JUDGMENT OF THE COURT (Sixth Chamber)
8 December 1987 *

In Case 144/86

REFERENCE to the Court pursuant to the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters by the Corte suprema di cassazione, Rome, for a preliminary ruling in the proceedings pending before that court between

Gubisch Maschinenfabrik KG, whose registered office is in Flensburg,

and

Giulio Palumbo, resident in Rome,

on the interpretation of Article 21 of the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978, L 304, p. 77),

THE COURT (Sixth Chamber),

composed of: O. Due and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, K. Bahlmann and C. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Gubisch Maschinenfabrik KG, by E. Meissner, in the written procedure,

the Government of the Federal Republic of Germany, by C. Böhmer, in the written procedure,

* Language of the Case: Italian.

the Government of the Italian Republic, by O. Fiumara, in the written procedure,

the Commission of the European Communities, by G. Berardis, in the written and oral procedures,

having regard to the Report for the Hearing and further to the hearing on 19 March 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 June 1987,

gives the following

Judgment

1 By an order of 9 January 1986, which was received at the Court Registry on 12 June 1986, the Corte suprema di cassazione (Supreme Court of Cassation), Rome, referred to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Convention') a question on the interpretation of Article 21 of the Convention.

2 That question arose in a dispute between Gubisch Maschinenfabrik KG (hereinafter referred to as 'Gubisch'), whose registered office is in Flensburg (Federal Republic of Germany), and Mr Palumbo, resident in Rome, relating to the validity of a contract of sale. Mr Palumbo brought proceedings against Gubisch before the tribunale di Roma (District Court, Rome) for a declaration that the contract was inoperative on the ground that his order had been revoked before it reached Gubisch for acceptance. In the alternative, the plaintiff claimed the contract should be set aside for lack of consent or, in the alternative, its discharge on the ground that Gubisch had not complied with the time-limit for delivery.

3 Gubisch objected that the tribunale di Roma lacked jurisdiction, in accordance with Article 21 of the Convention, on the ground that it had already brought an action before the Landgericht (Regional Court), Flensburg, to enforce performance by Mr Palumbo of his obligation under the contract, namely payment for the machine he had purchased.

4 The tribunale di Roma dismissed the objection of *lis pendens* based on Article 21 of the Convention; Gubisch appealed to the Corte suprema di cassazione, which stayed the proceedings and referred to the Court the following question for a preliminary ruling:

'Does a case where, in relation to the same contract, one party applies to a court in a Contracting State for a declaration that the contract is inoperative (or in any event for its discharge) whilst the other institutes proceedings before the courts of another Contracting State for its enforcement fall within the scope of the concept of *lis pendens* pursuant to Article 21 of the Brussels Convention of 27 September 1968?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

6 In order to answer the question submitted, it is necessary to determine first of all whether the terms used in Article 21 of the Convention in order to describe the circumstances constituting *lis pendens* (an expression used solely in the heading of Section 8 of Title II) are to be interpreted independently or are to be regarded as referring to the national law of one or other of the States concerned.

7 As the Court has already held in its judgment of 6 October 1976 in Case 12/76 *Tessili* v *Dunlop* [1976] ECR 1473, neither of those two options rules out the other since the appropriate choice can be made only in respect of each of the provisions of the Convention to ensure that it is fully effective having regard to the objectives of Article 220 of the EEC Treaty.

8 According to its preamble, which incorporates in part the terms of Article 220, the Convention seeks in particular to facilitate the recognition and enforcement of judgments of courts or tribunals and to strengthen in the Community the legal protection of persons therein established. Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27 (3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.

9 Moreover, in its judgment of 30 November 1976 in Case 42/76 *De Wolf* v *Cox* [1976] ECR 1759, the Court acknowledged the importance of those objectives of the Convention even outside the narrow field of *lis pendens*, holding that it would be incompatible with the meaning of Article 26 *et seq.* on the recognition of judgments to accept the admissibility of an application concerning the same subject-matter and brought between the same parties as an application upon which judgment has already been delivered by a court in another Contracting State.

10 Furthermore, the concept of *lis pendens* is not the same in all the legal systems of the Contracting States and, as the Court has already held in its judgment of 7 June 1984 in Case 129/83 *Zelger* v *Salinitri* [1984] ECR 2397, a common concept of *lis pendens* cannot be arrived at by a combination of the various relevant provisions of national law.

11 Having regard to the aforesaid objectives of the Convention and to the fact that Article 21, instead of referring to the term *lis pendens* as used in the different national legal systems of the Contracting States, lays down a number of substantive conditions as components of a definition, it must be concluded that the terms used in Article 21 in order to determine whether a situation of *lis pendens* arises must be regarded as independent.

12 That result does not conflict with the judgment of 7 June 1984, referred to earlier, in which the Court pointed out that the question as to the moment at which a court is to be considered seised of a case for the purposes of Article 21 of the Convention must be appraised and resolved, in the case of each court, according to the rules of its own national law. That reasoning was based on the absence of any indication in that article of the nature of the relevant procedural formalities, since the Convention does not have the aim of unifying those formalities, which are closely connected with the procedural systems of the different Member States. Accordingly, it cannot prejudge the interpretation of the substantive scope of the conditions of *lis pendens* laid down in Article 21.

13 It is therefore in the light of the aforesaid objectives and with a view to ensuring consistency as between Articles 21 and 27 (3) that the question whether a procedural situation of the kind at issue in this case is covered by Article 21 must be dealt with. The salient features of that situation are that one of the parties has brought an action before a court of first instance for the enforcement of an obligation stipulated in an international contract of sale; an action is subsequently brought against him by the other party in another Contracting State for the rescission or discharge of the same contract.

14 It must be observed first of all that according to its wording Article 21 applies where two actions are between the same parties and involve the same cause of action and the same subject-matter; it does not lay down any further conditions. Even though the German version of Article 21 does not expressly distinguish between the terms 'subject-matter' and 'cause of action', it must be construed in the same manner as the other language versions, all of which make that distinction.

15 In the procedural situation which has given rise to the question submitted for a preliminary ruling the same parties are engaged in two legal proceedings in different Contracting States which are based on the same 'cause of action', that is to say the same contractual relationship. The problem which arises, therefore, is whether those two actions have the same 'subject-matter' when the first seeks to enforce the contract and the second seeks its rescission or discharge.

16 In particular, in a case such as this, involving the international sale of tangible moveable property, it is apparent that the action to enforce the contract is aimed at giving effect to it, and that the action for its rescission or discharge is aimed precisely at depriving it of any effect. The question whether the contract is binding therefore lies at the heart of the two actions. If it is the action for rescission or discharge of the contract that is brought subsequently, it may even be regarded as simply a defence against the first action, brought in the form of independent proceedings before a court in another Contracting State.

17 In those procedural circumstances it must be held that the two actions have the same subject-matter, for that concept cannot be restricted so as to mean two claims which are entirely identical.

18 If, in circumstances such as those of this case, the questions at issue concerning a single international sales contract were not decided solely by the court before which the action to enforce the contract is pending and which was seised first, there would be a danger for the party seeking enforcement that under Article 27 (3) a judgment given in his favour might not be recognized, even though any defence put forward by the defendant alleging that the contract was not binding had not been accepted. There can be no doubt that a judgment given in a Contracting State requiring performance of the contract would not be recognized in the State in which recognition was sought if a court in that State had given a judgment rescinding or discharging the contract. Such a result, restricting the effects of each judgment to the territory of the State concerned, would run counter to the objectives of the Convention, which is intended to strengthen legal protection throughout the territory of the Community and to facilitate recognition in each Contracting State of judgments given in any other Contracting State.

19 The answer to the question submitted by the national court must therefore be that the concept of *lis pendens* pursuant to Article 21 of the Convention of 27 September 1968 covers a case where a party brings an action before a court in a Contracting State for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another Contracting State.

Costs

20 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Corte suprema di cassazione, by order of 9 January 1986, hereby rules:

The concept of *lis pendens* pursuant to Article 21 of the Convention of 27 September 1968 covers a case where a party brings an action before a court in a Contracting State for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another Contracting State.

Due Rodríguez Iglesias

Koopmans Bahlmann Kakouris

Delivered in open court in Luxembourg on 8 December 1987.

P. Heim
Registrar

O. Due
President of the Sixth Chamber