SYNOPSIS OF CASE-LAW

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

Part 3

Translation

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The EEC Convention of 27 September 1967 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

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(With a cumulative index of articles for Parts 1 - 3)

1979

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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 (Official Journal No. L 304/36 of 30 October 1978) must be guaranteed by the procedure whereby the Court of Justice of the European Communities, in accordance with the Protocol concerning the interpretation by that Court of the said Convention (Official Journal No. L 304/47 of 30 October 1978), 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 that 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 together with the opinions of the Advocates General are published officially in the "Reports of Cases Before the Court", which may be ordered from the Office for Official Publications of the European Communities, P.O. Box 1003, Luxembourg.

Preface to Part 3

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 1978 and 46 decisions given by courts of the Member States together with a decision of an international judicial body, most of which were given between 1 January and 31 December 1977. A further 17 decisions of courts of the Member States, also largely from 1977, are mentioned in the notes.

2. In the choice of the decisions to be included the practice commenced in Part 2 was followed of omitting decisions which presented no problems relating to the application of the Convention. The inclusion of the decision of the House of Lords of 26 October 1977 (No. 94) seemed expedient, having regard to the impending extension of the Convention inter alia to the United Kingdom.

3. In connexion with the statistics contained in Parts 1 and 2 it has once again been possible to give concrete statistical information on the grant of leave to enforce judgments under the Convention only with regard to the Grand Duchy of Luxembourg. Out of a total of 51 applications for leave to enforce judgments in that country in the period from 1 January to 31 December 1978, 50 applications were granted and one was refused.

Index of decisions contained in Part 3

* Decision consequent upon a preliminary ruling of the Court of Justice of the European Communities

3. France

Cour de Cassation	16 May 1977	No. 95
" "	3 November 1977	No. 128
Cour d'Appel, Aix-en-Provence	9 November 1976	No. 93
" " "	11 January 1977	No. 99
" " "	16 March 1977	No. 124
" " Paris	25 November 1977	No. 135

4. Italy

Corte di Cassazione	29 September 1977	No. 137
" "	27 October 1977	No. 131
" "	23 June/10 November 1977	No. 113
Corte d'Appello, Florence	17 May/ 1 September 1977	No. 125
" " Milan	1 July/27 September 1977	No. 126
Tribunale di Genova	20 December 1976/22 January 1977	No. 114

5. Luxembourg

Cour Supérieure de Justice	14 December 1977	No. 117

6. The Netherlands

Hoge Raad	14 January 1977	No. 120*
Gerechtshof 's-Gravenhage	22 April 1977	No. 101 *
Arrondissementsrechtbank Amsterdam	19 January 1977	No. 115
" "	15 June 1977	No. 102
" "	6 July 1977	No. 100
" "	13 September 1977	No. 104
" "	16 November 1977	No. 116
" 's-Gravenhage	18 January 1977	No. 138
" Leeuwarden	22 September 1977	No. 119
" Utrecht	8 December 1976	No. 127
" Zwolle	19 October 1977	No. 132

7. The United Kingdom of Great Britain and Northern Ireland

House of Lords	26 October 1977	No. 94

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* Decision consequent upon a preliminary ruling of the Court of Justice of the European Communities

Decisions mentioned only in the Notes

Courts of the Member States

Index of Provisions Judicially Considered *

Protocol on the Convention

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* The cumulative index of articles for Parts 1 to 3 is on pp. 72 and 73.

Synopsis

TITLE I - SCOPE

Court of Justice of the European Communities (cf. Notes to Nos. 89 and 92)

Courts of the Member States

No. 89: Cour d'Appel de Bruxelles, 3ème Chambre, Judgment of 1 April 1977, P. v H.

1. Scope - Provisional measures in divorce proceedings - Overlapping of measures relating to "status" (sub-paragraph (1) of the second paragraph of Article 1) with measures coming within the scope of the Convention - Application of the Convention to all related measures

2. Jurisdiction - Provisional, including protective, measures - Provisional measures in divorce proceedings according to Belgian law - Jurisdiction of Belgian courts independent of jurisdiction in the main case

In divorce proceedings pending before the Tribunal de Première Instance, Brussels, between Belgian nationals both resident in Italy at the time the proceedings were brought, the petitioning wife applied for provisional measures allowing her to live separately from her husband during the proceedings and giving her care and custody of the child of the family; further, there was an application for monthly payments of maintenance for herself and the child. The court of first instance rejected the respondent's claim that the court lacked territorial jurisdiction. The respondent appealed on the ground that under the Brussels Convention only the Italian courts of his residence had jurisdiction in relation to the measures applied for (Articles 2 and 3) or the courts of the residence or usual residence of the petitioner (Article 5 (2)). The appeal was dismissed.

In the view of the Cour d'Appel the measures applied for come within the scope of the Convention. In so far as the petitioner's claims concern custody of the child and the father's obligation to provide maintenance which was inseparable from the general legal position of the child they concerned status in the broad sense and this was excluded from the scope of the Convention under subparagraph (1) of the second paragraph of Article 1; this, however, did not apply to the determination of the residence of the petitioning wife and the husband's obligation to maintain her. In any case, it is not proper to split the petitioner's claims and to accept jurisdiction in respect of certain claims and not others. The Brussels Convention must be held to apply to all the claims.

Article 24 of the Convention gives jurisdiction to the court of first instance. It follows from that provision and from the Jenard Report explaining it that it is possible to apply to the competent court of a Contracting State for the provisional measures provided for by the national law of such State without regard to the rules on jurisdiction of the Convention. The provisional measures sought by the petitioner in connexion with the divorce proceedings brought by her are undoubtedly such as are provided for in Article 1280 of the (Belgian) Code Judiciaire. The court of first instance accordingly has jurisdiction.

(IH/336)

Note

The interpretation of the concept "status" in subparagraph (1) of the second paragraph of Article 1 of the Convention is the subject of a reference for a preliminary ruling pending before the Court of Justice of the European Communities from the Bundesgerichtshof of 22 May 1978 concerning the question whether the Convention is "inapplicable to an order made by a French judge of family matters simultaneously with proceedings for the dissolution of marriage pending before a French court for putting under seal and freezing assets, since it relates to proceedings incidental to an action concerning status or rights in property arising out of the matrimonial relationship" (Case 143/78) /QPH/563/.

No. 90: Tribunal de lère Instance de Charleroi, lère Chambre Civile, Order of 20 January 1977, Felicia Adamo v Tortorici

Scope - Matters excluded from the Convention - Custody and maintenance provisions in Italian separation order - Decisions on "status" (subparagraph (1) of the second paragraph of Article 1)

The applicant sought the enforcement of a judgment of the Tribunale Caltanissetta of 10 April 1975 which had ordered first the separation (separazione personale) between her and her husband, secondly gave her custody of the child of the family subject to access by the father, and thirdly ordered him to pay monthly maintenance for her and the child.

The court dismissed the application on the ground that the decisions contained in the Italian judgment related to status or "in the context of an application for enforcement" represented an indivisible entity together with a question relating to status. Accordingly the Brussels Convention is not applicable.

(IH/272)

Note

By order dated 11 February 1977, No. R.R. 12561, the same court dismissed an application for enforcement of a French judgment by which the marriage of the parties had been dissolved and the husband had been ordered to pay monthly maintenance for the children of the family. The reasons given for the dismissal of the application are that the Convention expressly excludes "status" from its scope (IH/276).

No. 91: Tribunal de lère Instance d'Arlon, Judgment of 20 April 1977, Anne-Marie Josette Bâlon v Jean Mottet 2294-292

Scope - Matters excluded from the Convention - Custody and maintenance provisions in a Luxembourg divorce - No decisions on "status" (subparagraph (1) of the second paragraph of Article 1)

The applicant sought enforcement of a judgment of the Tribunal d'Arrondissement, Luxembourg, of 17 May 1976 divorcing the parties and making provision for custody and maintenance.

The court stated that since decisions on status are excluded from the scope of the Brussels Convention the application could be allowed only in respect of the ancillary decisions. It accordingly ordered enforcement of the provisions in the Luxembourg judgment relating to maintenance, custody and costs.

(IH/256)

No. 92: Tribunal de Commerce de Tournai, 2ème Chambre, Judgment of 24 November 1977, S.A. Jaczon-Frigo v B.V. Rodenburg, 516/76 - Rep. 1973

1. Scope - Matters excluded from the Convention - "Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analagous proceedings" (subparagraph (2) of the second paragraph of Article 1) - Action by a Belgian liquidator (curateur) against a Netherlands company in respect of a "claim arising out of the bankruptcy" - Application of the Convention rejected

2. Relationship to other Conventions - Convention between Belgium and the Netherlands of 28 March 1925 - Continued application in respect of matters relating to bankruptcy

By judgment of the court having jurisdiction the liquidation was begun of the property of a Belgian company. Shortly before, a creditor (an undertaking with its registered office in the Netherlands) had taken possession of goods of the company and sought to set the purchase price of the goods off against certain claims. Relying on Article 445 of the Belgian Law on bankruptcy (according to which certain acts and transfers of property prior to the start of the liquidation proceedings by the court are invalid as against the assets) the liquidator (curateur) claimed that the set-off was invalid and brought an action before the Tribunal de Commerce, Tournai against the Netherlands undertaking for payment of the purchase price into the assets. The defendant made a preliminary objection to the jurisdiction of the court.

The court rejected the objection and stated: it is true that the Brussels Convention does not give it jurisdiction and is not applicable to the present case, being proceedings relating to the winding-up of an insolvent company within the meaning of subparagraph (2) of the second paragraph of Article 1 of the Convention. The set-off artificially alleged in connexion with the removal of the goods was in lieu of performance during the "période suspecte" before the commencement of the liquidation and was invalid as against the assets. The claim in the action brought by the liquidator was a typical example of "a claim arising out of bankruptcy".

Nevertheless, the court before which the matter had been brought had jurisdiction under Article 21 of the Convention between Belgium and the Netherlands of 28 March 1925 on jurisdiction, bankruptcy, and the validity and enforcement of judgments, arbitration awards and authentic instruments, and this continues to have effect under Article 56 of the Brussels Convention in respect of bankruptcy matters.

(IH/343)

Note

In a judgment of 22 March 1977, No. R.G. 893/76 F, the Tribunal de Commerce, Brussels, confirmed the application of the Convention in a matter in which a liquidator claimed the purchase price of goods which the subsequent common debtor had delivered to the defendant before the commencement of bankruptcy proceedings. The Court stated that the proceedings "do not have their origin in bankruptcy law" and are not the direct consequence of the bankruptcy. It is on the contrary a claim for payment which the present common debtor would no doubt himself have made if he had not become insolvent (IH/251).

In a case which was decided by judgment of the Rechtbank van Koophandel, Ghent, on 16 September 1977, No. A.R. 1482/77, a Belgian company had obtained a default judgment from that court against a French company. The defendant had appealed. In the meantime liquidation proceedings were commenced against the Belgian company. The appeal was accordingly continued against the liquidator. The court observed that the Convention was applicable since the original case had no connexion with liquidation (IH/281).

The question of the interpretation of subparagraph (2) of the second paragraph of Article 1 of the Convention is the subject of a reference for a preliminary ruling dated 22 May 1978 to the Court of Justice of the European Communities from the Bundesgerichtshof on the question "is a judgment given by French civil courts on the basis of Article 99 of the French Law No. 67/563 of 13 July 1967 against the de facto manager of a legal person for payment into the assets of the company in liquidation to be regarded as having been given in bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies or other legal persons and analogous proceedings or is such a judgment a decision given in a civil and commercial matter?" (Case 133/78) [QPH/557]

TITLE II - JURISDICTION

Section 1 - General Provisions

Courts of the Member States

No. 93: Cour d'Appel d'Aix-en-Provence, 2ème Chambre Civile, Judgment of 9 November 1976 Mocchi Luciano v Soc. Intercruiser S.A.M., 494/1976 - 50/76

Scope of the Convention ratione personae - Action before a French court by a company with its registered office in Monaco against a defendant resident in Italy - Applicability of the Convention denied

A limited company incorporated under Monacan law with its registered office in Monte Carlo (Monaco) brought an action against an Italian businessman resident in Pessaro (Italy) before the Tribunal de Commerce, Nice (France), for payment in respect of breach of a contract which gave the plaintiff the sole agency for the products of the defendant in France and Monaco. The defendant demurred to the jurisdiction of the French court and took the view that under Article 5 of the Brussels Convention it was the court in Pessaro which had jurisdiction since the contract in question had been entered into there and was to be performed there. The court of first instance gave judgment overruling the objection to jurisdiction. The appeal against this was successful.

The court of appeal stated that although the defendant had Italian nationality and was resident in Italy the plaintiff company had Monacan nationality and had its registered office in the Principality of Monaco. That State was not a member of the European Economic Community which had signed the Brussels Convention. The rules for jurisdiction in the Convention could therefore not apply to the present case. The jurisdiction of the Tribunal de Commerce, Nice, in the case before it could therefore be based solely on the provisions of French private international law. Since the defendant was resident abroad Article 46 of the new (French) Rules of Civil Procedure was relevant and this provided that in actions arising out of contract, apart from the court for the place where the defendant was resident, the court for the place where the article had in fact been delivered or the service performed also had jurisdiction. After considering the relevant contract and the facts of the case the Cour d'Appel concluded that even after taking account of the said Article 46 performance of the contract could not be situated in France, especially as the breach of contract on which the action was based arose in Italy. Accordingly there was no basis for jurisdiction of a French court.

(IH/231)

Note

cf. Note to No. 99

No. 94: House of Lords, Judgment of 26 October 1977, Owners of cargo lately taken on board the vessel "Siskina" v Distos Compania Naviera S.A., [1977] 3 Weekly Law Reports 818, Common Market Law Reports, vol. XXI/1978, part 126, p.190.

1. Jurisdiction - Provisions of the Convention - Assets within domestic jurisdiction of a debtor resident abroad - Not sufficient to give jurisdiction in the main action - Jurisdiction to issue provisional measures (Article 24) - Municipal law of the Contracting States - No harmonization of laws in this area

2. Scope of the Convention - Original Member States of the European Economic Community - New Member States - Obligations under Article 220 of the EEC Treaty - Negotiations to adopt and adjust the Convention - No prior obligation to harmonize laws on the basis of the Convention

In this case foreign plaintiffs brought an action in the High Court in London for damages against a Panamanian company and at the same time claimed an injunction to restrain the defendant from disposing of its assets in England arising from an insurance claim. The case was at first concerned with the question whether the writ could be served on the defendant out of the jurisdiction, thus giving the English courts jurisdiction. After conflicting decisions of the lower courts the Court of Appeal answered this question in the affirmative by a majority on 1 June 1977 ([1977] 3 Weekly Law Reports 532). The leave to serve could be granted under Order 11, Rule 1 (1) (i) of the Rules of the Supreme Court, since the injunction applied for with the writ related to an independent claim to do or refrain from doing something within the jurisdiction of the court; it was irrelevant whether the claim for damages, which the English courts could not decide, was valid. Giving judgment Lord Denning stated inter alia that the actual objective of the injunction sought was to restrain the defendant from disposing of its assets in England before a final decision on the claims of the plaintiff by the foreign courts having jurisdiction. Such measures can be taken by the courts of other States and are known as "saisie conservatoire", and after the United Kingdom's entry into the Common Market the English courts had to do their part in harmonizing the laws of the Member States as required by Article 3 (h) of the EEC Treaty. Further, under Article 220 of the EEC Treaty there is a duty to recognize the decisions of the courts of other Member States in the same way as the decisions of English courts. In the case in question, in which the Italian courts had jurisdiction in the main action, protective measures should therefore be taken so that the assets in England might not be disposed of before the judgment was reached in Italy. Moreover, under the Brussels Convention entered into in implementation of Article 220 of the EEC Treaty - and the Convention would in due course be extended to the United Kingdom - although a debtor as a rule has to be sued in the country in which he lives, the creditor can in the meantime apply under Article 24 of the Convention to the courts of his own country for protective measures to be taken against the assets of the debtor when those assets are situate in that country.

The appeal against this judgment was successful. The House of Lords held that the jurisdiction of English courts under Order 11 Rule 1 (1) (i) presupposed that the injunction sought was part of the substantive relief to which the plaintiff's cause of action entitled him. An order in relation to assets of the debtor within the jurisdiction of the court could be granted only if the creditor claimed rights to such assets enforceable by a final judgment of an English court. Since the plaintiffs were not claiming any such rights but were simply making claims to compensation for which the English courts had no jurisdiction in the present case the measures applied for were not available.

Lord Diplock stated in his judgment that the policy considerations for extending the jurisdiction of the English courts as Lord Denning had suggested in reliance on the obligation to harmonize laws in the context of the European Economic Community were not a matter for the courts. In particular the harmonization of laws was not to be done by an individual Member State or its courts but in accordance with the procedure set out in Article 100 of the EEC Treaty. Moreover the Brussels Convention, which adopts the general principle that jurisdiction depends upon the defendant being ordinarily resident within the jurisdiction of the court, led to the abolition of jurisdiction over a defendant solely on the basis of the existence of assets belonging to him within the territorial jurisdiction of the national court. The draft Convention providing for the Accession of the three new Member States to the Brussels Convention requires the Scots courts to do likewise as respects their corresponding 'exorbitant' jurisdiction over foreign defendants based on attachment of assets of the foreign defendant within the jurisdiction. The proposal to infer jurisdiction on the part of English courts to issue protective measures in relation to assets within the jurisdiction of a foreign defendant cannot be based on the Brussels Convention where there is no jurisdiction in the main action. Although Article 24 of the Convention preserves the jurisdiction of courts of Member States in which the national law provides for this to make orders of a protective or provisional character and although the codes of civil procedure of several of the original Member States allow protective measures in relation to assets within the jurisdiction of foreign debtors if there is an action on the main issue pending before a foreign court, Article 24 indicates that this is a field of law in which it has not been considered necessary by Member States or by the Council or Commission to embark upon a policy of harmonization.

(IH/393a)

Note

Order 11, Rule 1 of the Rules of the Supreme Court states:

"(1) ... service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say -

...

(i) if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction

(whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

..."

The above-mentioned Convention on the Accession of the three new Member States to the Brussels Convention (and to the Protocol on its interpretation) was signed on 9 October 1978 and published in the Official Journal of the European Communities 1978, No. L 304, p.1. Article 4 of that Convention provides:

"The following shall be substituted for the second paragraph of Article 3 of the 1968 Convention:

'In particular the following provisions shall not be applicable as against them:

...

In the United Kingdom: the rules which enable jurisdiction to be founded on:

(a) The document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or

(b) The presence within the United Kingdom of property belonging to the defendant; or

(c) The seizure by the plaintiff of property situated in the United Kingdom.'"

Section 2 - Special Jurisdiction

Article 5 (General)

Court of Justice of the European Communities (cf. No. 103)

Courts of the Member States

No. 95: Cour de Cassation, 1ère Chambre Civile, Judgment of 16 May 1977, Fa. Omrom-Europe GmbH v S.A. Office Equipment, 76-11.930, Bulletin des Arrêts de la Cour de Cassation, Chambre Civile, 1977, No. 5, 1ère Partie, Judgment No. 230, p.181-182

Jurisdiction - Special jurisdiction - Action for damages Contractual or tortious nature of the claim - Necessity for consideration before affirmation of jurisdiction under Article 5

With the object of taking over the sole agency in France for certain products of a Japanese undertaking, a French company entered into negotiations with a company in Hamburg having the agency in Europe for the products of the Japanese undertaking. Alleging that the sole agency had been given to another company and thus the agreements between them had been broken the French company subsequently brought an action before the Tribunal de Commerce, Paris, for compensation from the German company. The latter objected to the jurisdiction of the French court and cited Article 2 of the Convention. The Cour d'Appel confirmed the jurisdiction of the French courts, citing Articles 2 and 5 of the Convention, and stated that the alleged wrongful conduct of the German company was inseparable from the complicated relationships which had developed between the parties, the true nature of which was in dispute. The appeal to the Cour de Cassation by the German company against the decision of the Cour d'Appel was successful. The Cour de Cassation stated that the Cour d'Appel had erroneously neglected to consider whether the facts alleged by the plaintiff as the basis for its claims to compensation were of a contractual or tortious nature and where, according to the result of such preliminary consideration, the place of performance of the contract or the place where the harmful event occurred was situate.

(IH/308)

Article 5 (1)

Court of Justice of the European Communities (cf. Nos. 97 & 98)

Courts of the Member States (cf. Nos. 108, 110, 111, 112, 113, 137)

No. 96: Cour d'Appel de Liège, 3ème Chambre, Judgment of 12 May 1977, Audi-NSU Auto Union AG v S.A. Adelin Petit et Cie, Journal des Tribunaux, 1977, No. 5018, pp.710-712 with note by Keutgen and Huys, pp.713-714

1. Jurisdiction - Special Jurisdiction - Jurisdiction of the courts for the place of performance (Article 5 (1)) - Concept of "obligation" in Article 5 (1) - Interpretation of the Court of Justice of the European Communities - Determination of the place of performance - Law of the court before which the matter is brought - Imperative provisions of that law - Ineffectiveness of an agreement on the place of performance by the parties to the contrary effect

2. Jurisdiction - Prorogation of jurisdiction - Arbitration clause - No agreement on jurisdiction of a "court" within the meaning of the first paragraph of Article 17

An appeal pending before the Cour d'Appel, Liège, concerned a claim by a Belgian agent of a German motor manufacturer for damages and compensation from the German undertaking for the unilateral determination of two agency agreements. A term of the contracts, whose territorial scope extended to certain Belgian provinces and to the Grand Duchy of Luxembourg, was that the place of performance was to be Neckarsulm, the registered office of the defendant, and German law was to apply (Article 15); further, Article 16 contained an arbitration clause. Before the plaintiff brought proceedings in Belgium in September 1973 the defendant had in May 1973 started arbitration proceedings in Zürich under Article 16 of the contracts and these led to a declaration of jurisdiction by the court of arbitration on 30 March 1974 and an arbitration decision on 6 December 1975 to the effect that the contractual relations in question between the parties had determined on 31 December 1973, leaving the Belgian company with no rights, and certainly no rights to damages or other compensation, against the German undertaking. Accordingly, the claims made by the Belgian company in the alternative in the arbitration proceedings were rejected. Before the decision of the court of arbitration the court of first instance in Belgium, the Tribunal de Commerce, Liège, had refused by a judgment dated 17 March 1975 to recognize the decision on jurisdiction of the Zürich court of arbitration of 30 March 1974 and had declared the arbitration clause contained in the agency agreements to be invalid while confirming its own jurisdiction to decide the substantive issues. The appeal by the defendant against this was rejected.

The Cour d'Appel first of all found that action could be taken against the German defendant in Belgium only on the basis of the Brussels Convention, the provisions of which had precedence over national rules of jurisdiction (in particular Article 4 of the Law of 27 July 1961 which made a Belgian forum imperative for cases of the present kind). Accordingly, only Article 5 (1) and (5) of the Convention could found Belgian jurisdiction in the present case. The court then interpreted the concept of "obligation" in Article 5 (1) on the basis of the judgment of the Court of Justice of the European Communities of 6 October 1976 in Case 14/76 De Bloos (/1976/ ECR 1497; Synopsis of Case-Law, Part 1, No. 14) and went on to state that the determination of the place of performance of the obligations so defined was a matter for the court before which the matter was brought and that it had to apply its national law. It concluded that both the damages for insufficient notice of termination on the unilateral termination of the agency agreement and the additional compensation due in the case of such determination was payable in Belgium as the country in which the agency agreement was to be performed. As regards the legal classification of the claim to additional compensation as being ancillary to and in place of the original contractual obligation the Cour d'Appel referred to Belgian substantive law the application of which is provided for by Article 4 (2) of the Law of 27 July 1961.

The term of the contract to the effect that the place of performance should be where the German undertaking was based was in conflict with the local nature of the agreement, which, in so far as it was in dispute, was to have effect only in Belgium. According to the law applicable there, namely Article 6 of the Law of 27 July 1961, the clause in question was invalid. The choice of law in favour of German law contained in the same term of the contract was also invalid, since the contractual relations were necessarily subject to Belgian law under the provisions of the Law of 27 July 1961. In view of everything the Belgian courts had jurisdiction under Article 5 (1) of the Convention.

The Cour d'Appel thereupon declared the arbitration clause contained in Article 16 of the agreement to be invalid since the plaintiff could not effectively avail itself of its claims before the expiry of the contract, although the arbitration clause was to that effect. This result also followed from the Law of 27 July 1961 without there being any conflict on this question with the Brussels Convention. Although the first paragraph of Article 17 of the Convention allows agreements as to jurisdiction, subparagraph (4) of the second paragraph of Article 1 of the Convention expressly excepts arbitration.

(IH/15b)

Note

The judgment of the court of first instance, the Tribural de Commerce, Liège, of 17 March 1975 is published in Jurisprudence Commerciale de Belgique, 1977, 4ème partie, pp.186-197, and extracts in the Journal des Tribunaux, 1975, p.399-400, with a note by BRICMONT and PHILIPS.

Regarding the Belgian law of 27 July 1961, cf. Part 1, Nos. 12, 14, 32, 33, Part 2, No. 55 and the following decision.

No. 97: Cour d'Appel de Mons, lère Chambre, Judgment of 3 May 1977, Etablissements A. De Bloos S.p.r.l. v Soc. en Commandite par Actions Bouyer, 1290

1. Jurisdiction - Special jurisdiction - Jurisdiction of the court for the place of performance - Concept of "obligation" in Article 5 (1) - Contractual obligation forming the subject-matter of the action

2. Jurisdiction - Special jurisdiction - Jurisdiction of the court for the place in which a branch, agency or other establishment is situated (Article 5 (5)) - Conditions

In this case the Cour d'Appel, Mons, had referred questions for a preliminary ruling to the Court of Justice of the European Communities on the interpretation of Article 5 (1) and Article 5 (5) of the Convention, which the Court had answered by judgment of 6 October 1977 (Case 14/76 [1976] ECR 1497; Synopsis, Part 1, No. 14). On the basis of the preliminary ruling of the Court the Cour d'Appel now rules as follows on the question of jurisdiction:

Since according to the judgment of the Court of Justice the criterion for the determination of jurisdiction under Article 5 (1) of the Convention is the contractual obligation forming the basis of the legal proceedings (in the present case, the obligation of the grantor which corresponds to the contractual right relied upon by the sole agent in support of his claim), it is necessary to ascertain what that obligation is. The legal relations between the French defendant grantor and the Belgian grantee of an exclusive sales concession, who by the action was seeking to have the contract between the parties set aside and claiming damages for unilateral determination without notice by the grantor, were to be ascertained under the mandatory provisions of the Belgian Law on exclusive sales contracts of 27 July 1961 to 13 April 1971. Article 2 of that Law, according to which the grantor seeking to terminate the contract must give sufficient notice or pay appropriate damages, must be interpreted as meaning that the obligation to pay appropriate damages is not an alternative but compensation for the case where insufficient notice is given. The non-fulfilment of the obligation to give such notice is therefore the basis of the action. The right of the grantee of the exclusive sales concession to continue to exercise the rights under the exclusive sales concession in the area covered by the contract while the period of notice runs accords with that obligation. Thus the obligation in question of the grantor has to be performed in that area (in the present case Belgium), so that the Belgian court before which the matter has been brought has jurisdiction under Article 5 (1) of the Convention.

The further claim to damages in the action, which was to be assessed on the basis of Article 3 of the said Belgian Law, taking into account regular customers, the expenses of the grantee of the exclusive sales concession and other factors, was an "independent contractual obligation" which was intended to compensate for the enrichment of the grantor under the contract. Although, since the obligation represented a debt due at the address of the debtor it had to be performed where the defendant was situated, namely France, and accordingly an action relating thereto ought to have been brought before the French courts, nevertheless, since that claim was related to the other claims in the present action it was appropriate, having regard to Article 22 of the Brussels Convention, for it to be dealt with and decided by the same court.

On the other hand, there was no jurisdiction in Belgium under Article 5 (5) of the Convention since it was apparent from what the parties had agreed that the grantee of the exclusive sales concession was not subject either to the supervision or control of the defendant, so that the conditions laid down by the Court of Justice of the European Communities to determine the existence of a branch, agency or other establishment were not fulfilled.

(QPH/3531)

Note

The operative part of the decision of the Court of Justice of the European Communities is given in Part 1, No. 14.

No. 98: Oberlandesgericht Frankfurt, 21st Zivilsenat, Judgment of 23 March 1977,
Industrie Tessili v Dunlop AG, 21 U 158/74

Jurisdiction - Special Jurisdiction - Jurisdiction of the courts for place of performance (Article 5 (1)) - Determination of the place of performance according to the law which applies under the rules of conflict of laws of the lex fori in respect of the obligation in question

The Landgericht Hanau (Federal Republic of Germany) had ruled that it had jurisdiction in respect of a claim to set aside a contract for the delivery of ski suits by the Italian firm Tessili, the defendant in the action. The Oberlandesgericht Frankfurt-am-Main before which the case came on appeal referred a question to the Court of Justice of the European Communities on the concept of "place of performance of the obligation in question" within the meaning of Article 5 (1) of the Convention which the Court answered by judgment of 6 October 1976 (Case 12/76 [1976] ECR 1473; Synopsis, Part 1, No. 10).

The Oberlandesgericht dismissed the appeal and stated that the court of first instance had jurisdiction under Article 5 (1) of the Convention. It appeared from the interpretation of that provision given by the Court of Justice of the European Communities that determination of the place of performance of the contractual obligations is for the court before which the matter is brought to decide in accordance with its rules of conflict of laws. According to German private international law the German court determines the place of performance according to German substantive law. If, as in the present case, claims are made for annulment the place of performance would be the place where the purchaser is situated, where in accordance with the contract the goods to be returned are to be found. The Landgericht Hanau, in whose jurisdiction the plaintiff is situated, accordingly has jurisdiction as the court of the place in which the claims forming the substance of the action have to be met.

(QPE/351g)

Note

The operative part of the decision of the Court of Justice of the European Communities is set out in Part 1, No. 10.

No. 99: Cour d'Appel d'Aix-en-Provence, 2ème Chambre Civile, Judgment of 11 January 1977, Soc. Vaccaro S.p.A. v J.P. Abitbol, 66/1976

Jurisdiction - Special jurisdiction - Action for compensation for damage arising from criminal proceedings - Wrongful breach of contractual obligations giving rise to criminal proceedings - Contractual nature of the claim affirmed

An Italian company had sold a French businessman a consignment of fruit cocktail "fob Naples or fob Salerno". The covering invoice contained the note that the goods complied with the French "Législation sur les Fraudes" (Regulations on prices, quantity and weight, merchantable quality and description of goods) and that the seller guaranteed this. After it transpired that the goods did not comply with the said legal provisions criminal proceedings were brought against the purchaser before the Tribunal Correctionnel, Marseille, which, however, led to the discharge of the accused on the ground that he knew nothing of the infringement of the provisions. The purchaser thereupon brought an action against the Italian company before the Tribunal de Commerce, Marseille, for the general damages caused to him by the criminal proceedings. The court dismissed the defendant's preliminary objection of lack of jurisdiction and ruled that it had jurisdiction on the basis of Article 5 (3) of the Brussels Convention. The appeal against this was successful.

The Cour d'Appel held that since the defendant was an Italian company jurisdiction of a French court could arise in the present case only on the basis of the provisions of Article 5 of the Convention. There could be no jurisdiction on the basis of Article 5 (4); even if the claim were regarded as for damages based on an act giving rise to criminal proceedings, nevertheless it had not been brought in connexion with criminal proceedings against those responsible for the Italian company. Nor was there jurisdiction for the French court on the basis of Article 5 (1) or Article 5 (3). The wrongful conduct on which the plaintiff based its claim was of a contractual nature since the defendant had not fulfilled, in accordance with French law, its obligations as seller under the agreement for sale of the goods. However, delivery of the goods had been agreed as "fob Naples or fob Salerno" and therefore the seller's obligations were to be performed in Italy and not France. In this respect the interpretation of the Brussels Convention did not depend on French national law and in particular not on Article 46 of the new Code of Civil Procedure. Even if the defendant's conduct were regarded as a tortious act within the meaning of Article 5 (3), the place where the "harmful event" occurred was Italy; according to the wording of the Brussels Convention, the place where the damage occurred which is treated as material by Article 46 of the new Code of Civil Procedure is irrelevant.

(IH/462)

Note

Under Article 46 of the new French Code of Civil Procedure the plaintiff has the choice of suing the defendant inter alia, apart from in the court for the place where the defendant is domiciled: in actions for breach of contract, in the court for the place where the goods were in fact delivered or the services rendered; in actions for tort, in the court for the place where the harmful event occurred or the damage arose.

No. 100: Arrondissementsrechtbank Amsterdam, derde Kamer A, Judgment of 6 July 1977, Manheim & Zoon B.V. v Renzo Tasselli, 76.2223

Jurisdiction - Special jurisdiction - Jurisdiction of the court for the place of performance (Article 5 (1)) - Determination of the place of performance by interpretation of the sales contract concluded by the parties - Note to the contrary on the invoice irrelevant

The plaintiff, a Netherlands company, brought an action against an Italian company before the Arrondissementsrechtbank Amsterdam for late and defective delivery of goods, claiming cancellation of the contract and damages. The defendant made a preliminary objection to the jurisdiction of the court before which the matter had been brought because one of the invoices issued in relation to the goods bore the note "franco frontiera italiana". The court held that it had jurisdiction.

It gave as reasons that it was not in dispute by the parties that the goods ordered through the defendant's Amsterdam agent had been forwarded to Amsterdam by a forwarding agent on behalf of the defendant and, after the plaintiff had informed the defendant that it felt no longer bound by the contract, delivered, not to the plaintiff, but to another firm. It was apparent from these circumstances that the parties had agreed the place of performance within the meaning of Article 5 (1) of the Convention as being Amsterdam. The note on the invoices to the effect that delivery of the goods was to be "franco frontiera italiana" was therefore irrelevant.

(IH/328)

Article 5 (3)

Court of Justice of the European Communities (cf. No. 101)

Courts of the Member States (cf. Nos. 95 and 99)

No. 101: Gerechtshof 's-Gravenhage, tweede Kamer, Judgment of 22 April 1977, Handelskwekerij G.J. Bier B.V. and De Stichting "Reinwater" v Mines de Potasse d'Alsace S.A., 62 R/75 - Rol. 4320/1974

Jurisdiction - Special jurisdiction - Jurisdiction for matters relating to tort - "Place where the harmful event occurred" (Article 5 (3)) - Also place of the causal event and place wheter the damage occurred.

The Netherlands gardening business Bier B.V. and the Reinwater Foundation, the object of which is to promote the improvement of the quality of the water in the Rhine Basin, brought an action against Mines de Potasse d'Alsace S.A. of Mulhouse (France) before the Arrondissementsrechtbank, Rotterdam, for compensation for the damage caused to Bier's plantations by polluted Rhine water; the pollution was alleged to have been caused by the discharge of salt into the Rhine by the French undertaking. The Rotterdam court held that it had no jurisdiction. In the course of the appeal against this the Gerechtshof of The Hague referred a question for a preliminary ruling to the Court of Justice of the European Communities on the interpretation of the words "place where the harmful event occurred" in Article 5 (3) of the Convention and this was answered by the Court by a judgment of 30 November 1976 (Case 21/76 [1976] ECR 1735; Synopsis, Part 1, No. 15).

On the basis of the preliminary ruling of the Court of Justice of the European Communities the Gerechtshof of The Hague came to the conclusion that the Arrondissementsrechtbank Rotterdam had jurisdiction to decide the case brought before it and referred the matter back to that court.

(QPH/3571)

Note

The operative part of the decision of the Court of Justice of the European Communities is contained in Part 1, No. 15.

No. 102: Arrondissementsrechtbank Amsterdam, derde Kamer B, Judgment of 15 June 1977, Geobra Brandstätter GmbH & Co. KG v Big Spielwarenfabrik Dipl. Ing. Ernst A. Bettag, 77.0028

Jurisdiction - Special jurisdiction - Place where the harmful event occurred (Article 5 (3)) - Also place of the causal event and place where the damage occurred - Plaintiff's choice - Action brought at the place of the causal event - No jurisdiction for a subsequent action at the place where the damage occurred

The parties to this action, two German companies, make plastic toys which they sell inter alia in the Netherlands. The plaintiff maintained that the toys manufactured by the defendant and sold under the description "Playbig" were imitations of the toys sold by the plaintiff under the description "Playmobile". In its action before the Arrondissementsrechtbank Amsterdam it claimed an injunction against the defendant to restrain it from selling the toys in the Netherlands, together with damages. Already before bringing the action in the Netherlands the plaintiff had brought an action in the Landgericht Düsseldorf (Federal Republic of Germany) against the defendant for an injunction to restrain it from manufacturing and marketing the toys and for damages. Judgment was given in favour of the plaintiff on 22 June 1976. No decision had been reached on the appeal brought by the defendant to the Oberlandesgericht Düsseldorf at the time the action was commenced in the Netherlands. In the present case the defendant claimed that the Arrondissementsrechtbank had no jurisdiction and in the alternative cited the proceedings pending in the Federal Republic of Germany.

The court held that it had no jurisdiction. It expressly left open the question raised by the defendant as to whether the Brussels Convention was applicable at all in view of the fact that both parties had their registered office in the same Contracting State. Even assuming its applicability the courts of the Netherlands had no jurisdiction on the basis of the Convention. Although in respect of actions for tortious acts Article 5 (3) gives jurisdiction to the court "for the place where the harmful event occurred", according to the interpretation of that provision given by the Court of Justice of the European Communities in the judgment of 30 November 1976 in Case 21/76 [1976] ECR 1735 (Synopsis, Part 1, No. 15) it is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the plaintiff has a choice between the two jurisdictions. By bringing its action in the Netherlands the plaintiff had chosen the courts of the place where the damage occurred. However,

the judgment of the Landgericht Düsseldorf of 22 June 1976 shows that the plaintiff had previously made the same claims in the Federal Republic of Germany as in the present case. The claims had their origin in the same acts of the defendant which led to the alleged occurrence of damage in the Netherlands. Thus the plaintiff had already exercised the choice open to it under Article 5 (3) by bringing the action in the court for the place of the causal event and could therefore no longer choose the alternative court. The court accordingly, in the absence of other grounds of jurisdiction, had no jurisdiction and the question was no longer relevant whether as a result of the proceedings pending in the Federal Republic of Germany it should proceed with the matter in view of Article 21 of the Convention.

(IH/332)

Article 5 (5)

Court of Justice of the European Communities (cf. No. 97)

No. 103: Judgment of 22 November 1978, Case 33/78 Etablissements Somafer S.A. v Saar-Ferngas AG (Reference for a preliminary ruling by the Oberlandesgericht Saarbrücken) - Advocate General: H. Mayras

1. Jurisdiction - Special jurisdiction - Rules of Article 5 - Principles of interpretation.

2. Jurisdiction - Special jurisdiction - "Dispute arising out of the operations of a branch, agency or other establishment" (Article 5 (5)) - Independent interpretation - Substantive content of these concepts - Powers of the national court

The French company Somafer carried out blasting work on a bunker on behalf of the Saarland and in the direct vicinity of two gas mains of Saar-Ferngas AG, a German company. The German company carried out security measures to protect those mains and sought to recover from somafer compensation for the costs. With this object it brought an action before the Landgericht Saarbrücken against the French undertaking, whose registered office is in France but which has an office or place of contact in the Saarland (Federal Republic of Germany) described on its notepaper as "Vertretung für Deutschland" (representation for Germany). The defendant made a preliminary objection to jurisdiction which the Landgericht in an interlocutory judgment dismissed. The defendant appealed against that judgment to the Oberlandesgericht Saarbrücken. The appeal court referred three questions to the Court of Justice of the European Communities for a preliminary ruling on the interpretation of Article 5 (5) of the Brussels Convention.

First, it was asked whether the conditions regarding jurisdiction in the case of "the operations of a branch, agency or other establishment" mentioned in Article 5 (5) were to be determined under the law of State before the courts of which the proceedings had been brought or according to the law to be applied in the main action or independently. In the event of the last alternative being answered in the affirmative it was further asked what were the criteria for intepreting the expressions "branch" and "agency" with reference to capacity to take independent decisions and also to the extent of the outward manifestation and whether, as in German law, "the principles governing liability for holding oneself out in law to others, i.e. third parties, /are/ to be applied to the question whether there is in fact a branch or agency, with the legal consequence that anyone who creates the appearance of such a situation is to be treated as having operated a branch or agency".

After setting out the objectives of the Convention the Court in answering the first question first considers the function within the Convention of the concepts used in Article 5 (5). Having regard to the fact that in certain cases there is a particularly close connecting factor between a dispute and the court called upon to hear it Article 5, with a view to the efficacious conduct of the proceedings, makes provision for special jurisdiction, which the plaintiff may choose. It is in accord with the objective of the Convention to avoid a wide and multifarious interpretation of the exceptions to the general rule of jurisdiction contained in Article 2. The justification for the exceptions contained in Article 5 to the general rule of jurisdiction in Article 2 is solely in the interests of due administration of justice. Since the factors which are relevant as regards the question whether the conditions of Article 5 (5) are fulfilled must be determined in the same way, the need to ensure legal certainty and equality of rights and obligations for the parties as regards the power to derogate from the general jurisdiction of Article 2 requires an independent interpretation, common to all Contracting States, of the concepts of Article 5 (5).

The Court answered the remaining questions as follows:

> "The concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extention of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extention.
>
> The concept of 'operations' comprises:
>
> > actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there;

actions relating to undertakings which have been entered into at the above-mentioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above-defined meaning, has engaged at the place in which it is established on behalf of the parent body.

It is in each case for the court before which the matter comes to find the facts whereon it may be established that an effective place of business exists and to determine the legal position by reference to the concept of 'operations' as above-defined."

(QPH/522)

Courts of the Member States (cf. No. 97)

Article 6

Courts of the Member States (cf. No. 115)

Section 3 - Jurisdiction in matters relating to insurance

Courts of the Member States

No. 104: Arrondissementsrechtbank Amsterdam, Kamer B, Judgment of 13 September 1977, Bedrijfsvereniging voor de Textielindustrie v General Accident Fire and Life Assurance Corporation Ltd., 75.4518

1. Jurisdiction - General provisions - Jurisdiction of the court for the seat of companies and legal persons (Articles 2, 53)- Determination of seat - Application of the private international law of the State before whose courts the matter is proceeding

2. Jurisdiction - Jurisdiction in matters relating to insurance - Insurer not having any seat in the sovereign territory of a Contracting State - Branch or agency of that insurer in a Contracting State - Jurisdiction in disputes arising "out of the operations" of the branch or agency (third paragraph of Article 8) - Concept

3. Related actions - Stay of judgment - Conditions - Reference of a case to the courts of another Contracting State - Not permissible according to Netherlands law

The facts of this case concerned a traffic accident in Belgium in which the driver of a moped was injured in a collision with a motor car. The Netherlands social security insurer of the injured party, the plaintiff Bedrijfsvereniging, made payments to him for incapacity for work and thereupon sought before the Arrondissementsrechtbank Amsterdam compensation therefor from the insurer of the motor car, an insurance company with its seat in Perth (Scotland). Regarding the jurisdiction of the court before which the matter was brought the plaintiff alleged that the defendant maintained an office in Amsterdam and was accordingly established there; the Arrondissementsrechtbank accordingly had jurisdiction under Article 2

of the Brussels Convention. Further, after negotiations had been conducted between the parties since 1970 to settle the claims, the defendant's office in Amsterdam had taken over the matter since 1973 and conducted extensive negotiations with the plaintiff. The defendant claimed that the Amsterdam courts had no jurisdiction and that the dispute had not arisen from the operations of its branch in Amsterdam, since the contract of insurance with the driver involved in the accident had been entered into with its branch in Antwerp. Alternatively, it claimed inter alia that because of its logical connexion the case should be referred to the Rechtbank van eerste aanleg Dendermonde (Belgium), where an action between the parties to the accident was pending.

The Court ruled that it had jurisdiction. It first considered the question whether it had jurisdiction under the general provision of Article 2 of the Convention and answered it in the negative. The question where the defendant had its seat had to be answered, according to the provisions of Netherlands private international law - which applies under Article 53 of the Convention - in accordance with Netherlands law. Since it was undisputed that the seat of the defendant, in accordance with its articles, was Perth (Scotland) it had under Article 10 of Book I of the Burgerlijk Wetboek no seat in the Netherlands. Accordingly, on principle under the first paragraph of Article 4 of the Convention jurisdiction was to be determined by the national law of the Netherlands. The defendant had, however, in the present case to be treated under the third paragraph of Article 8 of the Convention as if it had a seat in the Netherlands, since the present case was concerned with a dispute arising "out of the operations" of its office in Amsterdam. It was no criterion that the contract of insurance with the driver involved in the accident had been entered into with its office in Antwerp since the case was not concerned with that contract of insurance but the defendant's obligations arising thereunder. It was not only the conclusion of contracts of insurance which came within the "operations" of a branch or agency of an insurer within the meaning of the third paragraph of Article 8 but also the settlement of claims arising out of the contracts of insurance. Since in the present case negotiations had been conducted since 1973 from the defendant's office in Amsterdam the court there had jurisdiction under the third paragraph of Article 8 of the Convention.

The defendant's alternative application to refer the case to the court in Dendermonde under the second paragraph of Article 22 of the Convention could not be granted, even if it was established that that court had jurisdiction, since Netherlands law did not allow a case to be referred to a court of another Contracting State. The question whether the court could stay its decision under the first paragraph of Article 22 in the interests of due administration of justice until judgment had been given by the court in Dendermonde could not yet be answered since the main proceedings were not yet ready for judgment.

(IH/329)

Section 4 - Jurisdiction in matters relating to instalment sales and loans

Court of Justice of the European Communities

No. 105: Judgment of 21 June 1978 in Case 150/77, Soc. Bertrand v Paul Ott KG (Reference for a preliminary ruling by the French Cour de Cassation) - Advocate General: F. Capotorti ([1978] ECR 1431)

Jurisdiction - Instalment sales and loans - Sale on instalment credit terms - Independent concept of the Convention - Substantive content - Contract for sale with agreement as to instalment credit terms in connexion with trade or professional activities - No "sale on instalment credit terms" within the meaning of the Convention

A German company had obtained a default judgment in the Landgericht Stuttgart against a French company for the payment of the balance of the purchase price. The case was concerned with a contract for the sale of a machine tool to the French undertaking, the agreed sale price to be paid by two equal instalments after intervals of 60 and 90 days. The German default judgment was at first declared to be enforceable in France; however, the final court before which the case came, the Cour de Cassation, made a reference to the Court of Justice of the European Communities in connexion with Article 13, the second paragraph of Article 14 and the first paragraph of Article 28 of the Brussels Convention (which provide that in matters relating to "the sale of goods on instalment credit terms" an action may be brought only before the courts of the State in which the defendant firm has its seat and that accordingly the decision of the German court ought not to have been enforceable) on the question "whether the sale of a machine which one company agrees to make to another company on the basis of a price to be paid by way of two equal bills of exchange payable at 60 and 90 days can be held to be a sale of goods on instalment credit terms within the meaning of Article 13 of the Brussels Convention."

The Court stated that the concept of a contract of sale on instalment credit terms varies from one Member State to another, in accordance with the objectives pursued by their respective laws. Since these various objectives have led to the creation of different rules it is necessary, for the purpose of eliminating obstacles to legal relations and to the settlement of disputes in the context of intra-Community relations in matters of the sale of goods on instalment credit terms, to consider that concept as being independent and therefore common to all the Member States. It is therefore also indispensable, for the coherence of the provisions of Section 4 of the Convention, to give that expression a uniform substantive content allied to the Community order.

It is clear from the rules common to the laws of the Member States that the sale of goods on instalment credit terms is to be understood as a transaction in which the price is discharged by way of several payments or which is linked to a financing contract. A restrictive interpretation of the second paragraph of Article 14, in conformity with the objectives pursued by Section 4, entails the restriction of the jurisdictional advantage described above to buyers who are in need of protection, their economic position being one of weakness in comparison with sellers by reason of the fact that they are private final consumers and are not engaged, when buying the product acquired on instalment credit terms, in trade or professional activities.

The Court accordingly answered the question referred to it for a preliminary ruling as follows:

> "The concept of the sale of goods on instalment credit terms within the meaning of Article 13 of the Brussels Convention of 27 September 1968 is not to be understood to extend to the sale of a machine which one company agrees to make to another company on the basis of a price to be paid by way of bills of exchange spread over a period".

(QPH/503)

Section 5 - Exclusive jurisdiction

Section 6 - Prorogation of jurisdiction

Court of Justice of the European Communities

No. 106: Judgment of 9 November 1978 in Case 23/78, Nikolaus Meeth v Soc. Glacetal (Reference for a preliminary ruling by the Bundesgerichtshof) - Advocate General: F. Capotorti

1. Jurisdiction - Prorogation of jurisdiction - Agreement to the effect that the parties could be sued only in the courts of their domicile - Jurisdiction under the first paragraph of Article 17 affirmed

2. Jurisdiction - Prorogation of jurisdiction - Agreement to the effect that the parties could be sued only in the courts of their domicile - Consideration of a set-off in connexion with the legal relationship in issue - Conditions

A contract was entered into between the firm Meeth, which has its seat in the Federal Republic of Germany, and the French firm Glacetal for the delivery of glass by the French firm to the German undertaking. The contract provided inter alia as follows: "If Meeth sues Glacetal the French courts alone shall have jurisdiction. If Glacetal sues Meeth the German courts alone shall have jurisdiction". Since Meeth had not paid for certain deliveries the French undertaking brought an action in the Landgericht Trier (Federal Republic of Germany) which ordered the German undertaking to make payment. Meeth had counterclaimed against Glacetal for compensation for the damage arising from the fact that the French firm had been guilty of delay and had imperfectly complied with its contractual obligations. The counterclaim for a set-off against the price claimed by Glacetal was however rejected by the Landgericht as unsubstantiated. In the appeal court in which the French firm's claim was basically confirmed, the Oberlandesgericht rejected the counterclaim for a set-off on the ground that the agreement as to jurisdiction contained in the contract did not allow the counterclaim to be made before a German court. Appeal against this judgment was made to the Bundesgerichtshof which referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

"1. Does the first paragraph of Article 17 of the Convention permit an agreement under which the two parties to a contract for sale, who are domiciled in different States, can be sued only in the courts of their respective States?

2. Where an agreement permitted by the first paragraph of Article 17 of the Convention contains the clause mentioned in Question 1, does it automatically rule out any set-off which one of the parties to the contract wishes to propose in pursuance of a claim arising under the said agreement in answer to the claim made by the other party in the court having jurisdiction to hear the latter claim?"

Regarding the first question the Court stated that although Article 17, as it is worded, refers only to the choice by the parties to the contract of a single court or the courts of a single State, it cannot be interpreted as intending to exclude the right of the parties to agree on two or more courts for the purpose of settling any disputes which may arise. This applies particularly where the parties have by such an agreement reciprocally conferred jurisdiction on the court specified in the general rule laid down by Article 2 of the Convention.

As regards the second question the Court held that the question of the extent to which a court before which a case is brought pursuant to a reciprocal jurisdiction clause, such as that appearing in the contract between the parties, has jurisdiction to decide on a set-off claimed by one of the parties on the basis of the disputed contractual obligation must be determined with regard both to the need to respect individuals' right of independence and the need to avoid superfluous procedure, which form the basis of the Convention as a whole. In the light of both of these objectives Article 17 cannot be interpreted as preventing a court before which proceedings have been instituted pursuant to a clause conferring jurisdiction of the type described above from taking into account a claim for a set-off connected with the legal relationship in dispute if such court considers that course to be compatible with the letter and spirit of the clause conferring jurisdiction.

The Court accordingly answered the questions referred to it for a preliminary ruling by the Bundesgerichtshof as follows:

"1. The first paragraph of Article 17 of the Convention ... cannot be interpreted as prohibiting an agreement under which the two parties to a contract for sale, who are domiciled in different States, can be sued only in the courts of their respective States.

2. Where there is a clause conferring jurisdiction such as that described in the reply to the first question the first paragraph of Article 17 of the Convention ... cannot be interpreted as prohibiting the court before which a dispute has been brought in pursuance of such a clause from taking into account a set-off connected with the legal relationship in dispute."

(QPH/517) .

Courts of the Member States (cf. Nos. 96 and 137)

No. 107: Hof van Beroep, Antwerp, vierde Kamer, Judgment of 15 June 1977, GmbH P. v N.V. D. e.a., Rechtskundig weekblad 1978, No. 25, col.1630-1635, with note by Laenens, col.1635-1638

1. Jurisdiction - Prorogation of jurisdiction - Jurisdiction clause in bill of lading - Validity - Rule of Belgian law (Article 91 of the Seegesetz) - Rule of Brussels Convention (Article 17) - Mutual relationship

2. Jurisdiction - Prorogation of jurisdiction - Concept of "parties" in Article 17 - Parties to the dispute

3. Jurisdiction - Prorogation of jurisdiction - Formal requirements under Article 17 - Jurisdiction clause in bill of lading - Held invalid

A consignment of organ parts sent on the SS Transontario from Chicago to Antwerp covered by a bill of lading arrived damaged at the port of destination. The Belgian holder of the bill of lading and his insurer thereupon sued the consignor and drawer of the bill of lading, a German company, for compensation before the Rechtbank van Koophandel, Antwerp. The German company claimed that the Belgian court had no jurisdiction and cited a clause in the bill of lading to the effect that "all disputes are to be decided according to German law and are exclusively to be put before the Hamburg courts". In addition, reference was made in other clauses of the bill of lading inter alia to the international Convention of 25 August 1924 on the harmonization of rules on bills of lading and to the American Carriage of Goods by Sea Act of 16 April 1936. The court of first instance held that it had jurisdiction and upheld the claim. The defendant's appeal to the Hof van beroep was unsuccessful.

The appeal court held that the jurisdiction clause was not valid either under Article 91 of the Belgian law of the sea or Article 17 of the Brussels Convention. The court first confirmed case-law to the effect that an agreement on jurisdiction in a bill of lading in favour of a foreign court is effective only if it is sufficiently certain that the foreign court will apply the mandatory provisions of Article 91 of the Belgian law of the sea (which itself does not determine jurisdiction) as interpreted by Belgian case-law and commentary. Since in the present case the clauses on the application of the law contained in the bill of lading do not refer to Article 91 of the law of the sea and in addition are ambiguous, the clause on jurisdiction must be regarded as invalid.

The jurisdiction clause does not, moreover meet the conditions of Article 17 of the Brussels Convention, which as an international treaty takes precedence over national laws. When Article 17 of the Convention refers to an agreement between "parties" it means the "parties to a dispute" for it is a Convention concerned with procedural questions; a third party who, as holder of the bill

of lading, has rights thereunder was not involved in the drawing up of the document. The conditions regarding formalities contained in Article 17, which must be strictly interpreted, were intended to ensure that agreement on jurisdiction was in fact reached between the parties to the dispute. This is not the case for a third party in possession of the bill of lading. Further, a bill of lading, even between a consignor and carrier, is not a written agreement within the meaning of the Convention. This arises from the special nature of the bill of lading which is primarily to be regarded as a certificate of receipt concerning the goods to be shipped and in practice is mostly signed only by the captain or the agent of the shipping company and contains general conditions laid down by the shipping company. The written agreement referred to in the Convention must be express and unambiguous and cannot be inferred from conditions laid down unilaterally.

Moreover, the Brussels Convention does not determine the question as to which law governs the validity of the substantive rights under the agreement or its individual clauses. Article 17 is only a rule of procedure and cannot validate agreements which are invalid pursuant to substantive provisions. The court before which the agreement is being considered must decide the substantive law. In the present case the invalidity of the jurisdiction clause contained in the bill of lading follows from Article 91 of the Belgian law of the sea, for that clause, as mentioned above, does not ensure that the holder of the bill of lading in fact has the protection of Article 91. Contrary to the plaintiff's view, Article 17 of the Convention does not take precedence over Article 91 of the law of the sea; it cannot be assumed that it was the intention of the Contracting States that the Convention should override national provisions which were part of national or international public policy.

(IH/335)

Note

Regarding the relationship between Article 17 of the Convention and Article 91 of the Belgian law of the sea cf. Part 1, No. 31, and the judgment of Rechtbank van koophandel, Antwerp, of 15 April 1975, Rechtspraak der haven van Antwerpen 1975-1976, 84 and European Transport Law 1976, I, 92 together with the note; see also on this decision the note by Weser in Jurisprudence commerciale de Belgique 1976, IV, 666-672 (IH/68).

The question whether a jurisdiction clause contained in a bill of lading satisfies the conditions of the first paragraph of Article 17 of the Convention is also answered in the negative in the judgment of the Rechtbank van koophandel, Antwerp, of 14 June 1977, No. 4394/76 (IH/269).

cf. in addition No. 114.

No. 108: Hof van beroep, Antwerp, vierde Kamer, judgment of 30 November 1977,
Fa. Gottfried Kellermann GmbH v P.B.A. "Dura",
1616-A.R. 1244/75

1. Jurisdiction - Prorogation of jurisdiction - Jurisdiction clause on the back of the invoice - Acceptance of the invoice without challenge - No effective agreement under Article 17

2. Jurisdiction - Special jurisdiction - Jurisdiction of the courts for the place of performance - Sale contract between a Belgian company and a German company - Determination of the place of performance according to the Uniform Law on the international sale of goods.

The Belgian plaintiff sued the defendant, the seat of which is in the Federal Republic of Germany, before the Rechtbank van koophandel, Turnhout, for the payment of the sale price under contracts of sale. On the back of the relevant invoices, which were for amounts expressed in German currency, it was stated that the courts in Turnhout should have jurisdiction. The defendant had accepted these invoices without protest. The court of first instance held that it had jurisdiction; the appeal to the Hof van beroep, Antwerp, was unsuccessful.

The appeal court first considered and answered in the negative the question whether jurisdiction of the court of first instance had been effectively agreed under Article 17 of the Brussels Convention. The note as to the jurisdiction of the court in Turnhout on the back of the invoices was not sufficient to amount to an effective agreement as to jurisdiction; the fact that the invoices were accepted without protest did not make any difference. The court of first instance did, however, have jurisdiction under Article 5 (1) of the Convention, which gives jurisdiction to the courts for the place of performance of the obligation in question. Under Article 59 of the Uniform Law on the international sale of goods of 1 July 1964 the buyer had to pay the seller the price at the place where the seller is established, or in the absence of establishment, where it is habitually resident. That provision is unaffected by the fact that the sale price is expressed in the purchaser's currency.

(IH/342)

No. 109: Cour d'appel de Mons, 1ère chambre,

Judgment of 17 October 1977, S.A. Soc. Nouvelle des Paveurs Réunis (S.N.P.R.) v S.p.r.l. Joseph Maillien et Fils, 542-R.G. 2.527

1. Jurisdiction - Prorogation of jurisdiction - Oral contract for sale evidenced in writing between traders - Jurisdiction clause on back of invoice - Acceptance of invoice without protest - Evidence of agreement as to the clause on the invoice - Validity under Article 17 affirmed

2. Lis pendens (Article 21) - Recourse to courts in different Contracting States in respect of the same claim - Action brought subsequently of no effect on the action before the first court

The plaintiff, a Belgian company, brought an action against the French defendant before the Tribunal de commerce, Charleroi, in respect of an oral contract for the delivery of blast furnace slag, claiming payment and compensation. In support of the jurisdiction of the Belgian court the plaintiff relied inter alia on a jurisdiction clause which had been printed together with other general conditions of sale on the back of all the invoices sent to the defendant and accepted by it without protest. The defendant maintained that when the contract was entered into it had no knowledge of the jurisdiction clause and that the clause did not become effective simply because it had not protested when it received the invoices. Only the Tribunal de commerce, Paris, had jurisdiction and the plaintiff had moreover also brought an action there after commencing proceedings in Belgium in respect of the same claim.

The Tribunal de commerce, Charleroi, held that it had jurisdiction. The defendant's appeal was unsuccessful. In the view of the appeal court the court of first instance had jurisdiction as a result of a valid agreement under Article 17 of the Brussels Convention. Although it is true that the content of an obligation must be known so that the consent of the particular party to the contract may extend to it, this did not prevent the acceptance of the invoice without protest from being regarded as evidence that the consent of the parties extended to all the conditions of the contract contained in the invoice. It was irrelevant whether one party learnt of those conditions long before or only shortly before the invoice was sent. Further, the defendant as an experienced trading company ought to have taken account of such clauses on the back of invoices and should have properly assessed their scope. The conditions of Article 17 of the Convention were accordingly fulfilled.

The action pending before the Tribunal de commerce, Paris, in respect of the same claim had, moreover, in accordance with Article 21 of the Convention, no effect on the proceedings pending before the Belgian courts since the action had been brought in the French court subsequent to that in the Belgian court.

(IH/317)

No. 110: Tribunal de commerce de Bruxelles, 9ème chambre,

Judgment of 13 June 1977, S.p.r.l. Créations Davos v Fa. Katag Gruppe top Textil AG, R.G. 7.710/73

Jurisdiction - Special jurisdiction - Jurisdiction of the court for the place of performance (Article 5 (1)) - Determination of the place of performance according to the legal provisions governing the contract - Effective agreement between the parties on a place of performance other than that provided for by law - Jurisdiction under Article 5 (1) even though the formalities of Article 17 are not fulfilled.

A Belgian company sued a German company before the Tribunal de Commerce, Brussels, for payment in respect of goods which had been delivered. On the back of the order forms and invoices on which the action was based were the plaintiff's general conditions of sale containing a clause conferring jurisdiction on the courts in Brussels. The plaintiff's invoices were further marked "payable in Brussels". The defendant claimed that the court had no jurisdiction.

The court held that it had jurisdiction. Although there had been no valid agreement as to jurisdiction between the parties since - as the court held, citing case-law of the Court of Justice of the European Communities (judgments of 14 December 1976 in Case 24/76 [1976] ECR 1831 and Case 25/76 [1976] ECR 1851; Synopsis, Part 1, Nos.24 and 25) - the formalities laid down in the first paragraph of Article 17 of the Convention had not been complied with, the court before which the matter came did however have jurisdiction under Article 5 (1) of the Convention. The first paragraph of Article 17 was not applicable to the jurisdiction of the court for the place of performance provided for in that article. Since, moreover, the Convention prescribes no formalities for an agreement as to the place of performance, the law applicable to the contract, in the present case Belgian law, was applicable. According to this the parties could agree upon a place of performance other than that provided for by law. The express notice in the plaintiff's invoices "payable in Brussels", which is customary in the trade and was not objected to by the defendant, was evidence that the parties had agreed upon that town as the place of payment. The courts for that place accordingly had jurisdiction under Article 5 (1) of the Convention.

(IH/253)

Note

Two other Belgian cases hold that it is possible to confer jurisdiction under Article 5 (1) by way of agreement in favour of a court for a place of performance other than that provided for by law without observing the formalities of Article 17, although in those particular cases it was held that this had not been done in fact (Rechtbank van koophandel Kortrijk, judgment of 1 February 1977, No. 249 [IH/232]; Rechtbank van koophandel Turnhout, judgment of 9 February 1977, No. A.R. 3113 [IH/262].

No. 111: Oberlandesgericht Hamm, 2nd Zivilsenat,
Judgment of 20 January 1977, Fa. S. v Fa. G, KG, 2 U 120/76

1. Jurisdiction - Prorogation of jurisdiction - Jurisdiction clause in general conditions of sale - Global reference in order form insufficient even where the conditions are made available - Where it is above such reference a signature on the order form is not written confirmation

2. Jurisdiction - Special Jurisdiction - Jurisdiction of the court for the place of performance (Article 5 (1)) - Stipulation of a place of performance in the general conditions of sale other than that provided for by law - - No conferment of jurisdiction under Article 5 (1) where the formalities of Article 17 are not fulfilled

The defendant, a French firm, ordered from the plaintiff, a German clothing undertaking, goods on the plaintiff's order form drafted in French. On the front of the form there was the notice that the "general conditions of the German outer garment industry" should apply, together with the note: "Tribunal d'arbitrage: Gelsenkirchen-Buer". Paragraph 1 of the general conditions, which had been delivered to the defendant, stated that the place of performance under the contract of sale should be the place where the seller carried on business and paragraph 2 that the court for the place where the plaintiff carried on business or where its relevant trade or cartel management had its seat should have jurisdiction. Paragraph 12 provided that disputes arising out of the contract should be decided by the normal court or an agreed arbitrator but that if the matter were brought first before the court it should have jurisdiction in the event of its not having been agreed that the arbitrator should have exclusive jurisdiction.

After the defendant had refused to accept goods which were alleged to have been delivered too late the plaintiff brought an action before the court for the place where it has its seat in the Federal Republic of Germany for payment of the sale price and an order that the goods should be accepted. The action was successful in the court of first instance but on appeal was dismissed for want of jurisdiction.

The Oberlandesgericht held that the defendant was established in France and could be sued in the Federal Republic of Germany only on the basis of Sections 2 to 6 of the Brussels Convention. There was no valid consent to jurisdiction under Article 17 of the Convention. The notice "Tribunal d'arbitrage: Gelsenkirchen-Buer" on the order form related only to an arbitrator and no arbitrator had been agreed upon. Nor did paragraph 12 of the general conditions in conjunction with that notice give jurisdiction to the courts of Gelsenkirchen-Buer, since that provision was only to the general effect that any dispute had to be decided either by an ordinary court or an arbitrator.

Nor did paragraph 2 of the general conditions satisfy the requirements of Article 17, even if the conditions had been expressly agreed and a copy had been delivered to the defendant. The object of the formalities required by Article 17, which was to prevent the surreptitious insertion of jurisdiction clauses, was not sufficiently met by the delivery of often comprehensive conditions of sale. It was doubtful whether written confirmation by one of the parties that the conditions applied was sufficient, but in any case there was no such confirmation. The front of the order form bore the signature of the defendant's principal; but even if she had appended this herself, there was still no written confirmation since the signature was above the notice to the effect that the general conditions should apply.

There was also no jurisdiction in the Federal Republic of Germany on the basis of paragraph 1 of the general conditions of sale. Although under Article 5 (1) of the Convention a defendant not resident in Germany could be sued at the place of performance, nevertheless the same formal requirements applied to an agreement in relation to a place of performance as to an agreement on jurisdiction if jurisdiction was to be based on the agreed place of performance. The court held that this was the objective from the fact that paragraph 1 of the general conditions was not intended to determine the actual place of performance. The defendant was neither to take delivery nor to pay for the goods in Gelsenkirchen. Under paragraph 1 of the conditions those obligations remained governed by the general rule of German law (Article 269 of the Bürgerliches Gesetzbuch), according to which the place of performance was the defendant's domicile in France.

(IH/203a)

No. 112: Oberlandesgericht Munich,
Judgment of 9 November 1977, Ber. Reg. 7 U 2924/77,
Recht der internationalen Wirtschaft, Aussenwirtschafts-dienst des Betriebs-Beraters 1978, No. 2, pp. 119-121,
with note by Mezger, pp. 334-336

Jurisdiction - Special jurisdiction - Jurisdiction of the court for the place of performance (Article 5 (1)) - Determination of the place of performance according to the legal provisions governing the contract - Effective agreement between parties on a place of performance other than that provided for by law - No basis for jurisdiction under Article 5 (1) where the formalities of Article 17 are not fulfilled.

The plaintiff, a German trader, brought an action before the Landgericht Munich against the defendant, who was resident in Italy, for repayment of the balance of a loan and claimed that he had agreed orally with the defendant that the courts of Munich should have jurisdiction for all disputes. Further, he had also agreed orally with the defendant that Munich should likewise be the place of performance of all the defendant's obligations in respect of the loan. The Landgericht dismissed the action for want of international jurisdiction.

The Oberlandesgericht Munich dismissed the plaintiff's appeal. It held that in the present case there was no jurisdiction under Article 5 (1) of the Convention (and this was all that could have given the Landgericht jurisdiction). Although the place of performance within the meaning of Article 5 (1) is to be determined in accordance with the law which governs the obligation in question according to the rules of conflict of laws of the court before which the matter is brought (judgment of 6 October 1976 in Case 12/76 [1976] ECR 1473; Synopsis of Case-law, Part 1, No. 10), on principle, however, only the place of performance provided for by the relevant law can be regarded as such. The international jurisdiction of a court other than that of the defendant's residence can be based on an agreed place of performance only where the agreement is in the form required by Article 17 of the Convention. This applies even where the relevant national law determining the place of performance considers an oral agreement as to the place of performance as valid and, as does for example German law, allows it, subject to certain conditions, to be the basis of jurisdiction (Article 29 (2) of the Zivilprozessordnung).

The Oberlandesgericht based its interpretation of Article 5 (1) on the position which that provision occupies in the system of jurisdiction created by the Convention. An essential part of that system was not only the principle of Article 2 but also Article 17, which made the validity of agreements as to jurisdiction dependent on the observance of certain formalities. If Article 17 were to be disregarded in determining the court having jurisdiction under Article 5 (1), then the formal requirements of an agreement as to jurisdiction could always be circumvented by an informal agreement as to a place of performance, in so far as contracts and claims arising under contracts were concerned and the law relating to contract allowed an informal agreement as to the place of performance. This could not, however, have been the intention of the Contracting States to the Convention pursuant to the principle enshrined in Article 2 and the system of the rules as to jurisdiction.

Applying German law the court thus came to the conclusion that the place of performance provided for by law for the obligation in question was the defendant's residence in Italy.

(IH/351)

No. 113: Corte di cassazione, sezioni unite civile,
Judgment of 23 June and 10 November 1977,
Nik Arsidi v Magrini, 4836, Giustizia civile,
anno XXVIII/1978, No. 1, parte prima, pp.44-47

1. Jurisdiction - Prorogation of jurisdiction - Appearance before an Italian court lacking jurisdiction - Objection to jurisdiction - Alternative counterclaim - No "submission to the jurisdiction of the Italian court"

2. Jurisdiction - Special jurisdiction - Jurisdiction of the court for the place of performance (Article 5 (1)) - Determination of the place of performance in accordance with the law which governs the obligation in question according to the rules of conflict of laws of the court before which the matter is brought

3. Jurisdiction - Prorogation of jurisdiction (Article 17) - Validity of agreement as to jurisdiction contested by opposite party - Court on which jurisdiction allegedly conferred by agreement has jurisdiction under Articles 2 and 5 (1) - Not necessary to consider validity of agreement

An Italian undertaking brought an action against a French company in the Tribunale Udine (Italy) for payment under the contract between the parties for the delivery of certain goods by the Italian undertaking: the goods were to be delivered in France and the sale price paid there by bill of exchange. The defendant objected to the jurisdiction of the court at Udine and claimed that the Tribunal de la Seine (France) had jurisdiction, either because the contract out of which the matter arose was entered into in France and was to be performed there or because of a jurisdiction clause contained in the contract conferring jurisdiction on the said French court in the event of disputes. In the alternative, the defendant claimed that the action should be dismissed as unfounded because the contract had been rendered void, and counterclaimed damages.

The Corte di Cassazione, before which the matter of jurisdiction was heard, in interlocutory proceedings, held that the Italian court before which the case had been brought had no jurisdiction. It held that the making of the counterclaim could not be regarded as a submission to the jurisdiction of the Italian court since the counterclaim was made only in the alternative in the event of the court before which the matter had been brought holding that it had jurisdiction. The court then held that under Articles 2 and 5 (1) of the Brussels Convention the French courts alone had jurisdiction to decide the action since the defendant had its seat in France and the obligation in question had to be performed at the seat of the defendant. Pursuant to the judgment of the Court of Justice of the European Communities of 6 October 1976 (Case 12/76 [1976] ECR 1473; Synopsis of Case-law, Part 1, No. 10) the place of performance had to be determined in accordance with the law which governs the obligation in question according to the rules of conflict of laws of the court before which the matter is brought. In the present case, in accordance with Article 25 of the Disposizioni sulla legge in generale of the Codice civile, this was French law, the relevant provisions of which (Articles 1651, 1247 Code Civile) in the present case provided that the obligation in question was to be performed in France.

Since the French court had jurisdiction directly under the general law it was not necessary to consider the agreement as to jurisdiction cited by the defendant in favour of the Tribunal de la Seine.

The Corte di Cassazione further added that the Hague Convention of 15 June 1955 and 1 July 1964 on the International Sale of Goods was not relevant, either because it had not been ratified by France or because the Brussels Convention contained the more particular provisions on the question of jurisdiction.

(IH/355)

No. 114: Tribunale di Genova, sezione I, Judgment of 20 December 1976/22 January 1977, Basso Legnami S.p.A. v The Licenses Insurance Company Ltd., Comoran Africa Line and Charles Le Borgne S.A. 362/RG 75 - 144450
Rivista di Diritto Internazionale Privato e Processuale, anno XIII/1977, No. 3, pp.613-617

Jurisdiction - Prorogation of jurisdiction - Formalities under Article 17 - Express and specific agreement unnecessary (argument on the basis of second paragraph of Article I of Protocol) - Jurisdiction clause in bill of lading - Validity confirmed in respect of successors in title to the original parties to the contract

A consignment of wood carried on the vessel Ulysses from Abidjan to Port St. Louis du Rhône and covered by a bill of lading arrived damaged at the port of destination. The Italian consignee of the wood and holder of the bill of lading thereupon brought an action for damages in the Tribunale di Genova against the French shipping agents of the shipper and shipowner and against the insurer of the cargo. Only one of the shipping agents of the shipper and shipowner entered appearance and made a preliminary objection to the jurisdiction of the Italian court, citing a jurisdiction clause in the bill of lading. According to this latter all actions were to be brought before the Tribunal de Commerce, Marseilles, whose exclusive jurisdiction "the discharger, claimant and every other interested party recognize ..."

The court held that it had no jurisdiction. It considered and confirmed the question whether the jurisdiction clause contained in the bill of lading was valid under Article 17 of the Brussels Convention. The condition that at least one of the parties must be domiciled in a Contracting State was satisfied; the fact that the parties to the dispute in question were not the same as the original parties to the consignment was irrelevant, since it was recognized that rights and obligations under the contract could be transferred to "third party beneficiaries". Contrary to the plaintiff's view there was moreover agreement "in writing" within the meaning of the first paragraph of Article 17. The bill of lading on the back of which the clause in question was printed bore the signatures of the representative of the shipper and of the discharger below a notice to the effect that "the discharger expressly recognizes all the clauses and conditions contained herein". Specific agreement to the jurisdiction clause contained in the conditions was not necessary, even having regard to the Jenard report. The decisive argument against any such additional requirement follows from the second paragraph of Article I of the Protocol on the Convention which provides that "An agreement conferring jurisdiction, within the meaning of Article 17, shall be valid with respect to a person domiciled in Luxembourg only if that person has expressly and specifically so agreed." From this "additional restriction", as it is called in the Jenard report, it follows that the said formality is not required where the jurisdiction clause is to apply to someone not domiciled in Luxembourg.

(IH/277)

No. 115: Arrondissementsrechtbank Amsterdam,
Judgment of 19 January 1977, Enna Nederland Aerosols B.V. v Deutsche Präzisionsventil GmbH,
Nederlandse Jurisprudentie, Uitspraken in burglerlijke en strafzaken, 1977, No. 48, Uitspraak No. 576, p.1832

Jurisdiction - Prorogation of jurisdiction - Jurisdiction clause in general conditions of sale on back of confirmation of order - No valid agreement under the first paragraph of Article 17 - Previous business transactions on the basis of the relevant general conditions of sale irrelevant

In an action pending before the Arrondissementsrechtbank Amsterdam in which claims arising under contract were made against a Netherlands company, the latter in reliance on Article 6 (2) of the Brussels Convention brought an action on a guarantee before the same court against a company with its seat in the Federal Republic of Germany. There was a preliminary issue between the parties to the action on the guarantee as to the jurisdiction of the court before which the matter was brought; the jurisdiction of the court was challenged by the defendant to the action on the guarantee in reliance on an agreement as to jurisdiction entered into in favour of the German courts. The parties, who had already had dealings with one another in 1966 and 1967, had entered into a contract at the beginning of 1971 according to which the defendant was to deliver certain goods to the plaintiff. The defendant's confirmation of order contained a reference to its general conditions of sale and delivery printed on the back of the letter, paragraph 21 of which provided that the courts of Frankfurt-am-Main were to have jurisdiction.

The court held that it had jurisdiction on the basis of Article 6 (2) of the Convention. It stated that the jurisdiction of the courts in Frankfurt-am-Main had not been validly agreed. The jurisdiction clause had not been the subject of the previous oral negotiations nor had there been an agreement in writing in respect to it. The acceptance without objection of the confirmation of order by the plaintiff did not satisfy the formalities required by the first paragraph of Article 17; the specific object of that provision was to exclude agreements as to jurisdiction from being based on the silence of one of the parties. The fact was irrelevant in the present case that the plaintiff had known of the conditions of sale in question in 1970 as a result of the transactions in 1966 and 1967 and the dispatch of the defendant's catalogue in which the general conditions of sale were printed.

(IH/282)

Note

Cf. Part 2, No. 66, and the note thereto on the question of the relationship between Article 6 (2) and Article 17 of the Convention.

No. 116: Arrondissementsrechtbank Amsterdam,
Judgment of 16 November 1977, Allpac Holding B.V. v Erich Bauer KG, Nederlandse Jurisprudentie, Uitspraken in burgerlijke en strafzaken 1978, No. 37, Uitspraak No. 473, pp.1610-1611

Jurisdiction - Prorogation of jurisdiction - Reference to general conditions of sale containing a jurisdiction clause when giving an order - Confirmation of order with conflicting jurisdiction clause on the reverse - Current transactions on the basis of the general conditions of the party giving the order - Effective agreement as to the jurisdiction clause contained therein

A Netherlands company brought an action against a German company in the Arrondissementsrechtbank Amsterdam citing a jurisdiction clause under the first paragraph of Article 17 of the Brussels Convention. The action concerned a contract entered into in January 1976 for the delivery of certain goods by the plaintiff to the defendant. The defendant's written order referred to general conditions of sale in which inter alia a jurisdiction clause conferred jurisdiction on the courts in Hamburg (Federal Republic of Germany). The confirmation of orders sent by the plaintiff contained on the reverse general conditions of sale and delivery in Dutch and German; these conditions provided inter alia for the jurisdiction of the courts in Amsterdam. The defendant accepted the confirmation of orders without demur. There had moreover already been negotiations in May 1975 between the parties in respect of other transactions in the course of which the plaintiff had sent the defendant inter alia a German translation of its general conditions of sale and delivery. Subsequently several transactions were concluded in respect of which the plaintiff had sent invoices on the reverse of which the relevant conditions had also been printed. Further, a price list which the plaintiff sent to the defendant in August 1975 also contained a reference to the conditions.

The court held that it had jurisdiction. Although the confirmation of the order in January 1976 did not contain an express reference to the general conditions of sale on the reverse and the defendant's subsequent silence could not be regarded as effective consent to jurisdiction, nevertheless during the current transactions between the parties the defendant had had sufficient opportunity in view of the numerous documents sent to it to take notice of the plaintiff's conditions of sale. It could no longer claim that those conditions of sale were not the subject of an express agreement. Assuming normal care, it must be treated as having known of and approved the jurisdiction clause contained in the general conditions. Further, it could not rely on the jurisdiction clause in favour of the Hamburg courts contained in the general conditions referred to in its order, for there had been no agreement either in writing or evidenced by the plaintiff in writing in respect of that clause.

(IH/444)

Section 7 - Examination as to jurisdiction and admissibility

Courts of the Member States (cf. No. 119)

Section 8 - Lis pendens - Related actions

Courts of the Member States (cf. Nos. 102, 104 and 109)

No: 117: Obergerichtshof (Cour supérieure de justice) Luxembourg, Judgment of 14 December 1977, Rohstoff - Einfuhr und Handelsgesellschaft v La Continentale nucléaire, 4326

Related actions - Actions between different parties in various Contracting States - Different matters in dispute - No stay of proceedings by the court subsequently seised - Application for stay rejected by the court first seised

The plaintiff, a German company, brought an action on 21 January 1976 before the Tribunal d'Arrondissement, Luxembourg, against the Luxembourg company La Continentale nucléaire for payment for goods delivered. On 9 June 1976 the Luxembourg limited company International Metals brought an action in the Landgericht Düsseldorf (Federal Republic of Germany) against the German undertaking Hempel KG und Fundus for payment of a larger sum in dollars. At the hearing before the Luxembourg court on 4 November 1976 the defendant there applied for a stay of judgment until after judgment in the proceedings pending before the Landgericht Düsseldorf. It gave as grounds that the Luxembourg and German companies involved in the two actions belonged respectively to the same groups of undertakings; the relations between the Luxembourg companies in particular were so close that the defence of the German defendants in the Düsseldorf action was to the effect that the legal relations on the basis of which the claim had been brought were established solely with the company Continentale nucléaire, the defendant in the Luxembourg proceedings. The Luxembourg court of first instance rejected the application for a stay and upheld the claim. The appeal was unsuccessful.

The Obergerichtshof held, following the court of first instance, that there was no interrelation between the actions brought in Luxembourg and Düsseldorf; in view of the different matters in dispute there was no risk that conflicting decisions might result. If judgment went against the German company in the Federal Republic of Germany this would have no influence on the action for payment brought in Luxembourg. Further, although there were close ties of interest between the companies involved in the two actions this did not alter the fact that in law they were different persons distinct from their members or directors. Further, it was apparent from the documents in the case that there had been no application before the Landgericht Düsseldorf for a stay of judgment on the grounds that the matters were related within the meaning of the first paragraph of Article 22 of the Brussels Convention, nor had there been an application under the second paragraph of Article 22 that the German court - which had been seised at a later date - should decline jurisdiction. Accordingly the application for a stay of judgment should be rejected.

(IH/338)

Section 9 - Provisional, including protective, measures

Courts of the Member States (cf. Nos. 89 and 94)

No. 118: Cour d'Appel de Bruxelles, 2ème Chambre, Judgment of 11 February 1977, Soc. Eli Lilly, Journal des Tribunaux 1977, No. 5008, pp.529-530

Provisional, including protective, measures (Article 24) - Action for infringement of patent - Netherlands patent - Action in anticipation commenced in the Netherlands - Protective measures in Belgium - Order by Belgian courts - Conditions

The applicant, the holder of a Netherlands patent, intended to bring an action in the courts of the Netherlands for infringement of that patent. To obtain evidence for that action he applied, before commencing the proceedings in the Netherlands, to the Tribunal de première instance, Brussels, for execution of a saisie-description (a provisional measure provided for in Article 1481 et seq. of the Belgian Code Judiciaire in order to safeguard evidence in actions for infringement of patent and copyright) in respect of an undertaking established within the jurisdiction of the court before which the matter was brought. The application was dismissed on the ground that no action on the main issue was to follow the protective measures in the court in the jurisdiction of which the protective measures were intended to be taken; in this event Article 1488 of the Code Judiciaire provided that the measures ordered under Article 1481 would as a matter of course lose their effect. The appeal against this decision was successful.

In the view of the Cour d'Appel the application should be allowed under Article 24 of the Brussels Convention. That rule on jurisdiction (which takes precedence over municipal Belgian law) also applies to proceedings of saisie-description, which are to be treated as "protective measures". The difficulty arising from the fact that such a measure takes effect only when the main issue is brought before a Belgian court may be circumvented by requiring the applicant to bring the main issue before the foreign court having jurisdiction within a particular period. The appeal court set aside the previous decision, ordered the saisie-description and gave the applicant the same time as allowed by Belgian law to bring the main matter before the Netherlands court.

(IH/227)

Note

In a decision of 13 June 1977 the Tribunal de Première Instance, Mons, took the view that the procedure of saisie-description under Article 1481 et seq. of the Code Judiciaire did not apply to foreign (in that case, French) patents but was intended only to protect Belgian patents. The question whether Article 24 of the Brussels Convention altered the position was raised but left open (Revue de Droit Intellectuel - l'ingénieur-conseil 1977, No. 11-12, pp. 426-428) (IH/390).

No. 119: Arrondissementsrechtbank Leeuwarden, eerste enkelvoudige Kamer,
Judgment of 22 September 1977, Transatlantische Transport- und Rückversicherungsaktiengesellschaft v D. von Wulffen, 986/1977

Provisional, including protective, measures - Distraint levied under Netherlands law against non-residents (vreemdelingenbeslag) - Jurisdiction under Article 24 - Jurisdiction of the court ordering the seizure to try the main action (forum arresti) under Netherlands law - Inapplicability in the context of the Convention

As a protective measure in furtherance of a claim for the return of a motor yacht against the defendant resident in Dortmund (Federal Republic of Germany) the plaintiff, a company with its seat in Hamburg (Federal Republic of Germany), had obtained an order from the Arrondissementsrechtbank Leeuwarden for the provisional seizure of the yacht which was within the jurisdiction of that court. In the subsequent proceedings for confirmation of the seizure (vanwaardeverklaring) before the same court the plaintiff brought an action on the substantive matter. The defendant did not appear.

Applying Article 20 of the Brussels Convention the court first considered its jurisdiction in relation to the main action and found that the Netherlands courts did not have jurisdiction for this on the basis of the Convention but that the courts for the defendant's domicile in the Federal Republic of Germany had jurisdiction. The rules of Netherlands procedural law, according to which in order to guarantee a claim a creditor may cause the property in the Netherlands of a debtor who does not have a known address in that country to be impounded (the so-called vreemdelingenbeslag, cf. Article 764 et seq. of the Wetboek van burglerlijke Rechtsvordering) and may also bring the substantive issues before the same court, had to be reconciled with the Brussels Convention. Although under Article 24 of the Convention the "vreemdelingenbeslag" could be ordered by a court of the Netherlands as a protective measure, the action on the main issues had to be brought before the court having jurisdiction under the Convention, in the present case the court for the debtor's domicile in the Federal Republic of Germany.

The court seised of the claim accordingly had jurisdiction only to confirm the seizure. The court stayed judgment thereon for six months to give the plaintiff an opportunity to bring the main issues before the court having jurisdiction in the Federal Republic of Germany in order to secure a right to execution in the Netherlands.

(IH/405)

TITLE III - RECOGNITION AND ENFORCEMENT

Court of Justice of the European Communities (cf. No. 120)

Courts of the Member States (cf. No. 134)

No. 120: Hoge Raad der Nederlanden,

Judgment of 14 January 1977, Jozef de Wolf v Harry Cox B.V., 11033, Nederlandse Jurisprudentie, Uitspraken in burgerlijke en strafzaken 1978, No. 8, Uitspraak No. 102, p.335

Recognition and enforcement - Rule of the Convention conclusive - Enforceable judgment of a court in a Contracting State - Fresh action between the same parties on the same subject-matter before the courts of another Contracting State - Inadmissible

In this case the plaintiff had obtained an enforceable judgment from a Belgian court against a Netherlands company and subsequently brought fresh proceedings before a Netherlands court on the same claim because the costs of enforcing the first judgment would have been greater than those of the new action. After the court of first instance had allowed the claim the Procureur-Generaal raised an objection before the Hoge Raad on the grounds of infringement of the Brussels Convention. The Hoge Raad thereupon made a reference to the Court of Justice of the European Communities for a preliminary ruling on the question whether the provisions of the Convention prevented a fresh action in the present case. The Court answered the question in the affirmative by judgment of 30 November 1976 (Case 42/76 [1976] ECR 1759; Synopsis of Case-law, Part 1, No. 39). The Hoge Raad thereupon set aside the judgment of the Netherlands court of first instance and dismissed the action as inadmissible.

(QPH/372j)

Note

The operative part of the decision of the Court of Justice of the European Communities is given in Part 1, No. 39.

Section 1 - Recognition

Article 26

Courts of the Member States

No. 121: Oberlandesgericht Düsseldorf,

Judgment of 9 December 1977, 16 U 48/77, Der Betrieb, 1978, No. 12, p.584

Recognition - Judgment given in a Contracting State whereby the court declines jurisdiction - Effect - Suspension of the limitation period under German law

A Belgian undertaking brought an action in Belgium against a German undertaking for payment under a contract of sale. The Belgian court held that it had no jurisdiction and dismissed the action. In the subsequent action before the German court which had jurisdiction the defendant German undertaking made a preliminary objection to the action as being barred by lapse of time and further claimed that the goods had been defective. The court of first instance found in favour of the plaintiff.

The Oberlandesgericht dismissed the appeal and held that it was no defence that the action was barred by lapse of time since the action brought before the Belgian court had prevented time from running against the claim for the purchase price under Article 209 (1) of the Bürgerliches Gesetzbuch. Although the Reichsgericht had repeatedly taken the view that an action before a foreign court did not prevent time running where the foreign judgment was not recognized in Germany, nevertheless after the Brussels Convention came into force judgments in a Contracting State were recognized in other Contracting States without special proceedings. In particular, under the third paragraph of Article 28 of the Convention the jurisdiction of the court of the State in which the judgment was given may not be reviewed. The requirements laid down by the Reichsgericht for effective suspension of the period of limitation within the meaning of Article 209 of the Bürgerliches Gesetzbuch (making of the claim through the offices of the judicial authorities responsible for the court proceedings or the proceedings for enforcement, "substantive effect" of the foreign judgment municipally by reason of recognition) were accordingly fulfilled as regards judgments of the courts of other Contracting States. There could accordingly no longer be any distinction made according to whether the action had been brought before a German court or a court of another Contracting State.

Further, it was irrelevant that the Belgian court had held that it had no jurisdiction to decide the matter. It has long been recognized that an action in a (German) court, which does not have jurisdiction, suspends the period of limitation. After the Convention came into force the position could not be different as regards a judgment of a Belgian court.

(IH/388)

Article 27 (1)

Courts of the Member States

No. 122: Oberlandesgericht Celle, 8th Zivilsenat,

Order of 2 June 1977, L.T. GmbH and B.S. GmbH v J.D., 8 W 161/77

1. Enforcement - Obstacles to enforcement (second paragraph of Article 34) - Incompatibility with public policy of the State in which enforcement is sought (Article 27 (1)) - Judgment to pay damages at a provisional rate ("provision") by a French court - Not contrary to German public policy

2. Enforcement - Obstacles to enforcement (second paragraph of Article 34) - Incompatibility with public policy of State in which enforcement is sought (Article 27 (1)) - Enforceability of a judgment which is not yet "final" - Not contrary to German public policy, especially where the provision of security is ordered under the second paragraph of Article 38

In a case concerning the unilateral determination of a contract the Cour d'Appel, Rennes, by judgment of 13 July 1976 ordered the two defendant German companies to pay damages. The court appointed an expert to make a final determination of the amount of compensation but in the meantime ordered provisional damages ("provision") of FF 200 000. The defendants appealed but at the time of the decision of the Oberlandesgericht the appeal had not yet been heard.

On the application of the plaintiff the Landgericht Stade had ordered enforcement of the judgment of the Cour d'Appel, Rennes, which was enforceable under French law. The defendants appealed and claimed that enforcement of the "not yet final" judgment of the Cour d'Appel, Rennes, was contrary to the public policy of the Federal Republic of Germany, just as was the order for "provisional damages".

The Oberlandesgericht rejected the appeal and held that recognition and enforcement of the French judgment was not contrary to German public policy within the meaning of the second paragraph of Article 34 and Article 27 (1) of the Convention. It was apparent from the grounds of judgment that the Cour d'Appel, in ordering the defendants to make a "payment on account" ("provision") of FF 200 000, had assumed this to be the minimum damages. Even if the final damages on the basis of the findings of the expert should be lower there was nothing contrary to German public policy in ordering the payment of "provisional damages". German law too had such "judgments subject to reservations", as for example in actions on bills of exchange and proceedings based solely on documentary evidence (Article 599 of the Zivilprozessordnung) and in connexion with set-off (Article 302 of the Zivilprozessordnung).

Nor is it contrary to the public policy of the Federal Republic of Germany for a judgment to be enforceable "before it becomes final". The fact that in the event of the judgment of the Cour d'Appel being set aside by the Cour de Cassation after execution the defendants might not be able to obtain damages was not in itself incompatible with the public policy of the Federal Republic of Germany. Moreover, the second paragraph of Article 38 of the Convention offers the possibility of making enforcement conditional on the provision of security and thus protecting the defendants' interests.

The court ordered the plaintiff to provide security and ruled that the defendants were thereby sufficiently protected, so that it was not necessary to stay proceedings under the first paragraph of Article 38 of the Convention.

(IH/298)

Note

Under Article 500 of the new French Code de Procédure Civile a judgment becomes "final"(having "force de chose jugée") when there is no recourse against it capable of effecting a stay of execution. Subject to particular provisions, an appeal to the Cour de Cassation is not a bar to enforcement of the judgment appealed against (Article 19 (1) of Law No. 67-523 of 3 July 1967). Under Article 705 of the Zivilprozessordnung judgments become "final" when they are no longer open to any challenge by "legal remedy" (appeal, appeal on a point of law) or "objection".

Article 27 (2)

Court of Justice of the European Communities (cf. Note to No. 126)

Courts of the Member States (cf. No. 128)

No. 123: Oberlandesgericht Stuttgart, 8th Zivilsenat, Order of 16 August 1977, Fa. I. v H.E., 8 W 196/77

1. Enforcement - Judgment by default - Obstacles to enforcement (second paragraph of Article 34) - Due service in sufficient time of the document instituting the proceedings (Article 27 (2)) - Criterion of due service - Conventions or treaties between Contracting States (Article IV of Protocol)

2. Enforcement - Judgment by default - Obstacles to enforcement (second paragraph of Article 34) - No due service of the document instituting the proceedings (Article 27 (2)) - Not cured by failure to take action against the service of the judgment by default

The applicant, an Italian firm, had obtained judgment by default in the civil and criminal court at Monza (Italy) against the defendant resident in the Federal Republic of Germany. The statement of claim and summons were served on the defendant several months in advance, first by posting on the notice board of the court in Monza, secondly by registered post and thirdly by delivery to the Procuratore della Repubblica of the court in Monza. In accordance with the requirements of the German court bailiff a translation of the claim was also posted to the defendant seven weeks before the hearing of the application for enforcement. The defendant did nothing about this nor did he make any appeal against the default judgment, of which he had had notice.

After the Landgericht Tübingen had ordered enforcement of the Italian judgment the defendant appealed to the Oberlandesgericht Stuttgart which set aside the order of the court of first instance and dismissed the application for the order for enforcement on the ground that service of the claim and summons did not satisfy the requirements of the Brussels Convention for the purposes of enforcement. Under the second paragraph of Article 34 and Article 27 (2) enforcement is not available where the judgment was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to

enable him to arrange for his defence. The criterion of due service is Article IV of the Protocol on the Convention of 27 September 1968, which provides that judicial and extra-judicial documents drawn up in one Contracting State which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States. The form of service chosen in the present case satisfies neither the former German-Italian Convention on the recognition and enforcement of judgments in civil and commercial matters of 9 March 1936, which has now been replaced by the Brussels Convention, nor The Hague Convention on Civil Procedure of 1 March 1954. Although Article 6 of The Hague Convention allows direct posting the Federal Republic of Germany has entered into no convention in respect thereto and has not allowed direct postal service.

The ineffectiveness of the service was not cured by the fact that the defendant took no action in respect of the default judgment. Although Article 2 (c) (2) of the German-Netherlands Convention on the mutual recognition and enforcement of judgments of 30 August 1962 contains an appropriate rule, this cannot be taken as the expression of a general legal principle but must be treated as an exception. There is no similar provision in any convention on the recognition and enforcement of foreign judgments entered into by the Federal Republic of Germany. Nor does the Brussels Convention have any such provision, but on the contrary lays down special safeguards in the second paragraph of Article 20 and Article 27 (2) in conjunction with Article IV of the Protocol regarding service of the summons on a foreign defendant.

(IH/287)

Note

The question of due service within the meaning of Article 27 (2) of the Convention is considered in other decisions with reference to The Hague Convention of 1954 and other bilateral conventions, cf. order of the Oberlandesgericht Hamm of 12 December 1977 - 20 W 26/77 - as between the Federal Republic of Germany and Italy (IH/364); order of the Oberlandesgericht Hamm of 20 May 1977 - 19 W 72/76 - as between the Federal Republic of Germany and Belgium (IH/202); order of the Oberlandesgericht Düsseldorf of 15 June 1977 - 19 W 1/77 - as between the Federal Republic of Germany and the Netherlands (IH/201).

No. 124: Cour d'Appel d'Aix-en-Provence, 1ère chambre civile, Judgment of 16 March 1977, Christiansen v Fioretti, 107/77 - 76.2748

Enforcement - Italian default judgment against defendant domiciled in Switzerland - Enforcement in France - Conditions - Proof of service in Switzerland of the document instituting the proceedings in accordance with Article 46 (2)

A default judgment of 17 December 1974 given in proceedings pending before the Pretura di San Remo (Italy) ordered a Danish national resident in Switzerland to pay certain sums. On the plaintiff's application enforcement of this judgment was authorized by order of the president of the Tribunal de Grande Instance, Nice, of 4 February 1976. The debtor appealed as provided for in Article 36 of the Convention and claimed in substance that she was not able duly to defend the proceedings in the Italian court and, further, that the applicant had not produced the evidence required by Article 46 (2) that the document instituting the proceedings had been served on her. The appeal was unsuccessful.

The Cour d'Appel found that the summons commencing the action had been sent by registered letters of 30 August 1974 to the defendant at her Swiss address and to her Swiss advocate who was empowered to accept service. The defendant's advocate had thereupon claimed in a letter dated 12 September 1974 that the court in San Remo had no jurisdiction. By an interlocutory judgment of 22 October 1974 given by default the court had found that the service of the summons had been effective; after that judgment had been notified to the defendant and her advocate by registered letters of 9 November the defendant by letter dated 22 November 1974 had renewed her claim that the Italian court had no jurisdiction. On 17 December 1974 the Pretura in a default judgment in the main action had held that it had jurisdiction under Articles 2 and 4 of the Italian rules of civil procedure and ordered the defendant to pay. The judgment had been served on her by registered letter dated 24 March 1975.

From these findings it was apparent that the defendant could have duly defended herself in Italy. In particular, the conditions of Articles 46 and 47 of the Convention were satisfied. Enforcement was accordingly properly authorized in France.

(IH/228)

No. 125: Corte d'Appello di Firenze, sezione promiscua, Judgment of 17 May/1 September 1977, Casa di Spedizioni Meoni Mario v Nedex Vervoersbedrijf B.V., 579

Enforcement - Default judgment - Obstacles to enforcement (second paragraph of Article 34) - Due service in sufficient time of the document instituting the proceedings (Article 27 (2)) - Criterion of due service - Law of the State where service is effected - Wide interpretation of the term "service"

An Italian businessman, proprietor of a business conducted in Italy under the name "Casa di Spedizioni Meoni Mario" was ordered by a default judgment of a Netherlands court to pay a particular sum. After enforcement was authorized for this in Italy he appealed under Article 36 of the Brussels Convention and claimed inter alia that he had not received the writ and summons to appear before the Netherlands court. Service had in fact been made at the address of the branch in Milan of the limited company "Mario Meoni S.p.A. - Organizzazione Trasporti Nazionali e Internazionali", the main establishment of which was in Florence. The one-man business, on the other hand, had its main establishment in Prato and branches in Florence and Milan, albeit in a street other than that of the limited company's branch.

The appeal was unsuccessful. The Corte d'Appello came to the conclusion that service on the proprietor of the one-man business could effectively be made under the Italian rules of civil procedure at the limited company's branch since transactions on behalf of the one-man business had been conducted from there. Moreover, the question whether there had strictly been formal service ("notificazione") of the writ and summons to appear before the foreign court was not very relevant. Article 27 of the Brussels Convention was satisfied if the writ were "served" ("comunicata") on the defendant. If the term used in Article 27 were understood in this wide sense it was apparent that the defendant proprietor of the business must have received the documents sent to the limited company's branch; he had accordingly had notice of them, that is they were "served" on him.

(IH/358)

Note

The Italian version of Article 27 is as follows: "Le decisioni non sono riconosciute: ... 2) se la domanda giudiziale non è stata notificata o comunicata al convenuto contumace regolarmente ed in tempo congruo ..."; for "notificata o comunicata" the other versions of the Convention have "signifié ou notifié", "zugestellt", "verleend" and "served".

No. 126: Corte d'Appello di Milano, sezione I civile,

Judgment of 1 July/27 September 1977, S.p.A. Terraneo v Fernalst Speditionsgesellschaft mbH, 1785

Enforcement - Default judgment - Obstacles to enforcement (second paragraph of Article 34) - Service in sufficient time of the document instituting the proceedings (Article 27 (2)) - Examination by court ordering enforcement - Criterion of examination - Particular facts of the individual case - Procedural law both of the State where judgment was given and of the State where enforcement is sought irrelevant

By default judgment of 5 March 1975 in an action before the Landgericht Braunschweig (Federal Republic of Germany) the Italian defendant was ordered to pay a particular sum. The writ had been served on it on 5 November 1974 by the court bailiff in Italy. The Landgericht had given the defendant a month to put in an appearance and had fixed the date of the hearing for 5 March 1975. The defendant did not appear nor did it attend the hearing. It subsequently objected to authorization of enforcement of the default judgment in Italy on the ground that service of the writ was not made within sufficient time for it to be able to arrange for its defence.

The Corte d'Appello dismissed the appeal and held that service of the writ was made within sufficient time within the meaning of Article 27 (2) of the Brussels Convention. The question of the sufficiency of time which the court ordering enforcement had to decide did not depend on the rules of procedure either of the country in which judgment was given or of that in which enforcement was sought. It was a question of whether the time for appearance allowed by the Landgericht Braunschweig accorded with the Italian or German rules of procedure. The court then considered the facts of the case and held that taking account of the distance and the means of communication between Milan and Braunschweig a period of one month to put in a defence to the action by instructing an advocate and setting out the defence in writing was sufficient. Apart from this the defendant still had the possibility effectively to defend itself at the hearing, which did not take place until four months after service of the writ.

(IH/357)

Note

In a decision of 30 April/28 September 1976, No. 1871-2340/75, the Corte d'Appello, Milan, came to the conclusion that a period of 25 days could be regarded as sufficient for the preparation of a defence by a defendant resident in Milan to an action pending before the Landgericht Stuttgart (Federal Republic of Germany) if the procedure followed the normal course. This was not, however, the case where, as in that instance, both service of the writ and the date for the hearing fell in the holiday month of August in which, due to the judicial vacation, it was difficult and time-consuming to instruct an advocate. It was also to be taken into account that the defendant's business was closed during August. In these circumstances service of the action had not been effected within "sufficient time" in accordance with Article 27 (2) of the Convention (IH/36a)

Cf. further, Part 2, No. 83, on the question of sufficient time within the meaning of Article 27 (2).

The Oberlandesgericht Karlsruhe had to decide a case in which it was not until 4 January 1978 that the German defendant had received the writ and summons to attend before the Tribunal de Commerce, Nantes (France) on 12 December 1977 and already on 12 December 1977 a default judgment had been entered. The defendant appealed against enforcement of this judgment and relied on Article 27 (2) of the Convention. The plaintiff claimed that the defendant could easily have intervened in the French proceedings to assert its rights with the legal remedies available to it including various kinds of appeal and an application for further time to appeal, but it had not done so.

The Oberlandesgericht, which inclined to the view that there could be no recognition under Article 27 (2) of a judgment which infringed the second paragraph of Article 20 of the Convention in spite of the circumstances stressed by the plaintiff, referred the following question to the Court of Justice of the European Communities for a preliminary ruling by order dated 18 October 1978 (6 W 82/78):

> "In the recognition procedure under Article 27 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, is a defendant debarred from objecting that he was not served in sufficient time with the document which initiated the proceedings, if notice of the pending action was served on him later and he failed to take any procedural steps in his defence?"

As a result of a subsequent notification by the Oberlandesgericht of an out of court settlement between the parties the Court ordered the case to be removed from the register /Case 254/78/ (QPH/623).

No. 127; Arrondissementsrechtbank Utrecht,

Judgment of 8 December 1976, E.D. de Jong v J. Huybrechts and M. Huybrechts, Nederlandse Jurisprudentie, Uitspraken in burgerlijke en strafzaken 1978, No. 2, Uitspraak No. 28, pp. 80-81

Enforcement - Default judgment - Obstacles to enforcement (second paragraph of Article 34) - Service in sufficient time of the document instituting the proceedings (Article 27 (2)) - Notice of the appointment of an expert and of a site inspection two days before it was due to take place - Insufficient time within the meaning of Article 27 (2)

By a default judgment of the Justice of the Peace in Mol (Belgium) the defendant resident in the Netherlands was ordered to pay compensation for damage caused by wild rabbits in the plaintiff's hunting district. The proceedings leading to this judgment were set in motion on 7 August 1973, as provided for in Belgian hunting law, by the Justice of the Peace ordering, on the plaintiff's application, the appointment of an expert and a site inspection for 10 August 1973. The records clerk informed the defendant of this order by registered letter of 8 August 1973 and a telegram of the same date. The defendant was not present at the site inspection. Enforcement of the default judgment of 6 November 1973 was authorized in the Netherlands in accordance with the application. The defendant's appeal was successful.

In the view of the Rechtbank the document instituting the proceedings was not served on the defendant in sufficient time for him to be able to arrange for his defence, so that there could be no enforcement of the default judgment under the second paragraph of Article 34 and Article 27 (2) of the Brussels Convention. The registered letter sent to the defendant by the records clerk on 8 August 1973 or the telegram of the same date had to be treated as the document instituting the proceedings. This was because the proceedings turned on the site inspection. Under Article 7 bis (3) of the Belgian hunting law on which the proceedings were based the parties were bound to present the whole of their claims and defences by the latest at the time of the site inspection. Apart from the fact that the defendant received the registered letter only in September 1973, the period between the dispatch of the telegram on 8 August and the site inspection on 10 August 1973 was too short for a proper defence.

(IH/322)

Courts of the Member States

No. 128: Cour de Cassation, lère chambre civile,

Judgment of 3 November 1977, Soc. française de couvoirs "Sofraco" v Soc. Pluimvee Export Coolen B.V., 734-76-12.328

1. Enforcement - Obstacles to enforcement (second paragraph of Article 34) - Where judgment irreconcilable with a judgment in the State where enforcement is sought (Article 27 (3))- Not irreconcilable if set-off possible where both judgments enforced

2. Enforcement - Default judgment - Obstacles to enforcement - Service in sufficient time of the document instituting the proceedings (Article 27 (2)) - Criterion - Facts of the case - Rules of procedure of the State where enforcement is sought irrelevant

A Netherlands company had obtained a default judgment in the Arrondissementsrechtbank Roermond on 2 May 1974 against a French company for the payment of the purchase price for 2 000 fowls. The writ and summons to appear on 4 April 1974 were served on the French defendant on 25 March 1974. On 7 October 1974 in an action pending before the Tribunal de Grande Instance, Laval (France), the French company was ordered to pay compensation to the ultimate purchaser of the poultry because it was defective; in the same judgment the Netherlands company was ordered to reimburse the French company. Subsequently, enforcement of the Netherlands default judgment was authorized and the appeal against it rejected by the Cour d'Appel, Angers, on 10 March 1976. The French company appealed to the Cour de Cassation alleging infringement of Articles 5, 20, 27 (3) and 27 (2) by the Cour d'Appel. The appeal was unsuccessful.

The Cour de Cassation found, first, that the third paragraph of Article 28 of the Convention excluded the review of the jurisdiction of the Netherlands court sought by the appellant. There could be such a review only where there was infringement of Articles 7 to 16 of the Convention, and even the appellant itself did not allege this in the present case. Nor did the judgment of the Cour d'Appel infringe Article 27 (3) of the Convention, which provides that a judgment shall not be recognized if it "is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought". The Cour d'Appel had found that the Netherlands judgment was in respect of the payment of the purchase price for goods delivered, while the French judgment was for compensation in respect of defects in the goods; there was no contradiction between the judgments and both could be enforced, in which case the lower amount could be set off against the higher. In the view of the Cour de Cassation these findings could be interpreted as meaning that the two judgments were not "irreconcilable" within the meaning of the said provision. Finally, the judgment in question did not infringe Article 27 (2) of the Convention in considering that a summons returnable within ten days, which was shorter than the period for proceedings allowed by French courts, was sufficient for the purposes of arranging a defence. The Cour d'Appel was able to give a conclusive answer to the question whether the appellant had received the document instituting the proceedings in sufficient time to arrange for its defence on the basis of the facts of the case and without regard to the periods provided for by French municipal law.

Section 2 - Enforcement

Courts of the Member States (cf. Nos. 122 to 128)

No. 129: Oberlandesgericht Köln, 6th Zivilsenat,

Order of 2 March 1977, Fa. G.I. GmbH & Co KG v Fa. M.P.M., 6 W 15/77

Enforcement - Appeal against authorization of enforcement - Provision of security (second paragraph of Article 38) - Conditions - Stay of proceedings (first paragraph of Article 38) - Conditions

An Italian firm obtained a provisionally-enforceable judgment for the payment of 4 million Lire, interest and costs in the Tribunale Civile e Penale di Mantua against a German company; in accordance with the application the German court having jurisdiction authorized enforcement. The German company appealed to the Oberlandesgericht Köln, alleging that it had in the meantime appealed against the judgment of the Italian court of first instance to the Corte d'Appello di Brescia. It considered that it would be an undue hardship for it if it had to pay the Italian firm, of whose financial status it had no certain information, before final judgment and therefore sought a stay of proceedings under the first paragraph of Article 38 until the appeal had been decided and to make enforcement of the judgment of the court of first instance conditional on the provision of security.

The appeal was successful in part. The Oberlandesgericht ordered the provision of security by the Italian firm on the ground that unconditional authorization of enforcement (especially having regard to the unknown financial status of the Italian creditor) could lead to serious prejudice for the German debtor in the event of the judgment of the court of first instance being reversed.

The court dismissed the wider application for a stay of proceedings, holding that in the terms of Article 39 of the Convention such a measure would result in enforcement measures not being allowed to cover the provision of security. This was contrary to the meaning and purpose of provisional enforcement, which was intended to give a successful creditor, irrespective of any appeal, the possibility of satisfaction and not merely a security. Such postponement of enforcement in relation to satisfaction could be ordered only where there were relevant grounds, such as could be assumed where prejudice would be caused to the debtor by enforcement for the purposes of satisfaction and such prejudice would not be guarded against by the provision of security. This resulted from general principles of the law of enforcement, even if the Convention itself did not contain any specific conditions in this respect. In the present case the Italian creditor had not alleged any such special jeopardy or prejudice.

(IH/367)

No. 130: Landgericht Hamburg, 5th Zivilkammer,

Order of 10 August 1977, Fa. W. S.p.r.l. v Fa. I., 5 O 82/77

Enforcement - Belgian judgment against a company registered in Liechtenstein - Enforcement in the Federal Republic of Germany - Application of the Brussels Convention - No convention preventing enforcement under Article 59

A Belgian company with its seat in Antwerp had obtained a default judgment in the commercial court there against a Liechtenstein company with its seat in Vaduz, Liechtenstein, and applied for enforcement in the territory of the Federal Republic of Germany. The Landgericht Hamburg allowed the application on the basis of Article 31 et seq. It held that an order for enforcement of the Belgian judgment was not excluded by the fact that the Principality of Liechtenstein was not a Contracting State of the Brussels Convention. Article 31 provides that a judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there. The fact that the judgment was given against nationals of non-Contracting States or parties who have their seat in a non-Contracting State does not on principle exclude an order for enforcement. The application of the Convention can, however, be prevented by a convention under Article 59 (which provides that a Contracting State may assume an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3). There is, however, no such convention between the Federal Republic of Germany and the Principality of Liechtenstein.

(IH/292)

No. 131: Corte di Cassazione, sezione I civile,

Judgment of 27 October 1977, Ciaralli-Parenzi, 4617, Il Foro italiano, anno CIII/1978, No. 2, parte prima, col. 388

1. Scope - Contracting States - United Kingdom not a Contracting State - Enforcement of an English judgment on the basis of the Convention not possible

2. Enforcement - Authorization of enforcement of a judgment of a non-Contracting State - Appeal - Application of Articles 36 and 37 of the Convention affirmed

By order of 1 October 1974 the Corte d'Appello of Rome, applying the provisions of the Brussels Convention, authorized enforcement of a judgment of the English High Court of Justice of 14 June 1972 giving the applicant custody of her two children, both minors. The husband appealed both to the Corte d'Appello as provided for in Article 36 of the Convention and to the Corte di Cassazione.

The Corte di Cassazione dismissed the appeal as inadmissible. Although the Brussels Convention did not apply to the present case, since the United Kingdom, albeit a Member State of the European Economic Community, had not yet adhered to the Brussels Convention, and although the Convention between Italy and the United Kingdom on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and the Protocol thereto of 7 February 1964/14 July 1970, which had been applied to Italy by Law No. 280 of 18 May 1973, likewise did not apply since the judgment of the English High Court had been given before the law entered into force (Article II (1) of the Convention), nevertheless, since the Corte d'Appello had held, albeit erroneously, that the Brussels Convention applied and had declared the judgment of the English court enforceable on that basis, only the appeal provided for in Articles 36 and 37 of the Convention was available against that order and this should be made to the Corte d'Appello in accordance with the provisions applying to the proceedings in question; the defendant had availed himself of this. Simultaneous appeal to the Corte di Cassazione is not possible in accordance with the principles of the Italian rules of procedure.

(IH/354b)

Note

On the question of the application of the rules of the Brussels Convention in relation to the enforcement of English judgments cf. Part 1, Nos. 45 and 46, and Majoros, Ferenc: A propos de la procédure simplifiée de l'exequatur. La Convention de Bruxelles peut-elle se combiner avec les traités d'exécution bilatéraux conclus entre la Grande-Bretagne et les autres Etats de la CEE?, Revue critique de droit international privé, tome LXVII/1978, No. 1, pp. 45-57.

In a judgment of 4 February 1977 (Rivista di diritto internazionale privato e processuale, anno XIII/1977, No. 4, pp.876-884) in an employment dispute between a British national and an agency of NATO in Italy the Pretura in La Spezia considered whether the plaintiff as an alien could bring an action in the Italian courts and held that she could, inter alia because after the accession of the United Kingdom to the EEC the Brussels Convention also applied between Italy and the United Kingdom; it was clear from its provisions that nationals of the Member States of the EEC could bring actions in the Italian courts against persons resident in Italy. This must take precedence over the prerequisite of nationality and over the requirement of reciprocity referred to in Article 16 of the Disposizioni sulla legge in generale of the Italian Codice Civile /IH/333/.

No. 132: Arrondissementsrechtbank Zwolle, kamer voor burgerlijke zaken,

Judgment of 19 October 1977, Visscher, Jacob v Gebrüder Bröker KG, 329/1977

Enforcement - Authorization of enforcement - Appeal by debtor (Article 36) - Legal nature - Beginning of the period for appeal - Service of judgment - Municipal law decisive

On the application of a German firm an order for payment and enforcement was made by the German court having jurisdiction against a Netherlands company, the defendant being described as "Firma Handelmij. Modak Int. B.V., represented by its personally liable member, Jan Visscher". On the creditor's application the president of the Arrondissementsrechtbank Zwolle authorized enforcement of that judgment against Modak and against Visscher personally. On 30 November 1976 that judgment was served on the wife of Visscher. On 4 February 1977 Visscher appealed against the authorization of enforcement as provided for in Article 36 of the Convention. The German creditor countered in essence that the appeal was out of time since the period of one month allowed in that provision had not been respected.

The Arrondissementsrechtbank set aside that part of the judgment which authorized enforcement against Visscher personally. On the question whether the appeal was in time it held that, according to the Jenard report, in relation to Article 36, the date from which the period of one month began to run was decided by the general provisions of municipal law. In order to be able to decide which provisions of Netherlands procedural law governed the commencement of the period the legal nature of the appeal provided for in Article 36 of the Convention must be determined. The general provisions on the procedure for the enforcement of foreign instruments (Article 985 et seq. of the Netherlands rules of civil procedure) could not apply since this

was an inter partes procedure in which the final judgment could be challenged only by appeal (hoger beroep) to the Gerechtshof. The Brussels Convention, on the other hand, provided an ex parte procedure under which the debtor, on authorization of enforcement under the first paragraph of Article 36 and Article 37, may lodge an appeal (verzet) with the Arrondissementsrechtbank, while if the application for enforcement is refused the creditor may lodge an appeal (hoger beroep) with the Gerechtshof (Article 40 of the Convention). It is apparent from this that the appeal referred to in Article 36 is to be treated as an objection (verzet in oppositie) against a default judgment, such as is governed in Netherlands procedural law by Article 81 of the rules of civil procedure. Accordingly, the question not decided in Article 36 of the Convention, as to how the service of judgment referred to there has to be effected in order to start the period running, must be answered in accordance with Article 81 of the rules of civil procedure. According to that provision service must be effected on the debtor personally. Failing that, the period begins to run only when the debtor has actual knowledge. Since it was not apparent from the appeal when that occurred, the appeal must be treated as having been lodged in time.

On the case itself the court found that mention of the personally liable member Visscher in the German order for payment and enforcement was made simply for the purpose of specifying the firm Modak named there as debtor by naming its legal representative and did not mean that Visscher was a party to the proceedings.

(IH/331)

Note

The Dutch version of the Convention refers in Article 36 et seq. to "verzet" and in Article 40 to "beroep"; in the other versions both articles refer to "recours", "Rechtsbehelf", "opposizione" and "appeal".

Section 3 - Common provisions

Courts of the Member States (cf. No. 124)

No. 133: Oberlandesgericht Stuttgart, 8th Zivilsenat,

Order of 11 October 1977, Fa. Z.H.S.A. v K.H.P., 8 W 335/77

Recognition and enforcement - Common provisions - Proof of service of the enforceable judgment (Article 47 (1)) - Omission repaired before appeal - Conditions

A French firm had obtained a default judgment before the French court having jurisdiction against the German defendant and the German court having jurisdiction had authorized enforcement. The appeal against this to the Oberlandesgericht Stuttgart was dismissed as unfounded. The Oberlandesgericht found that although at first instance the French firm had not produced proof of due service of the French judgment as required by Article 47 (1) of the Convention, nevertheless in the meantime that judgment and a translation thereof had been formally served on the German defendant together with the order of the court of first instance regarding enforcement. Referring to the report on the Convention the court held that service of the judgment was intended to enable the debtor voluntarily to satisfy the judgment. That objective did not prevent repair of the omission at least where the debtor, as in the present case, let it be understood that he was unwilling to comply, so that even due service of the judgment would not have made the proceedings unnecessary.

(IH/361)

TITLE IV - AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

Courts of the Member States

No. 134: Vredegerecht Antwerpen, 5e kanton,

Judgment of 15 February 1977, Clausen-Werft KG, Ferd. Clausen v Internationale Stoombootdiensten Flandria N.V., A.R. 5736-335

Authentic instruments and court settlements - Settlement including order for enforcement reached before a German court on 5 November 1969 - Fresh action in Belgium - Inadmissibility

A German company sued a Belgian company for payment before the Justice of the Peace in Antwerp. The claim in the action had already been the subject of an action before the Landgericht Bonn (Federal Republic of Germany) which had ended in a court settlement including an order for enforcement reached on 5 November 1969. The Justice of the Peace cited the judgment of the Court of Justice of the European Communities of 30 November 1976 (Case 42/76 De Wolf /1976/ ECR 1759; Synopsis of Case-law, Part 1, No. 39) to the effect that the provisions of the Brussels Convention prevent a party who has obtained a judgment in his favour in a Contracting State, being a judgment for which an order for enforcement under Article 31 of the Convention may issue in another Contracting State, from making an application to a court in that other State for a judgment against the other party in the same terms as the judgment delivered in the first state, and dismissed the action of the German company as inadmissible.

(IH/263)

No. 135: Cour d'Appel de Paris, 1ère chambre,

Judgment of 25 November 1977, J.C.M. Hallais v Liesel Kunz, E 11464

1. Scope - Court settlement concerning custody and maintenance during divorce proceedings - Enforcement of maintenance claims in another Contracting State - Applicability of Convention to maintenance claims affirmed

2. Authentic instruments and court settlements - Obstacles to enforcement - Irreconcilable with public policy of State where enforcement is sought - Not so where an advocate in accordance with his powers enters into a court settlement in divorce proceedings

In divorce proceedings before the Landgericht Frankfurt-am-Main the husband's advocate agreed to a settlement on 30 May 1973 concerning inter alia custody of the children of the marriage and the husband's liability for alimony pending suit in respect of his wife and children. The marriage of the parties was dissolved by decree of 15 February 1976. By order of 5 July 1977 the Tribunal de Grande Instance, Paris, applying the provisions of the Brussels Convention, authorized enforcement of the court settlement on the application of the divorced wife who claimed arrears of maintenance. The divorced husband appealed as provided for in Article 36 of the Convention; he claimed inter alia that the settlement related to a question of status excluded from the scope of the Convention and moreover was irreconcilable with French public policy since he, the complainant, had not been properly represented when it was entered into. Further, the settlement was no longer enforceable after the effective conclusion of the divorce proceedings. The appeal was rejected.

The Cour d'Appel held that the court settlement which was enforceable under German law could be enforced in France under Articles 50 and 51 of the Convention. It was clear from Article 5 (2) that the Convention also applied to maintenance matters even if, as in the present case, the maintenance claim was based on a provision relating to status. Further, the settlement did not lose its purpose after the divorce proceedings had terminated in so far as the maintenance creditor claimed arrears of maintenance. French public policy did not prevent enforcement of the settlement. The possibility under German law of reaching a settlement before and under the aegis of the court and bearing the endorsement of the latter was not contrary to French international public policy as regards the provisions applicable in France. Nor was the fact that the appellant had given his advocate in the Federal Republic of Germany a full power of attorney to represent his interests in the proceedings against his wife both before the court and in out of court matters open to objection from this point of view. Further, the appellant had not availed himself of the possibility of challenging the validity of the court settlement.

(IH/392)

TITLE V - GENERAL PROVISIONS

Courts of the Member States (cf. No. 104)

TITLE VI - TRANSITIONAL PROVISIONS

Courts of the Member States (cf. No. 134)

TITLE VII - RELATIONSHIP TO OTHER CONVENTIONS

International judicial bodies

No. 136: Appeal Board of the Central Commission for the Navigation of the Rhine (Strasbourg), Judgment of 2 March 1977, Haeger & Schmidt GmbH v Compagnie française de Navigation Rhénane S.A., Nederlandse Jurisprudentie, Uitspraken in burgerlijke en strafzaken 1978, No. 4 Uitspraak No. 62, pp. 167-168

Relationship to other conventions - Rules of jurisdiction of the revised Convention for the Navigation of the Rhine of 17 October 1868 (Convention of Mannheim) - Precedence over the rules of jurisdiction of the Convention

In an action between a German company and a French company concerning a collision between ships on the Rhine the Rhine Navigation Court at Arnhem (Netherlands) held that it had jurisdiction under Article 5 (3) of the Brussels Convention because the collision had taken place within its district. On appeal from the judgment of the court of first instance the Appeal Board of the Central Commission for the Navigation of the Rhine affirmed the jurisdiction of the court of first instance but held that the Rhine Navigation Court had wrongly based its jurisdiction on Article 5 (3) of the Brussels Convention. It was clear from Article 57 of the Convention that the jurisdiction in Rhine navigation matters was governed not by the Convention but by the revised Convention for the Navigation of the Rhine. In the particular case the court in Arnhem had jurisdiction as the Rhine Navigation Court under Articles 34 and 35 of the Convention.

(IH/326)

Courts of the Member States (cf. Nos 92 and 130

No. 137: Corte di Cassazione, sezioni unite civile,

Judgment of 29 September 1977, Soc. J. Wagner GmbH v Soc. Larius Import di Castagna & C., Il Foro italiano, anno CIII/1978, No. 10, parte prima, col. 2240-2245, with notes by Pierucci, A., col. 2241-2242; Lener, A., col. 2242

1. Relationship to other conventions - Hague Convention of 1 July 1964 on the introduction of a Uniform Law on the Formation of Contracts for the International Sale of Goods (Uniform Law) - Article 7 (2) of the Uniform Law - Does not take precedence over Article 17 of the Brussels Convention

2. Jurisdiction - Prorogation of jurisdiction - Acceptance without demur of confirmation of an order in which reference is made to general conditions of sale containing a jurisdiction clause - No agreement within the meaning of the first paragraph of Article 17

An Italian company brought an action in the court for the place where it has its seat in Italy against a German company for non-fulfillment of two contracts of sale under which the German company had undertaken to deliver machines; the Italian company claimed release from the contracts together with damages. The German defendant pleaded that the Italian court had no jurisdiction, citing a jurisdiction clause in its general conditions of sale according to which the Landgericht Ravensburg had exclusive jurisdiction. Reference to those general conditions of sale was contained in the defendant's acceptance of the order, to which the plaintiff had not objected. The defendant took the view that under Article 7 (2) of the Uniform Law on the Formation of Contracts for the International Sale of Goods introduced by the Hague Convention of 1 July 1964 the jurisdiction clause had become part of the contract as a result of the plaintiff's silence in respect of the acceptance of the order; under Article 7 (2) of the Uniform Law, which applied both in Italy and in the Federal Republic of Germany, "a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance".

In the interlocutory proceedings on the jurisdiction of the Italian court the Corte di Cassazione dismissed the defendant's objection. It held that the Hague Convention of 1 July 1964 was concerned with the substantive aspects of the contract of sale; as regards the question whether jurisdiction clauses were the subject of effective agreement, Article 17 of the Brussels Convention was the more particular provision and therefore took precedence. According to the case-law of the Court of Justice of the European Communities on that provision (Case 24/76, judgment of 14 December 1976 [1976] ECR 1831; Synopsis of Case-law, Part 1, No. 24) an agreement on jurisdiction must be in writing, and where one party stipulates a jurisdiction clause it must be ascertained that the other party has knowingly agreed to the clause. Mere silence in response to an acceptance of an order, which acceptance refers to general conditions of sale containing a jurisdiction clause, does not satisfy these conditions.

Despite the invalidity of the agreement on jurisdiction the Corte di Cassazione came to the conclusion upon further consideration that it was not the Italian court before which the matter had been brought which had jurisdiction but the court for the place where the German defendant had its seat. There could have been jurisdiction in Italy only on the basis of Article 5 (1) of the Convention; the place of performance of the obligation in question was, however, in the present case the place where the defendant had its seat. The obligation to deliver, the non-fulfillment of which by the defendant was the basis of the claims made in the action, should have been performed, under Article 19 (2) of the Uniform Law, at the place where the defendant had its seat.

(IH/445)

TITLE VIII - FINAL PROVISIONS

Courts of the Member States (cf. Nos. 94 and 131)

No. 138: Arrondissementsrechtbank 's-Gravenhage,

Judgment of 18 January 1977, D. v W., Nederlandse Jurisprudentie, Uitspraken in burgerlijke en strafzaken, 1977, No. 48, Uitspraak No. 578, p. 1834

Scope of the Convention - Surinam - Convention not applicable to relations with the Netherlands - Question of application to relations with other Contracting States after Surinam's independence left open

The court dismissed an application for enforcement of a judgment of the Kantonrechter of Paramaribo (Republic of Surinam) of 3 May 1976 based on the provisions of the Brussels Convention.

It held that Surinam was not one of the Contracting States of the Convention. Although the Netherlands had previously declared under the second paragraph of Article 60 that the Convention applied to Surinam, after it had gained independence on 25 November 1975 the Republic of Surinam on 29 November 1975 declared to the United Nations that it wished to review which of the treaties entered into by the Netherlands and affecting Surinam it would endorse and that the existing treaties were to be regarded as continuing in force until it declared the contrary. The court held that it was accordingly conceivable that a Surinam judgment could still be recognised and enforced on the basis of the Convention in the Contracting States of the Brussels Convention with the exception of the Netherlands. The Convention never applied as regards the recognition and enforcement of Surinam judgments in the Netherlands. The appropriate authority for this was, until Surinam's independence, Article 40 of the Statuut voor het Koninkrijk. A convention on the recognition and enforcement of judgments and authentic documents entered into on 27 August 1976 between the Republic of Surinam and the Netherlands had not yet entered into force.

(IH/283)

Note

Under Article 40 of the Statuut voor het Koninkrijk (Stb. 1954 No. 503) judgments and certain other decisions of the courts of the Netherlands, Surinam, the Netherlands Antilles or Netherlands New Guinea may be enforced throughout the realm, subject to local law.

The convention between the Republic of Surinam and the Netherlands referred to in the judgment is published in Tractatenblad 1976 No. 144.

PROTOCOL ON THE CONVENTION

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