SYNOPSIS OF CASE-LAW

The EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

Part 2

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1978

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The object of the synopsis of case-law

The effective and uniform application of the EEC Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Council Document No. 100 on the Recognition of Judgments) must be guaranteed by the procedure whereby the Court of Justice of the European Communities, in accordance with the Protocol concerning the interpretation by this Court of the said Convention (Official Journal No. L204/28 of 2 August 1975) has jurisdiction to give preliminary rulings on questions referred to it concerning the interpretation of the Convention by national courts and other competent authorities.

The proper functioning of this procedure for referring questions for interpretation depends upon the diffusion of information concerning decisions made in application of the EEC Convention.

For this reason the signatory States declared in the "Joint Declaration" annexed to this Protocol concerning the interpretation by the Court of Justice of the Convention that they were "ready to organize, in co-operation with the Court of Justice, an exchange of information on the judgments".

The publication of the synopsis of case-law is intended to further this exchange of information. Its form has been determined by the endeavour to ensure that those using it are presented with the information speedily and in several languages.

The summaries of decisions have been supplemented by a table of statistical information, which is designed to make it possible to assess how effective the Convention has been in practice.

Instructions for users

1. The synopsis of case-law contains summaries of decisions of national courts concerning the EEC Convention and also extracts from judgments of the Court of Justice of the European Communities in which it gives rulings concerning the interpretation of the Convention.+

2. It is hoped to publish the synopsis twice or thrice yearly in the six languages of the European Community; cumulative indexes will be issued at regular intervals. It is therefore recommended that the individual issues be kept in a loose-leaf file.

3. The decisions will be numbered consecutively, commencing with the first issue (Part 1) and are classified according to the subject-headings in the Convention. They have been included only under the heading with which they were most closely connected; however, rulings on the various questions of law dealt with in the decisions can also be traced by means of the Index of Provisions Judicially Considered.

4. The synopsis of case-law has been extracted from a comprehensive card index of the case-law of the EEC Convention kept by the Documentation Branch of the Court of Justice of the European Communities. Any user who is interested may have access to this card index. The number quoted in each case at the end of the summaries refers to this card index.

5. Orders for the synopsis of case-law may be placed with the Documentation Branch.

6. In principle, the Documentation Branch receives copies of decisions under the EEC Convention from the Ministries of Justice. However, in order to ensure that the records of such decisions are as complete as possible the Branch will be grateful if users of the synopsis of case-law will send it copies of decisions direct.

+ The judgments of the Court of Justice of the European Communities are published officially in the "Reports of Cases Before the Court", which may be ordered through the Office for Official Publications of the European Communities, P.O. Box 1003, Luxembourg.

Preface to Part 2

1. This part of the Synopsis of Case-law contains the three judgments on the interpretation of the Convention delivered by the Court of Justice of the European Communities in 1977 and 32 decisions given by courts of the Member States, most of which were given between 1 July 1976 and 30 June 1977.

   It is impossible, at least in the first few parts, to achieve the aim of basing the individual parts of the Synopsis of Case-law on a specific period related to the date upon which the decisions were given, since the periods which elapse between the issue of the decisions of the national courts and the date on which the Court of Justice is informed of them vary very considerably. For that reason this part also contains decisions which fall within the period which was in the main covered by Part 1 (1 July 1975 to 30 June 1976).

2. In the choice of the decisions to be included in Part 2 there seemed justification for not following the course adopted in Part 1; those decisions in which the application of the Convention presented no problems have accordingly been omitted. The summaries are now preceded by head-notes so as to enable the user to ascertain more rapidly the general content of the decisions included.

3. In connexion with the statistics contained in Part 1 it has once again only been possible to give concrete statistical information on the grant of leave to enforce judgments under the Convention with regard to the Grand Duchy of Luxembourg. Out of a total of 49 applications for leave to enforce judgments in that country in the period from 1 January to 31 December 1977 48 applications were granted and one was refused. It appears from the other records available that in Belgium and the Federal Republic of Germany only a very small proportion of the applications was refused.

Index of decisions contained in Part 2

Index of provisions judicially considered

TITLE I

SCOPE

Court of Justice of the European Communities (See No. 85)

Courts of the Member States (cf. Nos. 81, 86 and 87)

No. 54 Order of the Oberlandesgericht Karlsruhe, 2nd Civil Senate, of 4 June 1976, B.K. v P.K., 2 W 7/76

Scope - Duty to pay maintenance in an "ordonnance de non-conciliation" issued by a French court in divorce proceedings - No decision on "status" (Article 1 (1))

The applicant had instituted divorce proceedings before the Tribunal de Grande Instance, Paris. After the attempt at reconciliation had failed the court issued an "ordonnance de non-conciliation", in accordance with the provisions of Article 238 of the Code Civil as they then stood and of Article 878 of the Code de Procedure Civile, ordering that the applicant should be given custody of the children and, further, that the husband should pay maintenance to the applicant and the children. The Landgericht Karlsruhe granted leave to enforce the order with regard to the obligation to pay maintenance to the applicant.

The Oberlandesgericht Karlsruhe dismissed the appeal lodged by the husband and stated that an "ordonnance de non-conciliation" is a judgment within the meaning of Article 25 of the Brussels Convention which falls within the material scope of the Convention (Article 1). The fact that the order was issued in divorce proceedings does not result in the inapplicability of the Convention in accordance with Article 1 (1) ("The Convention shall not apply to: (1) the status ..."). The decisive factor is whether the order of the court the enforcement of which is involved relates to the law on status or not. If a composite judgment contains various separable orders some of which concern status and some of which do not, these latter, which include orders relating to the obligation to pay maintenance, are covered by the Convention. Article 40 of the Convention provides expressly for the possibility that a foreign judgment may contain various orders of which only some are enforceable under the Convention.

The court thereupon considered whether it could interpret Article 1 (1) of its own jurisdiction and answered this question in the affirmative. It stated that although under Article 2 (2) of the Protocol of 3 June 1971 on the Interpretation of the Convention it could request the Court of Justice of the European Communities to give a preliminary ruling on the interpretation of the question this was however not appropriate in the present case since the answer to the question was clear and, moreover, if the question were referred to the Court of Justice for a preliminary ruling it would result in undue delay in the enforcement of the order.

(IH/171 a)

TITLE II

JURISDICTION

Section 1

General provisions

Courts of the Member States (cf. Nos. 58, 60, 74 and 82)

Section 2

Special jurisdiction

Article 5 (1)

Courts of the Member States (cf. Nos. 69 and 70)

No. 55 Judgment of the Tribunal de Commerce, Brussels, 16th Chamber, of 7 August 1975, S.p.r.l. Arfa v Erso Adrion Co., Jurisprudence Commercial de Belgique, 10ème année/1977, No. 1-2, 4ème partie, pp. 167-176

Jurisdiction - Special Jurisdiction - Jurisdiction in the place of performance (Article 5 (1)) - Concept of "obligation in question" in Article 5 (1) - Independent classification

The Court held, in a dispute between a Belgian sole distributor and its German supplier concerning the unilateral termination without notice of the sole distribution agreement by the supplier that there is no jurisdiction in Belgium under Article 5 (1). The "obligation in question" mentioned in this provision must not be determined in accordance with Belgian law but independently, from the Convention. As follows from the Italian version, what is meant is the obligation which is "at issue" in the proceedings concerned. In a dispute such as the present this means the obligation arising from the (Belgian) Law of 27 July 1961 on the supplier in the case of termination of the contract to give a period of notice of termination or to pay compensation. If it has terminated the contract without notice the obligation to pay compensation under Article 1247 of the Code Civil must be performed at the place of its domicile or seat.

(IH 226)

Note

With regard to the Belgian Law of 27 July 1961 see also Part 1, Nos. 12, 14, 32 and 33

No. 56 Judgment of the Landgericht Hamburg, 5th Civil Chamber, of 29 October 1975, S.u.P. KG v L.O. S.p.A., 5 O 13/75

Jurisdiction - Special Jurisdiction - Jurisdiction in the place of performance (Article 5 (1)) - Rights arising from a pre-contractual relationship as "matters relating to a contract" within the meaning of Article 5 (1) - Appraisal of the legal nature of the rights and determination of the place of performance in accordance with the determinative substantive law of conflict of laws

Negotiations had taken place between the parties to this dispute, a German limited partnership and an Italian company limited by shares, on the taking over by the German undertaking of a "regional agency agreement" in respect of the products of the Italian company. No contract was however concluded. The German undertaking subsequently brought proceedings against the Italian company before the Landgericht Hamburg for the payment of damages "for unjustified severance of contractual negotiations" in the amount of its pre-contractual expenses. The defendant raised the preliminary objection that the court before which the matter had been brought did not have jurisdiction.

The court dismissed the application as inadmissible. It held that in the present case it could only have jurisdiction under Article 5 (1) of the Brussels Convention so that it was first necessary to determine whether the subject-matter of the dispute concerned matters relating to a contract and, if necessary, where the place of performance was in relation thereto. The preliminary question which law was decisive with regard to the legal nature of the rights and the place of performance had to be answered by a German court according to German private international law. In this connexion the rules relating to conflict of laws in the field of the law of obligations were decisive since the parties obviously intended to conclude an agency agreement and the plaintiff was putting forward rights arising from breach of contract or pre-contractual liability and thus "rights of a contractual nature in the broadest sense". In the absence of an express or implied agreement between the parties it was necessary to ascertain the law which was applicable hereto according to the focal point of the intended contractual relationship. In view of the fact that the plaintiff was to act on behalf of the defendant in Germany, the court located the focal point of the legal relationship in Germany and thus made the whole contractual relationship, including the question of pre-contractual liability, uniformly subject to German law. Then it found that, in accordance with Articles 269 et seq. of the German Bürgerliches Gesetzbuch (German Civil Code) the place of performance with regard to the rights asserted by the plaintiff is the defendant's seat in Italy. It is therefore impossible to deduce from Article 5 (1) of the Convention that the court having jurisdiction is that of the plaintiff's seat.

No. 57 Judgment of the Oberlandesgericht Bamberg of 5 November 1976, 3 U 46/76, Neue Juristische Wochenschrift, 1977, No. 11, p. 505

Jurisdiction - Special Jurisdiction - Jurisdiction in the place of performance (Article 5 (1)) - Determination of the place of performance according to the law applicable in accordance with the rules relating to conflict of laws of the court before which the matter is brought - No application of these rules relating to conflict of laws where the Uniform law on the international sale of goods (Article 2) is applicable

The plaintiff, a German undertaking with its seat in Hof (Federal Republic of Germany), instituted proceedings for payment before the Landgericht Bayreuth against the defendant, a Netherlands undertaking, to which it had delivered in the Netherlands a consignment of Czech sour cherries, in reliance upon an alleged agreement conferring jurisdiction. The Landgericht declared that it had no jurisdiction. The plaintiff pursued its request on appeal but claimed in the alternative that the court should refer the proceedings to the Landgericht Hof.

The Obserlandesgericht complied with this alternative request and stated that no agreement conferring jurisdiction on the Landgericht Bayreuth had been concluded under Article 17 of the Brussels Convention; on the contrary, the Landgericht Hof had jurisdiction as the court for the place of performance under Article 5 (1) of the Convention. The law applicable under the German rules relating to conflict of laws is in principle applicable with regard to the determination of the place of performance. However, in the present case the German law of conflict of laws did not apply since the Einheitliches Gesetz über den internationalen Kauf beweglicher Sachen (Uniform Law on the international sale of goods), Article 2 whereof excludes the rules of private international law, is applicable to the disputed contractual relationship between the parties. Under Article 59 (1) of that law the buyer must pay the purchase price to the vendor at the latter's seat. Therefore the place of performance within the meaning of Article 5 (1) of the Brussels Convention is the plaintiff's seat which is situated within the judicial district of the Landgericht Hof.

(IH/174)

No. 58 Judgment of the Landgericht Göttingen of 9 November 1976, 3 O 19/76, Recht der internationalen Wirtschaft, April 1977, p. 235

Jurisdiction - Rights arising under a bill of exchange. No contractual relationship between the bearer and the drawer of the bill of exchange - Article 5 (1) of the Convention not applicable - Authority of the general rules on jurisdiction under Article 2

The plaintiff in these proceedings lodged an application as the bearer of a bill of exchange drawn by the defendant, an Italian company, which was payable in Göttingen (Federal Republic of Germany) and which was protested there for non-payment. The defendant was not represented at the hearing. The court declared, in accordance with the first paragraph of Article 20 of the Brussels Convention, that it had no jurisdiction and dismissed the application. It stated that the jurisdiction of the court for the place of payment provided for under German law (Article 603 of the Zivilprozessordnung (Code of Civil Procedure)) with regard to recourse by the bearer of the bill against the drawer thereof did not apply in relation to the Contracting States to the Convention. On the contrary, it may only have jurisdiction under Article 5 (1) of the Convention, since the defendant's seat is in Italy. However, there was no contractual relationship between the parties since a claim was merely being brought against the defendant as the drawer under Article 43 of the Wechselgesetz (Law on Bills of Exchange). A contractual relationship existed merely between the defendant and the drawee and acceptor of the bill of exchange.

In addition the Court observed obiter that even if Article 5 (1) of the Convention were applicable a German court would not have jurisdiction. The place of performance of the obligation in question is determined by German law since the special rule on conflict of laws contained in Article 93 (1) of the Wechselgesetz provides that the law of the place of payment is applicable to the effects of the undertakings entered into by the drawer of a bill of exchange. According to the general rule laid down in German law, however, the place of performance is in this case the place of the seat of the debtor to whom recourse is being had, which is in Italy.

(IH/181)

No. 59 Judgment of the Cour d'Appel, Colmar, Chamber A for Social Affairs, of 24 March 1977, Gutbrod Werke v Raymond Streiff U.P. 61/76

Jurisdiction - Jurisdiction in the place of performance (Article 5 (1)) - Claim for a company pension resulting from a contract of employment with a German undertaking - Work performed first in Germany and then in France with subsidiaries of the German undertaking - No jurisdiction in France for an application against the German undertaking

The plaintiff in these proceedings was promised in 1950, in a contract of employment which he had entered into with a German company in the Federal Republic of Germany, payment of a company pension when he had reached the age of 65. On the basis of the contract of employment he performed his obligations thereunder until 1952 in the Federal Republic of Germany. From 1952 onwards until he reached the age of 65 he worked, ultimately in Strasbourg, at the direction of the German undertaking, for various French companies which belonged to the group of undertakings comprised in the German company.

During this period he was paid his remuneration by the French companies concerned. When the plaintiff was not paid the agreed pension after reaching the age of 65 he lodged an application against the German undertaking before the Conseil de Prud'hommes, Strasbourg. The Court declared that it had jurisdiction. The defendant subsequently lodged an appeal, as a result of which the Cour d'Appel, Colmar, annulled the judgment at first instance and dismissed the application on the ground that the Conseil de Prud'hommes had no jurisdiction.

The court held that since the defendant's seat is in the Federal Republic of Germany and the defendant as such may not be sued at the place of the seat of the companies which belong to its group of undertakings in France and with which the plaintiff had worked, the jurisdiction of Strasbourg court only comes into consideration as the court having jurisdiction for the place of performance under Article 5 (1) of the Brussels Convention. The obligation whose place of performance must be determined is, as results from the case-law of the Court of Justice of the European Communities, the contractual obligation which forms the basis of the dispute, in other words in the present case the obligation to pay the company pension which was agreed by contract. It is necessary to ascertain the place of performance thereof under French law; since it is a debt which must be collected at the debtor's address - and moreover the same applies under German law - the place of performance is the defendant's seat in the Federal Republic of Germany. The plaintiff's right to a pension under the contract must be separated from his right to remuneration; in any event, because of the different nature and the different legal basis of the two rights in the present case, it is impossible to deduce from the alleged principle that the remuneration must always be paid at the place where the work is performed that the pension under the contract must also be paid at the place where the work is performed.

(IH/198)

No. 60 Judgment of the Cour d'Appel, Paris, 23rd Chamber A, of 20 June 1977, Roland Heiler, Heinz Mappes and Others v Georges Beaumont

1. Jurisdiction - Defendant domiciled in another Contracting State. - Place of performance (Article 5 (1)) of the obligation where the defendant is domiciled according to both legal systems involved - Choice of law left open
2. Jurisdiction - Connexity with other proceedings before the same court - Jurisdiction established under domestic law but not under the Convention - Convention takes precedence - Court does not have jurisdiction

Following the sale of a large number of shares in a French company with its seat in France to several German nationals domiciled in the Federal Republic of Germany, the vendor brought proceedings against the German buyers before a French court for payment of the

balance of the purchase price, for payment of a sum in respect of which proceedings had been brought against him as guarantor, and for damages. At the time at which the application was lodged another action was pending before the same court in which the plaintiff in the present proceedings was being sued by a French bank and had, for his part, brought an action on a guarantee against one of the present defendants. The defendants, in reliance upon the rules on jurisdiction contained in the Brussels Convention, raised the objection that the court before which the matter had been brought did not have jurisdiction. The court, however, declared that it had jurisdiction, essentially on the ground of the close factual connexion between the first action, in respect of which it is not at issue that it had jurisdiction, and the present application. As a result of the defendant's appeal the Cour d'Appel, Paris, annulled the judgment according to which that the first court had jurisdiction and dismissed the plaintiff's application.

The Court held, first, that jurisdiction with regard to the present proceedings is determined exclusively in accordance with the Brussels Convention which, as a result of being duly ratified and published in accordance with Article 55 of the French Constitution of 1958, takes precedence over domestic legislation. Within the context of the field of application of the Convention, therefore, those rules of French law which established jurisdiction on the basis of the factual connexion have in particular been superseded.

Then the Court stated that since the defendants were domiciled in the Federal Republic of Germany the jurisdiction of the French courts could only be established under Article 5 of the Convention. So far as the claim relating to the purchase price put forward in the application was concerned there was, however, no such jurisdiction in accordance with Article 5 (1), since the place of performance of this obligation was, in the absence of any other contractual agreement the domicile of the debtors in the Federal Republic of Germany, both under French law (Article 1247 of the Code Civil) and under German law (Article 269 of the Bürgerliches Gesetzbuch). The fact that earlier payments were made in France did not preclude jurisdiction under the Convention. In addition the French courts did not have jurisdiction with regard to the remaining claims put forward in the application: the second claim put forward was also of a contractual nature and had to be satisfied in the Federal Republic of Germany; the claim for damages put forward thirdly stemmed from the conduct of the debtors in connexion with the performance of their contractual obligations and therefore had likewise to be made at the place of performance in the Federal Republic of Germany.

(IH/197)

No. 61 Judgment of the Tribunale di Pinerolo of 31 March 1976, Beloit Italia S.p.A. v Atec Weiss KG, Rivista di Diritto Internazionale Privato e Processuale, 1977, No. 1, p. 78

1. Jurisdiction - Place of performance of the obligation in question (Article 5 (1)) - In the case of claims for damages the original obligation alleged not to have been performed is decisive
2. Jurisdiction - Jurisdiction established by entering an appearance (Article 18) - No jurisdiction if viewpoint adopted with regard to the substance of the case itself only in the alternative and principal claim is that the Court has no jurisdiction

The Italian plaintiff had ordered from the defendant German undertaking parts for an industrial plant to be set up in the Federal Republic of Germany and took delivery of them at the German building site in accordance with the agreement. It instituted proceedings before the court at the place of the seat of its branch office in Italy for annulment of the contract and damages on the ground that the parts were unserviceable. The defendant objected that the court before whom the matter had been brought did not have jurisdiction.

The court declared that it had no jurisdiction. In application of the Brussels Convention it found that in those circumstances only the court having jurisdiction for the place of performance (Article 5 (1)) could establish its jurisdiction. All the obligations resulting from the contractual relationship between the parties had, however, to be performed in Germany. Since the causa petendi must be regarded as the failure by the defendant to perform its obligation to supply the goods the plaintiff's claim itself merely constitutes the substitute for that obligation. Thus the place of performance of the original obligation is decisive with regard to jurisdiction and not the place of performance of the obligations arising from the failure to perform the contract.

The plaintiff had in addition relied upon Article 18 of the Convention and claimed that since the defendant had also actually joined issue and had not merely raised the objection of lack of jurisdiction, the court had jurisdiction. The court overruled that objection, on the ground that Article 18 did not apply since the defendant had expressly raised the preliminary objection that the court did not have jurisdiction and had only adopted a viewpoint with regard to the substance of the case as a precautionary measure. Under Italian procedural law (Articles 167 and 187 of the Codice di Procedura Civile (Code of Civil Procedure)) the defence must, moreover, even if the court has to give a preliminary ruling as to jurisdiction, contain all means of defence put forward by the defendant with regard to the actual substance of the case. Therefore Article 18 must not be interpreted as meaning that the defendant must take the risk that if his objection is dismissed he can no longer defend himself with regard to the actual substance of the case. Such an interpretation would be in contradiction with the provisions of the Italian constitution concerning the rights of the defendant in legal proceedings (Article 24).

No. 62 Judgment of the Tribunale di Firenze of 9 December 1976, Italconf v Ditta Christoph Andreae, Rivista di Diritto Internazionale Privato et Processuale, 1977, No. 2, pp. 414-416

Jurisdiction - Jurisdiction in the place of performance (Article 5 (1)) - German-Italian sales contract - Application for annulment of the contract before an Italian court - Determination of the place of performance in accordance with the principles of substantive law of the court before which proceedings are brought

Following a sales contract on the basis of which a German undertaking had delivered a consignment of fabric to an Italian undertaking a dispute arose over the quality of the goods. The purchaser instituted proceedings before the court at its seat in Italy against the German vendor for annulment of the contract and for damages. The defendant joined issue and raised a preliminary objection that the Italian court did not have jurisdiction. The court declared that it did not have jurisdiction and stated that it could only have jurisdiction in the present case under Article 5 (1) of the Brussels Convention. In so far as this article establishes that the court having jurisdiction is that of the place of performance of the obligation at issue, this provision accords with that laid down in Article 20 of the Italian Codice di Procedura Civile according to which the jurisdiction of the forum destinatae solutionis is available as an option. It is therefore necessary to determine on the basis of Italian law where the place of performance of the obligation in question is situated. The obligation to deliver the goods forms the subject-matter of the dispute since the claim for annulment of the contract and for damages was based on the defectiveness of the goods delivered, for which the defendant must answer. In accordance with Article 1510 of the Italian Codice Civile the vendor is released from his obligation by delivery of the goods to a carrier or forwarding agent; therefore the place of performance for the relevant obligation on the vendor is the place of that delivery, and in the present case the goods were delivered to an Italian forwarding agent at the vendor's seat in the Federal Republic of Germany; therefore, in accordance with the Italian case-law jurisdiction was established at that place. Thus the special rules contained in Article 5 (1) of the Convention did not result in jurisdiction in Italy.

(IH/200)

No. 63 Judgment of the Gerechtshof Arnhem of 25 June 1975, Cartonnagefabriek N.V. v Les Editions René Touret, Nederlandse Jurisprudentie, Uitspraken in Burgerlijke en Strafzaken, 1977, No. 304, pp. 1059-1060

Jurisdiction - Special jurisdiction - Jurisdiction of the place of performance (Article 5 (1)) - Determination of the place of performance in accordance with the rules of the law of obligations - Agreement between the parties takes precedence over statutory rules

The defendant, a French company, had ordered a large consignment of cardboard boxes from the plaintiff, whose seat is in the Netherlands. Payment was to be effected, in accordance with a separate agreement, by acceptance by the defendant of bills which were to be payable at a bank in Amiens (France). After delivery and payment for part of the goods in accordance with the agreement the defendant unilaterally repudiated the contract. The plaintiff subsequently lodged an application before the court of its seat in the Netherlands for payment of the balance of the purchase price. In this connexion it claimed that when the defendant has refused to pay the balance of the purchase price in accordance with the agreement the place of performance of the relevant obligation is determined in accordance with the statutory provisions; according to those provisions, the present case concerns a debt payable at the address of the creditor which must be discharged at the plaintiff's seat. The court of first instance declared that it had no jurisdiction. The plaintiff's appeal was unsuccessful.

The Gerechtshof stated that in the present case the Netherlands court could only have jurisdiction as a result of Article 5 (1) of the Brussels Convention; that article requires that the contractual obligation to which the application refers must be performed within the area of jurisdiction of that court. The parties had however agreed that the defendant's obligation to pay for the goods should be performed in France. It is certainly possible, in accordance with the plaintiff's view, to assume that the contract is governed by Netherlands law; the provision laid down in Article 1429 (2) of the Burgerlijk Wetboek, according to which payment must be made at the place of the creditor's domicile, applies however only in so far as the parties have made no other agreement. The court dismissed the plaintiff's objection that the agreement concerning the place of payment had automatically become void as a result of the defendant's failure to perform the obligation: it held that the question of jurisdiction depends exclusively on what the defendant has undertaken to do on the basis of the contractual agreements.

(IH/318)

Article 5 (3)

Courts of the Member States

No. 64 Judgment of the Cour d'Appel, Bastia, of 28 February 1977, Société Montedison v Département de la Haute Corse and Others, 114/26-77/01

1. Jurisdiction - Action in tort - Place where the harmful event occurred (Article 5 (3)) - Both place of the event giving rise to the damage and place where the damage occurred - Right of plaintiff to elect
2. Connexity - Definition (third paragraph of Article 22) - Danger of contradictory decisions - No such danger in a hypothetical case in which compensation for the same damage is sought in two separate actions

The Italian Montedison group runs a factory near Leghorn (Italy) which manufactures titanium dioxide. The waste products arising from manufacture were, as from April 1972 discharged into the Mediterranean Sea. The Prud'homie des Pêcheurs de Bastia, a trade organization of fishermen in Corsica, maintaining that the pollution of the maritime waters caused thereby led to a reduction in catches, brought an action against the Italian company in January 1976 before the Tribunal de Grande Instance, Bastia, for compensation for the damages suffered by the fishermen. Both Corsican "départements" joined these proceedings by an application in which they sought compensation for the damage which they allege was caused to the tourist trade and public health by the water pollution. Montedison raised a preliminary objection that the court in Bastia did not have jurisdiction on the ground that there was no jurisdiction there under either Article 2 or Article 5 (3) of the Brussels Convention, since the waste products were being discharged into international waters; only the court of the place at which it had its branch office in Italy had jurisdiction (Article 2 of the Convention). In the alternative, it claimed that the court should also declare that it had no jurisdiction because criminal proceedings in which the Prud'homie des Pêcheurs de Bastia was also seeking damages as "parte civile" (party claiming damages in criminal proceedings) were pending before a court in Leghorn against senior employees of its company; there was connexity between the two proceedings. The Tribunal de Grande Instance dismissed by preliminary ruling the objection that the court had no jurisdiction and the plea of connexity. Montedison lodged an appeal against that decision and reiterated its previous submissions.

In its decision the Cour d'Appel dismissed the appeal as unfounded and held that the Tribunal de Grande Instance, Bastia, had local jurisdiction in accordance with Article 5 (3) of the Convention. It held that this followed from the interpretation of that provision by the Court of Justice of the European Communities in its judgment of 30 November 1976 (Case 21/76, Bier v Mines de Potasse d'Alsace). The concept of "place where the harmful event occurred" must accordingly be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it; therefore, according to the election of the plaintiff, the defendant may be sued before the court of the place where the damage occurred or before the court of the place of the event giving rise to and forming the basis of the damage. Moreover, the same consequence results from Article 46 of the new Code de Procédure Civile.

The court dismissed the plea of connexity under Article 22 of the Convention with regard to the proceedings pending in Leghorn - the defendant itself had not put forward a plea of lis pendens in accordance with Article 21. The court started in this connexion from the definition of connexity given in Article 22 (3) and found that even if the issue in both proceedings was compensation for the same damage, which had not been shown, this could not by itself establish the danger that a separate decision in both proceedings, in which the defendants were, moreover, not identical, might lead to contradictory results. The court in addition expressly pointed out the fact that the concept of "proper administration of justice" to which the defendant had referred had nothing to do with the concept of connexity.

(IH/178)

Note

The above-mentioned judgment of the Court of Justice of the European Communities is reported in Part 1, No. 15.

Article 5 (5)

Courts of the Member States

No. 65: Judgment of the Oberlandesgericht Karlsruhe, 7th Civil Senate, of 11 May 1977, P. GmbH & Co. KG v F.S.p.A.
7 U 157/76

1. Jurisdiction - Place of performance of the obligation (Article 5 (1)) - Determination according to the law applicable under the conflict rules of the court entertaining the action

2. Jurisdiction - Place where the branch, agency or other establishment is situated - Concept of branch - "Other Centre of the undertaking in question" (determination under the law of the court seised of the action).

1. The Court first considered whether it had its jurisdiction under Article 5 (1) and then ruled that it had not; in determining what is the "obligation" and in ascertaining the place of performance within the meaning of Article 5 (1) it had regard to the decided cases of the Court of Justice of the European Communities (Case 12/76 Tessili and Case 14/76 De Bloos).

2. A German undertaking brought an action for payment for work done before the Landgericht Heidelberg against an Italian company limited by shares whose seat is in Milan. In support of its contention that the Landgericht had jurisdiction the plaintiff relied inter alia on Article 5 (5) of the Brussels Convention and stated that the defendant maintained a branch in Heidelberg. The Italian company however stated that in Heidelberg there was merely an "office" of its subsidiary company whose seat is in Hamburg, and is a limited liability company incorporated under German law. That office merely had the function of a "postbox" for the Italian undertaking. The Landgericht dismissed the action as being inadmissible; the plaintiff lodged an appeal which was unsuccessful.

In interpreting the concept of "branch" in Article 5 (5) of the Convention the Oberlandesgericht had regard to German law. According to that law, as the defendant was a company limited by shares (incorporated under Italian law) a branch within Germany must bear the description 'company limited by shares'. However, as the "office" in Heidelberg bears the name of the subsidiary company of the defendant in Hamburg it must be regarded as the branch of the latter company but not of the Italian parent company. This follows in particular from the fact that a branch cannot itself have legal personality. Furthermore, as the branch of the German subsidiary company, the office is not also automatically a branch of the parent company as both companies are independent legal persons.

The court further considered whether, independently of the formal aspects, the Heidelberg office might actually be regarded as a branch of the defendant because of the tasks which it in fact carries out. In this respect the court decided, once again having regard to German law, that a branch is not a subordinate and dependent department of the principle establishment but "another centre of the undertaking in question". The branch must be established in such a way that if the principal establishment were to be removed the branch could continue as its own trading establishment. This means that it must have a management which is independent in dealings with others and holds general powers and that it must possess its own business assets and keep its own accounts. This is not the case with the office in question however.

(IH/186)

Note

The judgments of the Court of Justice of the European Communities referred to above are contained in Part 1 under Nos. 10 and 14.

Article 6

Courts of the Member States

No. 66: Judgment of the Arrondissementsrechtbank Leeuwarden, Second Multiple Chamber, of 2 September 1976, Islanders Canning Corp. Ltd. v Yvonne Yolanda and Marghuarita Hoekstra; Yvonne Yolanda and Marghuarita Hoekstra v Schmalbach-Lubeca-Werke Aktiengesellschaft Metallverpackungs-Werk Wedel, 630-1974

1. Jurisdiction - Agreement as to jurisdiction - "Disputes in connexion with a particular legal relationship" (first paragraph of Article 17) - Action on a warranty or guarantee (Article 6 (2)) - Dispute within the meaning of the first paragraph of Article 17 - Lack of jurisdiction of the court seised of the original proceedings if the parties to the action on a warranty or guarantee have agreed otherwise

2. Jurisdiction - Agreement as to jurisdiction - Clause conferring jurisdiction in the general business conditions - Effectiveness independent of the contractual status - Continuous business relations on the basis of the general business conditions.

In an action on a warranty or guarantee in a contract of sale pending before the court in Leeuwarden between a company with its seat in Hong Kong and the owner of a Netherlands company the defendant for her part brought an action on a warranty or guarantee against a German undertaking having registered offices in the Federal Republic of Germany.

The German undertaking contended that the Netherlands court had no jurisdiction and relied on the clause conferring jurisdiction in its general business conditions whereby the courts in Brunswick in the Federal Republic of Germany were to have "jurisdiction in respect of all claims". The court dismissed the action on a warranty or guarantee.

It first considered the relationship between Article 17 (jurisdiction by consent) and Article 6 (2) (jurisdiction in an action on a warranty or guarantee) of the Brussels Convention and, expressly referring to the report of a committee of experts on the Convention, held that an effective agreement conferring jurisdiction within the meaning of the first-mentioned provision would also establish the jurisdiction of the designated court for actions on a warranty or guarantee which otherwise under Article 6 (2) of the Convention could be brought before the court seised of the original proceedings. The court went on to examine the scope of the clause on jurisdiction contained in the general business conditions of the defendant to the action on a warranty or guarantee and decided that in view of its wording it was also applicable to actions on a warranty or guarantee. The question of the effectiveness of the agreement conferring jurisdiction was determined by the court under German law which is the law applicable to the whole contractual relationship. Under German law an agreement conferring jurisdiction between "Vollkaufleuten" (persons who have the full status of merchants under German law) such as the parties to the dispute is in principle effective. As the business relationship between the defendant to the action on a warranty or guarantee and the predecessor in law of the plaintiff had continued for years on the basis of the general business conditions of the defendant - to which reference was regularly made in invoices - the defendant must allow the clause on jurisdiction to be applied against her.

(IH/194)

Note

Cf. on the question of the relationship of Article 17 and Article 16 (2) of the Convention the decision to the same effect of the Cour d'Appel, Rouen, of 25 June 1974, Recueil Dalloz-Sirey 1975, Jurisprudence, p. 341 with a note by Droz, p. 342 et seq.

Section 3

Jurisdiction in matters relating to insurance

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Section 4

Jurisdiction in matters relating to instalment sales and loans

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Section 5

Exclusive jurisdiction

Court of Justice of the European Communities

No. 67: Judgment of 14 December 1977, T.E. Sanders v R. van der Putte (Reference for a preliminary ruling by the Hoge Raad der Nederlanden) Case 73/77

Jurisdiction - Exclusive jurisdiction - Action concerning tenancies of immovable property (Article 16 (1)) - Leasing of shop premises - Not "tenancy" within the meaning of Article 16 (1)

The plaintiff in an action before the Hoge Raad of the Netherlands ran a florist's business in rented premises in Wuppertal in the Federal Republic of Germany until February 1973. He then agreed with the defendant that the latter should carry on the business in return for a monthly sum representing the usufructuary lease of the shop (Pachtzins); the rent for the business premises was also to be paid by the defendant who in addition undertook to pay a certain sum for the goodwill. The plaintiff brought an action for damages for failure to fulfil these obligations in the Netherlands where the parties are domiciled. The Gerechtshof Arnhem ruled that the German courts did not have exclusive jurisdiction over the dispute under Article 16 (1) of the Convention (cf. No. 68).

The defendant appealed on a point of law to the Hoge Raad which referred to the Court of Justice of the European Communities questions asking inter alia whether "tenancies of immovable property" within the meaning of Article 16 (1) of the Convention also include an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third party by the lessor and whether the answer to that question 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.

In its judgment the Court of Justice ruled that as regards the matters listed under subparagraphs (2), (3), (4) and (5) of Article 16 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. 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 (Article 16 (1)); 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. 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 State in which they are in force. 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, as to compensation for damage caused by the tenant or as to giving up possession of the premises.

The same considerations do not apply where the principle aim of the agreement is of a different nature, in particular, where it concerns the operation of a business.

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. 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 Court of Justice further stated that 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.

Accordingly, in answer to the questions referred to it, the Court of Justice ruled:

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.

(QPH/458)

Courts of the Member States

No. 68: Judgment of the Gerechtshof Arnhem, First Civil Chamber, of 4 May 1976, R. van der Putte v T.E. Sanders, 66/74

Jurisdiction - Exclusive jurisdiction - Action concerning tenancies of immovable property (Article 16 (1)) - Assignment of business for consideration - Not a "tenancy" within the meaning of Article 16 (1)

The facts giving rise to this decision are set out under No. 67.

On appeal the Gerechtshof considered of its own motion whether under Article 16 (1) of the Brussels Convention the German courts have exclusive jurisdiction because the action concerns the "tenancy of immovable property" (in this instance situated in the Federal Republic of Germany). The court ruled that this was not the case: the action did not so much concern the assignment of the use of immovable property for consideration but rather the assignment of a whole business for consideration which in the proceedings was referred to as the "pacht" (usufructuary lease) of that business. Such matters however are not included in Article 16 (1) of the Convention. The ground for the exclusive jurisdiction of the courts of the State in which the property is situated within the meaning of Article 16 (1) is to be found in the fact that generally special legal provisions exist for tenancies of immovable property and it is better

that such provisions are only applied by the courts of the State in which they apply. As the action does not concern a tenancy in this sense the German courts do not have exclusive jurisdiction.

(IH/154)
(QPH/458)

Note

The defendant lodged an appeal on a point of law against that decision. By decision of 10 June 1977 the Hoge Raad of the Netherlands stayed proceedings and referred several questions on the interpretation of Article 16 (1) of the Convention to the Court of Justice of the European Communities for a preliminary ruling. The judgment of the Court of Justice is set out under No. 67.

Section 6

Jurisdiction by consent

Courts of the Member States (See Nos. 66 and 68)

No. 69: Judgment of the Tribunal de Commerce de Verviers, 1st Chamber, of 31 March 1977, S.p.r.l. Société Nouvelle Artifil Europar v S.A. Dunil France, 657/76-740

Jurisdiction - Jurisdiction by consent - Clause conferring jurisdiction on the back of the contract - Express reference necessary

The Belgian court ruled that it had no jurisdiction over an action, concerning a purchase price, brought by a Belgian company against a French company whose seat is in France. No effective agreement as to jurisdiction within the meaning of Article 17 of the Brussels Convention had been reached as the contract did not expressly refer to the general business conditions of the plaintiff on the back of the contract which contained a clause conferring jurisdiction. The court seised of the proceedings did not have jurisdiction either by virtue of the place of performance within the meaning of Article 5 (1) of the Convention. The plaintiff had failed to prove its allegation that under the contract the payment should have been made in Belgium. Therefore the place of performance for the defendant's obligation to make payments was in France.

(IH/176)

No. 70: Judgment of the Landgericht Hamburg, 6th Chamber for Commercial Matters, of 18 August 1976, Firma H.O.B. & M. v Firma I. Ch. I.C. S.p.A., 26 O 122/75

Jurisdiction - Jurisdiction by consent - In writing - "Confirmation of order" signed by both parties - Clause conferring jurisdiction at the foot of the form below the signatures - Agreement effective

In September 1974 the parties, a German and an Italian undertaking, concluded a contract for the supply of ground-nut oil by the German undertaking to the Italian undertaking. In this connexion they signed a "confirmation of order" on the front of which at the foot of the form below the signatures of the parties there was a clause assigning jurisdiction to the German courts. The parties disagreed about whether a part consignment was delivered within the proper time-limits and the Italian firm refused to accept the consignment whereupon the German undertaking contended that it was no longer bound by the contract and demanded damages. The defendant challenged the jurisdiction of the Hamburg court before which the plaintiff had brought the action.

The court ruled that it had jurisdiction and stated that the parties had reached an effective agreement conferring jurisdiction within the meaning of the first paragraph of Article 17 of the Brussels Convention. The clause relating to jurisdiction had become part of the contract as it was "covered" by the signatures on the confirmation of order. Moreover, the Landgericht Hamburg also had jurisdiction under Article 5 (1) of the Convention as the court of the place of performance. The contractual relations of the parties are governed by the Einheitliche Gesetz über den internationalen Kauf beweglicher Sachen (Uniform law on the international sale of goods) of 17 June 1973 adopted in accordance with the corresponding Hague Convention of 1 July 1964. Under Article 59 of that law the place of payment of the purchase price, and the place where an action for damages should be brought in case of non-payment, is the habitual residence of the seller, thus in the present case Hamburg.

(IH/165)

No. 71: Judgment of the Bundesgerichtshof, VIIIth Civil Senate, of 4 May 1977, Firma Estasis Salotti di Colzani Aimo and Gianmario Colzani, s.n.c. v Firma Rüva Polsterei-maschinen GmbH, Cologne

Jurisdiction - Jurisdiction by consent - In writing - Contract - Entered into by reference to prior offers - Reference to general business conditions - Necessity for an express reference

This case concerns the question whether the Landgericht Köln has jurisdiction in an action brought by an undertaking whose seat is in

the area of that court against an Italian undertaking for failure to perform a contract concerning the supply of machines by the German undertaking to the Italian undertaking. The supply was agreed on in a written contract which was signed on the business note-paper of the German undertaking. Printed on the back of the business note-paper were the general business conditions of the German undertaking which contained a clause whereby the courts of Cologne were to have jurisdiction for any disputes arising out of the contract. The text of the contract did not expressly mention the general business conditions but made reference to prior offers of the German firm which contained an express reference to those general business conditions.

After the lower courts had reached different decisions on the question whether there existed an effective agreement on jurisdiction in this instance the Bundesgerichtshof referred to the Court of Justice of the European Communities several questions concerning the interpretation of Article 17 of the Brussels Convention. By judgment of 14 December 1976 (Case 24/76, [1976] ECR 1831; cf. Synopsis of case-law Part 1, No. 24) the Court of Justice of the European Communities, in answer to those questions, ruled 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. 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, in the terms of the same judgment, satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care.

As in the case to be decided by the Bundesgerichtshof the contract referred to previous offers made by the German undertaking which offers contained an express reference to the same general business conditions, the Bundesgerichtshof concluded that the Italian firm "was in a position to find out without difficulty about the general business conditions of the plaintiff and therefore about the clause conferring jurisdiction". Accordingly the requirement of a writing under the first paragraph of Article 17 of the Convention in the binding interpretation of the Court of Justice of the European Communities was fulfilled and consequently an effective agreement conferring jurisdiction upon the Landgericht Köln had been concluded.

(QPH/359 e)

No. 72: Judgment of the Bundesgerichtshof, VIIth Civil Senate, of 16 May 1977, Firma S.A. R. N.V.i.L. v Firma S.M. GmbH and Firma K.I.B. KG P.G., VIII ZR 225/75

Jurisdiction - Jurisdiction by consent - Clause conferring jurisdiction in letter containing offer - Rejection of the clause conferring jurisdiction in the order form - Confirmation of the order with fresh reference to general business conditions - No effective agreement in the absence of written acceptance

Two German firms had submitted offers to a Belgian firm for the delivery of mechanical installations "in accordance with the sales and delivery conditions overleaf". These conditions included a clause conferring jurisdiction whereby the courts in West Berlin were to have jurisdiction in all disputes. The Belgian firm gave each undertaking an order in which one of the conditions set out on the order form read as follows: "the clauses in this order annul automatically any other general or specific clauses and conditions, whether or not in writing, contained in your correspondence with the Company ...". The first undertaking confirmed the order in a letter to the Belgian firm "on the basis of our sales and delivery conditions of which you are aware". The second undertaking noted on the translation of the order form as a result of verbal consultation after the word "conditions" the words "which conflict with them" and confirmed the order on that understanding. The Belgian firm accepted both confirmations of the orders without raising objection. Subsequently several of the additional orders which in part were given verbally by the Belgian firm were received, confirmed and carried out by the German undertakings subject to their sales and delivery conditions which contained the above-mentioned clause conferring jurisdiction. When certain obligations under the contractual relationships were not fulfilled the German undertakings brought an action against the Belgian firm before the Landgericht Berlin which ruled in favour of the plaintiffs. The appeal lodged by the defendant failed.

The Bundesgerichtshof overruled the judgments of the lower courts and ruled that the action was inadmissible as the German courts did not have territorial jurisdiction.

The Bundesgerichtshof stated that in this instance the jurisdiction of the German courts could only be founded on an agreement between the parties under the first paragraph of Article 17 of the Brussels Convention. However the agreement conferring jurisdiction on which the Berlin undertakings rely did not satisfy the procedural requirements laid down in that provision. Decisive factors in interpreting the first paragraph of Article 17 are the judgments of the Court of Justice of the European Communities of 14 December 1976 in Case 24/76 (Estasis Salotti v Rüwa GmbH [1976] ECR 1831; Synopsis of Case Law, Part 1, No. 24) and No. 25/76 (Galeries Segoura v Rahim Bonakdarian [1976] ECR 1851; Synopsis of Case Law, Part 1, No. 25). Accordingly there exists no formally effective written agreement between the parties. In its order forms the Belgian firm stated that all the clauses and conditions contained in the offers of the German undertakings were invalid with the result that the parties had not reached an agreement conferring jurisdiction.

The confirmation of the order by the first German undertaking on the basis of its general business conditions cannot establish an agreement conferring jurisdiction which is effective under the first paragraph of Article 17 as there is no written acceptance. The fact that the Belgian company did not contest that confirmation of the order cannot under the case-law of the Court of Justice of the European Communities be regarded as an acceptance to the clause conferring jurisdiction. The parties concerned were also not in continuous business relations evolved on the basis of the general business conditions of the German undertaking. No effective agreement conferring jurisdiction had come about on the basis of the conduct of the second German undertaking. The Belgian firm did not accept the latter's confirmation of the order with the above-mentioned addition.

(IH/184)

Section 7

Examination as to jurisdiction and admissibility

Courts of the Member States (cf. No. 58)

No. 73: Judgment of the Arrondissementsrechtbank 's-Gravenhage, First Single Chamber for Civil Matters, of 31 August 1976, Ontvanger der directe belastingen v Staat der Nederlanden, 76/2130

Jurisdiction - Examination as to jurisdiction and admissibility - Stay of proceedings where defendant has not been heard (second paragraph of Article 20) - Enforcement of a tax notice - Freezing a debt - Declaratory procedure under Netherlands law (verklaringsprocedure) - Service of notice of freezing on debtor - "Document instituting proceedings"

The Netherlands tax authorities had issued against and served on a German undertaking with a seat in the Federal Republic of Germany which had carried out transactions in the Netherlands, several tax notices (dwangbevelen) which, under Netherlands law, were immediately enforceable. In the course of the enforcement of the notices the administration directed the responsible Netherlands enforcement officers to freeze claims of the German undertaking against the Netherlands telecommunications administration. Notice of this freezing was served on the German debtor owing the tax in accordance with the Netherlands law; no communication was received from the debtor.

In the proceedings arising out of the freezing - the declaratory procedure (verklaringsprocedure) - the Dutch creditor sought an order for the third party debtor which had admitted the existence of the claim against it to pay the amounts to the creditor. The court stayed proceedings and declared that it was obliged to do so under the second paragraph of Article 20 of the Brussels Convention so long as it was not shown that the defendant had been able to receive the document instituting the proceedings for the freezing of the claim in sufficient time to enable it to arrange for its defence, or that all necessary steps had been taken to that end.

The court relied on the fact that the freezing of the claim could give rise to appeal proceedings (under Netherlands law the debtor has a right of appeal (verzet) against the freezing of a debt, cf. Article 477 Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure)) and therefore that the document effecting the freezing (beslagexploit) was to be regarded as a "document instituting the proceedings" (second paragraph of Article 20 of the Convention). Consequently the creditor had to show that the debtor had received the document in sufficient time.

(IH/193)

Section 8

Lis pendens - Related actions

Courts of the Member States (cf. No. 64)

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Section 9

Provisional and protective measures

Courts of the Member States

No. 74: Judgment of the Oberlandesgericht Koblenz, 13th Civil Senate, of 2 May 1975, Firma M.B. S.A. v Firma O.u.A.M. oHG, 13 U 9/75, Neue juristische Wochenschrift 1976, p. 2081

1. Jurisdiction - Provisional measures - Jurisdiction independent of jurisdiction as to the substance of the matter (Article 24)

2. Jurisdiction over provisional measures under national law - Enforcement of German judgments outside Germany as a ground for protective measures - Retention of this principle in the context of the Brussels Convention

A German firm with its seat in Hamburg obtained from the Landgericht Mainz an Arrest (protective order) to protect a claim against a French firm with its seat in Paris and obtained an order freezing a debt owed to the French firm by a German undertaking whose seat was in Mainz. As grounds for the protective measure it argued that the judgment in the main proceedings would have to be enforced abroad (§ 917 (2) of the Zivil prozessordnung (Code of Civil Procedure) hereinafter referred to as "ZPO"). After that judgment had been delivered the Hamburg firm brought an action on the substance of the matter before the Tribunal de Commerce, Paris. In the meantime the French firm had lodged an appeal against the protective measure which was dismissed by judgment of the Landgericht. The subsequent appeal by the French firm against that judgment was however successful.

As the courts in the Federal Republic of Germany did not have jurisdiction under the Brussels Convention as regards the substance of the matter - jurisdiction, by virtue of the situation of the property which exists under German procedural law (§ 23 ZPO) is excluded by the second paragraph of Article 3 of the Convention - a separate basis was necessary to give the German courts territorial jurisdiction. In this respect the Oberlandesgericht (Higher Regional Court) relied on Article 24 of the Convention whereby the German courts may have jurisdiction even if under the Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter. Under German procedural law (§ 919 ZPO) in such an instance the courts in whose area the property which is to be the subject of protective measures is situated have jurisdiction. However, the Oberlandesgericht ruled that the ground for protective measures relied on by the Landgericht, namely the enforcement outside Germany (§ 917 (2) ZPO) did not exist and stated that that provision is only applicable where a German judgment must be enforced outside Germany. § 917 (2) seeks to retain the effectiveness of an enforceable German right to enforcement and therefore does not apply to foreign judgments. This rule is also not unfair to German creditors if proceedings must be brought pursuant to the Brussels Convention against the debtor in the State of his domicile as the Convention is intended to remove any discrimination between persons in the sovereign territories of the Contracting States.

(IH/130 a)

No. 75: Judgment of the Oberlandesgericht Düsseldorf, of 18 May 1977, 3 U 6/77, Neue Juristische Wochenschrift, 1977, p. 2034

1. Jurisdiction - Provisional measures - Jurisdiction independent of the jurisdiction as to the substance of the matter (Article 24)

2. Jurisdiction over provisional measures under national law - Enforcement of German judgments outside Germany as a ground for an Arrest (protective order) - Retention of this principle in the context of the Brussels Convention

As in the case decided by the Oberlandesgericht Koblenz (supra No. 74) in this instance too the courts in the Federal Republic of Germany had no jurisdiction for the action on the substance of the matter. The Oberlandesgericht Düsseldorf confirmed that the German courts nevertheless had territorial jurisdiction to adopt an Arrest (protective order) under Article 24 of the Convention. An application for a protective order can in such a case also be made before the court which under German law would be the court with jurisdiction as to the substance of the matter.

In this case also the applicant relied on the ground for protective measures referred to in § 917 (2) of the ZPO namely enforcement abroad. However, contrary to the view taken by the Oberlandesgericht Koblenz the Oberlandesgericht Düsseldorf concluded that that provision is still applicable when a non-German judgment has to be enforced abroad. The principle that it must be a German judgment cannot be applied in the context of the Brussels Convention. A particular pre-condition of Article 24 of the Convention is that the judgment on the substance of the case is delivered in another Contracting State. Within the scope of the Convention judgments in Contracting States which would be recognized in the other Contracting States without any special procedure being required (Article 26 of the Convention) are to be treated in the same way as domestic judgments. This does not however mean that the Contracting States are no longer to be regarded as "abroad" within the meaning of § 917 (2) of the ZPO. Thus in the context of the European Community that provision may still be applicable.

(IH/319)

TITLE III

RECOGNITION AND ENFORCEMENT

Courts of the Member States (cf. Nos. 54 and 81)

No. 76: Order of the Landgericht München I, 32nd Civil Chamber, of 7 October 1976, Société S.C.M.I. v M.A.-D.

Recognition and enforcement - Order to pay damages in criminal proceedings - "Judgment" within the meaning of Article 25 of the Brussels Convention - Judgment in default - Proof of service (Article 46 (2)) - Establishment in the judgment that service has taken place - Certified copy of the judgment - Indirect certificate proving service - Not sufficient

The defendant, resident in the Federal Republic of Germany, had been ordered in his absence by the Tribunal de Grande Instance Versailles in criminal proceedings, in addition to a criminal penalty, to pay damages to the civil party (partie civile) claiming damages. Before the Landgericht München the civil party sought an order for the enforcement of the French judgment. The Landgericht dismissed the application and stated: the judgment is a judgment within the meaning of Article 25 of the Brussels Convention which in principle can be enforced and which in the present instance had been delivered in default. Under Article 46 (2) of the Convention therefore the original or a certified true copy of the document which establishes that the party in default was served with the document instituting proceedings was to be produced. It is certainly evident from the certified true copy that the defendant had been served by a court officer with a summons to appear in answer to the action. However, that indirect certificate of service is not sufficient to satisfy the conditions in the Convention. In the view of the Landgericht Article 46 (2) of the Convention requires the production of proof of service itself or a certified copy of that proof.

(IH/170)

Section 1

Recognition

Court of Justice of the European Communities (cf. No. 78)

Courts of the Member States (cf. No. 83)

No. 77: Judgment of the Gerechtshof Amsterdam, First Chamber, of 19 February 1976, Frank Onnen v Anthonia Maria Francisca Nielen, 215/74 F, Nederlandse Jurisprudentie 1977, No. 132, p. 486

Recognition - Obstacle - Preliminary question concerning the status of a natural person (Article 27 (4)) - Differing decision in application of the private international law of the State in which recognition is sought - No recognition of the decision of the State in which judgment was given

This case concerns a matrimonial dispute between Netherlands nationals. Following an application by the wife on 10 January 1974 the Arrondissementsrechtbank Amsterdam dissolved the marriage under Netherlands law for permanent breakdown (duurzame ontwrichting) and ordered the husband to pay Hfl 1 200 per month maintenance to the wife. Before that judgment was delivered the husband, for his part, had made an application for divorce to the Tribunal de Grande Instance, Créteil, France, where the couple had lived for a long time. The objection of lis alibi pendens raised by the wife was overruled and by judgment of 9 January 1975 in application of French law the French court ruled that the marriage was dissolved because of grave and repeated violations of the marital obligations (violation grave et renouvelée des obligations résultant du marriage) by the wife and at the same time the court ruled that the husband was no longer under an obligation to maintain her. The judgment became enforceable.

In the meantime in the Netherlands the husband had lodged an appeal against the judgment of the Arrondissementsrechtbank and, making reference to the French judgment, sought the annulment of the divorce and of the order to make maintenance payments. The Gerechtshof dismissed the appeal in its entirety and stated: a judicial divorce of Netherlands subjects which is pronounced abroad can be recognized in the Netherlands only if it is based on grounds which under Netherlands law would also be regarded as sufficient for a divorce or if it is at least based on facts which under Netherlands law could have led to a divorce. In the present instance those conditions were not satisfied; the grave offence (injure grave) established by the French court was not sufficient to establish "permanent breakdown" (duurzame ontwrichting) of the marriage.

The further ruling in the French judgment that the husband was no longer obliged to maintain his wife could also not be recognized. It is true that the Brussels Convention was applicable to that decision although at the beginning of the proceedings both parties were domiciled in the State in which judgment was given. Under Article 27 (4) of the Convention, however, a judgment is not to be recognized "if the court of the State in which the judgment was given, in order to arrive at its judgment, has decided a preliminary question concerning the status ... of natural persons ... in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State". Since, if Netherlands private international law had been applied, the Netherlands substantive law would have been applicable to the divorce and for that reason the marriage could not have been dissolved on the basis of the facts established by the French court - thus the preliminary question would have had to be decided otherwise - the obligation of the husband to pay maintenance would have continued and the decision would therefore have been different.

(IH/162)

Section 2

Enforcement

Court of Justice of the European Communities

No. 78: Judgment of 22 November 1977, Industrial Diamond Supplies v Luigi Riva (Reference for a preliminary ruling by the Rechtbank van Eerste Aanleg (Court of First Instance) of the judicial district of Antwerp), Case 43/77

Recognition and enforcement - Stay of proceedings where an ordinary appeal has been lodged against the judgment in the State in which judgment was given (Articles 30 and 38) - Concept of "ordinary appeal" - Independent concept of the Convention - Determination

The Belgian undertaking Industrial Diamond Supplies was ordered by the Tribunale Civile e Penale (Civil and Criminal Court), Turin, to pay to Luigi Riva, a commercial representative, a certain sum as commission. On application by Riva the Rechtbank, Antwerp, gave leave to enforce in Belgium the judgment which was enforceable under Italian law in accordance with the provisions of Article 31 et seq. of the Convention. Industrial Diamond Supplies lodged an appeal against the order for enforcement before the Antwerp court under Articles 36 and 37 of the Convention. In addition it lodged an appeal in cassation before the Italian Corte Suprema di Cassazione (Supreme Court of Appeal) which, it is not disputed, does not have the effect of suspending the enforceability of the judgment given by the Turin court in Italy. It was also established that Industrial Diamond Supplies had not sought a stay of execution in Italy.

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 had been delivered between the parties in Italy. So as to be able to reach a decision on that request the Antwerp court referred to the Court of Justice two questions on the interpretation of the concept "ordinary appeal" in Articles 30 and 38 of the Convention.

The Court of Justice first considered whether the expression "ordinary appeal" 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. According to the Belgian undertaking it is necessary to regard any appeal considered to be an ordinary appeal in the Contracting State in which the judgment, the recognition or enforcement of which is sought, as an "ordinary appeal". That view was supported by the Government of the United Kingdom and the Commission of the European Communities. On the other hand the Government of the Federal Republic of Germany expressed the opinion that the expression "ordinary appeal" 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. The Court of Justice also adopted that view.

It stated that 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 the distinction is completely unknown. 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. 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. Moreover, reference to a particular 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 belong to the legal system of one or other of the Contracting States. 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 a 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. Therefore the interpretation of the concept of "ordinary appeal" may only be usefully sought within the framework of the Convention itself.

The Court of Justice ruled on the meaning of the expression "ordinary appeal" within the meaning of the Convention and stated that it may be deduced from the actual structure of Articles 30 and 38 and from their function in the system of the Convention. 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. 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, a judgment is being contested or may be contested within specific periods.

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. 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. 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. 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. 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 considérations arising from the nature and conditions for the application of the judicial remedies in question. 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 reasonably expect. 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. 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 unforseeable 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. 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 under Article 38 in this respect.

In answer to the questions referred to it the Court of Justice ruled:

1. The expression "ordinary appeal" within the meaning of Articles 30 and 38 of the Convention 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 or 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.

(QPH/446)

Courts of the Member States (cf. No. 54)

No. 79: Order of the Oberlandesgericht Stuttgart, 5th Civil Senate, of 19 May 1976, R.L. v M.M.L.L., 5 W 9/76

Enforcement - Issue of the order for enforcement - Proof that the decision is enforceable under the law of the State in which the judgment was delivered (Article 47 (1)) - Order to pay maintenance in a divorce judgment which is not yet binding - Uncertainty whether the provisional enforceability of the judgment also relates to maintenance rights - Interpretation by the court of the State in which enforcement is sought.

In this instance the marriage of the parties had been dissolved by a judgment of the Tribunal de Grande Instance, Versailles, which had not yet become final. In addition to the divorce the judgment settled the parental care and access rights and ordered the husband to pay maintenance to the wife. It was further ordered that the judgment was provisionally enforceable. On application by the wife the Landgericht Stuttgart ruled that in respect of the right to maintenance the judgment was enforceable in the Federal Republic of Germany in accordance with Article 31 et seq. and Article 42 of the Brussels Convention. Against that decision the husband lodged an appeal in accordance with Article 36 of the Convention.

The Oberlandesgericht Stuttgart upheld the appeal and rejected the wife's application on the grounds that the proof, required under Article 47 (1) of the Convention, that the decision was enforceable according to the law of the State in which it was given had not been produced. Interpretation of the divorce judgment does not clearly show that the provisional enforceability thereby ordered also extends to the maintenance obligations set out in the judgment; it is moreover possible that only the maintenance of the children was intended. This view is supported by the fact that the order that the maintenance obligation was provisionally enforceable was made in conjunction with the ruling as to the right of care and the right of access.

Moreover the declaration that the order is enforceable is contained in a paragraph which, having regard to the context, probably relates only to the children. Under the case-law of the highest French courts cited by the husband the judgment cannot in principle be declared enforceable in so far as it relates to the maintenance rights of the wife before the divorce judgment becomes binding. It cannot be assumed that the court ordering the divorce wished to act contrary to that case-law. In the view of the Oberlandesgericht this applies at least until proof to the contrary has been brought, the burden of which lies on the applicant.

In its decision the Landgericht examined a further question and ruled that the enforcement of a matter incidental to a divorce, namely the divorced wife's maintenance rights, is admissible in the Federal Republic of Germany, even before the responsible Landesjustizverwaltung (Regional Department of Justice) in the special proceedings under Article 7 (1) of the Familienrechtsänderungsgesetzes (Law amending family law) of 11 August 1961 has stated that the preconditions for the recognition of the divorce judgment in the Federal Republic of Germany were satisfied.

(IH/120d)

No. 80: Judgment of the Oberlandesgericht Koblenz, 2nd Civil Senate, of 27 September 1976, Firma J.W. GmbH v M. Sch., 2 W 338/76, Recht der internationalen Wirtschaft, 1977, p. 102 with a note by Schütze, p. 103

Enforcement - Appeal against the admissibility of enforcement - Order for the provision of a security by the court with which the appeal is lodged (second paragraph of Article 38) only when an ordinary appeal has been lodged against the decision in the country in which the judgment was delivered - Appeal in cassation in French law not "ordinary" appeal

In this case the Landgericht Koblenz had ordered the enforcement of a judgment of the Cour d'Appel, Paris, against which the German defendant had lodged an appeal in cassation which, at the time of the decision of the Oberlandesgericht, had not yet been decided. The objection lodged by the defendant against the enforcement order was rejected by the Oberlandesgericht because under French law the judgment of the Cour d'Appel was binding and also enforceable.

Furthermore the subsidiary application to have enforcement made conditional on provision of a security (second paragraph of Article 38 of the Brussels Convention) was rejected on the following grounds. Article 38 is applicable to a case where an ordinary appeal has been lodged against the foreign judgment in the State in which the judgment was given. However, in contrast to an appeal (appel), an appeal in cassation is an extraordinary appeal which does not prevent a judgment being enforceable. A precondition for an appeal in cassation is that the ordinary rights of appeal have been exhausted and an appeal in cassation has no suspensory effects and thus does not prevent a judgment becoming binding.

(IH/169 a)

Note

As to the interpretation of the expression "ordinary appeal" cf. the judgment of the Court of Justice of the European Communities of 22 November 1977, Industrial Diamond Supplies, Case 43/77, supra No. 78.

No. 81: Order of the Landgericht Hamburg, 5th Civil Chamber, of 9 March 1977, Firma H.W. GmbH v Firma H.B. GmbH, 5 O 181/76

Enforcement - Enforceable judgment - Arrestbefehl (protective measure) - Judgment for the purposes of the Convention (Article 25) - Bars to recognition which are an obstacle to enforcement (second paragraph of Article 34) - Proof that the defendant was duly served with the document in good time (Article 27 (2)) - Not applicable to an order for enforcement of an Arrestbefehl (protective measure)

In order to protect a claim against a Belgian undertaking a German undertaking obtained from the competent Belgian court an order whereby the German company was empowered to freeze an alleged debt owed by a Hamburg firm to the Belgian undertaking. In order to implement the measure the German company applied to the Landgericht Hamburg for an order for the enforcement of the Belgian order. The application was granted.

The Landgericht examined first the question of whether Arrestbefehle (protective measures), which are allegedly judgments within the meaning of Article 25 of the Convention, fall within the scope of application of the Convention and ruled that they do so. This is evident both from Article 1 of the Convention and also indirectly from Articles 34 and 35 of the German Ausführungsgesetz zu dem Übereinkommen vom 29 July 1972 (Law implementing the Convention of 29 July 1972) (Bundesgesetzblatt 1972 I 1328). Those articles contain particular provisions for judgments of German courts and relate inter alia to "Arrestbefehle".

As the decision of the Belgian court was delivered without hearing the Belgian defendant the Landgericht Hamburg further considered whether the bar to recognition referred to in Article 27 (2) of the Convention is an obstacle to the order for enforcement (cf. the second paragraph of Article 34).

It concluded that that provision, whereby a judgment delivered in a case where the defendant does not appear is not to 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, is not applicable to the present case because of the nature of the procedure for protective measures.

(IH/189)

No. 82: Judgment of the Cour d'Appel d'Orléans, Social Chamber, of 18 May 1977, Société Launay v Willem Deylgat, 22/76

Enforcement - Application (Article 34) - Refusal only on the exhaustively listed grounds (Articles 27 and 28) - No examination of the question whether the court of the State in which judgment was delivered had jurisdiction under the Convention and/or infringed Article 20

In this instance the Tribunal de Grande Instance, Montargis, ordered the enforcement of a judgment in default obtained by the plaintiff who was resident in Belgium from the Commercial Court, Courtrai, against a company with its seat in France. The Cour d'Appel dismissed the appeal lodged against the order for enforcement and stated that the objection raised by the defendant that pursuant to Article 2 of the Brussels Convention solely the French courts had jurisdiction and that accordingly under Article 20 of the Convention the Belgian court should of its own motion have ruled that it had no jurisdiction was without foundation. Pursuant to Article 34 and Article 28 of the Convention the court with which the application for authorization of enforcement is lodged can only refuse it on the grounds exhaustively listed in those articles none of which exists in the present case. Therefore the contested decision had to be adopted irrespective of whether the Belgian court complied with the rules as to jurisdiction under the Convention or not.

(IH/177)

No. 83: Judgment of the Corte d'Appello di Torino, First Civil Chamber, of 11 February/11 March 1977, Ditta Pollo Giusy s.n.c. v Société Rousseau et Vergnaud

Enforcement - Judgment in default - Bars to enforcement (second paragraph of Article 34) - Document instituting the proceedings duly served in sufficient time (Article 27 (2)) - Examination of the question of sufficient time by the court from whom recognition and enforcement is sought - Criterion for assessment - Actual circumstances in each case - Procedural law of the State in which the judgment was delivered irrelevant

A French company had obtained from the Tribunal de Commerce, Poitiers, a judgment in default against an Italian undertaking whose seat was in Northern Italy. On application by the creditor the Corte d'Appello Turin made an order for enforcement of the judgment. The debtor, the Italian undertaking, lodged against that order the appeal provided for in Article 36 of the Convention on the grounds that the French judgment in default could not be recognized and enforced in Italy because the defendant had not been duly served with the document which instituted the proceedings in sufficient time to enable it to arrange its defence (Article 27 (2) of the Convention).

The Corte d'Appello dismissed the appeal and stated first that the statement of claim and writ of summons had been duly served by an Italian court officer at the place where the Italian undertaking was established on instructions from the Procureur de la République at the Tribunal de Grande Instance, Poitiers, after the defendant had already received a copy of the statement of claim and writ of summons; the service had been carried out in accordance with the provisions of French procedural law and was also effective under Italian law.

The Italian undertaking argued principally that the period of time between the service of the statement of claim and writ of summons by the Italian court officer (17 May 1975) and the date of the hearing before the Tribunal de Commerce, Poitiers, (23 June 1975) had not been sufficient to enable it to arrange its defence and that therefore the service was not in sufficient time within the meaning of Article 27 (2). The service of those documents would only have been in sufficient time if the French court had complied with the periods for lodging the summons laid down under French procedural law and the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters of 3 June 1930. Under those provisions the period of notice given by the summons should have been 98 days whilst the period actually allowed was substantially shorter.

However, the Corte d'Appello stated that the criterion for the question whether the service was in sufficient time is solely Article 27 (2) of the Brussels Convention which in this respect has superseded the 1930 Convention (Article 55 of the Convention). It is true that under Article 56 the 1930 Convention is to continue to have effect in relation to matters to which the Brussels Convention does not apply; however, all questions relating to the enforcement of judgments and thus the question of whether the writ of summons was served in sufficient time are exclusively determined by the Brussels Convention. In interpreting the words "in sufficient time" in Article 27 (2) of the Convention it is not relevant whether the periods for serving a summons laid down in French internal civil procedural law have been complied with. The examination of whether the summons was served in sufficient time, by the court to whom the application for recognition and enforcement of a judgment has been lodged is to be carried out only on the basis of the actual circumstances of each case and independently of the procedural rules of the State in which judgment was delivered; in any event an examination of the question whether the court of the State in which the judgment was given correctly applied the procedural rules of the law of that State in this respect is not admissible.

On the basis of these considerations the Corte d'Appello then considered whether the statement of claim and the writ of summons were served in sufficient time taking into account the time which in fact was available to the defendant to prepare its defence (in this case 35 days), the distance between the location of the court and the place of the seat of the defendant (600 kilometres) and the fact that the defendant was conversant with the practice of the French court in question. Having regard to these circumstances, the Corte d'Appello decided that the documents were served in sufficient time. This conclusion is not invalidated by the fact that in cases such as the present the Italian Code of Civil Procedure lays down a period of service of 90 days which may however be reduced by up to one half (Article 163 a of the Code of Civil Procedure). The rules laid down in that article - and also those laid down in the French procedural rules - are abstract and are to cover a number of quite different cases; they cannot take account of the changed circumstances within the European Economic Community. Article 27 (2) of the Brussels Convention on the other hand requires that the concept of service in sufficient time should be complemented by assessing the circumstances of the actual individual case; in the present instance account may also be taken of the fact that 15 days before service by the court officer the defendant was given advance notice of the statement of claim and writ of summons by registered letter.

(IH/222)

Section 3

Common provisions

Courts of the Member States (cf. Nos. 76 and 79)

TITLE IV

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

TITLE V

GENERAL PROVISIONS

TITLE VI

TRANSITIONAL PROVISIONS

Courts of the Member States

No. 84 Judgment of the Corte Suprema di Cassazione, First Division (Civil), of 31 May/16 December 1976, Ursula Cobler v Alessandro Gibertoni, 4651

Transitional provisions - Enforcement of a German maintenance order made before the entry into force of the Convention - Limitation of enforcement to the obligation to pay - Declaration in interim proceedings that a relationship governed by family law exists does not prevent enforcement - Principles contained in the Brussels Convention and other conventions relating to the enforcement of maintenance orders are of importance

The decision relates to a German maintenance order, made before the Convention came into force, the validity (efficacia) of which was to be established in Italy with a view to enforcement. The Corte di Cassazione annulled the judgment of the court of first instance which had refused to find for the validity of the order on the ground that the affiliation order upon which the order to pay maintenance was based was made on the basis of evidence which was

incompatible with the requirements of Italian public policy. In contrast to this, the Corte di Cassazione emphasized the principle that although it is possible for reasons of Italian public policy to prevent the recognition in Italy of an affiliation order made by a foreign court, this does not preclude a declaration of paternity from being given in interim proceedings in Italy on the basis of the foreign judgment provided that it is limited to the validity of the order to pay maintenance, which must be acknowledged in Italy on the basis of international conventions, and that the establishment of a legal status under family law or the recognition of the financial and non-financial consequences of that status is not linked thereto. It is necessary to develop and define this principle in the light of the international conventions concluded in this field. Amongst these are the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations with regard to children, the Hague Convention of 15 April 1958 on the recognition and enforcement of judgments concerning maintenance obligations with regard to children and the Brussels Convention of 27 September 1968. These Conventions were all intended in addition to facilitate the grant and enforcement of maintenance orders. They enabled, or facilitated, the separation,for the purposes of recognition and enforcement,of the maintenance from the decision finding for the existence of a legal status governed by family law,and the separation of the relevant portion of the operative part of the judgment from the question of the legality of the judgment and of the evidence admitted by the foreign court. This did not, however, mean that Italian public policy could never prevent recognition and enforcement of the judgment in Italy. However, in this connexion only the substantive contents of the foreign judgment and not the evidence on which the foreign court based that judgment is the subject-matter of an examination by the Italian court on the basis of Article 797 of the Italian Codice di Procedura Civile.

TITLE VII

RELATIONSHIP TO OTHER CONVENTIONS

Court of Justice of the European Communities

No. 85 Judgment of 14 July 1977, Bavaria Fluggesellschaft Schwabe & Co. KG and Germanair Bedarfsluftfahrt GmbH & Co. KG v Eurocontrol (preliminary ruling requested by the Bundesgerichtshof), Joined Cases 9 & 10/77

Relationship to other Conventions - German-Belgian Convention of 30 June 1958 - Continuing validity in relation to matters which the Brussels Convention does not cover (Article 56) - Interpretation of the Convention which continues to have effect - Task of the national court - Delimitation of the scope of the Convention - Interpretation of the Court of Justice - Use of identical expressions in the Convention and in conventions which continue to have effect - Different interpretation conceivable

In this case the Bundesgerichtshof had referred to the Court of Justice of the European Communities a question on the interpretation of Article 56 of the Brussels Convention which had arisen in the context of two proceedings which concerned the enforcement in the Federal Republic of Germany of judgments of the Tribunal de Commerce, Brussels. The judgments related to claims brought by the European Organization for the Safety of Air Navigation - Eurocontrol - against two airline companies for the payment of charges due for the use of the equipment and services of Eurocontrol. In a similar case the Court of Justice of the European Communities decided, in a judgment of 14 October 1976 (Case 29/76, LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol, [1976] ECR 1541; Synopsis of Case-law, Part 1, No. 1) in reply to a question referred to the Court by the Oberlandesgericht Düsseldorf, that in the interpretation of the concept "civil and commercial matters" for the purposes of the application of the Brussels Convention "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". In view of these considerations "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".

When Eurocontrol had subsequently invoked the German-Belgian Convention on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters of 30 June 1958, the Bundesgerichthof was confronted in particular with the problem whether and to what extent the legal terms defined by the Court of Justice in the context of the Convention are binding for national courts in the application of a bilateral agreement like the above-mentioned one in fields which are excluded from the scope of the Convention.

The Court of Justice stated that a national court must not apply the Convention so as to recognize or enforce judgments which are excluded from its scope as determined by the Court of Justice but that 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 Convention, as for example the German-Belgian Convention. It is solely for the national courts to judge the scope of the above-mentioned agreements, which under the first paragraph of Article 56 of the Convention continue to have effect in relation to judgments to which the Convention does not apply, since the Court of Justice may only rule on the interpretation of the Convention and the Protocol under the Protocol of 3 June 1971. 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. 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. The Court of Justice accordingly answered the question as follows:

> The first paragraph of Article 56 of the 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 Convention first above mentioned, but to which nevertheless that Convention does not apply.

(QPH/429)

Courts of the Member States

No. 86 Judgment of the Bundesgerichtshof, VIIIth Civil Senate, of 10 October 1977, Bavaria Fluggesellschaft Schwabe & Co. KG v Eurocontrol, VIII ZB 44/75

Relationship to other Conventions - German-Belgian Convention of 30 June 1958 - Continuing validity in relation to matters not covered by the Convention (Article 56) - Interpretation of the concept "civil and commercial matters" within the meaning of Article 1 of the German-Belgian Convention - Interpretation by the court of the State in which the judgment was given is also decisive with regard to the proceedings for recognition and enforcement

In this case the Bundesgerichtshof had referred to the Court of Justice of the European Communities for a preliminary ruling the question which the latter answered in a judgment of 14 July 1977 (Joined Cases 9 and 10/77; in this connexion and for the facts of the case, see No. 85 above). In its decision on the appeal lodged by the German airline undertaking against the grant, based on the Brussels Convention, of leave to enforce the judgment contested by Eurocontrol in Belgium the Bundesgerichtshof considered whether it was necessary to declare the Belgian judgment enforceable under the German-Belgian Convention on Recognition and Enforcement of 30 June 1958, since on the one hand, following the judgment of the European Court of Justice of 14 October 1976 (Case 29/76, LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol, [1976] ECR 1541; Synopsis of Case-law, Part 1, No. 1), it was impossible to declare the judgment enforceable on the basis of the Brussels Convention, but, on the other, the German-Belgian Convention continued to be valid under the judgment of 14 July 1977.

With regard to the question which was decisive in this connexion, whether in fact the Belgian judgment was given in a civil or commercial matter within the meaning of Article 1 of the German-Belgian Convention, the Bundesgerichtshof began with the interpretation of that concept by the Belgian court. In contrast to the situation in the sphere of the Brussels Convention, the law of the State in which the judgment was given is decisive with regard to the question whether it is necessary to regard a dispute as a civil or commercial matter within the meaning of the German-Belgian Convention and not German law as the law of the State in which enforcement is sought. The classification of the present dispute as a commercial matter under Belgian law made by the Belgian court had also to be considered in the proceedings for recognition and enforcement under the German-Belgian Convention.

In the course of its further examination the Bundesgerichtshof confirmed that it was possible in principle to grant leave to enforce the Belgian judgment and that in view of the special legal situation of Eurocontrol, which was established under public international law with the participation of the Federal Republic of Germany, it in no way infringes public policy in the Federal Republic of Germany. Then it referred the case back to the court of first instance for another decision, since the lower courts had settled the proceedings under the Brussels Convention but not, however, under the German-Belgian Convention.

(IH/428i)

No. 87 Judgment of the Bundesgerichtshof, VIIIth Civil Senate, of 10 October 1977, Germanair Bedarfsluftfahrt GmbH & Co. KG v Eurocontrol, VIII ZB 10/76

Relationship to other Conventions - German-Belgian Convention of 30 June 1958 - Continuing validity in relation to matters not covered by the Convention (Article 56) - Interpretation of the concept "civil and commercial matters" within the meaning of Article 1 of the German-Belgian Convention - Interpretation by the court of the State in which the judgment was given is also decisive with regard to the proceedings for recognition and enforcement

The facts, course of procedure and the decision of the Bundesgerichtshof in this case are the same as those of the decision of the same Senate of the same date in Case VIII ZB 44/75 (No. 86 above).

(QPH/429g)

No. 88 Judgment of the Rechtbank van Koophandel, Antwerp, of 25 June 1976, Agence Belgo-Danoise N.V. v Rederij Hapag Lloyd AG, Droit Européen des Transports, 1976, No. 5, p. 691

Relationship to other Conventions - Convention on the Contract for the International Carriage of Goods by Road - Agreement conferring jurisdiction - Supremacy of the Convention on the Contract for the International Carriage of Goods by Road

A Belgian company brought proceedings against a German shipping company before the commercial court in Antwerp arising from a bill of lading because a consignment of shirts from Hong Kong was incomplete on its arrival in Antwerp. The German shipping company claimed that the Belgian courts had no jurisdiction and relied in this connexion on an agreement conferring jurisdiction on the German courts contained in the bill of lading, which agreement it claimed was valid under Article 17 of the Brussels Convention.

The bill of lading was issued as a "combined transport bill of lading" and provided that the consignment should be unshipped in Rotterdam and then transported overland to Antwerp. The court took the view that the shipping and the overland transportation were in each case subject to particular national or international provisions. The provisions of the Convention on the Contract for the International Carriage of Goods by Road are decisive with regard to the transportation by land, and Article 31 of that Convention provides that the plaintiff may bring an action in any court or tribunal designated by agreement between the parties and in addition in the courts or tribunals of a country in which the goods are to be taken over or delivered. Under Article 41 thereof it is impossible to derogate from that provision by stipulation. Article 17 of the Brussels Convention, which establishes exclusive jurisdiction for the courts agreed upon, is not decisive with regard to the contract for transportation by land since in accordance with Article 57 of the Brussels Convention the Convention on the Contract for the International Carriage of Goods by Road takes precedence over the Brussels Convention as lex specialis.

(IH/160)

TITLE VIII

FINAL PROVISIONS

PROTOCOL ON THE INTERPRETATION BY THE COURT OF JUSTICE OF THE CONVENTION

Courts of the Member States (cf. No. 54)


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