OPINION OF ADVOCATE GENERAL LÉGER

delivered on 9 September 2003 [1]

1. This case concerns the interpretation of Article 21 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. [2] That article, which deals with *lis pendens*, provides that, where identical proceedings are brought before two courts in different Member States, the court second seised must stay proceedings and refer the matter to the court first seised as soon as the latter has established its jurisdiction.

I — Law

2. In this case, the Oberlandesgericht (Higher Regional Court) Innsbruck (Austria) has asked the Court to give its first ruling on whether the court second seised must comply with Article 21 of the Brussels Convention where that court has exclusive jurisdiction to hear the case under an agreement conferring jurisdiction. It also asks whether that court may derogate from the requirements of that article where proceedings before the courts of the Member State in which the court first seised are established are, in general, excessively long.

3. The aim of the Brussels Convention, according to its preamble, is to facilitate the recognition and enforcement of judgments in accordance with Article 293 EC, and to strengthen in the European Community the legal protection of persons therein established. According to the relevant recital in that preamble, it is necessary for that purpose to determine the international jurisdiction of the courts of the Contracting States.

1 — Original language: French.

2 — (OJ 1972 L 299, p. 32). Convention as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and amended text p. 77), by the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1), by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1) and by the Convention of 29 November 1996 on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1997 C 15, p. 1). A consolidated version of the Convention, as amended by those four conventions of accession, is published in OJ 1998 C 27, p. 1 (hereinafter the 'Brussels Convention').

4. The relevant provisions concern, on the one hand, jurisdiction and, on the other, the recognition in a Contracting State of judgments delivered by the courts of another Contracting State.

5. The provisions relating to jurisdiction are contained in Title II of the Brussels Convention.

6. Article 2 lays down the general rule that the courts of the State in which the defendant is domiciled are to have jurisdiction. Articles 5 and 6 provide the claimant with several options in the form of a number of special heads of jurisdiction. In particular, Article 5 provides that, in matters relating to a contract, the defendant may be sued in the courts for the place where the obligation which the action seeks to enforce was or should have been performed.

7. The Brussels Convention also lays down, in Sections 3 and 4 of Title II, mandatory rules of jurisdiction in matters relating to insurance and consumer contracts.

8. Furthermore, Article 16 of the Convention lays down rules governing exclusive jurisdiction. That article provides, for example, that, in proceedings which have as their object rights *in rem* in immovable property, the courts of the Contracting State in which the property is situated are to have exclusive jurisdiction, regardless of domicile.

9. Articles 17 and 18 relate to prorogation of jurisdiction. Article 17 concerns agreements conferring jurisdiction. It is worded as follows:

'If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

(1) in writing or evidenced in writing;

or

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

or

(3) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

...

Agreements... conferring jurisdiction shall have no legal force if they are contrary to the provisions... [laid down in matters relating to insurance and consumer contracts], or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.

...'

10. Article 18 provides that:

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

11. The Brussels Convention is also intended to prevent irreconcilable judgments from being given. To that effect, Article 21 is worded as follows:

'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

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

12. The provisions concerning recognition and enforcement appear under Title III of the Brussels Convention. Article 27 provides that:

'A judgment shall not be recognised:

...

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought...'.

13. In accordance with the first paragraph of Article 28, '[m]oreover, a judgment shall not be recognised if it conflicts with the provisions... [in matters relating to insurance and consumer contracts or with those referred to in Article 16]...'.

II — Facts and procedure

14. Erich Gasser GmbH [3] is a company whose registered office is in Dornbirn, Austria. For several years, it sold children's clothing to MISAT Srl, [4] a company established in Rome (Italy). Early in the year 2000, contractual relations between the parties were broken off.

15. By application of 14 April 2000, MISAT brought an action against Gasser before the Tribunale civile e penale di Roma (Civil and Criminal District Court, Rome) seeking a ruling that the contract between them had terminated *ipso jure*. In the alternative, it sought from that court a declaration that the contract had been terminated following a disagreement, that no failure to perform the contract could be attributed to MISAT and that Gasser's conduct had been unlawful, and an order requiring Gasser to pay MISAT damages for the losses sustained and to reimburse certain costs.

16. By application of 4 December 2000, Gasser brought an action against MISAT before the Landesgericht (Regional Court) Feldkirch, Austria, for payment of outstanding invoices. Gasser contended that that court had jurisdiction on the ground that it was the court for the place of performance of the contract. Gasser also contended that that court had jurisdiction under an agreement conferring jurisdiction. In support of that contention, it argued that all the invoices issued to MISAT stated that the court with jurisdiction in the event of a dispute would be the court in whose jurisdiction Dornbirn is located, and that MISAT had accepted those invoices without disputing them. According to Gasser, this showed that, in accordance with their practice and the usage prevailing in trade and commerce between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention.

17. MISAT pleaded that the Austrian court had no jurisdiction. It argued that the court of competent jurisdiction was that where the defendant was established, under the general rule laid down in Article 2 of the Brussels Convention. It disputed the existence of an agreement conferring jurisdiction and stated that it had previously brought an action before the Tribunale civile e penale di Roma on the basis of the same business relationship.

3 — Hereinafter 'Gasser'.
4 — Hereinafter 'MISAT'.

18. The Landesgericht Feldkirch decided to stay proceedings, pursuant to Article 21 of the Brussels Convention, until such time as the jurisdiction of the Tribunale civile e penale di Roma, the court first seised, had been established. It confirmed its own jurisdiction as the court for the place of performance of the contract, but it did not rule on the existence of an agreement conferring jurisdiction.

19. Gasser appealed against that decision to the Oberlandesgericht Innsbruck, contending that the Landesgericht Feldkirch should be declared to have jurisdiction and that the proceedings should not be stayed.

20. The Oberlandesgericht Innsbruck stated, first, that the proceedings before the Landesgericht Feldkirch and the Tribunale civile e penale di Roma had been brought by the same parties and must be regarded as having the same cause of action within the meaning of the Court's case-law, with the result that this was indeed a case of *lis pendens*.

21. It stated, next, that while the Landesgericht Feldkirch had pointed out that the invoices issued by Gasser to MISAT designated it as the court of competent jurisdiction, it had not ruled on the other evidence put forward by Gasser as proof of the existence of an agreement conferring jurisdiction.

22. In that regard, the Oberlandesgericht Innsbruck noted that, under subparagraphs (a), (b), and (c) of the first paragraph of Article 17 of the Brussels Convention, an agreement conferring jurisdiction must be either in writing or evidenced in writing, or in a form which accords with the practices between the parties, or, in international trade or commerce, in a form which accords with a usage of which the parties were or ought to have been aware and which is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. It took the view that the first two formal conditions relating to an agreement conferring jurisdiction were not fulfilled. It stated that the question none the less arose whether the conditions laid down in subparagraph (c) of the first paragraph of Article 17 were satisfied. It pointed out that, in its judgment in *MSG*, [5] the Court held that the fact that one of the parties repeatedly paid without objection invoices issued by the other party containing a jurisdiction clause may be deemed to constitute agreement to that clause, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice.

23. It stated that, if the existence of such an agreement were established, the Landesgericht Feldkirch would have exclusive juris-

5 — Case C-106/95 [1997] ECR I-911.

diction to deal with the dispute under Article 17 of the Brussels Convention. The question would then arise whether that court may review the jurisdiction of the Tribunale civile e penale di Roma.

24. Lastly, the Oberlandesgericht Innsbruck noted Gasser's contention that its rights had been adversely affected by the excessive length of proceedings in Latin countries.

III — The questions referred to the Court of Justice

25. It was in those circumstances that the Oberlandesgericht Innsbruck decided to refer the following questions to the Court for a preliminary ruling:

'1. May a court which refers questions to the Court of Justice for a preliminary ruling do so purely on the basis of a party's (unrefuted) submissions, whether they have been contested or not contested (on good grounds), or is it first required to clarify those questions as regards the facts by the taking of appropriate evidence (and if so, to what extent)?

2. May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ["the Brussels Convention"], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?

3. Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?

4. Do the legal consequences provided for by Italian Law No 89 of 24 March 2001 justify the application of Article 21 of the Brussels Convention even if a party is at risk of detriment as a consequence of the possible excessive length of proceedings before the Italian court and therefore, as suggested in Question 3, it would not actually be appropriate to proceed in accordance with Article 21?

5. Under what conditions must the court other than the court first seised refrain from applying Article 21 of the Brussels Convention?

6. What course of action must the court follow if, in the circumstances described in Question 3, it is not allowed to apply Article 21 of the Brussels Convention?

Should it be necessary in any event, even in the circumstances described in Question 3, to proceed in accordance with Article 21 of the Brussels Convention, there is no need to answer Questions 4, 5 and 6.'

IV — Analysis

A — *The first question*

26. By its first question, the referring court seeks to ascertain whether a national court may ask the Court of Justice to interpret the Brussels Convention on the basis of the submissions of a party the merits of which that national court has not assessed. The national court is thus referring to the fact that the second question is based on the premiss that the court in whose jurisdiction Dornbirn is located has jurisdiction to give judgment in the main proceedings under an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention, even though the existence of such an agreement conferring jurisdiction has not been confirmed by the court hearing the substance of the case.

'27. I consider that the answer to the first question referred can be inferred from the Court's case-law on the admissibility of questions referred for a preliminary ruling both under the Protocol of 3 June 1971 concerning the interpretation by the Court of Justice [6] of the Brussels Convention, and under Article 234 EC.

28. Article 3 of the Protocol of 3 June 1971 provides that, where a question relating to the interpretation of the Convention is raised in a case pending, the court seised may or must request the Court of Justice to give a ruling on that question if it considers that a decision on the matter is necessary to enable it to give judgment. Article 3 of the Protocol therefore follows the same logic as Article 234 EC. In both cases, the reference for a preliminary ruling is intended to enable the Court of Justice to provide the

6 — OJ 1975 L 204, p. 28, as amended by the conventions on accession.

national court with the interpretation it needs to give a judgment applying the provision whose interpretation is sought. [7] The Court, logically, inferred from this that its case-law concerning its jurisdiction to give preliminary rulings under Article 234 EC can be transposed to requests for interpretation of the Brussels Convention. [8]

29. According to settled case-law, the procedure laid down in Article 234 EC constitutes an instrument of cooperation between the Court of Justice and the national courts. Within the context of this cooperation, it is for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. Consequently, since the questions referred concern the interpretation of Community law, the Court is, in principle, obliged to give a ruling. [9]

30. The Court has consistently inferred from the fact that jurisdiction lies in principle with the national court that it is for that court, which alone has a direct knowledge of the facts of the main proceedings and of the arguments of the parties, to decide, in the light of considerations of procedural economy and expediency, at what stage in the proceedings it is necessary to submit a question to the Court for a preliminary ruling. [10]

31. However, the determinations made by the national court in exercising that jurisdiction may be subject to review by the Court of Justice. The latter has thus held that, in exceptional circumstances, it should examine the conditions in which the case was referred to it by the national court in order to determine whether it has jurisdiction. [11] It has held that the spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general and hypothetical questions. [12]

7 — See the Opinion of Advocate General Tesauro in Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, point 17.

8 — See Case C-220/95 *Van den Boogaard* [1997] ECR I-1147, paragraph 16, Case C-295/95 *Farrell* [1997] ECR I-1683, paragraph 11, Case C-159/97 *Castelletti* [1999] ECR I-1597, paragraph 14 and Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraph 38.

9 — See, in particular, Case 83/78 *Pigs Marketing Board* [1978] ECR 2347, paragraph 25, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59 and Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19. See also, with regard to the Brussels Convention, *Castelletti*, paragraph 14.

10 — See Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 7, Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 10, Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 11, Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraph 46 and Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 32.

11 — See *Bosman* (paragraph 60) and *Gantner Electronic* (paragraph 35).

12 — See Case 104/79 *Foglia* [1980] ECR 745, paragraph 11, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 18, Case 149/82 *Robards* [1983] ECR 171, paragraph 19, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25 and Case C-153/00 *der Weduwe* [2002] ECR I-11319, paragraphs 32 and 33.

32. In this respect, it has pointed out that, in order to enable it to provide the national court with an interpretation of Community law which will be of use to it in giving judgment in the main proceedings, the national court must define the legal context in which the interpretation requested should be placed. With that in mind, the Court has taken the view that it might be convenient, depending on the circumstances and without calling into question the principle that the referring court has exclusive jurisdiction to determine at what stage of the proceedings the reference for a preliminary ruling should be made, for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice, so as to enable the latter to take cognisance of all the features of fact and of law which may be relevant to the interpretation which it is called upon to give. [13] Furthermore, it is essential for the national court to explain why it considers that an answer to its questions is necessary. [14]

33. The Court has already had occasion to determine whether the abovementioned conditions are satisfied and to consider itself to have jurisdiction in the case of a question referred to it for a preliminary ruling on the basis of a premiss the well-foundedness of which is a precondition for applying the provision whose interpretation has been sought, for the purpose of giving judgment in the main proceedings.

34. Thus, in *Enderby*, [15] the Court of Appeal (England & Wales) asked the Court of Justice whether the principle of equal pay for male and female workers for equal work or work of equal value, laid down in Article 141 EC, required an employer to justify objectively a difference in pay between the job of principal speech therapist and that of principal pharmacist. The Court of Appeal had proceeded on the premiss that those two different jobs were of equal value.

35. In its observations to the Court, the German Government submitted that the Court could not rule on the question referred to it without first determining whether the two jobs at issue were equivalent. Since, in its view, they were not, there could be no infringement of Article 141 EC.

36. The Court rejected that argument. It stated that the Court of Appeal had decided in accordance with the British legislation and with the agreement of the parties to

13 — See *Irish Creamery Milk Suppliers Association and Others*, paragraph 6, Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 19, and the abovementioned judgments in *Meilicke*, paragraph 26, *Høj Pedersen and Others*, paragraph 45 and *JämO*, paragraph 31. According to what is now settled case-law, 'the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'. See, in particular, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6 and Case C-109/99 *ABBOI* [2000] ECR I-7247, paragraph 42.

14 — See Joined Cases 98/85, 162/85 and 258/85 *Bertini and Others* [1986] ECR 1885, paragraph 6 and *Lourenço Dias*, cited above, paragraph 19.

15 — Case C-127/92 [1993] ECR I-5535.

examine the question of the objective justification of the difference in pay before that of the equivalence of the jobs in issue, which might require more complex investigation. It was for that reason that the questions referred were based on the assumption that those jobs were of equal value. [16] It went on to say that, where the Court, as in that case, receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings, it must reply to that request and is not required to consider the validity of a hypothesis which it is for the referring court to review subsequently if that should prove to be necessary. [17]

37. The Court adopted the same position in its judgment in *JämO*, cited above, in a similar context. [18] It held, in particular, that it is for the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties and which must assume responsibility for giving judgment in the case, to decide at what stage in the proceedings it requires a preliminary ruling and to determine the relevance of the questions it refers to the Court. [19] In that case, it was also argued that determining whether the work was of equal value would require complex and costly investigations. [20]

16 — See *Enderby* (paragraph 11).

17 — Ibid. (paragraph 12).

18 — In that case, the Arbetsdomstolen referred to the Court for a preliminary ruling several questions intended to enable it to determine whether an employer had paid midwives less than a clinical technician, without adopting a position as to whether the work of those two categories of employee was equivalent.

19 — Paragraph 32.

20 — Paragraph 29.

38. Like the Commission, I consider that that case-law can be transposed to the present case. First, although it is regrettable that the referring court has not provided a detailed explanation in this regard, I share the Commission's view that determining the existence in the particular trade or commerce concerned of a usage in international trade or commerce which is widely known to, and regularly observed by, parties to contracts of the type involved may indeed necessitate long and costly investigations.

39. Second, it is clear from the order for reference that the way in which the dispute in the main proceedings is dealt with by the Oberlandesgericht Innsbruck will be completely different depending on whether the Court's answer to the question whether the court second seised may derogate from the requirements of Article 21 of the Brussels Convention where that court has jurisdiction pursuant to an agreement conferring jurisdiction is in the affirmative or in the negative. If that question is answered in the affirmative, the referring court will have to rule on whether such an agreement exists. If the existence of that agreement is established, the Austrian court will have exclusive jurisdiction to give judgment on the dispute between the parties. Conversely, if the answer is in the negative, the examination of the existence of an agreement conferring jurisdiction will no longer be relevant and Article 21 of the Brussels Convention will have to apply.

40. Last, the referring court has explained why, in the light of the judgment in *MSG*, cited above, MISAT's acceptance of invoices containing a clause designating the court in whose jurisdiction Dornbirn is located as having jurisdiction to rule on any dispute between the parties must be regarded as initial evidence of the existence of an agreement conferring jurisdiction within the meaning of subparagraph (c) of the first paragraph of Article 17 of the Brussels Convention. The other conditions laid down in that provision, namely that the usage in the particular trade or commerce concerned must be one which is accepted in international trade or commerce and of which the parties are or ought to have been aware, are not disputed in a specific and reasoned manner by MISAT. There is therefore nothing to indicate that the premiss relating to the existence of an agreement conferring jurisdiction is manifestly erroneous.

41. The second question, which seeks to ascertain whether the existence of an agreement conferring jurisdiction permits derogation from Article 21 of the Brussels Convention, is therefore highly material to the decision to be given in the main proceedings. The action taken by the referring court in asking the Court of Justice about the effects of an agreement conferring jurisdiction, before starting the investigations which might be required in the present case to establish the existence of such an agreement, cannot therefore be regarded, in my view, as a failure by that court to discharge the duty to cooperate which underpins the preliminary-ruling procedure.

42. In the light of the foregoing, I propose that the answer to the first question should be that it is for the national court to determine whether to refer a question to the Court of Justice for a preliminary ruling on the basis of a party's submissions or whether it is necessary to verify those submissions first. It is nevertheless incumbent on the national court to provide the Court of Justice with the factual and legal information enabling it to give an answer which will be of use to it in giving judgment in the main proceedings and to explain why it considers an answer to its questions to be necessary.

B — *The second question*

43. By this question, the referring court is essentially asking whether Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction. In other words, the referring court seeks to ascertain whether Article 17 of the Brussels Convention constitutes a derogation from Article 21 of the same Convention.

44. Article 21 of the Brussels Convention is intended, in the interests of the sound administration of justice within the Community, to prevent parallel proceedings

before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, so far as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3) of the Convention, that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in proceedings between the same parties in the State in which recognition is sought. [21]

45. In pursuit of the objectives set out above, Article 21 provides a simple system for determining at the start of proceedings which of the courts seised will ultimately have jurisdiction to give judgment in the case. That system is based on the chronological order in which those courts are seised. It requires that the court second seised to stay the proceedings until such time as the court first seised has given a decision as to its own jurisdiction. It is this effect of blocking the proceedings before the court second seised, an integral part of Article 21 of the Brussels Convention, which is at the centre of these preliminary-ruling proceedings.

46. In its observations on the third question, Gasser, in arguing that that article should not be applied, asks the Court to reconsider its case-law on the subject, which began with the judgment in *Gubisch Maschinenfabrik*, [22] in which the Court held that an action for the rescission or discharge of a contract involves the same cause of action as an action to enforce the same contract. [23] It was in the light of that case-law that the referring court was able to consider that the action brought before the Landesgericht Feldkirch involved the same cause of action as the action brought previously before the Tribunale civile e penale di Roma.

47. I take the view that there is no reason in these proceedings for the Court to depart from that broad interpretation of cause of action within the meaning of Article 21 of the Brussels Convention. First, although it has generally been contested by legal writers, that interpretation was implicitly confirmed in the judgment in *Overseas Union Insurance and Others*, cited above. [24] It was clearly maintained in the judgment in *Tatry*, [25] in which the Court held that an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that defendant seeking a declaration that he is not liable

21 — See Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 16.

22 — Case 144/86 [1987] ECR 4861.

23 — Paragraphs 15 to 17. That case concerned an action seeking to have a machine sales contract declared void or, in the alternative, rescinded, and an action for payment for the machine at issue.

24 — Paragraph 16.

25 — Case C-406/92 [1994] ECR I-5439.

for that loss.[26] It was reiterated more recently in the judgment in *Gantner Electronic*, cited above.[27]

48. Furthermore, another solution to the problem raised by Gasser may be inferred from case-law. In its judgment in *Overseas Union Insurance and Others*, cited above, the Court held that the requirements of Article 21 of the Brussels Convention may be derogated from where the court second seised has exclusive jurisdiction to hear the case. I consider that that case-law may be extended to circumstances in which the court second seised has exclusive jurisdiction under an agreement conferring jurisdiction.

49. It is appropriate to recall the context in which the judgment in *Overseas Union Insurance and Others*, cited above, was delivered. In that case, the Court was faced with the following situation. In 1980, New Hampshire Insurance Company,[28] registered in England as an 'overseas company', reinsured with three companies also registered in England a risk which it had covered for the benefit of the French company Nouvelles Galeries Réunies. In July 1986, the three reinsurers ceased payment of claims. By applications lodged in 1987 and in February 1988, New Hampshire brought actions against the reinsurers for enforced performance of the contract before the Tribunal de Commerce (Commercial Court), Paris. On 6 April 1988, the three reinsurers themselves brought an action against New Hampshire before the Commercial Court of the Queen's Bench Division seeking a declaration that they were no longer bound to perform any commitments which might arise from the reinsurance policies. That court decided to stay the proceedings pursuant to the second paragraph of Article 21 of the Brussels Convention until such time as the French court had given a decision on the question of its own jurisdiction in the disputes pending before it.

50. The three reinsurers appealed against that decision to the Court of Appeal, which referred to the Court of Justice questions seeking to ascertain, in particular, whether Article 21 must be interpreted as meaning that the court second seised may only stay proceedings where it does not decline jurisdiction, or whether that provision authorises or obliges it to examine the jurisdiction of the court first seised, and to what extent.[29]

26 — Paragraph 45.

27 — Paragraph 25.

28 — Hereinafter 'New Hampshire'.

29 — In order fully to understand the wording of the questions raised by the referring court, it must be remembered that Article 21 of the Brussels Convention, in the version applicable in that case, read as follows: 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, the second court shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested'. The new wording of Article 21, to the effect that, in the event of *lis pendens*, the court second seised must stay proceedings until such time as the jurisdiction of the court first seised is established, in no way changes the conclusions to be drawn from the judgment in *Overseas Union Insurance and Others* with respect to the answer to the question referred in this case. This new wording, which derives from the 1989 accession convention, does not change the meaning or the scope of that article but seeks to ensure that the court second seised does not decline jurisdiction to hear the case before being certain that the court first seised has jurisdiction to hear it, so as to avoid any jurisdictional vacuum.

51. The Court of Justice ruled that, 'without prejudice to the case where the court second seised has exclusive jurisdiction under the [Brussels] Convention and in particular under Article 16 thereof,' Article 21 of the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay proceedings and may not itself examine the jurisdiction of the court first seised. [30]

52. It follows from the Court's answer that a court second seised which has exclusive jurisdiction to hear the case, in particular under Article 16 of the Brussels Convention, is not obliged to stay proceedings until such time as the court first seised has declared that it has no jurisdiction. The court second seised may therefore continue to examine the merits of the case and give judgment in it.

53. In this case, that judgment has been interpreted in different ways by those who have submitted observations as to whether Article 17, like Article 16, may constitute a derogation from the requirements of Article 21 of the Brussels Convention. The Commission, the Italian Government and MISAT consider that the derogation thus accepted by the Court in that judgment does not apply to Article 17 of the Convention.

30 — Paragraph 26.

54. The Commission takes the view that such a derogation is justified in the case of Article 16 by the first paragraph of Article 28 of the Brussels Convention, according to which decisions given by a court in breach of Article 16 cannot be recognised in any other Contracting State. It would therefore be absurd to require the court with exclusive jurisdiction under Article 16 to stay proceedings, since a decision given by the court first seised, which would by definition have no jurisdiction, could take effect only in the State where it was given. The first paragraph of Article 28 of the Brussels Convention, it submits, is not applicable where the court second seised has jurisdiction under an agreement conferring jurisdiction within the meaning of Article 17.

55. The Commission considers that, since it cannot be completely ruled out that the court first seised might make a different assessment as to existence of an agreement conferring jurisdiction from that of the court second seised, contradictory decisions on the substance of the case might ensue if the court second seised did not stay proceedings. The parties would then find themselves in the situation envisaged in Article 27(3) of the Brussels Convention, which states that a judgment given in another Contracting State is not recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought, a situation that Article 21 specifically seeks to avoid.

56. In addition, it points out that the jurisdiction conferred by Article 17 is less effective than that arising from Article 16 because the parties cannot refrain from applying the latter article, whereas they can always terminate an agreement conferring jurisdiction or waive their right to rely on it. Under Article 18 of the Brussels Convention, if the defendant enters an appearance before the court first seised without raising an objection as to lack of jurisdiction on the basis of an agreement conferring jurisdiction, that court may hear and determine the case.

57. I do not share that view. Like Gasser and the United Kingdom Government, I consider that Article 17 of the Brussels Convention may constitute a derogation from Article 21 thereof. That analysis is based on the following considerations. First, courts designated under an agreement conferring jurisdiction in accordance with Article 17 have jurisdiction which may be described as exclusive. Second, the argument that the court second seised is obliged to comply with the requirements of Article 21 even if it has exclusive jurisdiction under an agreement conferring jurisdiction is such as to undermine the effectiveness of Article 17 and the legal certainty that attaches to it. Third, the risk of irreconcilable decisions can be significantly reduced.

58. First, the most important point to bear in mind is that, in *Overseas Union Insurance and Others*, the Court ruled that the requirements of Article 21 of the Brussels Convention might be derogated from in 'the case where the court second seised has exclusive jurisdiction under the Convention and in particular under Article 16 thereof'. In my view, there are two points to be made about the wording of that derogation. The first is that, by using the adverb 'in particular', the Court meant to indicate that that derogation is not confined solely to the cases of exclusive jurisdiction covered by Article 16. The second is that the Court likewise did not refer, as it could have done, only to the cases of exclusive jurisdiction covered by the first paragraph of Article 28 of the Brussels Convention, namely the heads of jurisdiction provided for in matters of insurance or consumer contracts or by Article 16. There is therefore nothing in the judgment in *Overseas Union Insurance and Others* to suggest that the exclusive jurisdiction referred to in Article 17 is excluded from the derogation from the requirements of Article 21, which was accepted by the Court in that judgment.

59. Next, it should be pointed out that, since the Court was not asked a question on this matter, it gave no explanation of the grounds capable of justifying that derogation. I take the view that that derogation can be explained as follows. Since the court first seised can only declare that it has no jurisdiction, it is pointless, in such a situation, to oblige the court second seised to stay proceedings. In other words, where the court second seised has exclusive juris-

diction, there is no *lis pendens*, since this requires that the two courts seised of the same dispute should both have jurisdiction to hear the case. [31]

60. That reasoning can be transposed to Article 17 of the Brussels Convention. As the wording of that article makes clear, the court or courts designated by the parties pursuant to that article 'shall have exclusive jurisdiction'. Read in conjunction with Article 18 of the Brussels Convention, Article 17 means that, where the parties are bound by an agreement conferring jurisdiction under that article, any other court seised by one of the parties has no jurisdiction, otherwise than with the consent of the defendant. It follows that if, as appears to be the situation here, the defendant contests the jurisdiction of the court first seised by the other party in breach of an agreement conferring jurisdiction, that court must, on the basis of that clause, declare that it has no jurisdiction. The Schlosser report [32] states that that court must even do so of its own motion if the defendant does not enter an appearance. [33]

61. In such circumstances, the jurisdiction of the court designated by the parties in the agreement conferring jurisdiction does indeed preclude the jurisdiction of the courts designated under the Brussels Convention by the general rule laid down in Article 2 and the rules of special jurisdiction contained in Articles 5 and 6. [34] In this respect, the effects of Article 17 are therefore similar to those of Article 16. It may therefore seem just as pointless to require the court second seised to stay proceedings when its jurisdiction derives from Article 17 as when it is based on Article 16.

62. Second, such an obligation would be liable to jeopardise the effectiveness of Article 17 and the legal certainty which attaches to it.

63. For the purposes of determining the effectiveness of Article 17 of the Brussels Convention, it should be borne in mind that that article is intended to leave room for the voluntary prorogation of jurisdiction. It is therefore the consensus between the parties which permits derogation from the rules of general and special jurisdiction laid down in Articles 2, 5 and 6 of the Brussels Convention. Consequently, the requirement of their consent to this exceptional attribution of jurisdiction is inherent in the spirit of that article. Accordingly, in

31 — See, in that regard, Gaudemet-Tallon, H., *Compétence et exécution des jugements en Europe*, third edition, LGDJ, 2002, paragraphs 323 and 324.

32 — Report by Professor Schlosser on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71).

33 — Paragraph 22.

34 — In that regard, see Case 23/78 *Meeth* [1978] ECR 2133, paragraph 5.

its judgments in *Estasis Salotti*[35] and *Segoura*,[36] the Court held that Article 17 of the Brussels Convention requires the court seised to examine whether the clause which confers jurisdiction on it was indeed the result of consent between the parties.[37]

64. Such consent by the parties is also the basis for agreements conferring jurisdiction concluded in accordance with a usage in international trade or commerce. That reference to a usage in international trade or commerce was of course added in the 1978 Accession Convention to make the formal conditions originally laid down in the Brussels Convention more flexible, in other words an agreement concluded in writing or a verbal agreement evidenced subsequently in writing.[38] However, the Court of Justice has held that, in spite of that new flexibility, real consent remains one of the objectives of Article 17. That requirement of real consent is justified by the concern to protect the weaker party to the contract by preventing jurisdiction clauses, incorporated in a contract by one party, from going unnoticed.[39] The Court has thus held that the contracting parties' consent to a jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the branch of international trade or commerce in which they operate and of which they are, or ought to have been, aware.[40]

65. It follows that Article 17 upholds the autonomy of the consensus formed between the parties by conferring exclusive jurisdiction on the courts so designated by them, by way of derogation from the rules of jurisdiction laid down by the Brussels Convention, but subject to those contained in the fourth paragraph of that article. As the Court has held, Article 17 is intended to designate, clearly and precisely, a court in a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein.[41] Article 17 thus seeks to secure legal certainty by enabling the parties to determine which court will have jurisdiction.

66. In this way, Article 17 is entirely in harmony with the objectives of the Brussels Convention. Indeed, as the Court has consistently held, the Convention seeks to unify the rules on jurisdiction of the Contracting States' courts, so as to avoid as far as possible the multiplication of heads of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the claimant easily to identify the

35 — Case 24/76 [1976] ECR 1831.

36 — Case 25/76 [1976] ECR 1851.

37 — Paragraphs 7 and 6 respectively.

38 — For an overview of the various versions of Article 17 of the Brussels Convention, from the first one in 1968 to that resulting from the San Sebastián Convention of 26 May 1989, see my Opinion in *Castelletti*, cited above, points 5 to 7.

39 — See *MSG*, paragraph 17 and *Castelletti*, paragraph 19.

40 — See *Castelletti*, paragraph 21.

41 — See Case C-269/95 *Benincasa* [1997] ECR I-3767, paragraph 29.

court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued. [42]

67. If, however, under Article 21 of the Brussels Convention, the court with exclusive jurisdiction is obliged to stay proceedings until such time as the court first seised declares that it has no jurisdiction, the effectiveness of Article 17 and, thus, the legal certainty to which it contributes would, in my view, be seriously jeopardised. For, in such a situation, a party who, in breach of his obligations under the agreement conferring jurisdiction, commenced proceedings first and did so before a court which he knew to have no jurisdiction could unreasonably delay judgment on the substance of a case in which he knew he would be unsuccessful. A party who failed to discharge his commitments in that way, by seising a court other than the one designated in the agreement conferring jurisdiction, would therefore derive an advantage from such a failure.

68. That is a disturbing consequence as far as principles are concerned and runs the risk of encouraging dilatory conduct. A party seeking to delay judgment on the substance of a case might thus be encouraged to 'take the initiative' and bring an action before a court which has no jurisdiction and which is less convenient for the other party, so as to bring to a halt any action based on the same contract until such time as that court declares that it has no jurisdiction. In that regard, I share the view of the United Kingdom Government that that risk is all the more worthy of consideration since the legal systems of the Contracting States generally allow proceedings to be brought for a declaration of non-liability.

69. Unlike the Commission, I do not consider this problem to be attributable solely to the domestic judicial systems of the Member States and the speed with which national courts seised in breach of an agreement conferring jurisdiction are able to give a decision as to their jurisdiction. After all, however quickly such a decision can be given, the defendant can still avail himself of all the remedies available under national law in order to put off the moment when the decision as to that court's lack of jurisdiction becomes final. I therefore take the view that the problem lies primarily in the interpretation of the Brussels Convention.

70. That is why I propose that the Court should adopt a solution which can ensure the effectiveness of Article 17 and the legal certainty to which it contributes. Indeed, a solution of this kind seems to me to be in keeping with the case-law on the interpretation of that article, according to which its interpretation must respect the consensus of the parties. Accordingly, in its judgment

42 — See Case 38/81 *Effer* [1982] ECR 825, paragraph 6, Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 11 and *Benincasa*, paragraph 26.

in *Elefanten Schuh*,[43] the Court held that the legislation of a Contracting State cannot allow the validity of an agreement conferring jurisdiction to be called in question solely on the ground that the language used is not that prescribed by that legislation. More recently, in its judgment in *Benincasa*, cited above, the Court found that a court in a Contracting State which is designated in a clause conferring jurisdiction validly concluded under Article 17 of the Brussels Convention also has exclusive jurisdiction where the action seeks a declaration that the contract containing that clause is void. According to the Court, the 'legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule of the [Brussels] Convention simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law'.[44]

71. Furthermore, that interpretation has the advantage of taking into consideration the requirements of international trade or commerce. I support the argument put forward by the United Kingdom Government that the sound development of international commercial relations requires that companies be able to trust the agreements between them. That requirement also extends to agreements by which the parties determine which courts will be responsible for settling disputes arising in the performance of their reciprocal obligations. Lastly, it seems undeniable that a delay in the settlement of those disputes can result in significant losses for economic operators, particularly where they relate to the payment of invoices for small and medium-sized enterprises. In that regard, the solution I propose is also in keeping with the intentions of those who drafted the Brussels Convention, since it was precisely in order to satisfy the requirements of international trade and commerce that, in 1978, they made the formal rules contained in Article 17 more flexible by adding to the original two rules a reference to usage in international trade or commerce.[45] If the Court accepts that, where a court is the court second seised and has exclusive jurisdiction under an agreement conferring jurisdiction it may continue to examine the substance of the dispute without waiting for a declaration from the court first seised that it has no jurisdiction, it will indisputably facilitate the implementation of agreements conferring jurisdiction incorporated in contractual documents or documents issued in the context of those relations, such as invoices.

72. Third, I consider that the risk of irreconcilable judgments being delivered can be significantly reduced.

43 — Case 150/80 [1981] ECR 1671.

44 — Paragraph 29. Also see Case C-387/98 *Coreck* [2000] ECR I-9337, paragraph 14.

45 — See the Schlosser Report, cited above, paragraph 179.

73. In order to counter that risk, the United Kingdom Government proposes that the Court rule that a court first seised whose jurisdiction is contested in reliance on a clause conferring jurisdiction must stay proceedings until the court which is designated by that clause and is the court second seised has given a decision as to its jurisdiction.

74. I do not endorse such a solution. In my view, it might encourage the very delaying tactics we are seeking to avoid. It would allow an unscrupulous party to contest the jurisdiction of the court before which proceedings had been brought against him under Articles 2, 5 or 6 of the Brussels Convention by the artifice of alleging the existence of an agreement conferring jurisdiction and to bring an action before the court supposedly designated in order deliberately to delay judgment in the case until such time as that court had declared that it had no jurisdiction.

75. In point of fact, the risk of irreconcilable judgments being given and, consequently, the resultant difficulties associated with recognition and enforcement, are inherent in any derogation from Article 21 of the Brussels Convention. Such a risk also exists in the case of Article 16. Thus, the question whether the dispute falls within the scope of that article may itself be assessed differently by the two courts seised.[46] Also, if the court first seised declares that it has jurisdiction and gives a decision on the substance of the case which is irreconcilable with that given by the court second seised, which has exclusive jurisdiction under Article 16, the decision of the latter court cannot be recognised in the Contracting State of the court first seised, by virtue of Article 27(3) of the Brussels Convention.

76. Consequently, the fact that determining the existence of an agreement conferring jurisdiction, in particular in the form required by subparagraph (c) of the first paragraph of Article 17, may sometimes necessitate complex investigations does not seem to me to justify the general exclusion of Article 17 from the derogation from Article 21 which has been accepted by the Court. The same is true, as I see it, of the fact that Article 28 of the Brussels Convention does not cover Article 17, with the result that the recognition and enforcement, in other Contracting States, of a decision given by a court second seised which has exclusive jurisdiction under that article might be precluded by a contrary decision of the court first seised if the latter decision was delivered first.

77. What matters, in my opinion, is that the risk of irreconcilable judgments can be significantly reduced. I consider such a

46 — For example, the question as to whether or not there is a lease falling within the scope of Article 16(1).

reduction to be perfectly possible given that, pursuant to the case-law of the Court, the courts concerned must assess the validity of the contested agreement conferring jurisdiction in accordance with the same principles and the same conditions, provided that the court second seised refrains from complying with the requirements of Article 21 only after having made absolutely sure that it has exclusive jurisdiction.

78. On the first point, the Court's case-law shows that an 'agreement conferring jurisdiction' must be regarded as an independent concept. [47] It follows that the formal and substantive conditions governing validity to which agreements conferring jurisdiction are subject must be assessed in the light of the requirements of Article 17 alone. That rule has been given clear expression with regard to the assessment of formal requirements, [48] and, as regards the rules governing substance, follows from the judgments in which the Court has held that an 'agreement' requires that the parties actually give their consent. [49] As I see it, that rule was confirmed in the judgment in *Benincasa*, cited above, where the Court held that '[a] jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction'. [50]

79. That case-law has been extended to usage in international trade and commerce. The Court has held that the usage to which Article 17 refers cannot be frustrated by provisions of national legislation which require compliance with formal conditions additional to those permitted in the particular trade or commerce concerned. [51] Likewise, as the referring court points out, the Court of Justice has indicated the objective factors which the national court must take into consideration in order to determine whether a usage in the particular international trade or commerce in which the parties operate exists and whether that usage is or may be assumed to be known by the parties. [52]

80. The risk of judgments which are inconsistent as regards the validity of an agreement conferring jurisdiction will therefore be further reduced since the conditions required by Article 17 of the Brussels Convention will have been clarified by the Court. [53]

81. On the second point, I take the view that the court second seised should not be authorised to derogate from the requirements of Article 21 of the Brussels Convention until it has made absolutely sure that it does have exclusive jurisdiction under an agreement conferring jurisdiction. It will therefore have to check whether the relevant agreement conferring jurisdiction

47 — See Case C-214/89 *Powell Duffryn* [1992] ECR I-1745, paragraph 14.

48 — See *Elefanten Schuh*, paragraphs 25 and 26.

49 — See *Estasis Salotti* and *Segouras*.

50 — Paragraph 25.

51 — See, in particular, *MSG*, paragraph 23 and *Castelletti*, paragraphs 33 to 39.

52 — See *MSG* and *Castelletti*.

53 — To date, the interpretation of that article has been the subject of around 15 references for a preliminary ruling.

satisfies the requirements of Article 17. In addition to the conditions mentioned above, it must be satisfied that that agreement does concern 'disputes which have arisen or which may arise in connection with a particular legal relationship' as required by the first paragraph of Article 17, and that it does not derogate from the rules governing exclusive jurisdiction laid down in Article 16 and the provisions of the Brussels Convention which are applicable in matters of insurance and consumer contracts. Next, the court second seised will have to examine whether the agreement conferring jurisdiction does cover the dispute which has been brought before it. If there were any doubt as to the validity of the agreement conferring jurisdiction or its scope, the court second seised would have to stay proceedings pursuant to Article 21.

82. The advantage of this solution, namely that Article 17 of the Brussels Convention may constitute a derogation from Article 21 only where there is no room for any doubt as to the jurisdiction of the court second seised, would be that it takes into account the requirements of international trade and commerce and at the same time makes economic operators aware of their own responsibilities by encouraging them to conclude agreements conferring jurisdiction which do not in fact leave room for any doubt as to their validity and their scope. That solution might thus prompt the representatives of the various economic operators to negotiate standard conditions which are explicit and extensively disseminated in the economic sector concerned.

83. In the light of the foregoing, I propose that the Court's answer to the second question should be that Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for any doubt as to the jurisdiction of the court second seised.

C— *The third, fourth, fifth and sixth questions*

84. By its third question, the referring court is essentially asking whether Article 21 of the Brussels Convention must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.

85. The referring court explains that it has raised this question because of Gasser's argument to the effect that, in Latin countries such as Italy, Greece and France, the average duration of legal proceedings is excessively long, which, in Gasser's view, is

contrary to the requirements of Article 6 of the European Convention on Human Rights (hereinafter the 'ECHR').

86. The Commission raises doubts as to the admissibility of the third question and, therefore, of the questions which follow it and are related to it, on the ground that the referring court has not provided tangible evidence to show that the Tribunale civile e penale di Roma has infringed Article 6 of the ECHR in the present case.

87. I do not share that point of view. I consider that, by that question, the national court did not mean to refer to the proceedings brought by MISAT before the Tribunale civile e penale di Roma. This question clearly has to do with whether, because the average duration of proceedings before the courts of the Member State in which the court first seised is established is excessively long, the court second seised may disregard the requirements of Article 21. In order for the Court to be able to give a useful answer to that question, which concerns a provision of the Brussels Convention and which is relevant for the decision to be given in the main proceedings, it was therefore not necessary for the referring court to provide information on the conduct of the procedure before the Tribunale civile e penale di Roma.

88. However, I support the Commission's view with regard to the answer to be given on the substance of this question. It does not really seem conceivable that it should be possible to refrain from applying Article 21 of the Brussels Convention on the ground that the court first seised is established in a Member State in whose courts there are, in general, excessive delays in dealing with cases. That would be tantamount to saying that the rules on *lis pendens* do not apply where the court first seised is established in one of certain Member States.

89. Such an interpretation would be manifestly contrary to the scheme and the basis of the Brussels Convention. The Convention does not contain any provision to the effect that its rules, in particular those of Article 21, should cease to apply because of the length of proceedings before the courts in another Contracting State. Moreover, it should be noted that the Brussels Convention is based on the trust which the Member States accord to each other's legal systems and judicial institutions. [54] It is on the basis of that trust that the Convention establishes a compulsory system of jurisdiction which all the courts within its purview are required to observe. It is also that trust which enables the Contracting States to waive the right to apply their internal rules on the recognition and

54 — See Advocate General Darmon's Opinion in Case C-172/91 *Sonntag* [1993] ECR I-1963, paragraph 71.

enforcement of foreign judgments in favour of a simplified mechanism for recognition and enforcement. It is therefore also the basis of the legal certainty which the Convention seeks to ensure by allowing the parties to foresee with certainty which court will have jurisdiction.

90. In the light of those considerations, I propose that the Court's answer should be that Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where the duration of proceedings before the courts of the Contracting State in which the court first seised is established is, in general, excessively long.

91. In view of that proposed answer, there is no need to rule on the fourth, fifth and sixth questions. Those questions are based on the premiss of a positive answer to the third question. Thus, by the fourth question, the referring court seeks to ascertain whether Italian Law No 89 of 24 March 2001 concerning compensation for damage caused by the unreasonable length of proceedings would none the less justify the application of Article 21 of the Brussels Convention. By the fifth and sixth questions, as I understand them, it is asking the Court to indicate, in the event of a positive answer to the third question, the circumstances in which the court second seised might derogate from the requirements of that article and the manner in which it might do so.

V — Conclusion

92. In the light of the foregoing, I propose that the Court should answer the questions referred to it by the Oberlandesgericht Innsbruck as follows:

(1) It is for the national court to determine whether to refer a question to the Court of Justice for a preliminary ruling on the basis of a party's submissions or whether it is necessary to verify those submissions first. It is nevertheless incumbent on the national court to provide the Court with the factual and legal information enabling it to give an answer which will be of use to it in giving judgment in the main proceedings and to explain why it considers an answer to its questions necessary.

(2) Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter 'the Brussels Convention') must be interpreted as meaning that a court second seised which has exclusive jurisdiction under an agreement conferring jurisdiction may, by way of derogation from that article, give judgment in the case without waiting for a declaration from the court first seised that it has no jurisdiction where there is no room for any doubt as to the jurisdiction of the court second seised.

(3) Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where the duration of proceedings before the courts of the Contracting State in which the court first seised is established is, in general, excessively long.