 2201/2003, the courts of a Member State are to have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

75. By decision of 20 June 2006, the Regeringsrätten confirmed, on the basis of national law, the jurisdiction of the Swedish courts in the case. That court was of the view that, at the date when the social welfare board initiated an inquiry into the family situation of the children A and B, they were resident in Sweden, within the geographical jurisdiction of the Länsrätten i K län.

76. It follows that, for the purposes of Article 64(2) of Regulation No 2201/2003, the rules of jurisdiction applied on the basis of national law accord with those provided for by that regulation. Consequently, the third condition laid down is fulfilled.

77. In view of the foregoing, the answer to Question 3 must be that, subject to the factual assessment, which is a matter for the national court alone, Regulation No 2201/2003 must be interpreted as applying ratione temporis in a case such as that in the main proceedings.

Costs

78. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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32003R2201-A02PT9 : N 33
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32003R2201-A64P2 : N 69 76
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ADVGEN Kokott

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PROCEDU Reference for a preliminary ruling

ADVGEN Tizzano

JUDGRAP Colneric

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Reference for a preliminary ruling from the Juzgado de lo Mercantil No 1 (Commercial Court No 1), Spain lodged on 9 April 2008 - Finn Mejnertsen v Betina Mandal Barsoe

(Case C-148/08)

Language of the case: Spanish

Referring court

Juzgado de lo Mercantil No 1 (Commercial Court No 1), Spain

Parties to the main proceedings

Applicant: Finn Mejnertsen

Defendant: Betina Mandal Barsoe

Questions referred

1. For the purposes of Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty of European Union and the Treaty establishing the European Community, should Denmark be considered to be a Member State within the meaning of Article 16 of Regulation (EC) No 1346/2000 [1] on insolvency proceedings?

2. Does the fact that that Regulation is subject to that Protocol mean that that Regulation does not form part of the body of Community law in that country?

3. Does the fact that Regulation No 1346/2000 is not binding on and is not applicable in Denmark mean that other Member States are not to apply that Regulation in respect of the recognition and enforcement of judicial declarations of insolvency handed down in that country, or, on the other hand, that other Member States are obliged, unless they have made derogations, to apply that Regulation when the judicial declaration of insolvency is handed down in Denmark and is presented for recognition and enforcement in other Member States, in particular, in Spain?

_____

[1] - Of the Council, of 29 May 2000 (OJ L 160, p. 1)

Reference for a preliminary ruling from the Sąd Rejonowy Gdańsk - Północ w Gdańsku (Republic of Poland) lodged on 27 September 2007 - MG Probud Gdynia Sp. z o.o. v Hauptzollamt Saarbrücken

(Case C-444/07)

Language of the case: Polish

Referring court

Sąd Rejonowy Gdańsk - Północ w Gdańsku (Poland)

Parties to the main proceedings

Applicant: MG Probud Gdynia Sp. z o.o., Gdynia

Defendant: Hauptzollamt Saarbrücken

Questions referred

In the light of Articles 3, 4, 16, 17 and 25 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [1] that is to say, in the light of the rules governing the jurisdiction of the courts of the State in which insolvency proceedings are opened, the law applicable to those proceedings and the conditions governing, and the effects of recognition of, those proceedings, do the public administrative authorities of a Member State have the power to seize funds held in the bank account of an economic subject following a declaration of its insolvency made in another EU Member State (application of the so-called seizure of assets), thereby contravening the national legal rules of the Member State which opened such proceedings (Article 4 of Regulation No 1346/2000), where the conditions for the application of the provisions of Articles 5 and 10 of that regulation do not exist?

In the light of Article 25(1) et seq. of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, may the administrative authorities of the Member State in which secondary insolvency proceedings have not been opened and which must recognise the insolvency proceedings pursuant to Article 16 of that regulation refuse, on the basis of domestic legal rules, to recognise decisions made by the State of the opening of insolvency proceedings relating to the conduct and closure of insolvency proceedings pursuant to Articles 31 to 51 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters?

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[1] - OJ 2000 L 160, p. 1.

Reference for a preliminary ruling from the Bundesgerichtshof (Germany), lodged on 20 July 2007 - Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium N.V.

(Case C-339/07)

Language of the case: German

Referring court

Bundesgerichtshof

Parties to the main proceedings

Applicant: Rechtsanwalt Christopher Seagon als Insolvenzverwalter über das Vermögen der Frick Teppichboden Supermärkte GmbH (Christopher Seagon, lawyer, as liquidator in insolvency proceedings in respect of the assets of Frick Teppichboden Supermärkte GmbH)

Defendant: Deko Marty Belgium N.V.

Questions referred

On interpreting Article 3(1) of Council Regulation (EC) No 1346/2000 [1] of 29 May 2000 on insolvency proceedings and Article 1(2)(b) of Council Regulation (EC) No 44/2001 [2] of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation (EC) No 1346/2000 in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

If the first question is to be answered in the negative:

Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation (EC) No 44/2001?

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[1] - OJ 2000 L 160, p. 1.

[2] - OJ 2001 L 12, p. 1.

Volker Donath

Removal not yet on web site

Judgment of the Court (Grand Chamber)
of 2 May 2006
Eurofood IFSC Ltd. Reference for a preliminary ruling: Supreme Court - Ireland. Judicial cooperation in civil matters - Regulation (EC) No 1346/2000 - Insolvency proceedings - Decision to open the proceedings - Centre of the debtor's main interests - Recognition of insolvency proceedings - Public policy. Case C-341/04.

1. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 3(1))

2. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 16(1))

3. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 26)

4. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 26)

1. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Regulation No 1346/2000, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the regulation.

(see para. 37, operative part 1)

2. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State. The rule of priority laid down in that provision, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust, which has enabled a compulsory system of jurisdiction to be established, and, as a corollary, has enabled the Member States to waive the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings. If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision.

(see paras 39-40, 43, operative part 2)

3. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000,

a decision to open insolvency proceedings is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to that regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to that regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period. It is therefore necessary, in order to ensure the effectiveness of the system established by the regulation, that the recognition principle laid down in that provision be capable of being applied as soon as possible in the course of the proceedings.

(see paras 52, 54, operative part 3)

4. On a proper interpretation of Article 26 of Regulation No 1346/2000, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency. Whilst it is for the court of the State to which application has been made to establish whether a clear breach of the right to be heard has actually taken place in the conduct of the proceedings before the court of the other Member State, that court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the persons concerned by that procedure were given sufficient opportunity to be heard.

(see paras 66-68, operative part 4)

In Case C-341/04,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Supreme Court (Ireland), made by decision of 27 July 2004, received at the Court on 9 August 2004, in the proceedings

Eurofood IFSC Ltd,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann (Rapporteur), C.W.A. Timmermans, A. Rosas and J. Malenovsku, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, J. Kluka, U. Lohmus and E. Levits, Judges,

Advocate General: F.G. Jacobs,

Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 12 July 2005,

after considering the observations submitted on behalf of:

- Mr Bondi, by G. Moss QC and B. Shipsey SC, J. Gleeson, G. Clohessy and E. Barrington, barristers-at-law, and by B. O'Neil, D. Smith and C. Mallon, solicitors,

- the Bank of America NA, by M.M. Collins SC and L. McCann SC, and by B. Kennedy, barrister-at-law, and W. Day, solicitor,

- Mr Farrell, Official Liquidator, by M.G. Collins SC and D. Murphy, barrister-at-law, and by T. O'Grady, solicitor,

- the Director of Corporate Enforcement, by A. Keating, principal solicitor, and C. Costello, barrister-at-law,

- the Certificate/Note holders, by D. Baxter, solicitor, D. McDonald SC, and J. Breslin, barrister-at-law,

- Ireland, by D. O'Hagan, acting as Agent, assisted by D. Barniville, barrister-at-law,

- the Czech Government, by T. Boek, acting as Agent,

- the German Government, by W.-D. Plessing, acting as Agent,

- the French Government, by G. de Bergues, JC. Niollet and A. Bodard-Hermant, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by O. Fiumara and M. Massella Ducci Teri, acting as Agents,

- the Hungarian Government, by P. Gottfried, acting as Agent,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Finnish Government, by T. Pynnä and A. Guimaraes-Purokoski, acting as Agents,

- the Commission of the European Communities, by C. O'Reilly and A.-M. Rouchaud-Joet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2005,

gives the following

Judgment

On those grounds, the Court (Grand Chamber) hereby rules:

1. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

2. On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

3. On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a

liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

4. On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

1. This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) (the Regulation').

2. The reference was submitted in the context of insolvency proceedings concerning the Irish company Eurofood IFSC Ltd (Eurofood').

Legal context

Community legislation

3. According to Article 1(1) thereof, the Regulation applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

4. According to Article 2 of the Regulation, headed Definitions':

For the purposes of this Regulation:

(a) insolvency proceedings shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

(b) liquidator shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;

...

(e) judgment in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) the time of the opening of proceedings shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

...'

5. Annex A to the Regulation, concerning the insolvency proceedings referred to in Article 2(a) of the Regulation, mentions under Ireland the procedure of compulsory winding up by the Court'. By way of liquidators referred to in Article 2(b) of the Regulation, Annex C indicates, in relation to Ireland, the provisional liquidator'.

6. Concerning the determination of the court having jurisdiction, Article 3(1) and (2) of the Regulation provide:

The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the

territory of the latter Member State'.

7. Concerning the determination of the law to be applied, Article 4(1) of the Regulation provides:

Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened...'.

8. Concerning the recognition of insolvency proceedings, Article 16(1) of the Regulation states:

Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.'

9. Article 17(1) of the Regulation states:

The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings ...'.

10. However, according to Article 26 of the Regulation:

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.'

11. According to Article 29(a) of the Regulation, the liquidator in the main proceedings may request the opening of secondary proceedings.

12. Article 38 of the Regulation provides that, where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings'.

National legislation

13. Section 212 of the Companies Act 1963 (the Companies Act') confers on the High Court jurisdiction to wind up any company.

14. Section 215 of the Companies Act provides that an application to the court for the winding up of a company is to be by petition presented either by the company or by any creditor or creditors.

15. Section 220 of the Companies Act provides:

1. Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

2. In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.'

16. Section 226(1) of the Companies Act provides that the court may appoint a provisional liquidator at any time after the presentation of a winding-up petition. The appointment of the liquidator, pursuant to section 225, is otherwise made at the time the winding-up order is made. Pursuant to section 229(1), a provisional liquidator, once appointed, is obliged to take into his custody or

under his control all the property and things in action to which the company is or appears to be entitled'.

Background and questions referred for a preliminary ruling

17. Eurofood was registered in Ireland in 1997 as a company limited by shares' with its registered office in the International Financial Services Centre in Dublin. It is a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the Parmalat group.

18. On 24 December 2003, in accordance with Decree-Law No 347 of 23 December 2003 concerning urgent measures for the industrial restructuring of large insolvent undertakings (GURI No 298 of 24 December 2003, p. 4), Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, who appointed Mr Bondi as the extraordinary administrator of that undertaking.

19. On 27 January 2004, the Bank of America NA applied to the High Court (Ireland) for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. That application was based on the contention that that company was insolvent.

20. On the same day the High Court, on the strength of that application, appointed Mr Farrell as the provisional liquidator, with powers to take possession of all the company's assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf.

21. On 9 February 2004, the Italian Minister for Production Activities admitted Eurofoods to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator.

22. On 10 February 2004, an application was lodged before the Tribunale Civile e Penale di Parma (District Court, Parma) (Italy) for a declaration that Eurofoods was insolvent. The hearing was fixed for 17 February 2004, Mr Farrell being informed of that date on 13 February. On 20 February 2004, the District Court in Parma, taking the view that Eurofood's centre of main interests was in Italy, held that it had international jurisdiction to determine whether Eurofoods was in a state of insolvency.

23. By 23 March 2004 the High Court decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted by the Bank of America NA, namely 27 January 2004. Taking the view that the centre of main interests of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court in Parma were such as to justify, pursuant to Article 26 of the Regulation, the refusal of the Irish courts to recognise the decision of that court. Finding that Eurofood was insolvent, the High Court made an order for winding up and appointed Mr Farrell as the liquidator.

24. Mr Bondi having appealed against that judgment, the Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, does that order combined with the presentation of the petition constitute a judgment opening ... insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346/2000?

(2) If the answer to Question 1 is in the negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening

of insolvency proceedings for the purposes of that regulation by virtue of the Irish legal provision (section 220(2) of the Companies Act, 1963) deeming the winding up of the company to commence at the date of the presentation of the petition?

(3) Does Article 3 of the said regulation, in combination with Article 16, have the effect that a court in a Member State other than that in which the registered office of the company is situated and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings?

(4) Where,

(a) the registered offices of a parent company and its subsidiary are in two different Member States,

(b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the Member State where its registered office is situated and

(c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary, in determining the centre of main interests, are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?

(5) Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation [to] persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of Article 17 of the said regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?'

25. By order of the President of the Court of Justice of 15 September 2004, the application by the Supreme Court that the accelerated procedure provided for in the first subparagraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

The questions

The fourth question

26. By its fourth question, which should be considered first since it concerns, in general, the system which the Regulation establishes for determining the competence of the courts of the Member States, the national court asks what the determining factor is for identifying the centre of main interests of a subsidiary company, where it and its parent have their respective registered offices in two different Member States.

27. The referring court asks how much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the Member State where its registered office is situated and, on the other hand, the fact that the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.

28. Article 3 of the Regulation makes provision for two types of proceedings. The insolvency proceedings

opened, in accordance with Article 3(1), by the competent court of the Member State within whose territory the centre of a debtor's main interests is situated, described as the main proceedings', produce universal effects in that they apply to the assets of the debtor situated in all the Member States in which the regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as secondary proceedings', are restricted to the assets of the debtor situated in the territory of the latter State.

29. Article 3(1) of the Regulation provides that, in the case of a company, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

30. It follows that, in the system established by the Regulation for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction.

31. The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

32. The scope of that concept is highlighted by the 13th recital of the Regulation, which states that the centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

33. That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

34. It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

35. That could be so in particular in the case of a letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated.

36. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.

37. In those circumstances, the answer to the fourth question must be that, where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business

in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.

The third question

38. By its third question, which should be examined second, since it concerns the recognition system established by the Regulation in general, the referring court essentially asks whether, by virtue of Articles 3 and 16 of the Regulation, a court of a Member State, other than the one in which the registered office of the undertaking is situated, and other than the one in which that undertaking conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened, must be regarded as having jurisdiction to open the main insolvency proceedings. The referring court is thus essentially asking whether the jurisdiction assumed by a court of a Member State to open main insolvency proceedings may be reviewed by a court of another Member State in which recognition has been applied for.

39. As is shown by the 22nd recital of the Regulation, the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust.

40. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings [see by analogy, in relation to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters (OJ 1978 L 304, p. 36; the Brussels Convention'), Case C-116/02 Gasser [2003] ECR I-14693, paragraph 72; Case C-159/02 Turner [2004] ECR I3565, paragraph 24].

41. It is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3(1) of the Regulation, i.e. examine whether the centre of the debtor's main interests is situated in that Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process (see paragraph 66 of this judgment).

42. In return, as the 22nd recital of the Regulation makes clear, the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction.

43. If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision.

44. The answer to the third question must therefore be that, on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

The first question

45. By its first question, the referring court essentially asks whether the decision whereby a

court of a Member State, presented with a petition for the liquidation of an insolvent company, appoints, before ordering that liquidation, a provisional liquidator with powers whose legal effect is to deprive the company's directors of the power to act, constitutes a decision opening insolvency proceedings for the purposes of the first subparagraph of Article 16(1) of the Regulation.

46. The wording of Article 1(1) of the Regulation shows that the insolvency proceedings to which it applies must have four characteristics. They must be collective proceedings, based on the debtor's insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator.

47. Those forms of proceedings are listed in Annex A to the Regulation, and the list of liquidators appears in Annex C.

48. The Regulation is designed not to establish uniform proceedings on insolvency, but, as its second recital states, to ensure that cross-border insolvency proceedings... operate efficiently and effectively'. To that end, it lays down rules which, as its third recital indicates, are aimed at securing coordination of the measures to be taken regarding an insolvent debtor's assets'.

49. By requiring that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings, the first subparagraph of Article 16(1) of the Regulation lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first. As the 22nd recital of the Regulation explains, [t]he decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision'.

50. However, the Regulation does not define sufficiently precisely what is meant by a decision to open insolvency proceedings'.

51. The conditions and formalities required for opening insolvency proceedings are a matter for national law, and vary considerably from one Member State to another. In some Member States, the proceedings are opened very shortly after the submission of the application, the necessary verifications being carried out later. In other Member States, certain essential findings, which may be quite time-consuming, must be made before proceedings are opened. Under the national law of certain Member States, the proceedings may be opened provisionally' for several months.

52. As the Commission of the European Communities has argued, it is necessary, in order to ensure the effectiveness of the system established by the Regulation, that the recognition principle laid down in the first subparagraph of Article 16(1) of the Regulation, be capable of being applied as soon as possible in the course of the proceedings. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the Regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period.

53. It is in relation to that objective seeking to ensure the effectiveness of the system established by the Regulation that the concept of decision to open insolvency proceedings' must be interpreted.

54. In those circumstances, a decision to open insolvency proceedings' for the purposes of the Regulation must be regarded as including not only a decision which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such

divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present.

55. Contrary to the arguments of Mr Bondi and the Italian Government, that interpretation cannot be invalidated by the fact that the liquidator referred to in Annex C to the Regulation may be a provisionally-appointed liquidator.

56. Both Mr Bondi and the Italian Government acknowledge that, in the main proceedings, the provisional liquidator' appointed by the High Court, by decision of 27 January 2004, appears amongst the liquidators mentioned in Annex C to the Regulation in relation to Ireland. They argue, however, that this is a case of a provisional liquidator, in respect of whom the Regulation contains a specific provision. They note that Article 38 of the Regulation empowers the provisional liquidator, defined in the 16th recital as the liquidator appointed prior to the opening of the main insolvency proceedings', to apply for preservation measures on the assets of the debtor situated in another Member State for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings. Mr Bondi and the Italian Government infer from that that the appointment of a provisional liquidator cannot open the main insolvency proceedings.

57. In that respect, it should be noted that Article 38 of the Regulation must be read in combination with Article 29, according to which the liquidator in the main proceedings is entitled to request the opening of secondary proceedings in another Member State. That Article 38 thus concerns the situation in which the competent court of a Member State has had main insolvency proceedings brought before it and has appointed a person or body to watch over the debtor's assets on a provisional basis, but has not yet ordered that that debtor be divested or appointed a liquidator referred to in Annex C to the Regulation. In that case, the person or body in question, though not empowered to initiate secondary insolvency proceedings in another Member State, may request that preservation measures be taken over the assets of the debtor situated in that Member State. That is, however, not the case in the main proceedings here, where the High Court has appointed a provisional liquidator referred to in Annex C to the Regulation and ordered that the debtor be divested.

58. In view of the above considerations, the answer to the first question must be that, on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

The second question

59. In the light of the answer given to the first question, there is no need to reply to the second question.

The fifth question

60. By its fifth question, the referring court essentially asks whether a Member State is required, under Article 17 of the Regulation, to recognise insolvency proceedings opened in another Member State where the decision opening those proc eedings was handed down in disregard of procedural rules guaranteed in the first Member State by the requirements of its public policy.

61. Whilst the 22nd recital of the Regulation infers from the principle of mutual trust that grounds for non-recognition should be reduced to the minimum necessary', Article 26 provides that a Member State may refuse to recognise insolvency proceedings opened in another Member State where the effects of such recognition would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

62. In the context of the Brussels Convention, the Court of Justice has held that, since it constitutes an obstacle to the achievement of one of the fundamental aims of that Convention, namely to facilitate the free movement of judgments, recourse to the public policy clause contained in Article 27, point 1, of the Convention is reserved for exceptional cases (Case C-7/98 Krombach [2000] ECR I1935, paragraphs 19 and 21).

63. Considering itself competent to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State, the Court of Justice had held, in the context of the Brussels Convention, that recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (Krombach , paragraphs 23 and 37).

64. That case-law is transposable to the interpretation of Article 26 of the Regulation.

65. In the procedural area, the Court of Justice has expressly recognised the general principle of Community law that everyone is entitled to a fair legal process (Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraphs 20 and 21; Joined Cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-1, paragraph 17; and Krombach , paragraph 26). That principle is inspired by the fundamental rights which form an integral part of the general principles of Community law which the Court of Justice enforces, drawing inspiration from the constitutional traditions common to the Member States and from the guidelines supplied, in particular, by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

66. Concerning more particularly the right to be notified of procedural documents and, more generally, the right to be heard, referred to in the referring court's fifth question, these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.

67. In the light of those considerations, the answer to the fifth question must be that, on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

68. Should occasion arise, it will be for the referring court to establish whether, in the main proceedings, that has been the case with the conduct of the proceedings before the Tribunale civile

e penale di Parma. In that respect, it should be observed that the referring court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator appointed by the High Court was given sufficient opportunity to be heard.

Costs

69. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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PROCEDU Reference for a preliminary ruling

ADVGEN Jacobs

JUDGRAP Jann

DATES of document: 02/05/2006
of application: 09/08/2004

Judgment of the Court (Grand Chamber)
of 17 January 2006
Susanne Staubitz-Schreiber. Reference for a preliminary ruling: Bundesgerichtshof - Germany. Judicial cooperation in civil matters - Insolvency proceedings - Regulation (EC) No 1346/2000 - Temporal application - Court having jurisdiction. Case C-1/04.

1. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 43)

2. Judicial cooperation in civil matters - Insolvency proceedings - Regulation No 1346/2000

(Council Regulation No 1346/2000, Art. 3(1))

1. The first sentence of Article 43 of Regulation No 1346/2000 on insolvency proceedings must be interpreted as applying if no judgment opening insolvency proceedings has been delivered before its entry into force on 31 May 2002, even if the request to open proceedings was lodged prior to that date.

(see para. 21)

2. Article 3(1) of Regulation No 1346/2000 on insolvency proceedings must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.

(see para. 29, operative part)

In Case C-1/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 27 November 2003, received at the Court on 2 January 2004, in the proceedings

Susanne Staubitz-Schreiber

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Malenovsku, Presidents of Chambers, A. La Pergola, J.-P. Puissochet (Rapporteur), R. Schintgen, N. Colneric, S. von Bahr, J. Kluka, U. Lohmus and E. Levits, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the observations submitted on behalf of:

- the German Government, by A. Tiemann, acting as Agent,

- the Netherlands Government, by H.G. Sevenster and N.A.J. Bel, acting as Agents,

- the Commission of the European Communities, by S. Grünheid and A.M. RouchaudJoet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2005,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) (the Regulation').

2. The reference was made in the course of proceedings brought before the Bundesgerichtshof by Ms Staubitz-Schreiber (the applicant in the main proceedings') after her application to open insolvency proceedings (Insolvenzverfahren') was dismissed by the Amtsgericht-Insolvenzgericht Wuppertal and subsequently, on appeal, by the Landgericht Wuppertal.

Legal background

3. According to the fourth and sixth recitals in the preamble, the Regulation defines the rules of jurisdiction for opening insolvency proceedings with cross-border effects and for judgments which are delivered directly on the basis of such proceedings and are closely connected with them. It also contains provisions regarding the recognition of those judgments and the applicable law, and in particular aims to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position.

4. It follows from the 12th recital in the preamble to the Regulation that the latter provides for the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. Those proceedings have universal scope and aim in principle at encompassing all the debtor's assets, subject, in particular, to the opening of parallel secondary proceedings in the Member State or States in which the debtor has an establishment, the effects of which are limited to the assets located in that State or those States.

5. According to Article 1(1), the Regulation is to apply, subject to special cases set out in paragraph 2, to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

6. Under Article 2 of the Regulation:

(a) insolvency proceedings shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

...

(d) court shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;

(e) judgment in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;

(f) the time of the opening of proceedings shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;

...'.

7. Article 3 of the Regulation lays down the following rules on international jurisdiction:

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the

territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.'

8. Article 4(1) of the Regulation states that the law applicable to the insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the State of the opening of proceedings'. Several exceptions to the law of the State of the opening of proceedings are, however, provided for by Articles 5 to 15 of the Regulation.

9. Under Article 16(1) of the Regulation, [a]ny judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States'.

10. According to Article 17(1) of the Regulation, [t]he judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State'.

11. Article 38 of the Regulation provides that [w]here the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings'.

12. Pursuant to the transitional provisions, Article 43 of the Regulation provides, under the heading Applicability in time':

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.'

13. Article 44 of the Regulation also provides, under the heading Relationship to Conventions':

1. After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States

2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.

...'.

14. Pursuant to Article 47, the Regulation entered into force on 31 May 2002. Annex A mentions the Insolvenzverfahren' in German law as insolvency proceedings referred to in Article 2(a) of the Regulation.

The dispute in the main proceedings and the question referred for a preliminary ruling

15. The applicant in the main proceedings was resident in Germany where she operated a telecommunications equipment and accessories business as a sole trader. She ceased to operate that business in 2001 and requested, on 6 December 2001, the opening of insolvency proceedings regarding her assets before the Amtsgericht-Insolvenzgericht Wuppertal. On 1 April 2002, she moved to Spain in order to live and work there.

16. By order of 10 April 2002, the Amtsgericht-Insolvenzgericht Wuppertal refused to open the insolvency proceedings applied for on the ground that there were no assets. The appeal brought by the applicant in the main proceedings against that order was dismissed by the Landgericht Wuppertal, by orders of 14 August 2002 and 15 October 2003, on the ground that the German courts did not have jurisdiction to open insolvency proceedings in accordance with Article 3(1) of the Regulation, since the centre of the main interests of the applicant in the main proceedings was situated in Spain.

17. The applicant in the main proceedings brought an appeal before the Bundesgerichtshof in order to have the above orders set aside and the case referred back to the Landgericht Wuppertal. She submits that the question of jurisdiction should be examined in the light of the situation at the time when the request to open insolvency proceedings was lodged, or, in this case, by taking account of her domicile in Germany in December 2001.

18. The national court states, first of all, that the case before it falls, in principle, within the scope of the Regulation, in accordance with Articles 43 and 44(2), since no positive judgment opening insolvency proceedings was delivered prior to the entry into force, on 31 May 2002, of the Regulation.

19. That court goes on to point out that the applicant in the main proceedings moved the centre of her main interests to Spain after she had requested the opening of insolvency proceedings in Germany, but before such proceedings were opened or produced their effects under German law.

20. In those circumstances, the Bundesgerichtshof decided to stay the proceedings before it and to refer the following question to the Court for a preliminary ruling:

Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?'

The question referred for a preliminary ruling

21. The first sentence of Article 43 of the Regulation lays down the principle governing the temporal conditions for application of that regulation. That provision must be interpreted as applying if no judgment opening insolvency proceedings has been delivered before its entry into force on 31 May 2002, even if the request to open proceedings was lodged prior to that date. That is in fact the case here, since the request by the applicant in the main proceedings was lodged on 6 December 2001 and no judgment opening insolvency proceedings was delivered before 31 May 2002.

22. It follows that, in the case in the main proceedings, the national court must determine whether it has jurisdiction in the light of Article 3(1) of the Regulation.

23. That provision, which states that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated are to have jurisdiction to open insolvency proceedings, does not specify whether the court originally seised retains jurisdiction if the debtor moves the centre of his main interests after submitting the request to open proceedings but before the judgment is delivered.

24. However, a transfer of jurisdiction from the court originally seised to a court of another Member State on that basis would be contrary to the objectives pursued by the Regulation.

25. In the fourth recital in the preamble to the Regulation, the Community legislature records its intention to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position. That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.

26. Such a transfer of jurisdiction would also be contrary to the objective, stated in the second and eighth recitals in the preamble to the Regulation, of efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself more or less permanently and would often mean in practice that the proceedings would be prolonged.

27. Furthermore, retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor's insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him.

28. The universal scope of the main insolvency proceedings, the opening, where appropriate, of secondary proceedings and the possibility for the temporary administrator appointed by the court first seised to request measures to secure and preserve any of the debtor's assets situated in another Member State constitute, moreover, important guarantees for creditors, which ensure the widest possible coverage of the debtor's assets, particularly where he has moved the centre of his main interests after the request to open proceedings but before the proceedings are opened.

29. The answer to be given to the national court must therefore be that Article 3(1) of the Regulation must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.

Costs

30. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request

but before the proceedings are opened.

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AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
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AUTLANG	German
OBSERV	Federal Republic of Germany ; Netherlands ; Member States ; Commission ; Institutions
NATIONA	Federal Republic of Germany

NATCOUR

A9 Bundesgerichtshof, Beschluß vom 27/11/2003 (IX ZB 418/02) ; - Betriebs-Berater 2004 p.127-128 ; - Europäische Zeitschrift für Wirtschaftsrecht 2004 p.158-160 ; - Internationales Handelsrecht 2004 p.86-88 ; - Juristenzeitung 2004 p.203* (résumé) ; - KTS Zeitschrift für Insolvenzrecht 2004 p.425-427 ; - NJW-Rechtsprechungs-Report Zivilrecht 2004 p.848-849 ; - Praxis des internationalen Privat- und Verfahrensrechts 2004 p.VII (résumé) ; - Praxis des internationalen Privat- und Verfahrensrechts 2004 p.429-431 ; - Recht der internationalen Wirtschaft 2004 p.388-389 ; - The European legal forum 2004 p.122-124 (D) ; - The European legal forum 2004 p.122-124 (EN) ; - Wertpapier-Mitteilungen 2004 p.247-248 ; - Zeitschrift für Wirtschaftsrecht 2004 p.94-96 ; - Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts 2005, p.720-724 ; - International Litigation Procedure 2005 p.48-52 ; - Mankowski, Peter: Entscheidungen zum Wirtschaftsrecht 2004 p.229-230 ; - Weller, Marc-Philippe: Forum Shopping im Internationalen Insolvenzrecht?, Praxis des internationalen Privat- und Verfahrensrechts 2004 p.412-417 ; - Brenner, Barbara: EuInsVO Art. 3, 48 - Zuständigkeit des Insolvenzgerichts auch bei COMI-Verlegung des Schuldners zwischen Antragstellung und Insolvenzeröffnung ("Susanne Staubitz-Schreiber"), Zeitschrift für Wirtschaftsrecht 2005 p.1646-1648

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Brenner, Barbara: EuInsVO Art. 3, 48 - Zuständigkeit des Insolvenzgerichts auch bei COMI-Verlegung des Schuldners zwischen Antragstellung und Insolvenzeröffnung ("Susanne Staubitz-Schreiber"), Zeitschrift für Wirtschaftsrecht 2005 p.1646-1648 ; Wittwer, Alexander: Die erste EuGH-Entscheidung zur EuInsVO - perpetuatio fori beim Insolvenzeröffnungsgericht, European Law Reporter 2006 p.91 ; Vogl, Thorsten: Entscheidungen zum Wirtschaftsrecht 2006 p.141-142 ; X: Il Corriere giuridico 2006 p.11 ; Kindler, Peter: Sitzverlegung und internationales Insolvenzrecht, Praxis des internationalen Privat- und Verfahrensrechts 2006 p.114-116 ; Vlas, P.: Nederlandse jurisprudentie ; Uitspraken in burgerlijke en strafzaken 2006 no 307 ; Mélin, François: Gazette du Palais 2006 no 120-124 I Jur. p.19 ; Kauff-Gazin, Fabienne ; Idot, Laurence: Centre des intérêts principaux du débiteur, Europe 2006 Mars Comm. no 99 p.28 ; Hess, Burkhard ; Laukemann, Björn: Juristenzeitung 2006 p.671-673 ; Vallens, Jean-Luc: Le règlement communautaire sur les procédures d'insolvabilité et le déménagement du débiteur, Revue des sociétés 2006 p.351-360 ; Volders, Bart ; Rétornaz, Valentin: Journal du droit international 2006 p.654-661 ; Dammann, Reinhard: L'application du règlement CE no 1346-2000 après les arrêts Staubitz-Schreiber et Eurofood de la CJCE, Recueil Le Dalloz 2006 Jur. p.1752-1760 ; Sortais, Jean-Pierre: Entreprises en difficulté, Revue de jurisprudence commerciale 2006 p.245-246 ; Jude, Jean-Michel: Revue critique de droit international privé 2006 p.683-691 ; Anthimos, A.: Armenopoulos 2006 p.500-502 ; Kotsiris, L.: Epitheorisis tou Emporikou Dikaiou 2006 p.452 ; Montanari, Massimo ; : La perpetuatio iurisdictionis nel sistema del regolamento comunitario sulle procedure d`insolvenza ; : Int'l Lis ; 2006-07 p.20-25 ; Lafortune, Maurice-Antoine: L'ouverture et la reconnaissance d'une procédure principale d'insolvabilité fondée sur le règlement communautaire du 29 mai 2000, Petites affiches. La Loi / Le Quotidien juridique 2007 no 62 p.4-6 ; Banu, Mihai: Cooperarea judiciar in materie civil, Revista româna de drept comunitar 2007 Nr.1 p.122-124

PROCEDU	Reference for a preliminary ruling
ADVGEN	Ruiz-Jarabo Colomer
JUDGRAP	Puissochet
DATES	of document: 17/01/2006 of application: 02/01/2004

Judgment of the Court (First Chamber)
of 17 March 2005
Commission of the European Communities v AMI Semiconductor Belgium BVBA and Others.
Arbitration clause - Designation of the Court of First Instance - Jurisdiction of the Court of Justice - Parties in liquidation - Capacity to be parties to legal proceedings - Council Regulation (EC) No 1346/2000 - Insolvency proceedings - Recovery of advances - Reimbursement under a clause of the contract - Joint and several liability - Recovery of sums paid but not due. Case C-294/02.

1. Procedure - Action brought before the Court on the basis of an arbitration clause - Jurisdiction of the Court of Justice as an institution comprising both the Court of Justice and the Court of First Instance - No requirement that the arbitration clause should indicate the Community Court having jurisdiction

(Art. 238 CE)

2. Procedure - Action brought before the Court on the basis of an arbitration clause - Action brought by a Community institution against an undertaking subject to insolvency proceedings - No Community provisions on the matter - Reference to principles common to the procedural laws of the Member States - Principles laying down the circumstances in which such an action is inadmissible

(Art. 238 EC; Council Regulation No 1346/2000, Arts 4(2)(f), 16 and 17)

3. Procedure - Application initiating proceedings - Subject-matter of the dispute - Definition - Amendment during the proceedings - Not permitted

(Rules of Procedure of the Court, Arts 38 and 42)

1. Since the term Court of Justice', as used in the Treaty, does not refer to one Community court or the other but to the Community institution comprising both the Court of Justice and the Court of First Instance, the reference to the Court of Justice' in Article 238 EC must be taken to be a reference to that institution, and it is to the latter that a contract must refer in order for it to be possible for jurisdiction to be conferred on either of the Community courts.

Since the Treaty does not lay down any particular wording to be used in an arbitration clause, any wording which indicates that the parties intend to remove any dispute between them from the purview of the national courts and to submit them to the Community courts must be regarded as sufficient to give the latter jurisdiction under Article 238 EC.

(see paras 49-50)

2. An action brought by the Commission before the Community courts against undertakings subject to insolvency proceedings in a Member State is inadmissible.

It follows from the principles common to the procedural laws of the Member States, from which it is necessary to deduce the rules to be applied in the absence of Community provisions in the matter, that a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure.

Moreover, it is clear from Regulation No 1346/2000 on insolvency proceedings that the Member States are required, on a mutual basis, to respect proceedings commenced in any one of them and that the opening of insolvency proceedings in a Member State is to be recognised in all the other Member States and is to produce the effects attributed thereto by the law of the State in which the proceedings are opened.

Consequently, the Community institutions would enjoy an unjustifiable advantage over the other creditors if they were allowed to pursue their claims in proceedings brought before the Community

judicature when any action before national courts was impossible.

(see paras 68-70)

3. In accordance with Article 38 of the Rules of Procedure, parties are required to state the subject-matter of the proceedings in their originating application. It follows that, even though Article 42 of the Rules of Procedure allows new pleas in law to be introduced in certain circumstances, a party may not alter the actual subject-matter of the action in the course of the proceedings. New claims put forward for the first time at the hearing could not be allowed without depriving defendants of an opportunity to prepare a response and thereby breaching the rights of the defence.

(see para. 75)

In Case C-294/02,

APPLICATION under Article 238 EC brought on

12 August 2002

,

Commission of the European Communities, represented by G. Wilms, acting as Agent, assisted by R. Karpenstein, Rechtsanwalt, with an address for service in Luxembourg,

applicant,

v

AMI Semiconductor Belgium BVBA , formerly Alcatel Microelectronics NV, established in Oudenaarde (Belgium), represented by M. Hallweger and R. Lutz, Rechtsanwälte,

A-Consult EDV-Beratungsgesellschaft mbH (in liquidation), established in Vienna (Austria), represented by E. Roehlich, Rechtsanwalt,

Intracom SA Hellenic Telecommunications & Electronic Industry, established in Athens (Greece), represented by M. Lienemeyer, U. Zinsmeister and D. Waelbroeck, avocats,

ISION Sales + Services GmbH & Co. KG (in liquidation), established in Hamburg (Germany), represented by H. Fialski and T. Delhey, Rechtsanwälte,

Euram-Kamino GmbH , established in Hallbergmoos (Germany), represented by M. Hallweger and R. Lutz, Rechtsanwälte,

HSH Nordbank AG, formerly Landesbank Kiel Girozentrale, established in Kiel (Germany), represented by B. Treibmann and E. Meincke, Rechtsanwälte,

and

InterTeam GmbH (in liquidation), established in Itzehoe (Germany), represented by M. Hallweger and R. Lutz, Rechtsanwälte,

defendants,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, R. Silva de Lapuerta, K. Lenaerts, S. von Bahr and K. Schiemann (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on

8 July 2004,

after hearing the Opinion of the Advocate General at the sitting on

23 September 2004,

gives the following

Judgment

Costs

109. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the application;

2. Dismisses the counterclaim by Intracom SA Hellenic Telecommunications & Electronic Industry;

3. Orders the Commission of the European Communities to pay the costs.

1. By its application, the Commission of the European Communities seeks from the Court an order that, as joint and several debtors, AMI Semiconductor Belgium BVBA, formerly Alcatel Microelectronics NV (AMI Semiconductor'), a company governed by Belgian law, AConsult EDVBeratungsgesellschaft mbH (AConsult'), a company governed by Austrian law, Intracom SA Hellenic Telecommunications & Electronic Industry (Intracom'), a company governed by Greek law, and also ISION Sales + Services GmbH & Co. KG, formerly AllCon Gesellschaft für Kommunikationstechnologie mbH (Ision'), EuramKamino GmbH (Euram'), HSH Nordbank, formerly Landesbank Kiel Girozentrale (Nordbank'), and InterTeam GmbH (InterTeam'), all four of which are governed by German law, pay it the sum of EUR 317 214, plus interest, as reimbursement of advances made by it under a contract (the contract') concluded with those companies in the context of Esprit Project No 26927 Electronic Commerce Fulfilment Service for the Electronics Industry (ECFS/E) (the project').

I - Facts

A - The contract

2. On 8 June 1998 the European Community, represented by the Commission, concluded with the defendants a contract relating to the financial contribution made to those companies for execution of the project.

3. The contract was drawn up in English. Under Article 10 thereof, it is governed by German law.

4. Under Article 1.1.1 of the contract, the defendants were required to carry out this contract jointly and severally towards the Commission for the work set out in Annex I up to the milestone at month 18'.

5. Article 1.1.2 of the contract reads as follows:

Subject to force majeure (including strikes, lockouts and other events beyond the reasonable control of the contractors), the contractors shall use reasonable endeavours to achieve the results intended for the Project and to fulfil the obligations of a defaulting contractor. A contractor shall not be liable to take action beyond its reasonable control or to reimburse money due from a defaulting contractor unless it has contributed to the default. Measures to be taken in the event of force majeure shall be agreed between the contracting parties.'

1. The scope of the contract

6. According to Article 1.1.1 of the contract, its purpose was execution of the work set out in Annex I thereto.

7. According to the project summary in Part 1 of that annex, the aim of the project was to facilitate sales of excess stocks of semiconductor components between undertakings in the electronic industry without using a broker and thereby to reduce transaction costs. Execution of the project was to facilitate attainment of that objective:

- by bringing together excess supply and unmet demand for components on a global platform;

- by supporting all business processes for the trade transactions created;

- by carrying out freight forwarding and declaration processes to fulfil buying/selling contracts, and

- by expanding the use of electronic commerce in the electronics field.

According to the same summary, the project would enable the electronics industry:

- to expand trade opportunities and reduce transaction costs by using global information exchange technology;

- to employ borderless electronic commerce in a globalised economy.

The three main objectives were set out as follows in the summary:

- integration of multiple key services for the electronics industry;

- design of appropriate interfaces for an efficient brokerage system to be integrated into the professional ITenvironment of future users and service providers;

- stimulation of increased electronic commerce in the electronics industry, including developing means for rewarding usage (bonus component') and for quantitatively determining the costefficiency gained through implementation of the project.

2. The work schedule

8. According to Article 2.2.1 of the contract, the time-limit for execution of the project was to be 18 months, as from 1 May 1998, that is to say the end of October 1999.

9. According to Title 2, point 2.2 of Part 2 of Annex I to the contract, the work was divided into eight workpackages, which were to give rise to a total of 29 deliverables. The first package encompassed the following deliverables:

Workpackage 1: Specification of relevant business procedures

Task 1.1 Commercial processes at user site (Months 0-2)

Components procurement processes

Excess inventory control and handling

QA processes (ISO 9000 etc.)

Alternate sourcing

Established payment methods

New payment methods

Task 1.2 Software interfaces/Standards (Months 0-2)

Interfaces to commercial software employed by industrial users

Software interfaces: Banks

Software interfaces: Carriers

Definition of SAP-specific parameters

Task 1.3 Evaluation of IT environment (Months 0-2)

PC, Workstation, LANs

Operating systems PC and networks

Internet access, Intranets'.

10. Tables defining the specific roles of the contractors for completion of the various workpackages also appear in Title 2, point 2.2 of Part 2 of Annex I to the contract.

11. Workpackage number 1 is broken down as follows, as indicated in the table on pages 40 and 41 of Annex I to the contract:

>lt>2

>lt>3

3. Monitoring by the Commission

12. Article 8 of Annex II to the contract provided that the Commission could be assisted by experts in managing the contract. In any such case, it was incumbent on the Commission to take the appropriate steps to ensure that those experts did not disclose or use confidential data given to them. Detailed information concerning those experts was to be given in advance to the contractors and the Commission was to take reasonable account of any objections raised by the contractors for legitimate business reasons.

4. The financial provisions

13. According to Article 3 of the contract, the total allowable costs were estimated as ECU 1 080 000 for the project. The same article provided that the Commission's contribution was to cover 50% of those costs, subject to the ceiling of ECU 540 000. The cost basis to be used was given in Annex I to the contract and Articles 18 to 20 of Annex II to the contract contain specific criteria to be applied for the calculation of allowable costs.

14. In Form 1 on page 6 of Annex I to the contract, the division among the defendants of the total allowable amount was set out as follows:

- Inter team: ECU 153 500;

- [Ision]: ECU 70 000;

- Euram: ECU 40 000;

- [Nordbank]: ECU 10 000;

- [AMI Semiconductor]: ECU 97 000;

- Intracom: ECU 68 000;

- A-Consult: ECU 101 500.

15. Form 5.3 on pages 56 and 57 of Annex I to the contract specifies the efforts, in person-months, to be provided by each contractor for the completion of each workpackage.

16. According to Article 4 of the contract, payment of the Commission's contribution was to be made as follows:

- an advance of ECU 270 000 within two months after the last signature of the contracting parties;

- by instalments to be paid within two months after the approval of the respective periodic progress reports and corresponding cost statements; the advance and instalments were not cumulatively to exceed ECU 486 000;

- the balance of its total contribution to (a guarantee retention of ECU 54 000) within two months after the approval of the last report, document or other project deliverables and the cost statement for the final period.

17. Article 23.2 of Annex II to the contract provided that all payments made by the Commission were to be treated as advances until acceptance of the appropriate deliverables, or if none were specified, until acceptance of the final report.

5. Reimbursements

18. Under Article 23.3 of Annex II to the contract the contractors undertook, in the event of the total financial contribution to the project payable by the Commission being less than the total amount of the payments made by the Commission, to reimburse the difference to it immediately.

19. Article 5.3(a)(i) of Annex II provided that the Commission was entitled to terminate the contract immediately by written notice where remedial action to rectify non-performance within a reasonable period of time (being not less than one month) specified in writing had been requested by the Commission and was not satisfactorily taken.

20. Article 5.4 of Annex II to the contract provided that, in the event of termination, the Community contribution to costs would relate only to costs in respect of project deliverables accepted by the Commission and such other costs as were fair and reasonable, including expenditure commitments.

21. According to the same paragraph, in the event of termination under Article 5.3(a) of Annex II to the contract, interest could be added to any amount to be reimbursed, upon written request, at a rate two percentage points above the rate applied by the European Monetary Institute for ECU operations for the period between receipt of the funds and their reimbursement.

6. The arbitration clause

22. Article 7 of Annex II to the contract contains an arbitration clause worded as follows:

The Court of First Instance of the European Communities, and in the case of appeal, the Court of Justice of the European Communities shall have exclusive jurisdiction in any dispute between the Commission and the contractors concerning the validity, application and interpretation of this contract.'

B - Performance of the contract

23. Execution of the project commenced in May 1998.

24. On 15 December 1998, the contractors sent the Commission a report covering a period of six months and describing the objectives attained. In that report, they declared that they had fully provided the various deliverables included in workpackages 1, 2 and 3.

25. To enable it to verify the results set out in the contractors' reports, the Commission proposed establishing a review team. Having received information concerning the experts proposed by the Commission and in particular their curricula vitae, InterTeam, by e-mail of 8 April 1999, agreed to the appointment of two candidates, Messrs Guida and Ouzounis.

26. At a meeting of the contractors and the Commission on 11 June 1999, the review team delivered its first review report, in which it mentioned serious deficiencies in the execution of the project. On the basis of those findings, the team announced suspension of the project until 1 July 1999 and invited the defendants to send it all necessary information showing that they had remedied the defects set out in the review report.

27. In a letter dated 18 June 1999, the Commission summarised the decisions taken at the meeting of 11 June 1999. On that occasion it also set, under Article 5.3(a)(i) of Annex II to the contract, an additional time-limit for the defendants and threatened to terminate the contract. By letters of 29 June and 14 July 1999, the Commission again complained about the defendants' execution of their contractual obligations and gave them a formal notice to remedy the non-performance of works and the defects discovered, and to do so within a period of one month.

28. At the beginning of July 1999, the defendants submitted to the Commission a report covering a period of 12 months, describing the objectives attained. According to that report, they had executed the project in accordance with the contract.

29. On 5 July 1999, the review team submitted a second review report which took account of the information contained in the 12-month progress report and the other documents provided by the contractors. That report contained fundamental criticisms of all the deliverables. Some of them, although described as poor, were nevertheless accepted.

30. Notwithstanding a complete re-presentation of the objectives attained by the defendants at a meeting held on 8 September 1999, the review team did not change its conclusion.

31. By letter of 21 December 1999 to InterTeam, the Commission declared the contract terminated with retroactive effect to 8 September 1999.

C - The payments made by the Commission and the claim for reimbursement

32. As a result of the entry into force of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro and the effect of Article 2(1) thereof, all references to ECU were replaced by references to euros at the rate of one euro per ECU.

33. In accordance with the provisions of the contract, the Commission paid the following sums to the defendants:

- EUR 270 000 on 8 June 1998;

- EUR 191 394 on 6 May 1999 for the period from 1 May to 31 October 1998.

The total amount advanced was thus EUR 461 394.

34. On 21 December 1999 the Commission sent the defendants a letter claiming reimbursement of EUR 317 214, representing the difference between the EUR 461 394 actually paid and the sum of EUR 1 44 180 which, according to its calculation, was the contribution payable by it.

35. A table in the application shows how, according to the Commission, those amounts, in euro, are apportioned among the defendants:

>lt>4

A = maximum assistance according to the contract, B = amount actually paid, C = assistance approved, D = amount to be repaid (B - C)

D - The winding up of three of the defendants

1. InterTeam

36. On 22 December 1999, a general meeting of InterTeam resolved that the company was to be wound up. On 17 July 2001, InterTeam filed its balance sheet as at 31 December 1999, which it described as corresponding to its balance sheet on liquidation. The balance sheet showed a deficit of DEM 695 605.33 (EUR 355 657.35) which was not covered by the company's own funds. On 8 November 2001 InterTeam was removed from the commercial register.

2. A-Consult

37. On 10 July 2002, a procedure for putting A-Consult into court-supervised receivership was commenced and the present administrator of the insolvent company, E. Roehlich, was appointed by the court as its administrator.

38. A-Consult withdrew its application to be put into court-supervised receivership so that, under Austrian insolvency law, that procedure was brought to an end and the insolvency procedure following court-supervised receivership' (Anschlußkonkursverfahren) was commenced on 25 July 2002.

3. Ision

39. On 19 July 2002, insolvency proceedings concerning Ision's assets were commenced and the court appointed H. Fialski as administrator of that company.

II - The jurisdiction of the Court of Justice

A - Legal framework

40. Article 238 EC provides:

The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law.'

41. Article 225(1) EC, in the version resulting from the Treaty of Nice, reads as follows:

The Court of First Instance shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 230, 232, 235, 236 and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. The Statute may provide for the Court of First Instance to have jurisdiction for other classes of action or proceeding.

Decisions given by the Court of First Instance under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.'

42. Article 51 of the Statute of the Court of Justice, as in force until 31 May 2004, before the entry into force of Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, page 5), provided:

By way of exception to the rule laid down in Article 225(1) of the EC Treaty ..., the Court of Justice shall have jurisdiction in actions brought by the Member States, the institutions of the Communities and the European Central Bank.'

B - The applicability of the arbitration clause

43. The arbitration clause in Article 7 of Annex II to the contract, the wording of which is reproduced in paragraph 22 of this judgment, purports to grant exclusive jurisdiction to the Court of First Instance of the European Communities for any dispute which might arise in relation to the contract.

44. However, it is common ground that the division of jurisdiction between the Court of First

Instance and the Court of Justice, under the EC Treaty and the Statute of the Court of Justice annexed thereto, did not, when the application was lodged, provide for the Court of First Instance to hear actions brought, as in this case, by a Community institution.

45. For that reason, after initially being lodged with the Court of First Instance, the application was forwarded, pursuant to Article 54 of the Statute of the Court of Justice, to the Registry of that Court.

46. Although the jurisdiction of the Court of Justice is not contested by the parties, the applicability of the arbitration clause must, as the Advocate General correctly observed in point 53 of her Opinion, be examined by the Court of Justice of its own motion.

47. In principle, therefore, the question arises whether the designation of the Court of First Instance in an arbitration clause may entail the result that the Court of Justice has jurisdiction under Article 238 EC, which grants jurisdiction specifically to the Court of Justice'.

48. The answer is necessarily affirmative, for the reasons given below.

49. As the Advocate General observed in point 59 of her Opinion, the term Court of Justice', as used in the Treaty, does not refer to one Community court or the other but to the Community institution comprising both the Court of Justice and the Court of First Instance. Consequently, the reference to the Court of Justice' in Article 238 EC must be taken to be a reference to that institution, and it is to the latter that a contract must refer in order for it to be possible for jurisdiction to be conferred on either of the Community courts.

50. The Treaty does not lay down any particular wording to be used in an arbitration clause. Accordingly, any wording which indicates that the parties intend to remove any dispute between them from the purview of the national courts and to submit them to the Community courts must be regarded as sufficient to give the latter jurisdiction under Article 238 EC.

51. Designation of the Court of First Instance clearly satisfies that requirement without it being necessary to interpret the clause in question in the light of the law applicable to the contract.

52. The fact that the parties incorrectly sought to determine the specific court within the institution of the Court of Justice' which was to deal with their disputes and that the arbitration clause is consequently partly ineffective does not detract from the clearly expressed intention of the parties to keep any disputes between them out of the national courts and to submit them to the Community courts.

53. The Court of Justice therefore has jurisdiction to adjudicate in the proceedings brought by the Commission and on the counterclaim brought by Intracom.

III - The admissibility of the action in so far as it is directed against the three defendants that are being, or have been, wound up

54. Three of the defendants, namely InterTeam, A-Consult and Ision, object that the action is inadmissible as far as they are concerned, primarily because, when the action was brought, they were involved, at various stages, in insolvency proceedings.

A - Legal background

1. Community law

55. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), which was adopted on the basis of Article 61(c) EC and Article 67(1) EC, includes the following recitals in its preamble:

(2) The proper functioning of the internal market requires that crossborder insolvency proceedings

should operate efficiently and effectively and this regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(3) The activities of undertakings have more and more crossborder effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).

...

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having crossborder effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.'

56. The same regulation contains the following provisions:

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

...

Article 4

Law applicable

1. Save as otherwise provided in this regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the State of the opening of proceedings.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

...

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with

the exception of lawsuits pending;

...

Article 16

Principle [of the recognition of insolvency proceedings]

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State....

Article 17

Effects of recognition

1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under [the] law of the State of the opening of proceedings, unless this regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects visàvis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

...

Article 40

Duty to inform creditors

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.

2. That information, provided by an individual notice, shall in particular include time-limits, the penalties laid down in regard to those time-limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.'

2. National law

57. Under German law, the opening of insolvency proceedings against a company has, in particular, the following consequences:

- pursuant to Paragraph 80 of the Insolvenzordnung (German Insolvency Code of 5 October 1999, BGBl. I, p. 2866, in the version applicable to these proceedings, hereinafter the InsO'), control of the assets of the company is vested in the administrator. As a result the administrator has the right to commence and defend legal actions, which implies that any notice of proceedings against the company must be served on the administrator and not on the company;

- pursuant to paragraph 87 of the InsO, creditors may enforce their claims against the company only if they comply with the provisions governing insolvency procedure. Consequently, the provisions of Paragraph 174 et seq. of the InsO displace the normal remedies governed by the rules of civil procedure and actions brought directly against the company or the administrator are inadmissible.

58. Under Austrian law, Paragraph 6(1) of the Konkursordnung (Austrian Insolvency Code, RGBl. No 337/1914, in the version applicable to these proceedings, hereinafter the KO'), actions to enforce claims against assets forming part of the insolvency estate cannot be brought or continued once insolvency proceedings have been commenced.

B - The admissibility of the action in so far as it is directed against InterTeam

59. According to AMI Semiconductor, Euram and InterTeam, the action is inadmissible to the extent to which it relates to InterTeam because the latter was removed from the commercial register on 8 November 2001, that is to say nine months before the Commission lodged its application, and consequently InterTeam had lost its legal capacity by that date.

60. As the Advocate General states in point 67 of her Opinion, an action against a company is inadmissible if, when the action is brought, that company had neither legal capacity nor standing to be a party to legal proceedings. The applicable law in that connection is that governing the incorporation of the company in question, which in this case is German law (see Case 81/87 Daily Mail and General Trust [1988] ECR 5483, paragraph 19, and Case C-208/00 Überseering [2002] ECR I-9919, paragraph 81).

61. It is common ground that under German law a limited liability company (GmbH'), such as InterTeam, loses its capacity to be a party to legal proceedings as a result of being dissolved, which necessarily involves its removal from the commercial register following a finding that it has no assets. De-registration thus creates a presumption that there are no assets.

62. Whilst in principle that presumption could be rebutted, with the result that the de-registered company might recover its capacity to be a party to legal proceedings, the simple fact of affirming that a de-registered company still has assets is not, contrary to the Commission's contention, sufficient for that purpose. The Commission should have set out the factual support for its allegation, by indicating, for example, the assets which, in its opinion, still exist, and stating at least the approximate value and legal basis thereof and, if appropriate, identifying the debtor from which they are due.

63. In the absence of such information, the action must be declared inadmissible in so far as it is directed against InterTeam.

C - The admissibility of the action in so far as it is directed against A-Consult and Ision

64. When the action was brought, insolvency proceedings had been commenced against those two companies under their respective national laws.

65. It is common ground that, under the relevant national provisions, namely Paragraph 6 of the KO in the case of A-Consult and Paragraph 87 of the InsO in the case of Ision, an action of the kind brought by the Commission would in such circumstances have been held to be inadmissible if brought against those companies before national courts.

66. Article 238 EC, in conjunction with the arbitration clause, in principle confers on the Court of Justice jurisdiction to deal with disputes between the parties.

67. Nevertheless, the question has arisen of how that jurisdiction is to be exercised vis-à-vis a party against which insolvency proceedings have been instituted. That question must be examined in the light of the procedural law applicable in the Court of Justice.

68. Given that neither the Statute of the Court of Justice nor its Rules of Procedure contain any specific provisions concerning the treatment of applications brought against parties against which insolvency proceedings have been commenced, it is necessary to deduce what rules are applicable from the principles common to the procedural laws of the Member States in this area.

69. In that connection, it appears that in the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible. Moreover, the Member States are required, on a mutual basis, to respect proceedings commenced in any one of them. That is clear from Article 4(2)(f) of Regulation No 1346/2000 according to which the law governing the effects of insolvency proceedings brought by individual creditors is that of the State in which they were opened, which in this case means Austrian law and German law. Furthermore, by virtue of Articles 16 and 17 of the same regulation, the opening of insolvency proceedings in a Member State is to be recognised in all the other Member States and is to produce the effects attributed thereto by the law of the State in which the proceedings are opened.

70. As the Advocate General observed in points 84 and 85 of her Opinion, the aim of Regulation No 1346/2000 is, as is clear in particular from recitals 2, 3, 4 and 8 in its preamble, to ensure the efficiency and proper coordination of insolvency proceedings within the European Union and thus to ensure equal distribution of available assets amongst all the creditors. The Community institutions would enjoy an unjustifiable advantage over the other creditors if they were allowed to pursue their claims in proceedings brought before the Community judicature when any action before national courts was impossible.

71. The Commission is also wrong to invoke Article 40 of Regulation No 1346/2000 by referring to the period of two-and-a-half months which had elapsed between the opening of the insolvency proceedings, on 10 July 2002, and the giving of notice thereof on 23 September 2002, in order to oppose the application of that regulation to this case. First, pursuant to Article 17(1) of that regulation, the opening of insolvency proceedings takes effect in the other Member States without the need for any notice to be given under Article 40 of that regulation. Second, even if the notice given to the Commission might be regarded as belated, Regulation No 1346/2000 does not provide for such belatedness to have any repercussions on recognition of the proceedings in other Member States, subject to possible entitlement to compensation for harm caused by late notification.

72. In view of the foregoing, the Commission's action, as set out in its application, must be declared inadmissible in so far as it is directed against A-Consult and Ision.

D - The additional claims made by the Commission

73. At the hearing, the Commission sought, in the alternative, to make additional claims, to the effect that, in so far as it is directed against A-Consult and Ision, its action should be regarded as seeking a declaration proving the debts payable to it for the purpose of pursuing them in national insolvency proceedings.

74. Those additional claims are manifestly inadmissible.

75. In the first place, they infringe the requirements of Article 38 of the Rules of Procedure.

According to that article, parties are required to state the subject-matter of the proceedings in their originating application. Even though Article 42 of the Rules of Procedure allows new pleas in law to be introduced in certain circumstances, a party may not alter the actual subject-matter of the action in the course of the proceedings (see Case 232/78 Commission v France [1979] ECR 2729, paragraph 3, and Case 125/78 GEMA v Commission [1979] ECR 3173, paragraph 26). New claims put forward for the first time at the hearing could not be allowed without depriving defendants of an opportunity to prepare a response and thereby breaching the rights of the defence.

76. Second, the relief sought falls outside the authority conferred on the Court of Justice by the arbitration clause in this case, which limits its jurisdiction to any dispute between the Commission and the contractors', and an application seeking a finding which is to be relied on in insolvency proceedings implies the involvement of other parties, namely the other creditors of the insolvent undertaking. In that connection, it should be emphasised that the Commission has not taken any steps with a view to involving those parties in the present proceedings.

77. Finally, the considerations set out in paragraphs 68 to 70 of this judgment are also applicable to the Commission's additional claims, and the latter must be declared inadmissible for that reason.

78. Consequently, the further forms of order sought by the Commission must also be rejected as inadmissible.

IV - The merits of the application in so far as it is directed against AMI Semiconductor, Intracom, Euram and Nordbank

79. The Commission's claims against the defendants have two legal bases. First, the Commission relies on its contractual right to reimbursement under Article 23.3 of Annex II to the contract. Second, it alleges unjust enrichment of the defendants within the meaning of paragraph 812 of the Bürgerliches Gesetzbuch (German Civil Code, the BGB'); according to that provision any person who without legal cause obtains anything to the detriment of a third party because of something done by that third party, or in any other way, is obliged to make restitution'.

A - The right to reimbursement based on Article 23.3 of Annex II to the contract

80. Article 23.3 of Annex II to the contract provides that if the payments made for the project exceed the total financial contribution due from the Commission, the contractors are required immediately to reimburse the difference between the payments and that contribution.

81. As far as the application of the provision to this case is concerned, two questions in particular have arisen. It is necessary first to determine whether the reimbursement obligation under that provision is joint and several or whether, on the contrary, a reimbursement may be sought only from those contractors who actually received funds from the Commission. Second, the calculation of the total financial contribution due from the Commission must be examined.

1. Joint and several liability

82. The expression contractors' is defined on the second page of the contract as referring collectively to the seven defendants who entered into the contract with the Commission. Nevertheless, the precise implications of the use of that expression in Article 23.3 of Annex II to the contract have been the subject of heated debate between the parties.

83. According to the Commission, the use of that expression shows that the reimbursement obligation laid down by that provision attaches to all the contractors and not only to those who received the advances at issue. The Commission is therefore entitled, in its view, to pursue each of the contractors for the total sum of the advances.

84. The defendants, on the contrary, contend that joint and several liability cannot be inferred

merely from the use of the expression the contractors' and that if such liability was what the parties had intended, it should have been made clearer. They also observe that the obligation imposed by Article 23.3 of Annex II to the contract is, according to the express terms of that provision, an obligation of reimbursement' which, by definition, presupposes that the amount of which reimbursement is sought has previously been received by the party from whom it is claimed.

85. Article 23.3 is not in itself sufficiently clear in that connection and must therefore be interpreted in the context of the other contractual provisions, notably Article 1 of the contract.

86. Article 1.1 at first sight imposes an obligation jointly and severally' on the parties to perform the contract for the work set out in Annex I'. That obligation, which in any event applies, according to the wording of the provision, only to performance of the work but not to the reimbursement of advances, is then strictly limited by Article 1.2.

87. Thus, the second sentence of Article 1.2 of the contract negates any joint and several liability for reimbursement of advances by providing that a contractor is not to be liable... to reimburse money due from a defaulting contractor unless it has contributed to the default'.

88. It follows from the above analysis that Article 23.3 of Annex II to the contract, interpreted in the light of Article 1.2 of the contract, requires a contractor to reimburse only advances which it has actually received, unless it is shown that the same contractor contributed to a default so as to confer on the Commission entitlement to reimbursement of an advance paid to another contractor. The burden of proving a contractor's contribution to such a default necessarily falls on the Commission as the claimant alleging that default.

89. The Commission has not shown that AMI Semiconductor, Intracom, Euram or Nordbank contributed in any way to a specific default by another contractor so as to entitle the Commission to reimbursement of an advance received by that other contractor. As the Advocate General observed in point 145 of her Opinion, allegations of a general nature that the defendants did not co-operate sufficiently or did not satisfy their obligations to provide the Commission with information are inadequate in that regard, even if they are partially based on the review reports.

90. It must therefore be accepted that none of the defendants can be required to reimburse under Article 23.3 of Annex II to the contract any greater sum than it itself received.

2. Calculation of the financial contribution due from the Commission

91. Article 23.3 of Annex II to the contract makes the right to reimbursement subject to the condition that the total financial contribution payable by the Commission in respect of the project is less than the sum of the advances already paid. In those circumstances, each of the defendants would be required to repay the difference between the advances received by it and the defrayal of the costs claimable by it.

92. In its application, the Commission gave a breakdown, in a table reproduced in paragraph 35 of this judgment, of the amounts which each of the defendants should, in its opinion, repay individually in the event of joint and several liability not being applicable. Those amounts were calculated by subtracting from the amount actually received by each contractor from the Commission the amounts relating to deliverables accepted by the Commission in so far as the contractor in question was considered to have contributed to them on the basis of the allocation of the work set out in Annex I to the contract.

93. Given that the Commission recognises that Nordbank was not the recipient of any payment and that Intracom received an amount less than that due to it, the Commission cannot claim any reimbursement from those two defendants.

94. It is common ground that AMI Semiconductor received in all the sum of EUR 26 743 and that

the Commission accepted deliverables up to a value of EUR 26 214.55. Consequently, the maximum amount that that company should repay is EUR 528.45. It is also common ground that Euram received the sum of EUR 21 606 and that none of the deliverables to which it contributed was accepted.

95. As regards the claims directed against those two defendants, the Commission is not entitled to refuse to approve deliverables or cost statements without giving a detailed explanation of how the work was deficient. Contrary to the Commission's contention, the specific nature of the contract, deriving from the fact that it is a contract for the payment of grants for which the Commission receives no consideration as such, does not mean that the Commission enjoys a discretion as to whether or not to accept the deliverables. As the Advocate General correctly observed in points 167 to 171 of her Opinion, for such wide unilateral powers of decision to have been conferred on the Commission, the contract would have had to contain clauses to that effect.

96. It is therefore necessary to consider whether the Commission's refusal to accept work done by AMI Semiconductor and Euram is justified. As the Advocate General observed in point 161 of her Opinion, the dispute is concerned essentially with deliverables 1.1 (Complete set of user-defined system functions and design specifications'), 1.2 (Complete set of design specifications for future software interfaces to integrate with the commercial software environment of these organisations') and 1.3 (Full description of future business partners' IT environment'), those three being the only rejected deliverables to which AMI Semiconductor and Euram had contributed.

97. The Commission based its rejection of those deliverables solely on the reports in which the review team recommended rejection. As regards the evidential force of those reports, the Commission's argument that they are binding on the defendants must be rejected at the outset. Although the defendants approved the choice of the two candidates proposed by the Commission, neither Article 8 of Annex II to the contract nor any other clause of the contract nor anything in the communications between them shows that the parties to the contract were to be bound by the reports drawn up by that team. Moreover, such binding force would manifestly run counter to the position taken on this point by the Commission which, at the hearing, contended that it could itself disregard those reports if it so wished.

98. In its second review report, the review team recommended that the deliverables at issue be rejected. Deliverable 1.1 was described as being largely incomplete and superficial. Deliverables 1.2 and 1.3 were judged to be non-existent on the ground that the documents provided to the team purported, according to their title, only to be summaries' and not complete documents.

99. There are certain unexplained contradictions in those reports. For example, with respect to deliverable 1.1, the review team criticises the fact that undertakings in the financial sector or the logistics sector, although represented in the consortium set up by the defendants, did not contribute to the execution of that deliverable. However, it is clear from Annex I to the contract that the participation of Nordbank or of Euram in that deliverable was not provided for by the contract. Clearly, the review team did not, in that respect, apply the contractual criteria in assessing the compliance of the work done, but wrongly applied its own criteria.

100. As regards deliverable 1.3, at the hearing the Commission observed that the presentation thereof by the defendants took up only one page, which was not compatible with the effort required in the contract for that deliverable. In fact, it is appropriate to point out that at first sight there is a surprising divergence between the four-and-a-half manmonths' envisaged on page 57 of Annex I to the contract for that deliverable and the brevity of the report submitted. Nevertheless, the fact that a report is brief does not necessarily imply that it lacks quality or does not comply with the contractual stipulations, the only relevant criteria in this case. If the Commission entertained doubts as to the amount of the costs invoiced for a deliverable, it should have contested the cost statements by reference to the criteria laid down in Articles 18 to 20 of Annex II to the contract

instead of rejecting the deliverable.

101. For rejection of a deliverable to be justifiable, the Commission must specifically identify the aspects of the deliverable which it wishes to criticise, giving the reasons for which, in its view, the deliverable failed to conform with the contractual stipulations. In this case, neither the review reports nor the Commission's application are sufficiently explicit in that regard.

102. Consequently, the Commission's pleas in law claiming a right of reimbursement under Article 23.3 of Annex II to the contract must be rejected. Therefore, the claim for interest based on Article 5.4 of the same annex must also be rejected.

B - The right to reimbursement based on Paragraph 812 of the BGB

103. As the Advocate General rightly observed in point 185 of her Opinion, a claim that amounts paid but not due should be reimbursed because they amount to unjust enrichment as provided for in Paragraph 812 of the BGB must be rejected for the same reasons as the claim for reimbursement based on the contract. In the absence of proof that the payments received exceeded the amounts due to the contractors, the Commission has not established the existence of any unjust enrichment.

104. The Commission's claim must therefore be dismissed in its entirety.

V - Intracom's counterclaim

105. By its counterclaim, Intracom seeks payment, from the Commission, of EUR 6 022. That amount represents the difference between the advance of EUR 10 362 actually paid by InterTeam to Intracom and the portion of the costs relating to the approved deliverables borne by Intracom which, according to the Commission's calculation, amounts to EUR 16 384.09.

106. Apart from alleging that the Commission obtained unjust enrichment', Intracom has not indicated the legal basis of its claim.

107. It is common ground that the Commission had, by its payments to InterTeam, transferred sufficient funds to the defendants to cover the payment of EUR 6 022 for Intracom. By the time the contract had come to an end, a sum of EUR 300 934 had been paid to InterTeam but that sum had not been passed on by the latter to the other defendants. Given that InterTeam could, according to the figures in the form on page 6 of Annex I to the contract, have been entitled in its own right t to payments of a maximum amount of EUR 153 500 under the contract, InterTeam was holding a sum of at least EUR 147 434 on behalf of the other contractors.

108. In those circumstances, the Commission did not obtain any unjust enrichment. Consequently, Intracom's counterclaim must be rejected.

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PROCEDU	Arbitration clause - application inadmissible;COMP=RF
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Judgment of the Court (Third Chamber)
of 8 May 2008
Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin.
Reference for a preliminary ruling: Bundesgerichtshof - Germany. Judicial cooperation in civil matters - Regulation (EC) No 1348/2000 - Service of judicial and extrajudicial documents - Annexes to the document not translated - Consequences. Case C-14/07.

In Case C14/07,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Bundesgerichtshof (Germany), made by decision of 21 December 2006, received at the Court on 22 January 2007, in the proceedings

Ingenieurbüro Michael Weiss und Partner GbR

v

Industrie- und Handelskammer Berlin,

joined party:

Nicholas Grimshaw & Partners Ltd,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, U. Lohmus, J. Kluka, P. Lindh and A. Arabadjiev, Judges,

Advocate General: V. Trstenjak,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 October 2007,

after considering the observations submitted on behalf of:

- Ingenieurbüro Michael Weiss und Partner GbR, by N. Tretter, Rechtsanwalt,

- Industrie- und Handelskammer Berlin, by H. Raeschke-Kessler, Rechtsanwalt,

- Nicholas Grimshaw & Partners Ltd, by P.-A. Brand and U. Karpenstein, Rechtsanwälte,

- the Czech Government, by T. Boek, acting as Agent,

- the French Government, by G. de Bergues and A.-L. During, acting as Agents,

- the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,

- the Slovak Government , by J. orba, acting as Agent,

- the Commission of the European Communities, by W. Bogensberger, and subsequently by A.-M. Rouchaud-Joet and S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 November 2007,

gives the following

Judgment

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters is to be interpreted

as meaning that the addressee of a document instituting the proceedings which is to be served does not have the right to refuse to accept that document, provided that it enables the addressee to assert his rights in legal proceedings in the Member State of transmission, where annexes are attached to that document consisting of documentary evidence which is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, but which has a purely evidential function and is not necessary for understanding the subjectmatter of the claim and the cause of action.

It is for the national court to determine whether the content of the document instituting the proceedings is sufficient to enable the defendant to assert his rights or whether it is necessary for the party instituting the proceedings to remedy the fact that a necessary annex has not been translated.

2. Article 8(1)(b) of Regulation No 1348/2000 is to be interpreted as meaning that the fact that the addressee of a document served has agreed in a contract concluded with the applicant in the course of his business that correspondence is to be conducted in the language of the Member State of transmission does not give rise to a presumption of knowledge of that language, but is evidence which the court may take into account in determining whether that addressee understands the language of the Member State of transmission.

3. Article 8(1) of Regulation No 1348/2000 is to be interpreted as meaning that the addressee of a document served may not in any event rely on that provision in order to refuse acceptance of annexes to the document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands where the addressee concluded a contract in the course of his business in which he agreed that correspondence was to be conducted in the language of the Member State of transmission and the annexes concern that correspondence and are written in the agreed language.

1. This reference for a preliminary ruling concerns the interpretation of Article 8 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37).

2. The reference has been made in the context of proceedings between Industrie- und Handelskammer Berlin (IHK Berlin') and the firm of architects Nicholas Grimshaw & Partners (Grimshaw'), a company governed by English law, concerning an action for damages for defective design of a building, the latter company joining Ingenieurbüro Michael Weiss und Partner GbR (Weiss'), established in Aachen, to the proceedings.

Legal context

Community and international law

3. Recitals 8 and 10 in the preamble to Regulation No 1348/2000 are worded as follows:

(8) To secure the effectiveness of this Regulation, the possibility of refusing service of documents is confined to exceptional situations.

...

(10) For the protection of the addressee's interests, service should be effected in the official language or one of the official languages of the place where it is to be effected or in another language of the originating Member State which the addressee understands.'

4. Article 4(1) of that regulation provides as follows:

Judicial documents shall be transmitted directly and as soon as possible between the agencies designated on the basis of Article 2.'

5. Article 5 of the regulation, entitled Translation of documents', provides as follows:

1. The applicant shall be advised by the transmitting agency to which he or she forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8.

2. The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs.'

6. Article 8 of Regulation No 1348/2000, entitled Refusal to accept a document', provides as follows:

1. The receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than either of the following languages:

(a) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected; or

(b) a language of the Member State of transmission which the addressee understands.

2. Where the receiving agency is informed that the addressee refuses to accept the document in accordance with paragraph 1, it shall immediately inform the transmitting agency by means of the certificate provided for in Article 10 and return the request and the documents of which a translation is requested.'

7. Article 19(1) of the regulation provides as follows:

Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.'

8. The remaining paragraphs of Article 19 of Regulation No 1348/2000 are concerned with particular situations in which the defendant does not enter an appearance.

9. Article 26 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) is worded in the following manner:

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of... Regulation (EC) No 1348/2000... shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted

from one Member State to another pursuant to this Regulation.

4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.'

10. Moreover, Article 34(2) of Regulation No 44/2001 provides that a judgment given in one Member State is not to be recognised in another Member State where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

11. Provision was also made for such measures in the 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 version - 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) (the Brussels Convention').

12. Article 20 of that convention concerns the default procedure.

13. Article 27 of the convention provides as follows:

A judgment shall not be recognised:

...

2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence

...'

14. Article 5 of The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the 1965 Hague Convention'), provides as follows:

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either:

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

...

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed....'

15. The first paragraph of Article 15 of that convention provides as follows:

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present convention, and the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.'

16. Subparagraph (b) of the first paragraph of Article 20 of the 1965 Hague Convention states that the Contracting States are not to be prevented from entering an agreement to dispense with the language requirements of, inter alia, the third paragraph of Article 5.

National law

17. A document instituting proceedings is defined in Paragraph 253 of the Zivilprozessordnung (German Code of Civil Procedure). That provision is worded as follows:

(1) An action shall be commenced by the service of a written pleading (application).

(2) The application must include:

1. the name of the parties and of the court

2. a precise statement of subject-matter and the cause of action relied on as well as specific heads of claim.

(3) The application must also state, where the determination of the court having jurisdiction is at issue, the value of the subject-matter of the dispute, unless that consists of a fixed sum of money, and must state whether there are reasons for which judgment should not be given in the case by a single judge.

(4) Furthermore, the general provisions relating to preparatory documents shall also be applicable to the application.'

18. Article 131 of the Code of Civil Procedure is entitled Annexed documents'. It is worded as follows:

(1) The documents held by a party to which the preparatory pleading refers must be attached to that pleading in the form of the original or a copy.

(2) Where only individual passages of a document are concerned, it is sufficient to attach an extract containing the introduction to the document, the extract which is relevant to the case, the purpose, date and signature.

(3) If the other party is already familiar with those documents or if they are voluminous, it is sufficient to indicate precisely what those documents are and that they are available for consultation.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19. IHK Berlin is pursuing an action for damages against Grimshaw for defective design on the basis of an architect's contract. In the contract, Grimshaw undertook to draw up the plans for a construction project in Berlin.

20. Paragraph 3.2.6 of the architect's contract stipulates:

The services shall be provided in German. Correspondence between [IHK Berlin] and [Grimshaw] and the authorities and public institutions shall be in German.'

21. It is apparent from the documents before the court and was confirmed at the hearing that the contract is governed by German law (paragraph 10.4 of the contract) and that, in the event of a dispute, the courts having jurisdiction are the Berlin courts (paragraph 10.2 of the contract).

22. Grimshaw joined Weiss to the proceedings.

23. IHK Berlin's application, which forms part of the case-file submitted to the court, refers to the various items of evidence relied on in support of its submissions. That documentary evidence is annexed to the application in a file consisting of approximately 150 pages.

24. As stated by the Bundesgerichtshof, the content of those documents is partially reproduced in the application. The annexes include the architect's contract concluded between the parties, an addendum and the draft thereof, an extract of the contractual specifications, a large number of documents or extracts such as technical reports or statements of account, as well as several letters, including some from Grimshaw, relating to the correspondence with the companies entrusted with establishing and repairing the defects complained of in the main proceedings.

25. After Grimshaw had initially refused to accept the application on the ground that there was no English translation, an English translation of the application and the annexes in German, which were not translated, were delivered to it in London on 23 May 2003.

26. By written pleading of 13 June 2003, Grimshaw complained that service was defective because the annexes had not been translated into English. For that reason, relying on Article 8(1) of Regulation No 1348/2000, it refused to accept the application and submits that the application was not properly served. Grimshaw raises the objection that the application is time-barred.

27. The Landgericht Berlin held that the application was properly served on 23 May 2003. Grimshaw's appeal against that decision was dismissed by the Kammergericht Berlin. Weiss lodged an appeal on a point of law before the Bundesgerichtshof against the judgment on the appeal.

28. The Bundesgerichtshof states that, under the German Code of Procedure, an application which refers to annexes attached forms a whole with those annexes and that all the evidence relied on by the applicant which is necessary for the defendant's defence must be made available to him. It is not therefore appropriate to determine whether an application has been properly served without having regard to the service of the annexes, on the assumption that the essential information is already clear from the application and the right to be heard remains protected by virtue of the fact that the defendant can still adequately prepare his defence in the proceedings in so far as concerns the content of the annexes.

29. An exception to that principle is permissible if the defendant's need for information is not significantly prejudiced, for example, because an annex which was not attached to the application was sent at virtually the same time as the action was brought or because the defendant was already familiar with the documents before the proceedings were instituted.

30. The Bundesgerichtshof states that, in the present case, Grimshaw was not familiar with all the documents, in particular those establishing the defects and how to remedy them as well as those relating to costs. Such documents cannot be regarded as insignificant since the decision on whether to submit a defence may be dependent on their content being assessed.

31. The referring court is uncertain whether Grimshaw was correct to refuse the application. It states that none of the bodies authorised to represent that firm understands German.

32. According to the Bundesgerichtshof, Article 8(1) of Regulation No 1348/2000 can be interpreted

as meaning that service cannot be refused on the ground that annexes have not been translated.

33. That provision is in fact silent on the refusal to accept the service of annexes. Moreover, the standard form to be used pursuant to the first sentence of Article 4(3) of the regulation for requests for service in the Member States of the European Union requires information on the nature and language of the document only as regards the document to be served (Paragraphs 6.1 and 6.3) and not as regards the annexes attached to it, for which only the number is required to be stated (Paragraph 6.4).

34. Should it be possible to refuse service on the sole ground that the annexes have not been translated, the referring court states that, in its view, the right of the defendant to refuse to accept a document pursuant to Article 8(1)(b) of Regulation No 1348/2000 cannot be denied simply because the contract between the applicant and the defendant provides that correspondence is to be in German.

35. That clause does not mean that the defendant understands that language within the meaning of that regulation. However, as the referring court pointed out, academic opinion is divided, some writers considering that a clause specifying the use of a particular language in a contractual relationship may give rise to a presumption of knowledge of that language for the purpose of that regulation.

36. Finally, where knowledge of the language in question cannot be inferred from a contractual provision, the Bundesgerichtshof is uncertain whether it is possible in all cases to refuse service of an application where the annexes are not translated or whether there are exceptions, for example, if the defendant already has a translation of the annexes or if the content of the annex is reproduced word-for-word in the translated application.

37. That could also apply if the annexed documents were in a language which was validly chosen by the parties pursuant to a contract. The referring court also mentions the case of weaker parties who may need protection, such as cross-border consumers who have contractually agreed that correspondence is to be conducted in the language of the undertaking.

38. The Bundesgerichtshof states, however, that in the case in the main proceedings Grimshaw concluded the contract in the course of its business. It sees no special need to protect that firm or therefore any need to recognise that it has a right to refuse to accept service.

39. Against that background, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1. Must Article 8(1) of... Regulation (EC) No 1348/2000... be interpreted as meaning that an addressee does not have the right to refuse to accept service where only the annexes to a document to be served are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands?

2. If the answer to the first question is in the negative:

Must Article 8(1)(b) of Regulation No 1348/2000 be interpreted as meaning that the addressee is deemed to understand the language of a Member State of transmission within the meaning of that regulation where, in the course of his business, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission?

3. If the answer to the second question is in the negative:

Must Article 8(1) of Regulation No 1348/2000 be interpreted as meaning that the addressee may not in any event rely on that provision in order to refuse acceptance of annexes to a document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands if the addressee concludes a contract in the course of his business in which he agrees that correspondence is to be conducted in the language of the

Member State of transmission and the annexes concern that correspondence and are written in the agreed language?'

The questions

The first question

40. By its first question, the Bundesgerichtshof asks whether Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that the addressee of a document to be served does not have the right to refuse to accept service where only the annexes to the document are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands.

41. A preliminary point to be noted is that Regulation No 1348/2000 applies to documents to be served which can be very different in nature, depending on whether they are judicial or extrajudicial documents and, if the former, on whether it is a document instituting the proceedings, a judicial decision, an enforcement measure or any other document. The question referred to the Court concerns a document instituting proceedings.

42. Since the role and importance of annexes to a document to be served may vary according to the nature of the document, the reasoning and answers in this judgment must be confined to documents instituting proceedings.

43. It is apparent from the observations submitted to the Court that the number and nature of documents which must be annexed to a document instituting proceedings vary considerably according to the legal system concerned. Under some systems, such a document need only contain the subject-matter and a summary of the pleas of fact and law of the application, the documentary evidence being communicated separately, whereas under other legal systems, such as German law, the annexes must be produced at the same time as the application and form an integral part of it.

44. Article 8 of Regulation No 1348/2000 does not refer to annexes to a document to be served. However, the reference in paragraph 2 of that article to documents of which a translation is requested' indicates that a document to be served' may consist of a number of documents.

45. In the absence of useful guidance in the wording of Article 8 of Regulation No 1348/2000, that provision must be interpreted in the light of its objectives and its context and, more generally, the objectives and context of Regulation No 1348/2000 itself (see, to that effect, Case C287/98 Linster [2000] ECR I6917, paragraph 43).

46. As is apparent from recital 2 of the preamble, the objectives of Regulation No 1348/2000 are to improve and expedite the transmission of documents. Those objectives are reiterated in recitals 6 to 8. Recital 8 thus states that [t]o secure the effectiveness of this Regulation, the possibility of refusing service of documents is confined to exceptional situations'. In addition, Article 4(1) of that regulation provides that judicial documents are to be transmitted as soon as possible.

47. However, those objectives cannot be attained by undermining in any way the rights of the defence (see, by analogy, with regard to Regulation No 44/2001, Case C-283/05 ASML [2006] ECR I12041, paragraph 24). Those rights, which derive from the right to a fair hearing guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR'), constitute a fundamental right forming part of the general principles of law whose observance the Court ensures (see, inter alia, ASML , paragraph 26).

48. Every effort must therefore be made to reconcile the objectives of effectiveness and speed in the transmission of procedural documents, which are necessary for the sound administration of justice, with that of the protection of the rights of the defence, in particular in interpreting Article 8 of the Regulation No 1348/2000 and, specifically, the term document to be served', where

that is a document instituting proceedings, in order to be able to determine whether such a document must include annexes consisting of documentary evidence.

49. It is clear that the term document instituting the proceedings' in the context of Article 8(1) of Regulation No 1348/2000 cannot be interpreted in the light of the objectives of that regulation alone for the purpose of determining whether such a document can or must include annexes. Nor do those objectives make it possible to establish whether the translation of a document instituting the proceedings is a vital component of the defendant's rights of defence, which might clarify the scope of the translation obligation referred to in Article 8 of that regulation.

50. However, the interpretation of Regulation No 1348/2000 cannot be dissociated from the context of developments in the field of judicial cooperation in civil matters, which include that regulation, in particular Regulation No 44/2001, Article 26(3) and (4) of which expressly refers to Regulation No 1348/2000.

51. Various provisions require the court, before delivering a default judgment or recognising a judicial decision, to verify whether the means by which a document instituting proceedings was served were such that the rights of the defence have been respected (see, inter alia, with regard to default judgments, Article 19(1) of Regulation No 1348/2000, Article 26(2) of Regulation No 44/2001 and the second paragraph of Article 20 of the Brussels Convention and, with regard to the recognition of judgments, Article 34(2) of Regulation No 44/2001 and Article 27(2) of the Brussels Convention).

52. Before Regulation No 1348/2000 entered into force, cross-border service between the Member States was effected in accordance with the 1965 Hague Convention, to which Article 26(4) of Regulation No 44/2001 and the third paragraph of Article 20 of the Brussels Convention refer, or bilateral agreements concluded between Member States. However, The Hague Convention and the majority of those agreements do not lay down a general obligation to translate all the documents to be served, so that the national courts have considered that the rights of the defence are adequately protected if the addressee of a document served has had sufficient time to enable him to have it translated and prepare his defence.

53. Moreover, Regulation No 1348/2000 itself does not specify whether the right to refuse a document if it has not been translated also exists in the case of service by post effected in accordance with Article 14 of that regulation. In order to interpret that provision, it is necessary to examine the Explanatory Report on the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, drawn up by an act of the Council of the European Union dated 26 May 1997 (OJ 1997 C 261, p. 1, the 1997 Convention'; explanatory report, p. 26) on the basis of Article K.3 of the EU Treaty, on the text of which Regulation No 1348/2000 is based (see, to that effect, Case C443/03 Leffler [2005] ECR I9611, paragraph 47).

54. The commentary on Article 14(2) of the 1997 Convention concerning service by post states as follows:

This Article establishes the principle that service may be effected by post.

However, Member States may, in order to provide guarantees for persons residing in their territory, specify the conditions under which service may be effected in their regard by post. Such conditions might for instance include the use of registered post or the application of the Convention's rules on the translation of documents.'

55. Some Member States, rightly or wrongly, have interpreted Article 14(1) of Regulation No 1348/2000 as meaning that the document is not required to be translated if it is served by post and have considered it necessary to state, as permitted by Article 14(2) of that regulation, that they do not accept

service of judicial documents if they are not translated (see, in that regard, the Information communicated by Member States under Article 23 of Regulation No 1348/2000 (OJ 2001 C 151, p. 4) and the first update of the information communicated by Member States (OJ 2001 C 202, p. 10)).

56. It follows from the examination of the provisions of the 1965 Hague Convention, the Brussels Convention and the 1997 Convention, Regulation Nos 1348/2000 and 44/2001 and the information communicated by the Member States under Article 14(2) of Regulation No 1348/2000 that, in the areas covered by those provisions, neither the Community legislature nor the Member States consider it to be a necessary component of the exercise of the defendant's rights of defence that the applicant provide a translation of the document instituting the proceedings, since the defendant must simply be given sufficient time to enable him to have that document translated and to prepare his defence.

57. Such a choice on the part of the Community legislature and the Member States does not undermine the protection of fundamental rights, which is guaranteed by the ECHR. In fact, Article 6(3)(a) of that convention, which provides that everyone charged with a criminal offence has the minimum right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him, is applicable only in criminal matters. There is no provision in the ECHR requiring a document instituting proceedings in civil or commercial matters to be translated.

58. Consequently, if the Community legislature chose, by Article 8 of Regulation No 1348/2000, to permit the addressee of a document to refuse it if it is not translated into an official language of the Member State addressed or a language of the Member State of transmission which he understands, that is principally to establish in a consistent manner who is responsible for the translation of such a document and liable for the cost thereof at the stage when it is served.

59. Since the examination of international and Community law concerning the scope of the principle of the protection of the rights of the defence, and in particular the need for a translation of a document instituting proceedings, has enabled the purpose of Article 8 of Regulation No 1348/2000 to be clarified, it is in the light of that purpose that it is necessary to determine what is covered by the term document to be served' within the meaning of that article where the document is a document instituting proceedings and whether such a document can or must include annexes consisting of documentary evidence.

60. Regulation No 1348/2000 must be given an autonomous interpretation so that it may be applied in a uniform manner (Leffler , paragraphs 45 and 46). The same applies to Regulation No 44/2001 and, in particular, the term document instituting the proceedings' within the meaning of Articles 26 and 34(2) of that regulation, as well as the corresponding provisions of the Brussels Convention.

61. Ruling on the interpretation of Article 27(2) of the Brussels Convention concerning recognition of judgments, the Court defined the term document which instituted the proceedings or... equivalent document' within the meaning of that provision as meaning the document or documents which must be duly served on the defendant in due time in order to enable him to assert his rights before an enforceable judgment is given in the State of origin (see, to that effect, Case C474/93 Hengst Import [1995] ECR I2113, paragraph 19).

62. The Court thus held that in the case giving rise to the judgment in Hengst Import the document which instituted the proceedings was constituted by the combination of the order to pay (decreto ingiuntivo') issued by an Italian court in accordance with Article 641 of the Italian Code of Civil Procedure and the plaintiff's application. It is the joint service of both those documents which starts time running for the defendant to oppose the order. Moreover, the plaintiff cannot obtain an enforceable order before the expiry of that time-limit (Hengst Import , paragraph 20).

63. The Court stated that the decreto ingiuntivo ' is just a form which, to be comprehensible,

must be read with the application. Conversely, service of the application alone does not enable the defendant to decide whether to defend the action since, without the decreto ingiuntivo ', he does not know whether the court had granted or refused the application. Moreover, the requirement for joint service of the decreto ingiuntivo ' and the application was confirmed by Article 643 of the Italian Code of Civil Procedure, according to which it marked th e start of the proceedings (Hengst Import , paragraph 21).

64. It is apparent from that autonomous definition of the document instituting the proceedings, as interpreted by the Court, that such a document must consist of the document or documents, where they are intrinsically linked, enabling the defendant to understand the subjectmatter and grounds of the plaintiff's application and to be aware of the existence of legal proceedings in which he may assert his rights, either by defending a pending action or, as was the case in the matter giving rise to the judgment in Hengst Import , by challenging a judgment delivered on the basis of an ex parte application.

65. Moreover, as was pointed out at paragraph 43 above, under some national legal systems there is no requirement for the documentary evidence in a case to be annexed to what is defined as a document instituting the proceedings and they may be communicated separately. Such documents are not therefore regarded as intrinsically linked to the document instituting the proceedings, in that they are essential to enable the defendant to understand the claim brought against him and to be aware of the existence of the legal proceedings, but have a probative function which is distinct from the purpose of service itself.

66. It is appropriate to note that the conditions for recognition of judgments laid down in Regulation No 44/2001 have been relaxed by comparison with the conditions laid down in the Brussels Convention.

67. Article 34(2) of that regulation departed from the requirement in Article 27(2) of the Brussels Convention that the document instituting the proceedings be duly served, in order to place the emphasis on effective observance of the rights of the defence, which are considered to have been observed when the defendant is aware of the pending legal action and has been able to commence proceedings to challenge a judgment entered against him (see, to that effect, ASML , paragraphs 20 and 21).

68. That change in Regulation No 44/2201 by comparison with the Brussels Convention supports the interpretation of the term document to be served' - where that consists of a document instituting the proceedings - that such a document must include the essential information enabling a defendant to be aware primarily of the existence of legal proceedings but not of every item of documentary evidence which makes it possible to prove the various facts and points of law on which the application is based.

69. It follows from the above considerations that the term document to be served' in Article 8 of Regulation No 1348/2000, where such a document consists of a document instituting the proceedings, must be interpreted as meaning that documentary evidence which has a purely evidential function and is not intrinsically linked to the application in so far as it is not necessary for understanding the subjectmatter of the claim and the cause of action does not form an integral part of that document.

70. It is possible from an examination of the term document', as follows from the ECHR and, in particular, Article 6(3)(a) of that convention, referred to at paragraph 57 above, to reach a similar conclusion as regards criminal proceedings. According to the European Court of Human Rights, an indictment must enable the person charged to be informed not only of the cause of the accusation against him, that is the acts he is alleged to have committed and on which the accusation is based, but also of the detailed legal characterisation of those facts (see judgments of the European Court of Human Rights of 25 March 1999, Pélissier and Sassi v France, ECHR 1999II, º 51, and of 19 December 2006, Mattei v France, No 34043/02, º 34). On the other hand, the rights of the

defence are not undermined by the mere fact that the indictment does not include the evidence in support of the facts on which the accused stands charged.

71. Ruling in respect of Article 6(3)(e) of the ECHR, under which a person charged with a criminal offence has the right to an interpreter, the European Court of Human Rights has also held that that right does not go so far as to require a written translation of all items of written evidence or official documents in the procedure (judgment of 19 December 1989, Kamasinski v Austria , Series A, No 168, º 74).

72. As is apparent from the conclusion at paragraph 57 above, the requirements for the protection of the rights of the defence are not as stringent in civil and commercial matters as they are in criminal proceedings.

73. In the light of all the foregoing considerations, the term document to be served' in Article 8(1) of Regulation No 1348/2000, where such a document is a document instituting the proceedings, must be interpreted as meaning the document or documents which must be served on the defendant in due time in order to enable him to assert his rights in legal proceedings in the State of transmission. Such a document must make it possible to identify with a degree of certainty at the very least the subjectmatter of the claim and the cause of action as well as the summons to appear before the court or, depending on the nature of the pending proceedings, to be aware that it is possible to appeal. Documents which have a purely evidential function and are not necessary for the purpose of understanding the subject-matter of the claim and the cause of action do not form an integral part of the document instituting the proceedings within the meaning of Regulation No 1348/2000.

74. That interpretation is consistent with the objectives of Regulation No 1348/2000 to improve and expedite the transmission of documents. Indeed, it can take a long time to translate supporting documents and, in any event, such translation is not necessary for the purposes of the action which will take place before the court of the Member State of transmission and in the language of that State.

75. It is for the national court to determine whether the content of the document instituting the proceedings enables the defendant to assert his rights in the Member State of transmission and, in particular, to identify the subject-matter and the cause of action as well as to be aware of the existence of the legal proceedings.

76. If the national court considers that the content is inadequate in that regard on the ground that certain necessary information relating to the application is to be found in the annexes, it must endeavour to resolve that problem in accordance with its national procedural law, taking care to ensure the full effectiveness of Regulation No 1348/2000, in compliance with its objective (see, to that effect, Leffler , paragraph 69), while according maximum protection to the interests of both parties to the dispute.

77. The party issuing the document instituting the proceedings could thus be afforded the opportunity of remedying the lack of a translation of an essential annex by forwarding one as soon as possible in accordance with the rules laid down in Regulation No 1348/2000. The Court has held that the effect that sending a translation has on the date of service should be determined by analogy with the double-date system developed in Article 9(1) and (2) of Regulation No 1348/2000 (Leffler , paragraphs 65 to 67) in order to protect the parties' interests.

78. In the light of all the foregoing considerations, the answer to the first question must be that Article 8(1) of Regulation No 1348/2000 is to be interpreted as meaning that the addressee of a document instituting proceedings which is to be served does not have the right to refuse to accept that document, provided that it enables the addressee to assert his rights in legal proceedings in the Member State of transmission, where annexes are attached to that document consisting of

documentary evidence which is not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, but which has a purely evidential function and is not necessary for understanding the subjectmatter of the claim and the cause of action. It is for the national court to determine whether the content of the document instituting the proceedings is sufficient to enable the defendant to assert his rights or whether it is necessary for the party instituting the proceedings to remedy the fact that a necessary annex has not been translated.

The second question

79. By its second question, posed in the event that the answer to the first is that the addressee of a document may refuse to accept it if the annexes to that document are not translated, the Bundesgerichtshof asks whether Article 8(1)(b) of Regulation No 1348/2000 must be interpreted as meaning that the addressee of a document to be served is deemed to understand' the language of a Member State of transmission within the meaning of that regulation where, in the course of his business, he agreed in a contract with the applicant that correspondence was to be conducted in the language of the Member State of transmission. In view of the reservation formulated to the answer to the first question, it is necessary to answer the second question.

80. In order to establish whether the addressee of a document served understands the language of the Member State of transmission in which the document is written, the court must examine all the relevant evidence submitted by the applicant.

81. The parties which have submitted observations are divided on the question whether the addressee of a document should be deemed to understand the language of the Member State of transmission because he has signed a clause agreeing to the use of that language, as described by the referring court.

82. According to Grimshaw, it alone is in a position to say whether it understands the document served. IHK Berlin defends the opposite position, namely that signature of such a clause entails acceptance of that language as the language in which a judicial document is to be served, in the same way as a jurisdiction clause is valid between parties.

83. The other parties which submitted observations are of the view that, while knowledge of the language of the document for the purpose of Article 8(1)(b) of Regulation No 1348/2000 cannot be inferred from such a clause, it is an indication of knowledge of that language. Weiss and the Czech and Slovak Governments point out, inter alia, that the degree of knowledge of a language required for correspondence is not the same as that needed to defend an action.

84. Grimshaw's interpretation cannot be accepted, as that would mean that whether service was effective was dependent on whether the addressee of the document was willing to accept it.

85. Nor is it possible to accept IHK's interpretation. In order for Article 8(1)(b) of Regulation No 1348/2000 to be effective, the competent court must verify that the requirements of that provision are in fact met. The fact that a clause has been signed which provides that a particular language is to be used for correspondence and performance of the contract cannot give rise to a presumption of knowledge of the agreed language.

86. On the other hand, the signature of such a clause must be regarded as evidence of knowledge of the language of the document served. Greater weight will attach to that evidence where the clause refers not only to correspondence between the parties but also to correspondence with the authorities and public institutions. It may be supported by other evidence, such as the fact that correspondence was actually conducted by the addressee of the document in the language of the document served, or the presence in the original contract of clauses conferring jurisdiction on the courts of the Member State of transmission in the event of dispute or making the contract subject to the law

of that Member State.

87. As stated by Weiss and the Czech and Slovak Governments, the degree of knowledge of a language required for correspondence is not the same as that needed to defend an action. However, that is a matter of fact to be taken into account by the court in determining whether the addressee of a document served is capable of understanding the document so as to be able to assert his rights. It is necessary for the court, in accordance with the principle of equivalence, to take account of the extent to which an individual domiciled in the Member State of transmission would understand a judicial document written in the language of that State.

88. The answer to the second question must be that Article 8(1)(b) of Regulation No 1348/2000 is to be interpreted as meaning that the fact that the addressee of a document served has agreed in a contract concluded with the applicant in the course of his business that correspondence is to be conducted in the language of the Member State of transmission does not give rise to a presumption of knowledge of that language, but is evidence which the court may take into account in determining whether that addressee understands the language of the Member State of transmission.

The third question

89. By its third question, posed in the event that the second question referred by the Bundesgerichtshof is answered in the negative, that court asks whether Article 8(1) of Regulation No 1348/2000 must be interpreted as meaning that the addressee of a document served may not, in any event, rely on that provision in order to refuse acceptance of annexes to the document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands if the addressee concludes a contract in the course of his business in which he agrees that correspondence is to be conducted in the language of the Member State of transmission and the annexes concern that correspondence and are written in the agreed language.

90. It follows from the answer given by the Court to the first question that it may be necessary to translate certain annexes to a document instituting proceedings which has been served if the content of that document which has been translated is insufficient to enable the subjectmatter of the claim and the cause of action to be identified, so that the defendant can assert his rights, on the ground that certain necessary information relating to the application is to be found in those annexes.

91. However, such a translation is not needed where it is apparent from the factual circumstances that the addressee of the document instituting the proceedings is familiar with the content of those annexes. That is the case where the addressee is the author of those documents or can be presumed to understand the content, for example because he signed a contract in the course of his business in which he agreed that correspondence was to be conducted in the language of the Member State of transmission and the annexes concern that correspondence and are written in the agreed language.

92. The answer to the third question must therefore be that Article 8(1) of Regulation No 1348/2000 is to be interpreted as meaning that the addressee of a document served may not in any event rely on that provision in order to refuse acceptance of annexes to the document which are not in the language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, where the addressee concluded a contract in the course of his business in which he agreed that correspondence was to be conducted in the language of the Member State of transmission and the annexes concern that correspondence and are written in the agreed language.

Costs

93. 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. Costs incurred

in submitting observations to the Court, other than the costs of those parties, are not recoverable.

DOCNUM	62007J0014
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2008 Page 00000
DOC	2008/05/08
LODGED	2007/01/22
JURCIT	11992MK03 : N 53 31997F0827(01) : N 53 56 31997F0827(01)-A14P2 : N 54 32000R1348 : N 41 45 49 50 52 53 56 60 73 74 76 77 32000R1348-A04P1 : N 4 46 32000R1348-A05 : N 5 32000R1348-A08 : N 1 6 44 45 49 58 59 69 32000R1348-A08P1 : N 6 39 40 49 73 78 89 92 32000R1348-A08P1LB : N 39 79 83 85 88 32000R1348-A08P2 : N 44 32000R1348-A09P1 : N 77 32000R1348-A09P2 : N 77 32000R1348-A14 : N 53 32000R1348-A14P1 : N 55 32000R1348-A14P2 : N 55 56 32000R1348-A19 : N 8 32000R1348-A19P1 : N 7 51 32000R1348-A23 : N 55 32000R1348-C2 : N 46 32000R1348-C6 : N 46 32000R1348-C8 : N 3 46 32000R1348-C10 : N 3 32001R0044 : N 47 50 56 60 66 32001R0044-A26 : N 9 60 32001R0044-A26P2 : N 51 32001R0044-A26P3 : N 50 32001R0044-A26P4 : N 50 52 32001R0044-A34P2 : N 51 67 68 32001R0044-A34PT2 : N 10 60 41968A0927(01) : N 11 56 67

41968A0927(01)-A20 : N 12
41968A0927(01)-A20L2 : N 51
41968A0927(01)-A20L3 : N 52
41968A0927(01)-A27PT2 : N 13 51 60 61 67 68
41978A1009(01) : N 11
41982A1025(01) : N 11
41989A0535 : N 11
41997A0115(01) : N 11
61993J0474 : N 61 - 64
61998J0287 : N 45
62003J0443 : N 53 60 76 77
62005J0283 : N 47 67

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Interprets 32000R1348 -A08P1LB

SUB COJC

AUTLANG German

OBSERV CZ ; Finland ; Italy ; SK ; Member States ; Commission ; Institutions

NATIONA Federal Republic of Germany

NOTES Sujecki, Bartosz: Zum Annahmeverweigerungsrecht gem. Art. 8 EuZVO bei vertraglicher Bestimmung der Vertragssprache, Europäische Zeitschrift für Wirtschaftsrecht 2008 p.37-38

PROCEDU Reference for a preliminary ruling

ADVGEN Trstenjak

JUDGRAP Rosas

DATES of document: 08/05/2008
of application: 22/01/2007

Judgment of the Court (Third Chamber) of 9 February 2006

Plumex v Young Sports NV. Reference for a preliminary ruling: Hof van Cassatie - Belgium. Judicial cooperation - Regulation (EC) No 1348/2000 - Articles 4 to 11 and 14 - Service of judicial documents - Service through agencies - Service by post - Relationship between the methods of transmission and service - Precedence - Time-limit for an appeal. Case C-473/04.

Judicial cooperation in civil matters - Service of judicial and extrajudicial documents - Regulation No 1348/2000

(Council Regulation No 1348/2000, Arts 4 to 11 and 14)

Council Regulation No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters must be interpreted as meaning that it does not establish any hierarchy between the method of transmission and service through agencies under Articles 4 to 11 thereof and the method of service by post under Article 14 thereof and that, consequently, it is possible to serve a judicial document by one or other or both of those methods. First, neither the recitals in the preamble to the regulation nor its provisions state that a method of transmission and service, used in accordance with the rules of the regulation, would rank below the method of service through agencies. Secondly, in the light of the spirit and purpose of the regulation, which is intended to ensure that judicial documents are served effectively, while respecting the legitimate interests of the persons on whom they are served, and in view of the fact that all the methods of service provided for by the regulation can ensure, as a rule, that those interests are respected, it must be conceivable to use one or other, or indeed two or more at once of those methods of service which appear the most suitable or appropriate in light of the circumstances of the case.

Consequently, where service is being effected both through agencies and by post, in order to determine vis-à-vis the person on whom service is effected the point from which time starts to run for the purposes of a procedural time-limit linked to effecting service, reference must be made to the date of the first service validly effected. In order not to render meaningless the provisions of the regulation governing those methods of service, all the legal effects which follow when one of those methods is validly effected must be taken into account irrespective of subsequent successful service by another method. Moreover, the regulation is intended to expedite the transmission of judicial documents for service and, therefore, the conduct of judicial proceedings. If, for the purposes of computing a procedural time-limit, the first service of the document in question is taken into consideration, the person on whom that document is served is required to defend judicial proceedings earlier, which can enable the competent court to give a ruling within shorter time-limits.

(see paras 20-21, 28-32, operative part)

In Case C-473/04,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Hof van Cassatie (Belgium), made by decision of 22 October 2004, received at the Court on 9 November 2004, in the proceedings

Plumex

v

Young Sports NV,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovsku (Rapporteur), A. La Pergola, S. von Bahr and A. Borg Barthet, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Finnish Government, by T. Pynnä, acting as Agent,

- the Swedish Government, by A. Falk, acting as Agent,

- the United Kingdom Government, by E. O'Neill, acting as Agent,

- the Commission of the European Communities, by A.M. Rouchaud-Joet and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2005,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Articles 4 to 11 and 14 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37, the Regulation').

2. The reference was made in the course of an appeal brought by Plumex against the Hof van Beroep te Gent's dismissal for being out of time of an appeal against a judgment at first instance ruling on a dispute between Plumex and Young Sports NV.

Relevant provisions

Community legislation

3. In the words of the second recital in the preamble to the Regulation, the proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States.

4. The Regulation thus has the objective of improving efficiency and speed in judicial procedures by establishing the principle of direct transmission of judicial and extrajudicial documents.

5. Article 1(1) provides that the Regulation is to apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there.

6. Chapter II of the Regulation contains provisions which provide for various means of transmission and service of judicial documents. It is divided into two sections.

7. Section 1 of that chapter, comprised of Articles 4 to 11, relates to the first method of transmission and service (service through agencies'), under which a judicial document to be served is first to be transmitted directly and as soon as possible between the agencies designated by the Member States, referred to as transmitting agencies' and receiving agencies'. Next, the receiving agency is itself to serve that document or have it served, either in accordance with the law of the Member State addressed or in the particular manner requested by the transmitting agency, unless such a method is incompatible with the law of that Member State.

8. Article 7 of the regulation provides that all steps required for service of the document are

to be effected as soon as possible.

9. Section 2 of Chapter II of the Regulation provides for [o]ther means of transmission and service of judicial documents', namely transmission by consular or diplomatic channels (Article 12), service by diplomatic or consular agents (Article 13), service by post (Article 14) and direct service (Article 15).

10. As regards service by post in particular, Article 14 of the Regulation provides:

1. Each Member State shall be free to effect service of judicial documents directly by post to persons residing in another Member State.

2. Any Member State may specify, in accordance with Article 23(1), the conditions under which it will accept service of judicial documents by post.'

11. According to the information communicated by the Member States in accordance with Article 23 of the Regulation (OJ 2001 C 151, p. 4), as amended, inter alia, by its first update (OJ 2001 C 202, p. 10), the Portuguese Republic has accepted service by post, provided it is made by registered letter with advice of delivery and is accompanied by a translation.

National legislation

12. Under Article 1051 of the Belgian Judicial Code the time-limit for lodging an appeal is one month from service of the judgment.

13. Under the same provision, read in conjunction with Article 55 of the Judicial Code, the time-limit for an appeal is extended by 30 days if one of the parties on which the judgment is served does not reside or have a registered address or an address for service in Belgium, where that party resides in a European country other than the United Kingdom or the countries bordering on Belgium.

14. Article 40(1) of the Judicial Code provides that, as regards persons who do not have a known residence or registered address or address for service in Belgium, the copy of the document is to be sent by the process server by letter registered with the postal service to their residence or their registered address abroad and service is deemed to have been effected when the document is handed to the postal service in return for a certificate of posting, in accordance with the formal requirements under that article.

The main proceedings and the questions referred for a preliminary ruling

15. Plumex, a company incorporated under Portuguese law with a registered office in Portugal, was served at its address in Portugal with a judgment from a Belgian court of first instance delivered in a case between Plumex and Young Sports NV. Service was effected both through agencies and by post.

16. On 17 December 2001, Plumex lodged an appeal against that judgment before the Hof van Beroep. That court dismissed the appeal for being out of time, holding that the time-limit for an appeal provided for in Article 1051 of the Belgian Judicial Code had expired on 11 December 2001 since the period had begun to run on the day on which the first service was validly effected, in this case the service by post.

17. Plumex brought an appeal against that decision before the Hof van Cassatie, claiming that the Regulation had to be interpreted as meaning that service through agencies constituted the primary method of service taking precedence over service by post. Accordingly, the time-limit for an appeal must be calculated from the date of the primary' service - which took place after the service by post - since the latter was only secondary' service.

18. In those circumstances, the Hof van Cassatie decided to stay the proceedings and to refer

the following questions to the Court for a preliminary ruling:

(1) Is the service contemplated by Articles 4 to 11 the primary method of service and service directly by post contemplated by Article 14 a secondary method of service, whereby the former method takes precedence over the latter when both are effected in accordance with the legal requirements?

(2) In the case of service being effected twice, once in accordance with Articles 4 to 11, and once directly by post in accordance with Article 14, does the time-limit for an appeal begin to run against the person on whom service was effected on the date of the service effected in accordance with Articles 4 to 11 and not on the date of service in accordance with Article 14?'

On the questions referred for a preliminary ruling

The first question

19. By its first question, the national court asks, essentially, whether any hierarchy exists between service through agencies and service by post, whereby the first method takes precedence over the second where both have been validly effected.

20. It must be observed at the outset that there is nothing in the wording of the Regulation to indicate that it introduced a hierarchy between those methods of service. Neither the recitals in its preamble nor its provisions state that a method of transmission and service, used in accordance with the rules of the Regulation, would rank below the method of service through agencies.

21. Moreover, it follows from the spirit and purpose of the Regulation that it is intended to ensure that judicial documents are served effectively, while respecting the legitimate interests of the persons on whom they are served. Although all the methods of service provided for by the Regulation can ensure, as a rule, that those interests are respected, it must be conceivable, in view of that purpose, to use one or other, or indeed two or more at once of those methods of service which appear the most suitable or appropriate in light of the circumstances of the case.

22. In view of the foregoing, the answer to the first question must be that the Regulation does not establish any hierarchy between service through agencies and service by post and, consequently, it is possible to serve a judicial document by one or other or both of those methods.

The second question

23. By its second question, the national court asks, essentially, to the date of which service must reference be made to determine vis-à-vis the person on whom service is effected the point from which time starts to run for the purposes of a procedural time-limit linked to effecting service where service is being effected both through agencies and by post.

24. In the observations which they submitted to the Court, the Austrian Government and the Commission of the European Communities state that they are uncertain as to whether the Court has jurisdiction to answer that question, since it concerns only the interpretation of national law. Where a Member State makes it possible to serve a judgment in various ways, the time-limit for an appeal starts to run under Belgian law, as a rule, from the first service which was valid. That date is determined in accordance with the law of the Member State addressed and, in any event, in accordance with national law,

25. In that respect, it should be recalled that, according to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, where the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling (see,

inter alia, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraph 38, and Case C-18/01 Korhonen and Others [2003] ECR I-5321, paragraph 19).

26. The second question relates to the relationship between the various methods of service provided for by the Regulation and it therefore involves the interpretation of Community law.

27. Accordingly, the Court is obliged to give a ruling.

28. As to the substance, first of all it follows from the answer to the first question that no hierarchy exists between service through agencies and service by post.

29. Secondly, in order not to render meaningless the provisions of the Regulation governing those methods of service, all the legal effects which follow when one of those methods is validly effected must be taken into account irrespective of subsequent successful service by another method.

30. Finally, it must be observed that, in accordance with the second recital in the preamble thereof, the Regulation is intended to expedite the transmission of judicial documents for service and, therefore, the conduct of judicial proceedings. If, for the purposes of computing a procedural time-limit, the first service of the document in question is taken into consideration, the person on whom that document is served - to whom such a time-limit applies - is required to defend judicial proceedings earlier, which can enable the competent court to give a ruling within shorter time-limits.

31. It follows from all those considerations that, where service is effected more than once in accordance with the Regulation, account must be taken of the service effected first. There is nothing in the Regulation to preclude the application of such an approach to the relationship between service through agencies and service by post. Accordingly, where service is effected by both those methods, in order to determine vis-à-vis the person on whom service is effected the point from which time starts to run for the purposes of a procedural time-limit linked to effecting service, reference must be made to the date of service by post, where that occurred first.

32. That conclusion does not adversely affect in any way the interests of the person on whom a judicial document is served since the first service validly effected enables him in fact to become acquainted with the document and to have a sufficient period of time in which to defend the proceedings. The fact that he is subsequently served with the same judicial document by a different method does not alter the fact that the first service has already complied with those requirements.

33. The answer to the second question must therefore be that, where service is being effected both through agencies and by post, in order to determine vis-à-vis the person on whom service is effected the point from which time starts to run for the purposes of a procedural time-limit linked to effecting service, reference must be made to the date of the first service validly effected.

Costs

34. 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters must be interpreted as meaning that it does not establish any hierarchy between the method of transmission and service under Articles 4 to 11 thereof and that under Article 14 thereof and, consequently, it is possible to serve a judicial document by one or other or both of those methods.

2. Regulation No 1348/2000 must be interpreted as meaning that, where transmission and service

are effected by both the method under Articles 4 to 11 thereof and the method under Article 14 thereof, in order to determine vis-à-vis the person on whom service is effected the point from which time starts to run for the purposes of a procedural time-limit linked to effecting service, reference must be made to the date of the first service validly effected.

DOCNUM	62004J0473
AUTHOR	Court of Justice of the European Communities
FORM	Judgment
TREATY	European Economic Community
PUBREF	European Court reports 2006 Page I-01417
DOC	2006/02/09
LODGED	2004/11/09
JURCIT	11997E230 : N 25 - 27 32000R1348-A04 : N 19 - 22 28 - 33 32000R1348-A14 : N 19 - 22 28 - 33 61998J0379 : N 25 62001J0018 : N 25
CONCERNS	Interprets 32000R1348 -A04 Interprets 32000R1348 -A05 Interprets 32000R1348 -A06 Interprets 32000R1348 -A07 Interprets 32000R1348 -A08 Interprets 32000R1348 -A09 Interprets 32000R1348 -A10 Interprets 32000R1348 -A11 Interprets 32000R1348 -A14
SUB	COJC
AUTLANG	Dutch
OBSERV	Austria ; Finland ; Sweden ; United Kingdom ; Member States ; Commission ; Institutions
NATIONA	Belgium
NATCOUR	*A9* Hof van cassatie (België), 1e kamer, arrest van 22/10/2004 (C.04.0043.N) ; - Pasicrisie belge I 2004 no 499 p.1634-1637 ; - International Litigation

Procedure 2005 p.689-696

NOTES X: Il Corriere giuridico 2006 p.13-14 ; Carballo Piñeiro, Laura: Regularidad de la notificacion de documentos judiciales en el derecho europeo (Comentario a las SSTJCE de 9 de febrero de 2006, Plumex, y de 16 de febrero de 2006, Verdoliva), Diario La ley 2006 no 6537 p.1-10 ; Idot, Laurence: Application du règlement sur la signification des actes, Europe 2006 Avril Comm. no 140 p.32 ; Telkamp, Mareike: Internationales Privat- und Zivilverfahrensrecht - Anmerkung zu EuGH, Urteil vom 9. Februar 2006, C-473/04, Zeitschrift für Gemeinschaftsprivatrecht 2006 p.145-148 ; Anthimos, A.: Armenopoulos 2006 p.673-674 ; Frigo, Manlio: Cumulo e questioni di priorità dei mezzi di notificazione nella disciplina comunitaria, Il Corriere giuridico 2006 p.129-133 ; Sujecki, Bartosz: Verhältnis der Zustellungsalternativen der EuZVO zueinander, Europäische Zeitschrift für Wirtschaftsrecht 2007 p.44-45 ; Heiderhoff, Bettina: Keine Rangordnung der Zustellungsarten, Praxis des internationalen Privat- und Verfahrensrechts 2007 p.293-294

PROCEDU Reference for a preliminary ruling

ADVGEN Tizzano

JUDGRAP Malenovsku

DATES of document: 09/02/2006
of application: 09/11/2004

Judgment of the Court (Grand Chamber)
of 8 November 2005
Götz Leffler v Berlin Chemie AG. Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands. Judicial cooperation in civil matters - Service of judicial and extrajudicial documents - No translation of the document - Consequences. Case C-443/03.

1. Freedom of movement for persons - Judicial cooperation in civil and commercial matters - Service of judicial and extrajudicial documents - Regulation No 1348/2000 - Failure of the regulation to prescribe the consequences of certain facts - Application of national law - Conditions - Observance of the principles of equivalence and of effectiveness - Implications

(Council Regulation No 1348/2000)

2. Freedom of movement for persons - Judicial cooperation in civil and commercial matters - Service of judicial and extrajudicial documents - Regulation No 1348/2000 - Service of a document that is in a language other than the official language of the Member State addressed or a language of the Member State of transmission which the addressee of the document understands - Ability to remedy that situation by sending a translation - Procedure - Application of national law - Conditions

(Council Regulation No 1348/2000, Art. 8)

1. In the absence of Community provisions it is for the domestic legal system of each Member State to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from the direct effect of Community law. However, those rules cannot be less favourable than those governing rights which originate in domestic law (principle of equivalence) and they cannot render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). In addition, the principle of effectiveness must lead the national court to apply the detailed procedural rules laid down by domestic law only in so far as they do not compromise the raison d'être and objective of the regulation in question. It follows that, where Regulation No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters does not prescribe the consequences of certain facts, it is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of Community law, a task which may lead it to refrain from applying, if need be, a national rule preventing that or to interpret a national rule which has been drawn up with only a purely domestic situation in mind in order to apply it to the cross-border situation at issue.

(see paras 49-51)

2. On a proper construction of Article 8 of Regulation No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, that situation may be remedied by sending the translation of the document in accordance with the procedure laid down by the regulation and as soon as possible.

In order to resolve problems connected with the way in which the lack of translation should be remedied that are not envisaged by Regulation No 1348/2000, it is incumbent on the national court to apply national procedural law while taking care to ensure the full effectiveness of the regulation, in compliance with its objective.

(see paras 53, 71, operative part 1-2)

In Case C-443/03,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 17 October 2003, received at the Court on 20 October 2003, in the proceedings

Götz Leffler

v

Berlin Chemie AG,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas (Rapporteur) and J. Malenovsku, Presidents of Chambers, S. von Bahr, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, E. Juhasz, G. Arestis, A. Borg Barthet and M. Ilei, Judges,

Advocate General: C. Stix-Hackl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 April 2005,

after considering the observations submitted on behalf of:

- Mr Leffler, by D. Rijpma and R. Bakels, advocaten,

- Berlin Chemie AG, by A. Hagedorn, B. Gabriel and J.I. van Vlijmen, advocaten,

- the Netherlands Government, by H.G. Sevenster and C.M. Wissels, acting as Agents,

- the German Government, by W.-D. Plessing, acting as Agent,

- the French Government, by G. de Bergues and A. Bodard-Hermant, acting as Agents,

- the Portuguese Government, by L. Fernandes and M. Fernandes, acting as Agents,

- the Finnish Government, by T. Pynnä, acting as Agent,

- the Commission of the European Communities, by A.M. Rouchaud-Joet and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2005,

gives the following

Judgment

On those grounds, the Court (Grand Chamber) hereby rules:

1. On a proper construction of Article 8(1) of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, it is possible for the sender to remedy that by sending the translation requested.

2. On a proper construction of Article 8 of Regulation No 1348/2000, when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, that situation may be remedied by sending the translation of the document in accordance with the procedure laid down by Regulation No 1348/2000 and as soon as possible.

In order to resolve problems connected with the way in which the lack of translation should be remedied that are not envisaged by Regulation No 1348/2000 as interpreted by the Court, it is incumbent on the national court to apply national procedural law while taking care to ensure the full effectiveness of that regulation, in compliance with its objective.

1. This reference for a preliminary ruling concerns the interpretation of Article 8 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37; the Regulation').

2. The reference was made in proceedings between Mr Leffler, who resides in the Netherlands, and Berlin Chemie AG (Berlin Chemie'), a company governed by German law, for the recovery of goods owned by Mr Leffler which had been taken by way of seizure by that company.

Legal context

3. The Regulation has the objective of improving the efficiency and speed of judicial procedures by establishing the principle of direct transmission of judicial and extrajudicial documents.

4. Before the Regulation entered into force, most of the Member States were bound by the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which lays down a mechanism of administrative cooperation enabling a document to be served through a central authority. In addition, Article IV of the protocol annexed to the 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) (the Brussels Convention'), provided for the possibility of service through more direct channels. The second paragraph of Article IV of the protocol is worded as follows:

Unless the State in which service is to take place objects by declaration to the Secretary-General of the Council of the European Communities, such documents may also be sent by the appropriate public officers of the State in which the document has been drawn up directly to the appropriate public officers of the State in which the addressee is to be found. In this case the officer of the State of origin shall send a copy of the document to the officer of the State applied to who is competent to forward it to the addressee. The document shall be forwarded in the manner specified by the law of the State applied to. The forwarding shall be recorded by a certificate sent directly to the officer of the State of origin.'

5. The Council of Ministers for Justice, meeting on 29 and 30 October 1993, instructed the Working Party on Simplification of Document Transmission to draw up an instrument to simplify and speed up procedures for the transmission of documents between Member States. That work resulted in the adoption, on the basis of Article K.3 of the EU Treaty (Articles K to K.9 of the EU Treaty have been replaced by Articles 29 EU to 42 EU), of the Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (the Convention'). The Convention was drawn up by act of the Council of the European Union of 26 May 1997 (OJ 1997 C 261, p. 1; text of the Convention, p. 2; protocol on the interpretation of the Convention by the Court of Justice, p. 17).

6. The Convention did not enter into force. Inasmuch as its wording inspired the wording of the

Regulation, the explanatory report on the Convention (OJ 1997 C 261, p. 26) has been relied upon in order to clarify the interpretation of the Regulation.

7. After the Treaty of Amsterdam entered into force, the Commission, on 26 May 1999, presented a proposal for a Council Directive on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 1999 C 247 E, p. 11).

8. When this document was submitted to the European Parliament, the latter wished it to be adopted in the form of a regulation. In its report (A5-0060/1999 final of 11 November 1999), the Parliament observed in this regard:

The advantage of regulations is that they allow the rapid, transparent and homogenous implementation of the Community text, in line with the intended objective. This type of instrument has already been chosen, moreover, for the communitarisation of other conventions currently being considered.'

9. The second recital in the preamble to the Regulation states:

The proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States.'

10. The seventh to tenth recitals are worded as follows:

(7) Speed in transmission warrants the use of all appropriate means, provided that certain conditions as to the legibility and reliability of the document received are observed. Security in transmission requires that the document to be transmitted be accompanied by a pre-printed form, to be completed in the language of the place where service is to be effected, or in another language accepted by the Member State in question.

(8) To secure the effectiveness of this Regulation, the possibility of refusing service of documents is confined to exceptional situations.

(9) Speed of transmission warrants documents being served within days of reception of the document. However, if service has not been effected after one month has elapsed, the receiving agency should inform the transmitting agency. The expiry of this period should not imply that the request be returned to the transmitting agency where it is clear that service is feasible within a reasonable period.

(10) For the protection of the addressee's interests, service should be effected in the official language or one of the official languages of the place where it is to be effected or in another language of the originating Member State which the addressee understands.'

11. Article 4(1) of the Regulation provides:

Judicial documents shall be transmitted directly and as soon as possible between the agencies designated on the basis of Article 2.'

12. Article 5 of the Regulation states:

Translation of documents

1. The applicant shall be advised by the transmitting agency to which he or she forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8.

2. The applicant shall bear any costs of translation prior to the transmission of the document, without prejudice to any possible subsequent decision by the court or competent authority on liability for such costs.'

13. Article 7 of the Regulation reads as follows:

Service of documents

1. The receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular form requested by the transmitting agency, unless such a method is incompatible with the law of that Member State.

2. All steps required for service of the document shall be effected as soon as possible. In any event, if it has not been possible to effect service within one month of receipt, the receiving agency shall inform the transmitting agency by means of the certificate in the standard form in the Annex, which shall be drawn up under the conditions referred to in Article 10(2). The period shall be calculated in accordance with the law of the Member State addressed.'

14. Article 8 of the Regulation provides:

Refusal to accept a document

1. The receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than either of the following languages:

(a) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected; or

(b) a language of the Member State of transmission which the addressee understands.

2. Where the receiving agency is informed that the addressee refuses to accept the document in accordance with paragraph 1, it shall immediately inform the transmitting agency by means of the certificate provided for in Article 10 and return the request and the documents of which a translation is requested.'

15. Article 9 of the Regulation is worded as follows:

Date of service

1. Without prejudice to Article 8, the date of service of a document pursuant to Article 7 shall be the date on which it is served in accordance with the law of the Member State addressed.

2. However, where a document shall be served within a particular period in the context of proceedings to be brought or pending in the Member State of origin, the date to be taken into account with respect to the applicant shall be that fixed by the law of that Member State.

3. A Member State shall be authorised to derogate from the provisions of paragraphs 1 and 2 for a transitional period of five years, for appropriate reasons.

This transitional period may be renewed by a Member State at five-yearly intervals due to reasons related to its legal system. That Member State shall inform the Commission of the content of such a derogation and the circumstances of the case.'

16. Article 19 of the Regulation states:

Defendant not entering an appearance

1. Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service, under the provisions of this Regulation, and the defendant has not appeared, judgment shall not be given until it is established that:

(a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation;

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

...'

17. The Regulation prescribes the use of various standard forms, which are annexed to it. One of those forms, completed pursuant to Article 10 of the Regulation, is headed Certificate of service or non-service of documents'. Point 14 of this form provides for noting the addressee's refusal to accept the document on account of the language used. Point 15 of the form indicates various reasons for non-service of the document.

18. Article 26(1) to (3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) is worded as follows:

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of... Regulation (EC) No 1348/2000... shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.'

19. In addition, Article 34(2) of Regulation No 44/2001 provides that a judgment given in a Member State is not to be recognised in another Member State where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

The main proceedings and the questions referred for a preliminary ruling

20. According to the order for reference, Mr Leffler applied to the President of the Rechtbank te Arnhem (Arnhem Local Court) by writ of 21 June 2001 for interim relief against Berlin Chemie, in order to recover goods taken by way of seizure by that company and to obtain an order prohibiting further such seizure. Berlin Chemie contested the application and, by order of 13 July 2001, the President of the Rechtbank refused to grant the form of order sought by Mr Leffler.

21. By writ of 27 July 2001, served by bailiff at the office of Berlin Chemie's lawyer, Mr Leffler brought an appeal before the Gerechtshof te Arnhem (Arnhem Regional Court of Appeal). Berlin Chemie was summoned to appear at the sitting of that court of 7 August 2001.

22. However, since the case had not been entered on the Gerechtshof's cause list, Mr Leffler arranged for an amended writ to be served on 9 August 2001. By that writ, Berlin Chemie was summoned to appear at the sitting of 23 August 2001, but did not enter an appearance at that sitting.

23. The Gerechtshof decided to defer a decision on Mr Leffler's application for judgment in default against Berlin Chemie, in order to enable him to summon it to appear pursuant to Article 4(7) (former version) of the Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure)

and to the Regulation.

24. By writ of 7 September 2001, served by bailiff at the office of the Public Prosecutor at the Gerechtshof, Berlin Chemie was summoned to appear at the sitting of 9 October 2001. However, it did not enter an appearance at that sitting.

25. The Gerechtshof again decided to defer a decision on Mr Leffler's application for judgment in default, on this occasion pending the submission of information showing that service had been effected in accordance with Article 19 of the Regulation. Certain documents were submitted at the sitting of 4 December 2001.

26. By judgment of 18 December 2001, the Gerechtshof refused to grant Mr Leffler's application for judgment in default against Berlin Chemie and held that the proceedings were closed.

27. The relevant points of that judgment, as reproduced by the referring court, are the following:

3.1 It is clear from the information supplied that service of the writ on Berlin Chemie was effected in accordance with German legislation, but that Berlin Chemie refused to accept the documents on the ground that they had not been translated into German.

3.2 The writ served in Germany was not translated into the official language of the State addressed or into a language comprehensible for the intended recipient of that writ. This constitutes a failure to comply with Article 8 of the EU Regulation on service and has the unavoidable consequence that the application for judgment in default must be refused.'

28. Mr Leffler brought an appeal on a point of law against the judgment of 18 December 2001. He maintains that the Gerechtshof erred in law in point 3.2 of the grounds of that judgment. In his submission, that court should have granted judgment in default; in the alternative it ought to have set a new hearing date and ordered that Berlin Chemie be summoned to appear on that day, after rectification of any errors in the previous writ.

29. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) found that Article 8 of the Regulation does not prescribe the consequences of a refusal to accept service. It observed in particular:

... It may be possible to assume that, once the addressee has for good reasons refused to accept the document, no service at all has in fact taken place. However, it is also conceivable that it must be assumed that, following refusal by the addressee to accept the document, it is permissible to rectify the defect by subsequently providing the addressee with a translation. In the latter case, the question accordingly arises as to the period of time and the manner in which the translation must be brought to the attention of the addressee. Must the manner of service of documents indicated in the Regulation also be followed for the purpose of sending the translation, or can the manner of dispatch be decided freely? It is also important to determine, in the event that rectification is possible, whether national procedural law applies in that regard.'

30. The Hoge Raad der Nederlanden accordingly decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

(1) Must Article 8(1) of the Regulation be construed as meaning that, in the event of refusal by an addressee to accept a document on the ground of failure to comply with the language requirement laid down in Article 8(1), it is possible for the sender to rectify that failure?

(2) If the answer to Question 1 is in the negative: must refusal to accept the document be deemed to have the effect in law of rendering the service inoperative in its entirety?

(3) If the answer to Question 1 is in the affirmative:

(a) Within what period of time and in what manner must the translation be brought to the attention of the addressee?

Must notification of the translation satisfy the conditions which the Regulation imposes on the service of documents or can the manner of dispatch be freely determined?

(b) Does national procedural law apply in respect of the possibility of rectifying the failure?'

Consideration of the questions

Question 1

31. By its first question, the referring court asks whether, on a proper construction of Article 8(1) of the Regulation, when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, it is possible for the sender to remedy the lack of translation.

Observations submitted to the Court

32. The German and Finnish Governments submit that the consequences of refusal of the document must be determined in accordance with national law. In support of this proposition they cite the comments on Articles 5 and 8 appearing in the explanatory report on the Convention, the reference by the Court, in Case C305/88 Lancray [1990] ECR I-2725 at paragraph 29, to national law in order to determine whether defective service could be cured, and the Regulation's drafting history, as described by a commentator, showing that the delegations of the Member States did not wish the Regulation to interfere with national procedural law. The approach adopted by the applicable national rules determines whether or not it is permitted to remedy the lack of translation.

33. Mr Leffler, the Netherlands, French and Portuguese Governments and the Commission in its oral observations maintain that the consequences of refusal of a document must be inferred from an autonomous interpretation of the Regulation and that, in accordance with such an interpretation, remedying the lack of translation must be permitted. They highlight the Regulation's objective of speeding up and simplifying procedures for service of documents and stress that not to permit the lack of translation to be remedied renders Article 5(1) of the Regulation redundant since, in that case, businesses will take no risk and systematically have documents translated. They add that there is a logical reason for the presence of the words of which a translation is requested' in Article 8(2) of the Regulation only if it is possible to remedy the lack of translation and point out that certain passages in the explanatory report on the Convention suggest that such a possibility exists.

34. The Commission additionally puts forward a number of matters which in its submission warrant a lack of translation not being regarded as a basis for absolute nullity of service. In particular, the standard forms distinguish between mention of the lack of due service (point 15 of the form completed in accordance with Article 10 of the Regulation) and mention of refusal of the document on language grounds (point 14 of that form). Furthermore, Article 8(2) of the Regulation deals with returning the documents of which a translation is requested, and not all the documents, as would be the case if service had had no effect whatsoever. The Commission emphasises that no enactment provides for automatic nullity of service should there be no translation and that to allow such nullity is contrary to the principle that nullity must be provided for by an enactment (no nullity without an enactment'). It submits finally that absolute nullity exceeds what is necessary to safeguard the addressee's interests, while nullity is not conceivable without a grievance (no nullity without a grievance').

35. Berlin Chemie contends that service must not be simplified to the detriment of legal certainty

or the addressee's rights. The addressee must be able to understand rapidly what type of proceedings he is involved in and to prepare his defence properly. Berlin Chemie states that, where there is doubt as to whether the proceedings in question might be a matter of urgency, the addressee of the document will, as a precaution, have the document translated himself, whereas it should not be for him to bear the risk and the cost of the lack of translation. On the other hand, the sender is aware of the risks attaching to a lack of translation and can take measures to avoid them. Finally, to permit the lack of translation to be remedied would slow down procedures, in particular if the court must first determine whether the refusal to accept the untranslated document is justified. That could give rise to certain abuses in this regard.

36. Mr Leffler and the Netherlands Government argue that Article 19 of the Regulation provides adequate protection for an addressee who is the defendant in a case. Like the French Government, they submit that the court has the power to adjust time-limits in order to take account of the interests of the parties to the case and, in particular, enable the defendant to prepare his defence. As to the procedural delay caused by the need to remedy the lack of translation, the Netherlands Government contends that that would essentially prejudice the applicant and not the defendant addressee.

The Court's answer

37. Article 8 of the Regulation does not lay down the legal consequences which flow from refusal of a document by its addressee on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands.

38. However, the other provisions of the Regulation, the objective noted in the second and sixth to ninth recitals in its preamble of ensuring that documents are transmitted rapidly and efficiently and the practical effect which must be accorded to the possibility, provided for in Articles 5 and 8 of the Regulation, of not having the document translated into the official language of the State addressed, justify precluding nullity of the document where it has been refused by the addressee on the ground that it is not in that language or in a language of the Member State of transmission which the addressee understands and, on the other hand, accepting the possibility of remedying the lack of translation.

39. First of all, no provision of the Regulation lays down that refusal of a document because Article 8 thereof has not been complied with results in nullity of the document. On the contrary, while the Regulation does not specify the precise consequences of refusing the document, at the very least several of its provisions suggest that the lack of translation may be remedied.

40. Thus, the reference to documents of which a translation is requested' in Article 8(2) of the Regulation signifies that it is possible for the addressee to request a translation and, accordingly, for the sender to remedy the lack of translation by sending the translation required. This reference differs from the words documents transmitted' used in Article 6(2) and (3) of the Regulation to designate all the documents forwarded by the transmitting agency to the receiving agency and not only some of them.

41. Likewise, the standard form certifying service or non-service, completed in accordance with Article 10 of the Regulation, does not include refusal of the document because of the language used as a possible reason for non-service, but provides for that information as a separate entry. This supports the conclusion that refusal of the document is not to be regarded as non-service.

42. Furthermore, if that refusal could never be remedied, the sender's rights would be prejudiced in such a way that he would never take the risk of serving an untranslated document, thereby undermining the usefulness of the Regulation and, in particular, its provisions relating to the translation of documents, which contribute to the objective of ensuring that documents are transmitted rapidly.

43. This interpretation cannot be successfully countered by the submission that the consequences of refusal of a document should be determined by national law. The comments in the explanatory report on the Convention, the Court's decision in Lancray , cited above, and the Regulation's drafting history cannot properly be relied upon in this connection.

44. To let national law determine whether the very principle that it is possible to remedy a lack of translation is accepted would prevent any uniform application of the Regulation, since it is possible for the Member States to provide for different solutions in this respect.

45. The objective pursued by the Treaty of Amsterdam of creating an area of freedom, security and justice, thereby giving the Community a new dimension, and the transfer from the EU Treaty to the EC Treaty of the body of rules enabling measures in the field of judicial cooperation in civil matters having cross-border implications to be adopted testify to the will of the Member States to establish such measures firmly in the Community legal order and thus to lay down the principle that they are to be interpreted autonomously.

46. Likewise, the choice of the form of a regulation, rather than that of a directive initially proposed by the Commission, shows the importance which the Community legislature attaches to the direct applicability of the Regulation's provisions and their uniform application.

47. It follows that although the comments in the explanatory report on the Convention, an instrument adopted before the Treaty of Amsterdam entered into force, are useful, they cannot be relied upon to contest an autonomous interpretation of the Regulation demanding a uniform consequence for refusal of a document on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the document's addressee understands. Similarly, the Court's case-law in Lancray was formulated in the context of interpretation of a legal instrument of a different nature which, unlike the Regulation, did not seek to establish an intra-Community system of service.

48. As regards, finally, the conclusions drawn by the German Government from the drafting history described by a commentator, it need merely be observed that the supposed will of the delegations of the Member States did not materialise in the Regulation itself. It follows that the alleged drafting history cannot be relied upon to contest an autonomous interpretation of the Regulation which seeks to give practical effect to the provisions it contains, with a view to its uniform application in the Community, in compliance with its objective.

49. To interpret the Regulation as demanding the possibility of remedying the lack of translation as a uniform consequence of refusal of a document on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the document's addressee understands does not call into question the importance of national law and the role of national courts. As is apparent from settled case-law, in the absence of Community provisions it is for the domestic legal system of each Member State to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from the direct effect of Community law (see, inter alia, Case 33/76 Rewe [1976] ECR 1989, paragraph 5).

50. The Court has, however, made it clear that those rules cannot be less favourable than those governing rights which originate in domestic law (principle of equivalence) and that they cannot render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see Rewe , cited above, paragraph 5, Case C-261/95 Palmisani [1997] ECR I-4025, paragraph 27, and Case C-231/96 Edis [1998] ECR I-4951, paragraph 34). As the Advocate General has observed in points 38 and 64 of her Opinion, the principle of effectiveness must lead the national court to apply the detailed procedural rules laid down by domestic law only in so far as they do not compromise the raison d'être and objective of the Regulation.

51. It follows that, where the Regulation does not prescribe the consequences of certain facts, it is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of Community law, a task which may lead it to refrain from applying, if need be, a national rule preventing that or to interpret a national rule which has been drawn up with only a purely domestic situation in mind in order to apply it to the cross-border situation at issue (see inter alia, to this effect, Case 106/77 Simmenthal [1978] ECR 629, paragraph 16, Case C-213/89 Factortame and Others [1990] ECR I2433, paragraph 19, Case C453/99 Courage and Crehan [2001] ECR I-6297, paragraph 25, and Case C253/00 Muñoz and Superior Fruiticola [2002] ECR I7289, paragraph 28).

52. It is also for the national court to ensure that the rights of the parties to the case are safeguarded, in particular the ability of a party to whom a document is addressed to have sufficient time to prepare his defence or the right of a party who sends a document not to suffer, for example in urgent proceedings where the defendant fails to appear, the adverse consequences of a refusal to accept an untranslated document which purely seeks to delay matters and manifestly constitutes an abuse, when it can be proved that the addressee of that document understands the language of the Member State of transmission in which the document is written.

53. The answer to the first question must therefore be that, on a proper construction of Article 8(1) of the Regulation, when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, it is possible for the sender to remedy that by sending the translation requested.

Question 2

54. The second question, asked if Article 8 of the Regulation is to be interpreted as precluding a lack of translation from being remedied, is designed to ascertain whether refusal of the document has the effect of rendering service inoperative in its entirety.

55. In light of the answer given to the first question, there is no need to answer the second question.

Question 3

56. By the third question, asked if the answer to the first question is in the affirmative, the referring court essentially seeks to ascertain within what period of time and in what manner the translation must be brought to the attention of the addressee of the document and whether national procedural law applies to the possibility of remedying the lack of translation.

Observations submitted to the Court

57. So far as concerns the period within which the lack of translation may be remedied, the Netherlands and Portuguese Governments refer to Article 7(2) of the Regulation. They submit that the translation must be sent as soon as possible and that a period of one month may be regarded as reasonable.

58. As to the effect that sending the translation has on time-limits, the Netherlands Government submits that, even if the addressee of the document was fully justified in refusing the latter, the time-limit-preserving effect of Article 9(2) and (3) of the Regulation must in any event be maintained. The Commission observes that the dates of service will be determined in accordance with Article 9. For the addressee, only service of the translated documents will be taken into consideration, a fact which explains the words without prejudice to Article 8' that appear in Article 9(1). For the applicant, the date remains determined in accordance with Article 9(2).

59. The French Government points out that procedural time-limits must be capable of adjustment by the court in order to allow the addressee of the document to prepare his defence.

60. So far as concerns the manner in which the translation is sent, Mr Leffler and the French and Portuguese Governments submit that the translation should be communicated in accordance with the requirements of the Regulation. The Netherlands Government contends, on the other hand, that transmission may be effected informally but that, to avoid any misunderstanding, it is desirable to avoid direct dispatch from the transmitting agency to the addressee, and it is preferable to go through the receiving agency.

61. Berlin Chemie argues that, if the Court were to decide that it is possible to send a translation, in order to guarantee legal certainty the consequences of that possibility should be harmonised, in accordance with the Regulation's objectives.

The Court's answer

62. Although Article 8 of the Regulation contains no specific provision relating to the rules which should be followed when there is a need to regularise a document refused on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the document's addressee understands, general principles of Community law and the other provisions of the Regulation allow some guidance to be provided to the national court, in order to give practical effect to the Regulation.

63. For reasons of legal certainty, the Regulation is to be interpreted as meaning that the lack of translation must be remedied in accordance with the procedure laid down by the Regulation.

64. When the transmitting agency has been informed that the addressee has refused to accept the document for want of translation, and having heard the views of the applicant where appropriate, it is incumbent upon it, as may be inferred from Article 4(1) of the Regulation, to remedy that by sending a translation as soon as possible. In this regard, as suggested by the Netherlands and Portuguese Governments, a period of one month from receipt by the transmitting agency of the information relating to the refusal may be regarded as appropriate but this period can be determined by the national court according to the circumstances. Account should be taken, in particular, of the fact that certain texts may be unusually lengthy or have to be translated into a language for which there are few translators available.

65. The effect that sending a translation has on the date of service should be determined by analogy with the double-date system developed in Article 9(1) and (2) of the Regulation. In order to uphold the effectiveness of the Regulation, it is important to ensure that the rights of the various parties to the case are accorded maximum, and balanced, protection.

66. The date of service may be important for an applicant, for example when the document served constitutes the bringing of proceedings that must be instituted within a mandatory time-limit or is designed to interrupt the running of a limitation period. In addition, as has been stated in paragraph 38 of this judgment, failure to comply with Article 8(1) of the Regulation does not result in nullity of service. In view of those factors, it is to be held that the applicant must be able to benefit, as regards the date, from the effect of the initial service in so far as he has displayed diligence in regularising the document by sending a translation as soon as possible.

67. However, the date of service may also be important for the addressee, in particular because it constitutes the point at which time starts to run for having recourse to a remedy or preparing a defence. Effective protection of the document's addressee entails taking into account, in his regard, only the date on which he was able not only to have knowledge of, but also to understand, the document served, that is to say the date on which he received the translation of it.

68. It is for the national court to take into account and to protect the interests of the parties to the case. Thus, by analogy with Article 19(1)(a) and (b) of the Regulation, if a document has

been refused on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the document's addressee understands and the defendant has not appeared, judgment is not to be given until it is established that the document in question has been regularised by the sending of a translation and that this took place in sufficient time to enable the defendant to defend. Such an obligation also results from the principle laid down in Article 26(2) of Regulation No 44/2001 and compliance therewith is to be checked before a judgment is recognised, in accordance with Article 34(2) of that regulation.

69. In order to resolve problems connected with the way in which the lack of translation should be remedied that are not envisaged by the Regulation as interpreted by the Court, it is incumbent on the national court, as indicated in paragraphs 50 and 51 of this judgment, to apply national procedural law while taking care to ensure the full effectiveness of the Regulation, in compliance with its objective.

70. It should also be remembered that when a question relating to the interpretation of the Regulation is raised before it, the national court may, under the conditions laid down in Article 68(1) EC, make a reference to the Court in that regard.

71. In view of all of the foregoing matters, the answer to the third question must be that:

- on a proper construction of Article 8 of the Regulation, when the addressee of a document has refused it on the ground that it is not in an official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands, that situation may be remedied by sending the translation of the document in accordance with the procedure laid down by the Regulation and as soon as possible;

- in order to resolve problems connected with the way in which the lack of translation should be remedied that are not envisaged by the Regulation as interpreted by the Court, it is incumbent on the national court to apply national procedural law while taking care to ensure the full effectiveness of the Regulation, in compliance with its objective.

Costs

72. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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CONCERNS

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OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 18 July 2007 [1](1)

Case C-175/06

Alessandro Tedesco
v
Tomasoni Fittings Srl
and
RWO Marine Equipment Ltd

(Reference for a preliminary ruling from the Tribunale Civile di Genova (Italy))

(Cooperation between the courts of the Member States in the taking of evidence – Regulation (EC) No 1206/2001 – Directive 2004/48/EC – Hague Evidence Convention – Procedure for preserving evidence where intellectual property rights are infringed)

I – Introduction

1. Italian law provides for an effective method for preserving and obtaining evidence to prove intellectual property right infringements. On an application by the holder of the right, the competent court may order – even before proceedings in the main claim are brought and on an ex parte basis – that a 'description' (descrizione) be obtained of the object giving rise to the alleged infringement. The description is performed by a bailiff, accompanied, where appropriate, by an expert, who inspects and documents the object and may seize documents and samples relevant thereto.

2. The Tribunale Civile di Genova (Civil District Court, Genoa, Italy) addressed a request for judicial assistance to the competent body in the United Kingdom, with a view to the latter taking evidence in respect of evidential material situated in the United Kingdom. The requested court refused to perform the request, however, on the ground that such measures were not in keeping with its practices.

3. By its reference for a preliminary ruling, the Tribunale now seeks clarification as to whether a measure such as that for obtaining a description of goods as provided for in Italian law may be categorised as the taking of evidence, the performance of which the court of one Member State may request of a court of another Member State, pursuant to Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. (2)

4. As is evident from the observations submitted by the Member States, different views exist in the national legal orders as to the requirements which apply to the taking of evidence and the role played by courts in that regard. Those circumstances result also in diverging views on the scope of Regulation No 1206/2001, which falls to be interpreted for the first time by the Court in the present proceedings.

II – Legal framework

A – *International conventions*

5. The Hague Convention of 18 March 1970 on the Taking of evidence abroad in civil or commercial matters ('the Hague Evidence Convention') applies only as between 11 Member States of the European Union, including Italy and the United Kingdom. (3) Article 1 of the Hague Evidence Convention provides:

'In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.'

6. Article 50 of the Agreement on trade-related aspects of intellectual property rights (TRIPs Agreement) (4) lays down the following rules concerning provisional measures in the event of intellectual property right infringements:

'1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

(b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

...'

B – *Community law*

7. Regulation No 1206/2001, (5) which in accordance with Article 21 thereof, in matters to which it applies, prevails over the Hague Evidence Convention, provides in Article 1 for the Regulation to have the following area of application:

'1. This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests:

(a) the competent court of another Member State to take evidence; or

(b) to take evidence directly in another Member State.

2. A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

...'

8. Chapter II of that regulation governs transmission and execution of requests. The relevant provisions of that chapter are worded as follows:

'Article 4
Form and content of the request

1. The request shall be made using form A or, where appropriate, form I in the Annex. It shall contain the following details:

(a) the requesting and, where appropriate, the requested court;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature and subject-matter of the case and a brief statement of the facts;

(d) a description of the taking of evidence to be performed;

(e) where the request is for the examination of a person:

– the name(s) and address(es) of the person(s) to be examined,

– the questions to be put to the person(s) to be examined or a statement of the facts about which he is (they are) to be examined,

– where appropriate, a reference to a right to refuse to testify under the law of the Member State of the requesting court,

– any requirement that the examination is to be carried out under oath or affirmation in lieu thereof, and any special form to be used,

– where appropriate, any other information that the requesting court deems necessary;

(f) where the request is for any other form of taking of evidence, the documents or other objects to be inspected;

(g) where appropriate, any request pursuant to Article 10(3) and (4), and Articles 11 and 12 and any information necessary for the application thereof.

...

Article 7
Receipt of request

1. Within seven days of receipt of the request, the requested competent court shall send an acknowledgement of receipt to the requesting court using form B in the Annex. Where the request does not comply with the conditions laid down in Articles 5 and 6, the requested court shall enter a note to that effect in the acknowledgement of receipt.

2. Where the execution of a request made using form A in the Annex, which complies with the conditions laid down in Article 5, does not fall within the jurisdiction of the court to which it was transmitted, the latter shall forward the request to the competent court of its Member State and shall inform the requesting court thereof using form A in the Annex.

...

Article 10
General provisions on the execution of the request

...

2. The requested court shall execute the request in accordance with the law of its Member State.

3. The requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State, using form A in the Annex. The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons it shall inform the requesting court using form E in the Annex.

...

Article 13
Coercive measures

Where necessary, in executing a request the requested court shall apply the appropriate coercive measures in the instances and to the extent as are provided for by the law of the Member State of the requested court for the execution of a request made for the same purpose by its national authorities or one of the parties concerned.

Article 14
Refusal to execute

…

2. In addition to the grounds referred to in paragraph 1, the execution of a request may be refused only if:

(a) the request does not fall within the scope of this Regulation as set out in Article 1; or

(b) the execution of the request under the law of the Member State of the requested court does not fall within the functions of the judiciary; or

…

3. Execution may not be refused by the requested court solely on the ground that under the law of its Member State a court of that Member State has exclusive jurisdiction over the subject matter of the action or that the law of that Member State would not admit the right of action on it.

…'

9. In addition, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, (6) which the Member States were required to transpose by 29 April 2006, (7) contains, in Chapter II, procedures and remedies for enforcing intellectual property rights. In that connection, Article 7 of the Directive provides as follows:

'1. Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his/her claims that his/her intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

…'

C – *National law*

10. The Codice della Proprietà Industriale (Industrial Property Code, 'the CPI') (8) governs, inter alia, judicial protection of intellectual property. Article 128 of the CPI provides that the right holder may demand that a description (descrizione) of an infringing object be obtained. The description comprises evidence for the alleged infringement and the extent thereof. By way of an order not open to challenge, the judge who is competent to hear the substantive claim determines that a description is to be obtained. He adopts measures aimed at protecting confidential information and may authorise also the seizure of samples. The application may be heard on an ex parte basis in order to avoid prejudicing performance of the order. If the application for obtaining a description was made before the proceedings in the main claim were brought, the court sets a time-limit of 30 days at the most within which those proceedings are to be brought.

11. Under Article 129 of the CPI, the right holder may also apply for seizure of the infringing goods.

12. Article 130 of the CPI provides, inter alia, that description and seizure measures are to be performed by a bailiff – assisted by an expert, to the extent necessary – making use of technical equipment such as cameras and other tools. Authorisation may be given for the applicant, his representatives or designated technicians to be present during performance of the measures.

III – Facts and questions referred for a preliminary ruling

13. On 21 March 2005, Mr Alessandro Tedesco made an application to the Tribunale Civile di Genova for an order of description pursuant to Articles 128 and 130 of the CPI against the firms Tomasoni Fittings Srl ('Tomasoni'), established in Genoa, and RWO (Marine Equipment) Ltd ('RWO') established in Essex, United Kingdom.

14. He claimed to be the inventor of a harness system which he has protected by filing a patent application. RWO, which operates in Italy through the distributor Tomasoni, has, according to Mr Tedesco, marketed a harness system with identical technical features which is the subject of a patent application, filed after the application concerning his product.

15. On 5 May 2005, the Tribunale Civile di Genova ordered ex parte that a description be obtained of the products giving rise to the alleged infringement. First, a description was performed at the premises of Tomasoni in Italy. On 20 June 2005, acting on the basis of Regulation No 1206/2001, the Italian court sent a request to the office of the Senior Master of the Queen's Bench Division of the Supreme Court of England and Wales. The requested court was asked to perform a description of RWO's product at that firm's premises, in accordance with Italian law.

16. The description was to encompass also other evidence of the contested conduct, such as 'by way of example, however, not exhaustively': invoices, delivery notes, payment orders, commercial offer letters, advertising material, computer archive data and customs documents. In addition, the Tribunale authorised the use of all technical means, the assistance of an expert and the removal of items as samples. Those actions were to be confined to the measures necessary for the investigation. The applicant, his lawyers and his technical advisors were denied access to the documents.

17. By way of an informal note, the Senior Master communicated his refusal to perform the request for description on the ground that search and seizure of goods and documents fell outside the practice of the agents of the Senior Master and that the matter could not be dealt with under the Letter of Request procedure.

18. By order of 14 March 2006, the Tribunale Civile di Genova referred the following questions to the Court of Justice for a preliminary ruling.

'(a) Is a request for obtaining a description of goods under Articles 128 and 130 of the Codice della Proprietà Industriale (Italian Code of Industrial and Intellectual Property), in accordance with the formal terms of the order made by this court in the present case, one of the forms of the taking of evidence prescribed by Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters by which the courts of one Member State may, on the basis of that regulation, request that the competent court of another Member State should itself take that evidence?

(b) If the answer to question 1 is yes and the request for obtaining a description is incomplete or fails to comply with the conditions under Article 4 of the regulation, is the court to which the request is made under an obligation to:

– send an acknowledgment of receipt in accordance with the conditions laid down by Article 7 of the regulation?

– indicate any respect in which the request may be incomplete so as to enable the requesting court to complete and/or amend its request?'

19. Before the Court, Mr Tedesco, the Italian, Finnish, Swedish, Slovenian, Greek and Spanish

Governments, Ireland, the Government of the United Kingdom and the Commission of the European Communities submitted written and oral observations.

IV – Assessment

A – *Admissibility of the reference*

20. The reference submitted by the Tribunale Civile di Genova concerns questions on the interpretation of Regulation No 1206/2001 which was adopted on the basis of Article 61(c) EC and Article 67(1) EC. Under Article 68(1) EC, within the framework of Title IV of the EC Treaty references are admissible only from national courts against whose decisions there is no judicial remedy under national law. The Commission and the Spanish Government harbour doubts as to whether that is the case here.

21. According to the case-law on the third paragraph of Article 234 EC, the categorisation of a court as one against whose decisions there is no judicial remedy relies on a case-specific approach, that is to say, lower courts whose decisions in the particular proceedings cannot be challenged also constitute courts of last resort for the purposes of the third paragraph of Article 234 EC. (9) The obligation on national courts to refer is intended to ensure the uniform interpretation and application of Community law and, in particular, to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State. (10) That risk would exist even if, *in a specific case,* a court against whose decisions there was no judicial remedy were entitled to resolve in a definitive manner uncertainties on points of Community law without any obligation to refer the matter to the Court.

22. Those principles are all the more applicable within the framework of Article 68(1) EC, since in those circumstances only courts of last resort are entitled at all to make references for preliminary rulings to the court. In that regard, the problematic nature of the restriction reserving the right to refer to courts of last resort becomes apparent precisely in connection with Regulation No 1206/2001 governing judicial assistance in the taking of evidence. Findings of facts are typically the task of the lower courts and not of courts of last resort. For Regulation No 1206/2001 to be made in any way susceptible to interpretation by the Court, the concept of 'court against whose decisions there is no judicial remedy' within the meaning of Article 68(1) EC must not be interpreted too strictly. In particular, it is inappropriate to treat only the highest courts as being empowered to refer.

23. In the main proceedings, the Tribunale Civile di Genova granted an application for a description of goods. That procedure constitutes a measure aimed at preserving and/or obtaining evidence, imposed by way of an order which cannot be challenged. (11)

24. The Commission argues, however, that the procedure for ordering a description to be obtained has by way of execution – even if only partial – already been concluded by the court to which the request was made. The Tribunale has now moved on to the substantive claim, which will be determined by a judgment amenable to judicial remedy.

25. However, it must be observed that, to date, the request has not in fact resulted in evidence being preserved or obtained in the United Kingdom. The referring court considers the description of the taking of evidence to be clearly imperative. Before making a fresh request (or resuming the initial request) to the court in the United Kingdom, however, it wishes to obtain clarification as to whether a measure such as obtaining a description within the meaning of Articles 129 and 130 of the CPI falls within the scope of application of Regulation No 1206/2001.

26. Admittedly, it does not follow that every procedural measure which a court adopts as an order and which cannot be challenged makes that court one against whose decisions there is no judicial remedy for the purposes of Article 68(1) EC. Rather, that interim decision which is incapable of challenge must conclude an independent procedure or a particular stage of the proceedings and the question referred must concern precisely that procedure or stage of the proceedings.

27. To the extent that it can be determined from the case-file, obtaining the description of an infringing object constitutes a special procedure. That conclusion follows not least from the fact that an application for such measure may be made before proceedings in the main claim are brought. (12) The procedure for preserving and/or obtaining evidence is completed only when the description has in fact been obtained or when the court which made the order for description dispenses with the performance thereof, for example, for reasons of practical impossibility.

28. The first question referred is intended precisely to clarify whether the description mechanism may be implemented through a request to a court of another Member State to take evidence on the basis of Regulation No 1206/2001. Accordingly, that question is closely connected to the separate procedure for preserving and/or obtaining evidence through description. Since that procedure is completed by way of an order which is incapable of challenge, the Tribunale is empowered to make a reference to the Court under the combined provisions of Article 68(1) EC and Article 234 EC. The first question referred is, therefore, admissible.

29. In my opinion, the second question referred is, however, inadmissible.

30. In accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. (13)

31. However, the Court has also stated that, in exceptional circumstances, it is for the court to examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction. (14) It is settled case-law that a reference from a national court may be refused only where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the facts of the main action or its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (15)

32. By its second question, the referring court seeks to clarify what obligations apply to the *requested* court if the request is incomplete or does not meet the requirements of Article 4 of Regulation No 1206/2001, in particular, whether it must send an acknowledgement of receipt within the period and in accordance with the requirements of Article 7 of that regulation and whether it must indicate any respects in which the request is incomplete.

33. The answer to that question has no bearing on the decision handed down by the referring court in the context of the procedure for preserving evidence. Rather, it concerns acts of the requested court alone. Should doubts exist as to the latter's obligations, it is a matter for that court, where necessary, to make a reference to the Court on the interpretation of Regulation No 1206/2001.

34. Not only is the second question irrelevant to the main proceedings, it also concerns a hypothetical situation. There is material in the case-file indicating that the requested court did in fact acknowledge receipt of the request within the prescribed period using form B. (16) There is nothing to indicate that the requested court would not duly acknowledge receipt of a new request. Nor is it evident that the earlier request or any future request was or will be incomplete such as to necessitate the request of supplementary information using form C. (17)

B – *The first question*

35. The first question must be interpreted in the light of the Senior Master's rejection of the request for judicial assistance. It must be concluded from the requested court's brief reply that it takes the view that the measure does not fall within the scope of application of the regulation.

36. The Senior Master's reply could also be interpreted also as relying on the ground of refusal set out in Article 14(2)(b) of Regulation No 1206/2001. According to that provision, execution of a request which, under the law of the Member State of the requested court, does not fall within the functions of the judiciary, may be refused. Since the Tribunale Civile di Genova called for the request to be executed in accordance with a special procedure provided for by Italian law (Article 10 (3) of the Regulation), (18) the proviso set out in the second sentence of Article 10(3) could, in addition, come into play.

37. In order to provide the national court with a useful answer to the first question, it is necessary to consider whether a request to obtain a description of an object allegedly infringing a patent including the search, documentation and/or removal of the relevant commercial documents and the seizure of samples falls within the scope of application of Regulation No 1206/2001 and, if so, whether one of the grounds for refusal listed precludes the execution thereof.

1. Scope of application of Regulation No 1206/2001

38. According to Article 1(1)(a) of Regulation No 1206/2001, that regulation must be applied in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests the competent court of another Member State to take evidence. It further follows from Article 1(2) that the evidence which it is requested to take must be intended for use in judicial proceedings already commenced or contemplated.

39. I intend to consider below, first, the interpretation of the concept of taking evidence and then the particular circumstances and legal norms which are important in the context of judicial protection against infringement of intellectual property rights. Thereafter, I will examine the objections to the application of Regulation No 1206/2001.

a) Interpretation of the concept of taking evidence

40. The expression 'to take evidence' within the meaning of Article 1(1)(a) of Regulation No 1206/2001 is not defined in any greater detail by the Community legislature.

41. In its case-law on the Brussels Convention (19) the Court has developed the principle that the Convention concepts must be interpreted independently. (20) As regards the definition, relevant for the scope of application of the concept of civil and commercial matters within the meaning of Article 1 of the Brussels Convention, the Court has held, inter alia, that, as far as possible, the rights and obligations which derive from the Brussels Convention for the Contracting States and the persons to whom it applies must be equal and uniform. Accordingly, the terms of that provision could not be interpreted as a mere reference to the internal law of one or other of the States concerned. (21)

42. The same considerations also apply by analogy to the concept of taking evidence, the interpretation of which is decisive for determining the scope of application of Regulation No 1206/2001. Therefore, its meaning and scope must be determined independently having regard to the wording, legislative history, scheme and purpose of the Regulation.

43. Regulation No 1206/2001 is intended to contribute to the proper functioning of the internal market by improving, notably by simplifying and accelerating, the cooperation between courts in the taking of evidence, in particular the simplification and acceleration thereof, as evidenced by the second recital in the preamble thereto. That aim is facilitated if the simplified mechanism for judicial assistance provided for by Regulation No 1206/2001 is applied to as many judicial measures for obtaining information as possible. Therefore, the concept of taking evidence should not be interpreted too strictly.

44. In that regard, it follows from the interaction of Article 1(1) and Article 4(1)(e) and (f) of Regulation No 1206/2001, first, that the subject-matter of a request to take evidence is not strictly limited to the taking of evidence. (22) Above all, requests are not limited to the hearing of witnesses. Rather, it follows from Article 4(1)(f) that the taking of evidence may include also documents or other objects which may be visually examined or inspected by experts. The possibility of obtaining expert evidence is confirmed, moreover, by the first indent of Article 18(2), which governs the reimbursement of fees paid for experts.

45. The objects which are listed in the measure of inquiry ordered by the Tribunale Civile di Genova, that is, examples of the harness system and the sales and purchase invoices, delivery notes, payment orders, commercial offer letters, advertising and promotional material, data stored in computer archives and relevant customs documents, constitute documents and/or objects which a court itself is capable of visually examining or which it may subject to expert analysis. Accordingly, the objects listed in the measure of inquiry are, in principle, liable to be the subject-matter of taking of evidence for the purpose of Regulation No 1206/2001.

b) Preserving and obtaining evidence in cases of intellectual property right infringements

46. The reference for a preliminary ruling must be situated in the context of a request for judicial cooperation within the framework of a special procedure for preserving evidence in the case of an intellectual property right infringement. For those procedures, both at international level and under Community law, specific rules exist which take into consideration the particular requirements of right protection in that situation. Those rules must be taken into account in the broader

interpretation of Regulation No 1206/2001.

47. The taking of evidence generally presupposes that the party with the burden of proof must specify the matter to be proved and the evidence to be adduced in support thereof. However, the holder of an intellectual property right who becomes aware of an infringement of his right is often faced with the difficulty of being unable to specify the evidence in support of the allegation or to have access to it, since it is in the possession of the party responsible for the infringement or a third party. Moreover, in most such cases urgency is of the essence in order to limit the harm arising from the infringement and to preserve the evidence before it can be compromised.

48. In order to ensure effective protection of intellectual property, therefore, Article 50 of the TRIPs Agreement grants courts the authority to order prompt and effective provisional measures both to prevent the entry into circulation of infringing goods and to preserve evidence of an alleged infringement.

49. Article 7 of Directive 2004/48 builds on that provision of the TRIPs Agreement. (23) Under that provision, judicial authorities 'may ... order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement'. Those measures may 'include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto'.

50. In Italy, Article 128 et seq. of the CPI implements those requirements of the Directive in national law. Other Member States make use of similar instruments. (24) In the United Kingdom, section 7 of the Civil Procedure Act 1997, taken together with rule 25.1(1)(h), permits the issue of a search order. Those provisions codify the Anton Piller Order, (25) an instrument developed through the case-law. (26)

51. The provisions and aims of Directive 2004/48 ought to be taken into account in the interpretation of Regulation No 1206/2001 even though, according to the 11th recital in the preamble thereto, the Directive itself does not aim to establish harmonised rules for judicial cooperation. (27) There are, as is stated further in the recital mentioned, 'Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property'.

52. That consideration suggests that, in order to ensure effective protection of intellectual property rights also in cross-border situations, the possibility of judicial cooperation in accordance with Regulation No 1206/2001 ought to be available in procedures to preserve evidence provided for by Directive 2004/48.

c) Objections to the application of Regulation No 1206/2001

53. Whilst most of the parties are in favour of applying Regulation No 1206/2001 to situations such as those in the present proceedings, the Greek Government, Ireland and the United Kingdom Government oppose the Regulation's application, arguing essentially as follows:

– Orders seeking a description of goods constitute orders for search and seizure which are not covered by the Regulation.

– Like the Hague Evidence Convention, the Regulation does not cover provisional and protective measures.

– The application for the preserving measures sought must be made to an English court, on the basis of Regulation No 44/2001.

i) Inapplicability of Regulation No 1206/2001 to orders for search and seizure?

54. The United Kingdom Government argues that an order to obtain a description of goods includes orders for search and seizure which do not fall within the area of application of Regulation No 1206/2001. In its view, the taking of evidence must be distinguished from investigatory measures prior to the actual act of obtaining evidence. Moreover, the Regulation contains no provisions protecting the rights of the persons concerned in the event of search and seizure.

55. The taking of evidence consists of the sensory perception and appraisal of an item capable of constituting evidence. The testimony of a witness is heard, documents are read and other objects are examined. Judicial cooperation extends to all those acts, as is clear from Article 4(1)(e) and (f) of Regulation No 1206/2001.

56. A precondition to the taking of evidence is that the court or a person authorised by the court, for example, an expert, possibly also a party's representative in the proceedings must have access to the evidence. An order to obtain the description of goods or a search order requires the holder of the evidence to grant access thereto. Such orders are therefore inextricably linked with the taking of evidence. That is also the case where the court does not inspect the items on site, but engages another person to document the objects or to remove samples and the documentation (photocopies, photographs, data stored on relevant media or similar items) or the sample is produced directly to the court only at a later time.

57. Measures to preserve evidence also provide for protection of the rights of persons concerned. Within the framework of judicial cooperation, such orders are usually performed in accordance with the law of the Member State of the requested court (Article 10(2) of Regulation No 1206/2001). That ensures observance of the procedural standards in force in the place where the evidence is taken. Those standards protect the rights of the opposing party and the rights of third parties in possession of evidence.

58. If, exceptionally, the taking of evidence is performed in accordance with a special procedure provided for by the law of the Member State of the requesting court (Article 10(3) of Regulation No 1206/2001), the opposing party or third parties may find themselves confronted with a foreign procedural law in the place where the evidence is taken.

59. Measures for preserving evidence of an infringement of intellectual property rights have been harmonised, however, in Directive 2004/48. Assuming correct transposition of the Directive, the procedural laws of the Member States in this area are now liable to diverge from one another only to the extent that flexibility in the Directive's transposition is allowed. For the remainder, national laws must comply with principles of general application, such as, for example, the right to fair hearing and protection of home and property, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

60. If the taking of evidence in accordance with the foreign procedural law should nevertheless prove to be incompatible with national law or impossible due to major practical difficulties, the only remaining solution is for the request to be dismissed (second sentence of Article 10(3) of Regulation No 1206/2001). As a less radical measure, however, the requested court must first attempt to execute the requested order in a modified manner, thereby observing the guarantees provided for by national law. (28)

61. Finally, I wish to point out that my foregoing observations relate to the situation in which the holder of the evidence cooperates voluntarily with the evidence-taking. It is only when the person concerned does not allow access to the evidence that coercive measures have to be taken, where appropriate, in order to take evidence. Under Article 13 of Regulation No 1206/2001, such interferences of a more serious nature affecting the rights of the person concerned are determined exclusively in accordance with the lex fori of the requested court.

62. Applying those considerations to the present case, that means that the English court must, in principle, perform the order for description as requested in accordance with to the special procedure provided for by Articles 128 and 130 of the CPI unless it puts forward any grounds for refusal. In that regard, the taking of evidence consists, first, in the documentation of the harness system and of the relevant documents and data. It may include also the removal of documents and objects to the extent necessary for appraisal by an expert or for production to the requested or requesting court for a direct examination of the evidence. Regard must be had throughout to the principle of proportionality.

63. In addition, Article 7 of Directive 2004/48 requires that protection of confidential information must be ensured. That obligation applies both to the requested and to the requesting court. Accordingly, whilst the Tribunale Civile di Genova did consent to the presence of the applicant and his representative in the proceedings during the taking of the description, it did not allow them to inspect the documents divulged and requested that the documents be dispatched in a sealed envelope. It is conceivable, for example, that the Tribunale would admit the sensitive commercial documents into the proceedings only where, on the basis of the documentation, it is convinced that

a patent infringement exists. Only in that case is knowledge of the sales figures necessary in order to determine the extent of the loss.

64. If RWO does not voluntarily release the objects, Article 13 of Regulation No 1206/2001 allows for coercive measures. If English law allows for such and they are essential to the taking of evidence, a sample of the harness system, for example, could be seized.

65. Accordingly, it is incorrect to assert in such general terms that the measures requested by the Tribunale Civile di Genova, as search and seizure orders, do not fall within the scope of application of Regulation No 1206/2001.

ii) Prohibition on pre-trial discovery

66. The reservations expressed by the United Kingdom Government concerning the extension of judicial cooperation to cover measures for the preservation of evidence at a pre-trial stage are evidently connected to the issue of pre-trial discovery, repeatedly discussed within the framework of the Hague Conference. (29)

67. As a preliminary point, it must be borne in mind that, under Article 1(2) of Regulation No 1206/2001, a request to take evidence may not be made if the evidence is not *intended for use in judicial proceedings, commenced or contemplated*. The question of whether the request fully meets those requirements raises some doubt in the case of an order requiring a description to be obtained of other evidence of the contested conduct, including, by way of example but not exhaustively: invoices, delivery notes, payment orders, commercial offer letters, advertising material, computer archive data and customs documents.

68. Unlike the Hague Evidence Convention (Article 23), Regulation No 1206/2001 does not contain any explicit proviso with regard to pre-trial discovery. However, when Regulation No 1206/2001 was adopted, the Council issued the following Statement 54/01: (30) 'The scope of application of this Regulation shall not cover pre-trial discovery, including the so-called "fishing expeditions"'.

69. According to settled case-law, a statement in the Council minutes may be taken into account in the interpretation of a legal act inasmuch as its content is referred to also in the wording of the legal act and if it serves to clarify a general concept. (31) In the context of the present proceedings, the statement in the minutes clarifies the condition concerning the 'use of evidence in judicial proceedings, commenced or contemplated' within the meaning of Article 1(2) of Regulation No 1206/2001.

70. In that regard, the exclusion of pre-trial discovery referred to in the statement cannot be interpreted as precluding every procedure aimed at establishing facts prior to the bringing of proceedings in the main claim. That position is precluded by the wording of Article 1(2). Rather, the statement indicates that the evidence must be described with a sufficient degree of precision that the link to the proceedings commenced or contemplated is evident and that the judicial cooperation may relate only to the items themselves which are capable of constituting proof and not to circumstances which are linked only indirectly to the judicial proceedings.

71. In order to prevent the other party to the proceedings from having to comply with excessive requests for discovery (so-called fishing expeditions), in the case of orders for the discovery of specific documents a distinction must be drawn in the following manner.

72. An order to produce documents is inadmissible if the documents whose discovery is sought lead only to the identification of items which are capable of serving as evidence but which do not in themselves serve an evidential function in the proceedings (a so-called 'train of enquiry' – the inadmissible search for material which may be relevant as evidence). In such cases, the evidence is used merely indirectly. Accordingly, the condition '[for] use in judicial proceedings' is not satisfied.

73. On the other hand, an order to produce documents which are discovered only upon execution of the order is admissible, if such documents are specified or described with sufficient precision and are directly linked to the subject-matter of the dispute. Only in this manner can the excessive gathering of material – to the detriment of the other party to the proceedings – going beyond the matter in dispute be avoided.

74. In the main proceedings, the order of the Italian court requiring a description to be obtained of the sales and purchase invoices, delivery notes, payment orders, commercial offer letters, advertising material, data stored in computer archives and customs documents, serves the purpose of discovery of that evidence. Using those documents, the plaintiff in the main proceedings intends to prove the existence of a patent infringement as such, the extent thereof and, accordingly, to quantify his damages claim. To the extent that that evidence is intended to be used in proceedings pending or contemplated, the request of the Italian court is admissible.

75. However, the passage in that order of the Italian court by which it requests further unspecified documents ('by way of example, however, not exhaustively') is inadmissible. What is lacking in that passage is a precise description of the other types of documents.

iii) Delimitation of the taking of evidence and of provisional and protective measures

76. Unlike the other parties, the Greek Government, Ireland and the United Kingdom Government take the view that measures to obtain a description of goods, including the seizure of documents and removal of samples, constitute provisional and protective measures and not the taking of evidence within the meaning of Regulation No 1206/2001. That argument rests on two premises: first, that provisional and protective measures fall outside the scope of application of the Regulation and, second, that the measures to preserve evidence at issue in this case constitute such provisional and protective measures. I concur with the first premise but not with the second.

– Provisional and protective measures fall outside the scope of application of Regulation No 1206/2001

77. Prior to the adoption of Regulation No 1206/2001, the Hague Evidence Convention was essentially the basis for reference for judicial cooperation in the taking of evidence – at least between the Contracting States to the Convention which included, however, only 11 of the Member States. (32) The Regulation is intended to create a common basis for judicial cooperation throughout the whole Community (with the exception of Denmark) and to ensure the further simplification thereof. (33)

78. The initiative proposed by the Federal Republic of Germany with a view to adopting a Council regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters (34) aligned its definition of the scope of application with the corresponding wording of Article 1 of the Hague Evidence Convention. Accordingly, the regulation was intended to apply to requests to obtain evidence or perform some other judicial act, except the service of judicial or extrajudicial documents and *provisional and protective measures*. (35) Such measures are, in fact, already covered by Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (36) and by the Brussels Convention, as mentioned in the seventh and eighth recitals in the preamble to the German initiative.

79. Unlike the initiative, Regulation No 1206/2001 dispenses with the inclusion of 'other judicial acts' in its scope of application and refers only to the taking of evidence. Accordingly, it is superfluous also expressly to exclude provisional or protective measures from the scope of application since they may be regarded only as other judicial acts but not as the taking of evidence. It is therefore correct to assert that provisional or protective measures fall outside the scope of application of the Regulation.

– Does a procedure for preserving evidence constitute a provisional or protective measure?

80. That does not mean, however, that the second premise may also be regarded as correct, namely, that a measure for preserving and obtaining evidence, such as the order for a description of goods sought in the main proceedings, constitutes a provisional or protective measure to which neither the Hague Evidence Convention nor Regulation No 1206/2001 – which builds thereupon – applies. Thus, the connection in terms of legislative history between Regulation No 1206/2001 and the Convention fails to be of any further assistance in delimiting the taking of evidence from provisional or protective measures.

81. Two types of provisional measures must be distinguished by reference to the aim pursued: orders aiming to secure the judgment itself, on the one hand, and measures for the preservation and obtaining of evidence, on the other, as may be illustrated by the example of the present proceedings before the Tribunale Civile di Genova.

82. If the plaintiff in the main proceedings is successful, the judgment will require the defendant to discontinue the rights infringement and, if necessary, to pay damages. An effective measure to secure the right to discontinuance consists in the seizure of the infringing goods or of the equipment used in the production thereof.

83. The present case, however, does not concern a measure of that kind, aimed at securing execution of the judgment at a later time, thus, for example, seizure of all existing stocks of the harness system in order to prevent the distribution thereof. That measure would have had to have been based on Article 129 of the CPI. Instead, the referring court requested the English court to proceed with a measure for the preservation of evidence in accordance with Article 128 of the CPI.

84. Article 7 of Directive 2004/48, unfortunately, confuses those two types of provisional measure. By way of introduction, the provision refers, in fact, to measures for the preservation of evidence, under which are included, however, the physical seizure of the infringing goods, and, in appropriate cases, the materials and instruments used in the production and/or distribution of those goods and the documents relating thereto. As I have already explained, they are not really measures for the preservation of evidence, but rather provisional measures intended to secure the main claim.

85. A strict separation of the measures within the framework of Directive 2004/48 may well be unnecessary. It is, however, of considerable importance for the determination of the scope of application of Regulation No [32703m1206/2001. The Regulation is wholly inapplicable to provisional measures aimed at securing the main claim, but does apply to measures for the preservation of evidence.

86. This understanding of the concept of provisional and protective measures is also confirmed by a schematic examination of the concept's function within the legislative context of the Hague Evidence Convention. The exclusion of such measures is intended to ensure in their scopes of application the mutual delimitation of that convention and the Brussels Convention. That objective expressly underlies the German initiative behind the Regulation. (37)

87. Inasmuch as the United Kingdom Government asserts that provisional and protective measures which fall within the scope of application of Regulation No 44/2001 must be excluded also from the concept of taking evidence within the meaning of Regulation No 1206/2001, since in that regard the same need for delimitation exists, that view must be upheld.

88. Ireland and the United Kingdom Government go further, however, arguing that the measures for the preservation of evidence at issue here could have been sought directly before an English court on the basis of Article 31 of Regulation No 44/2001, thereby excluding any recourse to Regulation No 1206/2001.

89. Article 31 of Regulation No 44/2001 provides, in a manner analogous to Article 24 of the Brussels Convention, that 'application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter'.

90. In *St. Paul Dairy Industries,* the Court held that Article 24 of the Brussels Convention did not apply to independent measures for obtaining and preserving evidence prior to the commencement of proceedings. (38)

91. In support of that conclusion, the Court held, inter alia, that the expression 'provisional measures' within the meaning of Article 24 of the Brussels Convention is to be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case. (39) Thus, that provision applies to measures which are intended to preserve the substantive claim in law, not, however, to the performance of procedural measures such as the taking of evidence. (40)

92. Moreover, the Court pointed to the risk that the rules on judicial cooperation in the taking of evidence set out in Regulation No 1206/2001 could be circumvented if, on the basis of Article 24 of the Brussels Convention, measures for the taking of evidence could be sought directly before a court not having jurisdiction as to the substance of the case. (41) The Court thus indicated implicitly that independent measures for preserving and obtaining evidence must be characterised as the taking of

evidence within the meaning of Regulation No 1206/2001.

93. Thus, in the light of the Court's case-law, the possibility, based on Article 31 of Regulation No 44/2001, of having evidence preserved directly by a court in the place in which the evidence is situated, considered by Ireland and the United Kingdom to be the preferred approach, cannot be entertained. (42) Accordingly, nor does any problem of delimitation arise if measures for the preservation of evidence are considered to be cases to which Regulation No 1206/2001 applies. Rather, the exclusion of such measures from the area of application of Regulation No 44/2001 requires precisely the existence of judicial cooperation in accordance with Regulation No 1206/2001 in order to permit the preservation of evidence in another Member State on the basis of Community law.

d) Interim conclusion

94. Thus, by way of interim conclusion, it may be observed that the description of goods within the meaning of Articles 128 and 130 of the CPI, the performance of which is sought by the Tribunale Civile di Genova, constitutes a measure for the taking of evidence in accordance with Article 1 of Regulation No [32703m1206/2001. The requested court ought to perform that request, provided that the measures are described with adequate precision such that the link between the evidence to be taken and the proceedings (where applicable, contemplated) can be identified and no grounds for refusal exist.

2. Grounds for refusal

95. Article 14 of Regulation No 1206/2001 governs the grounds on which the requested court may refuse to perform a request. According to Article 14(2)(a) the requested court may refuse to execute a request, in particular, if the request does not fall within the area of application of the Regulation as set out in Article 1. In the present case, however, the subject-matter falls within the Regulation's area of application, as I have set out above. Furthermore, execution of a request may be refused on the basis of Article 14(2)(b) if, under the law of the Member State of the requested court, such execution does not fall within the functions of the judiciary.

96. The second sentence of Article 10(3) of Regulation No 1206/2001 contains, in addition, a public policy proviso which applies to requests which are to be executed in accordance with the law of the requesting court. The referring court made use of that possibility in requesting that a description of goods be performed in accordance with Articles 129 and 130 of the CPI. In general, the requested court must comply with such a requirement, too, unless that procedure is incompatible with the law of the Member State where it is situated or due to major practical difficulties.

97. Both possibilities for refusal make reference to the requirements of the law of the Member State of the requested court. The Court may not interpret those national provisions with a view to determining what powers the judiciary possesses under national law or what forms of taking evidence are incompatible with national law or cannot be performed for practical reasons. Those are questions for the requested court to determine.

98. It follows from the Court's case-law, however, that where a Community provision refers to national legislation and practice, Member States cannot adopt measures likely to frustrate the objective of the Community legislation of which that provision forms part. (43) The Regulation imposes external limits on the national legislatures' freedom which may be exceeded if the national law in question undermines the practical effectiveness of the Regulation. In that context, it is incumbent on the Court to interpret the Regulation with a view to ensuring observance of those limits.

99. In that regard, it should be borne in mind, as a general guideline, that in order to secure the effectiveness of the Regulation the possibility of refusing to execute the request for the taking of evidence should be restricted to narrowly-defined exceptional situations, as mentioned the 11th recital in the preamble to Regulation No 1206/2001.

100. According to the United Kingdom Government, the requested court rejected the request because it did fall outside the scope of application of Regulation No 1206/2001. The requested court did not rely on any possible grounds of refusal. (44) However, the United Kingdom takes the view, also shared by Ireland, that in any event performance of the requested measures also falls outside the functions of the English judiciary.

101. They argue that under the common law, obtaining evidence is not a task for the court or judicial agencies. Rather, the parties themselves must obtain the evidence. Whilst the supervising solicitor who, under section 7 of the Civil Procedure Act 1997, serves and performs a search order, is an officer of the court, he is not, however, a court agent.

102. By contrast, in response to a question from the Court, the Swedish and Finnish Governments and the Commission put the argument – in my view, correctly – that a distinction must be drawn between *ordering* a measure for evidence to be taken and the *performance* thereof. Execution of a request to obtain evidence cannot be refused simply on the basis that performance of certain forms of taking evidence does not fall within the scope of judicial activities. The decisive factor, however, is that courts are entitled to order the requested measures. Section 7 of the Civil Procedure Act 1997, taken together with Part 25 of the Civil Procedure Rules, appears, in principle, to grant English courts the appropriate powers. (45)

103. Moreover, as the Commission correctly points out, nor is it an imperative requirement that judicial functions may be exercised only by persons who, in organisational terms, are part of the court system. A supervising solicitor who is engaged by the court – albeit on the application of a party – to ensure the proper service and performance of a search order may be regarded also as exercising judicial functions. That view is supported by the fact only certain particularly experienced solicitors are entrusted with this function. (46) Moreover, in order to ensure the necessary neutrality in the execution of their task, they are not permitted to belong to the same firm of solicitors as the applicant's legal representative. (47)

104. Were only the taking of evidence as performed by the court itself to be treated as falling within the ambit of judicial functions, the practical effectiveness of the Regulation would be excessively impeded. Such an interpretation would also preclude, for example, the obtaining of expert reports which, likewise, are not drawn up by the court itself, but by an expert.

105. Accordingly, refusal to perform cannot be justified by the lack of judicial power in a situation where a measure for the preservation of evidence, such as an order for description of goods within the meaning of Articles 128 and 130 of the CPI, in accordance with the law of the requested Member State, is not performed by the court itself but by an independent institution of the justice system (officer of the court) engaged by the court.

106. The objection that, under the common law, responsibility for obtaining evidence lies with the parties could be regarded also as a reference to the proviso set out in the second sentence of Article 10(3) of Regulation No 1206/2001. Under that proviso, the requested court may refuse the performance of a request in accordance with a procedure provided for by the law of the State of the requesting court if that procedure is incompatible with the law of the Member State where it is situated or due to major practical difficulties.

107. In that regard, it must be observed, first, that such a proviso does not come into play simply because the requested foreign law measure does not correspond exactly with domestic law and national practice. (48) Otherwise Article 10(3) of Regulation No 1206/2001 would be deprived of all practical effect. To that extent, the wording of the Regulation's proviso is of an expressly more limited nature than Article 9(2) of the Hague Evidence Convention, which permits refusal in cases where the request to take evidence in accordance with a special procedure does not comply with internal practice in the requested State.

108. Instead, the requested court must, first, make all possible efforts, as far as the available means permit, to put into practice the measure governed by the law of the requesting State.

109. In that regard, account must be taken of the fact that the essence of judicial cooperation under Regulation No 1206/2001 consists in the possibility for a court of one Member State directly to approach the court of another Member State with a request to take evidence. Judicial cooperation may not be rendered excessively difficult by imposing too broad an obligation on the parties to the proceedings before the requesting court when taking evidence in the State of the requested court. (49)

110. Moreover, under Article 18(1) of Regulation No 1206/2001, in principle, no taxes and costs may be claimed for the execution of a request. Under Article 18(2), the requested court may require merely the reimbursement of fees paid to experts and interpreters and the costs occasioned by the taking of evidence according to a special procedure under Article 10(3) and (4).

111. If it proves impossible due to conflicting provisions of domestic law or major practical difficulties to carry out the foreign law request according to the letter, the request may not simply be returned unexecuted in its entirety. Rather, according to the required interpretation of Regulation No 1206/2001, which favours judicial cooperation, the requested court must perform the measure sought in a modified manner so as to comply with domestic law requirements. (50) Where even that approach is impossible, there remains the possibility of applying an analogous procedure in accordance with domestic law. (51)

112. At the present stage of the proceedings, however, the Court is not called upon to deliver a definitive interpretation on the relevant provisions of the Regulation setting out possible grounds of refusal or provisos. Instead, it is a matter, first, for the requested court to address those questions. Should it harbour doubts as to the ambit of the provisions it is entitled and required, as a court of last resort, to make a reference to the Court, which could then, having knowledge of the legal and factual situation, adopt a more specific position on the interpretation of Article 14(2)(b) and Article 10(3) of Regulation No 1206/2001.

V – Conclusion

113. In the light of the foregoing analysis, I propose that the Court should answer the first question of the Tribunale Civile di Genova as follows:

'Measures for the preservation and obtaining of evidence such as an order for the description of goods in accordance with Articles 128 and 130 of the Italian Codice della Proprietà Industriale constitute measures for the taking of evidence which, in accordance with Article 1 of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, fall within the scope of application thereof and which at the request of the court of one Member State a court of another Member State must execute, unless grounds for refusal exist.'

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1 – Original language: German.

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2 – OJ 2001 L 174, p. 1.

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3 – See the list of Contracting States of the Hague Conference on Private International Law available at 'www.hcch.net'.

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4 – The TRIPs Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) constitutes Annex 1C to the Agreement establishing the World Trade Organisation (WTO Agreement), approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1).

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5 – 'The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on the European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation' (21st recital in the preamble to Regulation No 1206/2001).

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6 – OJ 2004 L 157, p. 45, corrigendum in OJ 2004 L 195, p. 16.

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7 – See Article 20 of Directive 2004/48.

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8 – Decreto Legislativo (legislative decree) No 30/05 of 10 February 2005.

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9 – See Case 6/64 *Costa* v *ENEL* [1964] ECR 585; Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraph 25; and Case C-99/00 *Lyckeskog* [2002] ECR I–4839, paragraphs 14 and 15.

10 – *Lyckeskog*, cited in footnote 9, paragraph 15.

11 – Article 128(4) of the CPI.

12 – See Article 128(5) of the CPI.

13 – See, inter alia, Case C–415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Joined Cases C–295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 26.

14 – *Manfredi*, cited in footnote 13, paragraph 27.

15 – See, inter alia, *Bosman*, cited in footnote 13, paragraph 61, and Case C–344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 24.

16 – The United Kingdom Government includes form B, dated 11 July 2005, in Annex 2 to its observations. However, the Tribunale Civile di Genova does not mention that document in its order for reference, but indicates that receipt of the request was 'at least acknowledged [by the requested court] in its note of 20 September 2005'. Thus, the actual fate of form B remains uncertain.

17 – Where the reason for refusing to execute a request is the fact that the requested measure does not fall within the scope of Regulation No 1206/2001 – seemingly the view taken by the requested court – the Regulation provides, however, for the use of form H. That form may, however, also be used to communicate other grounds of refusal, for example, when the request does not fall within the functions of the judiciary. If a court considers itself prevented from taking evidence in accordance with a special procedure provided for by the law of the Member State of the requesting court (see Article 10(3) of Regulation No 1206/2001) the requesting court must be informed thereof using form E. Seemingly the English court to which the request was addressed did not make use of any of those forms.

18 – See form A, point 13 of the request, which is attached to the observations of the United Kingdom as Annex A 1.

19 – 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32) as amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1) and – amended text – p. 77) of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and 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) ('the Brussels Convention').

20 – See Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 20,

on the concept of 'civil and commercial matters' and Case C-265/02 *Frahuil* [2004] ECR I-1543, paragraph 22, on the concept of 'matters relating to a contract'. The Court has also applied that case-law in respect of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1); see Case C–103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 29.

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21 – *Préservatrice foncière TIARD*, cited in footnote 20, paragraph 20.

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22 – The Commission, too, attaches a broad interpretation to the concept of evidence in its practice guide for the application of the regulation on the taking of evidence. It sets out that the concept of 'evidence' includes, for example, hearings of witnesses of fact, of the parties, of experts, the production of documents, verifications, establishment of facts, expertise on family or child welfare (see point 8 of the practice guide accessible at http://ec.europa.eu/civiljustice/evidence/evidence_ec_guide_en.pdf).

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23 – See the fourth, fifth and seventh recital in the preamble to Directive 2004/48. For a more in-depth discussion, see McGuire, 'Die neue Enforcement Directive 2004/48/EG und ihr Verhältnis zum TRIPS-Übereinkommen', *Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht*, 2004, p. 255 and Ibbeken, A., *Das TRIPS-Übereinkommen und die vorgerichtliche Beweishilfe im gewerblichen Rechtsschutz*, Cologne, 2004.

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24 – See, for example, in France the 'saisie-contrefaçon' provided for in Article L. 615-5 of the Code de la propriété intellectuelle (Intellectual Property Code). For a comparative study of German, French and English law, see Ibbeken, A., cited in footnote 24.

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25 – See *Anton Piller KG* v *Manufacturing Processes Ltd* [1976] 1 All ER 779.

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26 – See Zuckerman, A., *Zuckerman on Civil Procedure*, 2nd edition, London, 2006, point 14.175; for a detailed account of the development, see Ibbeken, A., cited in footnote 24, p. 111 et seq.

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27 – Having regard to the facts of the main proceedings, however, account must be taken of the temporal scope of Directive 2004/48. It entered into force on 22 June 2004 and transposition was required by 29 April 2006 (see Articles 20 and 21 of Directive 2004/48). Before the period for transposition of a directive expires, only a limited obligation exists to have regard to its requirements (see Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 117 et seq.).

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28 – For a more detailed discussion of this issue, see below in point 111.

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29 – The exact scope of that reservation under Article 23 of the Hague Evidence Convention has not been clarified definitively. Interpretation of the concept of pre-trial discovery has been the subject-matter of explanatory declarations made by the Contracting States and of several discussions at the Hague Conference (see *Conclusions and Recommendations adopted by the Special Commission on the practical operation of the Hague Apostille, Evidence and Service Conventions* (28 October to 4 November 2003), points 29 to 34, accessible at: http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf; see also Nagel, H., and Gottwald, P., *Internationales Zivilprozessrecht*, 6th edition, Cologne 2006, para. 8, point 68 et

seq.). At issue, in principle, are measures permitted under the common law, especially American law, at a pre-trial stage for the purposes of obtaining information which is in the possession of the other party to the proceedings.

30 – See monthly summary of Council acts, Document No 10571/01, p. 16 of 4 July 2001.

31 – See Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18; Case C–368/96 *Generics(UK) and Others* [1998] ECR I-7967, paragraphs 26 and 27; and Case C–402/03 *Skov and Bilka* [2006] ECR I–199, paragraph 42.

32 – See the sixth recital in the preamble to Regulation No 1206/2001.

33 – Berger, C., 'Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelssachen (EuBVO)', *Praxis des Internationalen Privat- und Verfahrensrechts – IPRax* 2001, p. 522.

34 – OJ 2000 C 314, p. 1.

35 – The English translation of the German initiative – on which the Government of the United Kingdom relies – appears to be incorrect on this point, as the German passage 'Maßnahmen der Sicherung oder Vollstreckung' is reproduced as 'measures for the *preservation of evidence* or enforcement'. On the contrary, the French version, like the German original version, is aligned directly with the wording of the Hague Evidence Convention and speaks of 'mesures conservatoires ou d'exécution'. Following the same approach the English version should have read 'orders for provisional or protective measures'.

36 – OJ 2000 L 160, p. 37.

37 – See the seventh and eight recitals in the preamble to the initiative.

38 – Case C-104/03 *St. Paul Dairy Industries* [2005] ECR I-3481, paragraph 25. See also Geimer, R., and Schütze, R.A., *Europäisches Zivilverfahrensrecht*, 2nd edition, Munich, 2004, section A 1 – Article 2 of Regulation No 44/2001, point 92, and Article 31 of Regulation No 44/2001, point 32.

39 – *St. Paul Dairy Industries*, cited in footnote 38, paragraph 13.

40 – In the same vein, see *CFEM Facades SA* v *Bovis Construction Ltd* [1992] I.L. Pr. 561 QBD and Schlosser, P., *EU-Zivilprozessrecht*, 2nd edition, Munich, 2003, Article 32 of Regulation No 44/2001, point 7 and Article 1 of the Hague Evidence Convention, point 4.

41 – *St. Paul Dairy Industries*, cited in footnote 38, paragraph 23.

42 – One can certainly discuss whether the applicant ought not to have the option of both possibilities, the taking of evidence by means of judicial cooperation or the taking of evidence by a court in the place in which the evidence is situated. The second route might possibly be more swift, but is subject to the risk that the evidence gathered

abroad is not recognised by the court with jurisdiction as to the substance of the case. (For views critical of the Court's approach, see, for example: Mankowski, P., 'Selbständige Beweisverfahren und einstweiliger Rechtsschutz in Europa', *Juristenzeitung* 2005, p. 1144 and Hess B., and Zhou, C., 'Beweissicherung und Beweisbeschaffung im europäischen Justizraum', *Praxis des Internationalen Privat- und Verfahrensrechts –IPRax* 2007, p. 183). Irrespective of whether and, if so, under what circumstances, application of the Brussels Convention or Regulation No 44/2001 to independent procedures for obtaining evidence is desirable, the authors cited do not question the fact that in all cases those procedures are governed by Regulation No 1206/2001.

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43 – Case C-385/05 *CGT* [2007] ECR I-611, paragraph 35, which refers to Case C–151/02 *Jaeger* [2003] ECR I-8389, paragraph 59.

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44 – That view is supported by the fact that the requested court returned the request without making use of form E or H.

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45 – It appears that, in practice, the courts' use of this instrument is somewhat sparing. It is seemingly more usual to require disclosure by the parties themselves of the documents and items in their possession. Only where the disclosure procedure is deemed inadequate for the preservation of evidence does the issuance of a search order fall to be considered (see Zuckerman, *Zuckerman on Civil Procedure*, 2nd edition, London, 2006, point 14.177).

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46 – Practice Direction 25 – Interim injunctions, paragraph 7.2.

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47 – Practice Direction 25 – Interim injunctions, paragraph 7.6.

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48 – See Rauscher, T., and v. Hein, J., *Europäisches Zivilprozessrecht*, 2nd edition, Munich, 2006, Article 10 of Regulation No 1206/2001, point 13.

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49 – Where witnesses are examined pursuant to a request for judicial assistance under Regulation No 1206/2001, Practice Direction 34 – Depositions and Court Attendance by Witnesses, paragraph 11.3, for example, provides expressly for the Treasury Solicitor to assume the applicant's role before the requested court. On that point see also Layton and Mercer, *European Civil Practice*, 2nd edition, London, 2004, point 7.062.

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50 – See Rauscher T., and v. Hein, J., cited in footnote 48, Article 10 of Regulation No 1206/2001, point 22 et seq.

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51 – See Huber, S., in: Gebauer, M., and Wiedmann, T., *Zivilrecht unter Europäischem Einfluss*, Stuttgart, 2005, Chapter 29, point 133.